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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

RIN 0563–AB96

Common Crop Insurance Regulations, Cotton Crop Insurance Provisions and Macadamia Nut Crop Insurance Provisions; Correction

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule; Correcting amendment.

SUMMARY: This document is a correcting amendment to make corrections relating to the insurance of cotton and macadamia nuts that published March 30, 2010.

DATES: *Effective Date:* September 27, 2010.

FOR FURTHER INFORMATION CONTACT: Erin Albright, Risk Management Specialist, Product Management, Product Administration and Standards Division, Risk Management Agency, United States Department of Agriculture, Beacon Facility, Stop 0812, Room 421, PO Box 419205, Kansas City, MO 64141–6205, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Background

The final regulation that is the subject of this correction revised the Common Crop Insurance Regulations, Basic Provisions and applicable Crop Provisions, including the Cotton Crop Insurance Provisions. In addition, FCIC revised various Crop Provisions, including the Macadamia Nut Crop Insurance Provisions, to correct specific references to the revised Common Crop Insurance Regulations, Basic Provisions. It was published March 30, 2010 (75 FR 15778–15891).

Need for Correction

As published, the final regulation contained errors which may prove to be misleading and which need to be clarified. Section 10(d) of the Cotton Crop Insurance Provisions mistakenly included language that is no longer accurate. Language in section 10(d) referring to the quality adjustment parameters listed in the Special Provisions and to the date the last bale from the unit is classed or delivered is not necessary since the basis for quality adjustment is the Upland Cotton National Average Loan Rate determined by the Farm Service Agency. Additionally, the use of the word "quotation" in the term "price quotation" is no longer accurate or necessary. FCIC is replacing the term "price quotation" in section 10(d) with the term "price."

The introductory text of the Macadamia Nut Crop Insurance Provisions mistakenly included a reference to the 2011 and succeeding crop years. The applicability date for the final rule stated "The changes will apply for the 2011 and succeeding crop years for all crops with a 2011 contract change date on or after April 30, 2010, and for 2012 and succeeding crop years for all crops with a 2011 contract change date prior to April 30, 2010." The 2011 contract change date for the Macadamia Nut Crop Insurance Provisions is August 31, 2010, which is prior to April 30, 2011. Therefore, this specific provision should reference the 2012 and succeeding crop years.

List of Subjects in 7 CFR Part 457

Crop Insurance, Cotton and Macadamia nut, Reporting and recordkeeping requirements.

Correction of Publication

■ Accordingly, 7 CFR part 457 is corrected by making the following correcting amendments:

PART 457—COMMON CROP INSURANCE REGULATIONS

■ 1. The authority citation for 7 CFR part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l) and 1506(o).

■ 2. Revise sections 10(d)(1) and (2) of § 457.104 to read as follows:

§ 457.104 Cotton crop insurance provisions.

* * * * *

10. Settlement of Claim

* * * * *

(d) Mature white cotton may be adjusted for quality when production has been damaged by insured causes. Such production to count will be reduced if Price A is less than 85 percent of Price B.

(1) Price B is defined as the Upland Cotton National Average Loan Rate determined by FSA, or as specified in the Special Provisions.

(2) Price A is defined as the loan value per pound for the bale determined in accordance with the FSA Schedule of Premiums and Discounts for the applicable crop year, or as specified in the Special Provisions.

(3) If eligible for adjustment, the amount of production to count will be determined by multiplying the number of pounds of such production by the factor derived from dividing Price A by 85 percent of Price B.

* * * * *

■ 3. Revise the introductory text of § 457.131 to read as follows:

§ 457.131 Macadamia nut crop insurance provisions.

The macadamia nut crop insurance provisions for the 2012 and succeeding crop years are as follows:

* * * * *

Signed in Washington, DC, on September, 16, 2010.

Barbara Leach,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 2010–23884 Filed 9–24–10; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

RIN 0563–AC21

Common Crop Insurance Regulations, Stonefruit Crop Insurance Provisions; Correction

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule; correction.

SUMMARY: This document contains a correction to the final regulation which was published July 29, 2010 (75 FR 44709–44718). The regulation, as here

pertinent, related to the insurance of stonefruit.

DATES: *Effective Date:* September 27, 2010.

FOR FURTHER INFORMATION CONTACT: Claire White, Economist, Product Management, Product Administration and Standards Division, Risk Management Agency, United States Department of Agriculture, Beacon Facility, Stop 0812, Room 421, PO Box 419205, Kansas City, MO 64141–6205, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Background

The final regulation that is the subject of this correction revised the Stonefruit Crop Insurance Regulations that published July 29, 2010 (75 FR 44709–44718).

Need for Correction

As published, the final regulation contained an error which may prove to be misleading. The amendatory instruction published on page 44717 of the **Federal Register** contained language specific to redesignating section 3(c) as 3(d) and revising redesignated section 3(c) in the Stonefruit Crop Insurance Provisions. However, redesignated section 3(d) was not revised. Therefore, reference to revising redesignated section 3(d) on page 44717 is not needed.

In FR Doc. 10–18359 appearing on page 44717 in the issue published Thursday, July 29, 2010, the following correction is made:

§ 457.157 [Corrected]

1. On page 44717, in the first and second columns, remove amendatory instruction 3.l and redesignate amendatory instructions 3.m through 3.x as 3.l through 3.w.

Signed in Washington, DC, on September 16, 2010.

Barbara Leach,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 2010–23886 Filed 9–24–10; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF AGRICULTURE

National Institute of Food and Agriculture

7 CFR Part 3430

RIN 0524–AA60

Competitive and Noncompetitive Non-Formula Federal Assistance Programs—Specific Administrative Provisions for the New Era Rural Technology Competitive Grants Program

AGENCY: National Institute of Food and Agriculture, USDA.

ACTION: Final rule.

SUMMARY: The National Institute of Food and Agriculture (NIFA) is publishing a set of specific administrative requirements for the New Era Rural Technology Competitive Grants Program (RTP) to supplement the Competitive and Noncompetitive Non-formula Federal Assistance Programs—General Award Administrative Provisions for this program.

DATES: This rule is effective on September 27, 2010.

FOR FURTHER INFORMATION CONTACT: Greg Smith, National Program Leader, Higher Education Programs, Science and Education Resources Development; *Voice:* 202–720–2067; *E-mail: gsmith@nifa.usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Summary

On September 4, 2009, NIFA published an interim rule (74 FR 45972, September 4, 2009) to implement the Competitive and Noncompetitive Formula Federal Assistance Program—Specific Administrative Provisions for the New Era Rural Technology Competitive Grants Program. In the interim rule, NIFA invited comments which were due to the agency by January 4, 2010. We did not receive any comments. The only change to the rule is to clarify the definition on the type of organization that is eligible to apply under "Advanced Technological Center" (*see* Sec. 3430.902 Definitions). Most "Advanced Technological Centers" are postsecondary, degree-granting academic institutions. They are another name for community or junior colleges with a specific academic focus in paraprofessional or trade areas such as electronic, mechanical, civil, and engineering technology. Also, these Advanced Technological Centers confer an associate degree or certificate of completion following successful completion of an academic curriculum sanctioned by an independent accreditation governing body.

Some prospective applicants, who are not affiliated with a postsecondary, degree-granting academic institution, but are, instead, private businesses, do not offer an academic degree and are not sanctioned by an independent accreditation governing body. Accordingly, NIFA is not able to determine whether the commercial, for-profit interests of these private businesses are aligned with the following two New Era rural Technology program goals:

1. To increase the number of students encouraged to pursue and complete a two (2) year postsecondary degree, or a certificate of completion, within an occupational focus of this grant program; and

2. To assist rural communities by helping students achieve their career goals to develop a viable workforce for bioenergy, pulp and paper manufacturing, or agriculture-based renewable energy.

By including the terms postsecondary, degree-granting academic institution to the eligible applicant definition, applicants are more inclined to follow the original intent of Congress in providing academic coursework and training in technology development and applied research to help ensure workforce opportunities critical to rural communities.

Authority

Section 1405 of the National Agricultural Research, Extension, and Teaching Policy Act (NARETPA) of 1997, as amended (7 U.S.C. 3121) designates the U.S. Department of Agriculture (USDA) as the lead Federal agency for agriculture research, extension and teaching in the food and agricultural sciences. Section 1473E of NARETPA (7 U.S.C. 3319e), as amended, requires the establishment of a program to be known as the New Era Rural Technology Competitive Grants Program (RTP), which NIFA administers.

In carrying out the program, the Secretary is authorized to make competitive grants to support the fields of (i) bioenergy, (ii) pulp and paper manufacturing, and (iii) agriculture-based renewable energy resources, in order to help ensure workforce opportunities critical to rural communities. RTP will make grants available to community college(s) and/or advanced technology center(s), located in rural areas, for technology development, applied research, and/or training.

For fiscal year (FY) 2010, $850,000 has been made available for the RTP, including administrative costs.

Organization of 7 CFR Part 3430

A primary function of NIFA is the fair, effective, and efficient administration of Federal assistance programs implementing agricultural research, education, and extension programs. As noted above, NIFA has been delegated the authority to administer this program and will be issuing Federal assistance awards for funding made available for this program; and thus, awards made under this authority will be subject to the Agency's assistance regulations at 7 CFR part 3430, Competitive and Noncompetitive Non-formula Federal Assistance Programs—General Award Administrative Provisions. The Agency's development and publication of these regulations for its non-formula Federal assistance programs serve to enhance its accountability and to standardize procedures across the Federal assistance programs it administers while providing transparency to the public. NIFA published 7 CFR part 3430 with subparts A through F as an interim rule on August 1, 2008 [73 FR 44897–44909], and adopted as a final rule September 4, 2009 [74 FR 45736–45752]. These regulations apply to all Federal assistance programs administered by NIFA except for the formula grant programs identified in 7 CFR 3430.1(f), the Small Business Innovation Research programs with implementing regulations at 7 CFR part 3403, and the Veterinary Medicine Loan Repayment Program (VMLRP) authorized under section 1415A of the National Agricultural Research, Extension, and Teaching Policy Act of 1977 (NARETPA) with implementing regulations at 7 CFR 3431.

NIFA organized the regulation as follows: Subparts A through E provide administrative provisions for all competitive and noncompetitive non-formula Federal assistance awards. Subparts F and thereafter apply to specific NIFA programs.

NIFA is, to the extent practical, using the following subpart template for each program authority: (1) Applicability of regulations, (2) purpose, (3) definitions (those in addition to or different from Sec. 3430.2), (4) eligibility, (5) project types and priorities, (6) funding restrictions (including indirect costs), and (7) matching requirements. Subparts F and thereafter contain the above seven components in this order. Additional sections may be added for a specific program if there are additional requirements or a need for additional rules for the program (*e.g.,* additional reporting requirements). Through this rulemaking, NIFA is adding subpart M for the administrative provisions that are specific to the RTP.

II. Administrative Requirements for the Proposed Rulemaking Executive Order 12866

This action has been determined to be not significant for purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget (OMB). This final rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; nor will it materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; nor will it have an annual effect on the economy of $100 million or more; nor will it adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way. Furthermore, it does not raise a novel legal or policy issue arising out of legal mandates, the President's priorities or principles set forth in the Executive Order.

Regulatory Flexibility Act of 1980

This final rule has been reviewed in accordance with The Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601–612. The Department concluded that the rule will not have a significant economic impact on a substantial number of small entities. The rule does not involve regulatory and informational requirements regarding businesses, organizations, and governmental jurisdictions subject to regulation.

Paperwork Reduction Act (PRA)

The Department certifies that this final rule has been assessed in accordance with the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* (PRA). The Department concludes that this final rule does not impose any new information requirements; however, the burden estimates will increase for existing approved information collections associated with this rule due to additional applicants. These estimates will be provided to OMB. In addition to the SF–424 form families (*i.e.,* Research and Related and Mandatory), and SF–425, Federal Financial Report; NIFA has three currently approved OMB information collections associated with this rulemaking: OMB Information Collection No. 0524–0042, NIFA Current Research Information System (CRIS); No. 0524–0041, NIFA Application Review Process; and No. 0524–0026, Organizational Information.

Catalog of Federal Domestic Assistance

This final regulation applies to the Federal assistance program administered by NIFA under the Catalog of Federal Domestic Assistance (CFDA) No. 10.314, New Era Rural Technology Competitive Grants Program.

Unfunded Mandates Reform Act of 1995 and Executive Order 13132

The Department has reviewed this final rule in accordance with the requirements of Executive Order No. 13132 and the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.,* and has found no potential or substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. As there is no Federal mandate contained herein that could result in increased expenditures by State, local, or Tribal governments, or by the private sector, the Department has not prepared a budgetary impact statement.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

The Department has reviewed this final rule in accordance with Executive Order 13175, and has determined that it does not have "Tribal implications." The final rule does not "have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes."

Clarity of This Regulation

Executive Order 12866 and the President's Memorandum of June 1, 1998, require each agency to write all rules in plain language. The Department invites comments on how to make this final rule easier to understand.

List of Subjects in 7 CFR Part 3430

Administrative practice and procedure, Agricultural research, Education, Extension, Federal assistance.

■ Accordingly, the interim rule amending 7 CFR part 3430 which was published at 74 FR 45972 on September

4, 2009, is adopted as a final rule with the following change:

PART 3430—COMPETITIVE AND NONCOMPETITIVE NON-FORMULA FEDERAL ASSISTANCE PROGRAMS—GENERAL AWARD ADMINISTRATIVE PROVSIONS

■ 1. The authority citation for part 3430 continues to read as follows:

Authority: 7 U.S.C. 3316; Pub. L. 106–107 (31 U.S.C. 6101 note).

■ 2. In § 3430.902, revise the definition of "Advanced Technological Center" to read as follows:

§ 3430.902 Definitions.

* * * * *

Advanced Technological Center refers to a post-secondary, degree-granting institution that provides students with technology-based education and training, preparing them to work as technicians or at the semi-professional level, and aiding in the development of an agriculture-based renewable energy workforce. For this program, such Centers must be located within a rural area.

* * * * *

Done in Washington, DC, September 17, 2010.

Roger N. Beachy,

Director, National Institute of Food and Agriculture.

[FR Doc. 2010–23883 Filed 9–24–10; 8:45 am]

BILLING CODE 3410–22–P

FARM CREDIT ADMINISTRATION

12 CFR Parts 604, 607, 612, 614, 615, 618, and 627

RIN 3052–AC63

Farm Credit Administration Board Meetings; Assessment and Apportionment of Administrative Expenses; Standards of Conduct and Referral of Known or Suspected Criminal Violations; Loan Policies and Operations; Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; General Provisions; and Title IV Conservators, Receivers, and Voluntary Liquidations; Technical Changes

AGENCY: Farm Credit Administration.

ACTION: Notice of effective date.

SUMMARY: The Farm Credit Administration (FCA or Agency), through the FCA Board (Board), issued a direct final rule with opportunity for comment on June 24, 2010, amending our regulations to eliminate unnecessary, redundant or outdated regulations, to correct cross-reference errors, and to clarify the intent of a regulatory provision. The opportunity for comment expired on July 26, 2010. The FCA received no comments and therefore, the direct final rule becomes effective without change. In accordance with 12 U.S.C. 2252, the effective date of the direct final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is September 20, 2010.

DATES: *Effective Date:* Under the authority of 12 U.S.C. 2252, the regulation amending 12 CFR parts 604, 607, 612, 614, 615, 618, and 627 published on June 24, 2010 (75 FR 35966) is effective September 20, 2010.

FOR FURTHER INFORMATION CONTACT:

Jacqueline R. Melvin, Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4498, TTY (703) 883–4434,

or

Mary Alice Donner, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION: The Farm Credit Administration (FCA or Agency), through the FCA Board (Board), issued a direct final rule with opportunity for comment under parts 604, 607, 612, 614, 615, 618, and 627 on June 24, 2010 (75 FR 35966) amending our regulations to eliminate unnecessary, redundant or outdated regulations, to correct cross-reference errors, and to clarify the intent of a regulatory provision. The opportunity for comment expired on July 26, 2010. The FCA received no comments and therefore, the direct final rule becomes effective without change. In accordance with 12 U.S.C. 2252, the effective date of the direct final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session.

The direct final rule carries out the FCA Board's commitment to the principles contained in the Board's Policy Statement on Regulatory Philosophy, which includes the elimination of outdated regulations and technical amendments to ensure that regulations are accurate. In furtherance of that objective, the June 24, 2010, rule makes a number of technical changes to the agency's regulations.

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

Dated: September 20, 2010.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. 2010–23976 Filed 9–24–10; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21624; Directorate Identifier 2005–NE–17–AD; Amendment 39–16439; AD 2010–20–05]

RIN 2120–AA64

Airworthiness Directives; Turboméca S.A. ARRIEL 2B Turboshaft Engines

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) for Turboméca S.A. ARRIEL 2B turboshaft engines. That AD currently requires initial and repetitive inspections, cleaning, lubrication, and checks for proper operation of the hydro-mechanical unit (HMU) acceleration controller axle except on engines that incorporate modification TU 132. That AD also provides an optional terminating action for the repetitive inspections. This AD requires the same actions, but expands the applicability to include all engines that do not incorporate modification TU 149. This AD results from reports of engines with modification TU 132 incorporated experiencing stuck controller axles in the metering valve body. We are issuing this AD to prevent loss of control of engine fuel flow in manual control mode or mixed control mode, which can lead to engine overspeed, and in-flight engine shutdown resulting in a forced autorotation landing or accident.

DATES: Effective October 12, 2010. The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of October 12, 2010.

We must receive any comments on this AD by October 27, 2010.

ADDRESSES: Use one of the following addresses to comment on this AD.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building

Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* (202) 493–2251.

Contact Turboméca, 40220 Tarnos, France; telephone 33 05 59 74 40 00; fax 33 05 59 74 45 15, for the service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Kevin Dickert, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: kevin.dickert@faa.gov;* telephone (781) 238–7117; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: On April 9, 2007, the FAA issued AD 2005–13–25R1, Amendment 39–15028 (72 FR 19110, April 17, 2007). That AD requires initial and repetitive inspections, cleaning, lubrication, and checks for proper operation of the HMU acceleration controller axle on engines that incorporate modification TU 62A, unless the engine incorporates modification TU 132. That AD was the result of several reports of the HMU acceleration controller axle sticking. The stuck acceleration controller axle resulted in engine overspeed and commanded and uncommanded in-flight engine shutdowns. That condition, if not corrected, could result in loss of control of engine fuel flow in manual control mode or mixed control mode, which can lead to engine overspeed, and in-flight engine shutdown resulting in a forced autorotation landing or accident.

Actions Since AD 2005–13–25R1 Was Issued

Since we issued AD 2005–13–25R1, the European Aviation Safety Authority (EASA), which is the airworthiness agent for the Member States of the European Union, has informed us that the manufacturer, Turboméca S.A., has reported additional occurrences of stuck controller axles in the metering valve body. Some of these occurrences occurred on engines that incorporated modification TU 132. Turboméca S.A. introduced modification TU 149 to eliminate the cause of the unsafe condition on the ARRIEL 2B turboshaft engines. This AD requires inspecting and lubricating the P3 cover and HMU acceleration control axle on HMUs that are not modified to TU 149. It also approves incorporating modification TU 149 to eliminate the cause of the unsafe condition and the repetitive inspections required by this AD. We are issuing this AD to prevent loss of control of engine fuel flow in the manual or mixed control modes, which can lead to engine overspeed, and in-flight engine shutdown resulting in a forced autorotation landing or accident.

Relevant Service Information

Turboméca has issued Mandatory Service Bulletin A292 73 2814, Version D, dated October 16, 2009, that describes procedures for inspecting, lubricating, and checking for proper operation of the HMU acceleration controller axle. EASA classified this service bulletin as mandatory and issued AD 2009–0246, dated November 10, 2009, in order to assure the airworthiness of these ARRIEL 2B turboshaft engines in the European Union.

Bilateral Airworthiness Agreement

This engine model is manufactured in France, and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Under that agreement, EASA has kept us informed of the situation described above. We have examined EASA's findings, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

FAA's Determination and Requirements of This AD

The unsafe condition described previously is likely to exist or develop on other Turboméca S.A. ARRIEL 2B turboshaft engines of the same type design. We are issuing this AD to prevent loss of control of engine fuel flow in the manual control mode or mixed control mode, which can lead to engine overspeed, and in-flight engine shutdown resulting in a forced autorotation landing or accident. This AD requires initial and repetitive inspections, cleaning, lubrication, and checks for proper operation of the HMU acceleration controller axle. You must use the service information described previously to perform the actions required by this AD.

FAA's Determination of the Effective Date

Since an unsafe condition exists that requires the immediate adoption of this AD, we have found that notice and opportunity for public comment before issuing this AD are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to send us any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include "AD Docket No. FAA–2005–21624; Directorate Identifier 2005–NE–17–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Examining the AD Docket

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

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

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

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

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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 39–15028 (72 FR 19110, April 17, 2007), and by adding a new airworthiness directive, Amendment 39–16439, to read as follows:

2010–20–05 Turboméca S.A.: Amendment 39–16439. Docket No. FAA–2005–21624; Directorate Identifier 2005–NE–17–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective October 12, 2010.

Affected ADs

(b) This AD supersedes AD 2005–13–25R1, Amendment 39–15028.

Applicability

(c) This AD applies to Turboméca S.A. ARRIEL 2B turboshaft engines that do not have Modification TU 149 incorporated. These engines are installed on, but not limited to, Eurocopter AS350B3 helicopters.

Unsafe Condition

(d) This AD results from reports of engines with modification TU 132 incorporated experiencing stuck acceleration control axles in the hydromechanical unit (HMU) metering valve body. We are issuing this AD to prevent loss of control of engine fuel flow in manual control mode or mixed control mode, which can lead to engine overspeed, and in-flight engine shutdown resulting in a forced autorotation landing or accident.

Compliance

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

HMUs Without Modification TU 149

(f) Within 20 operating hours of the effective date of this AD, check the fuel metering system and perform maintenance procedures in accordance with Paragraph 2 of Turboméca MSB A292 73 2814, Version D, dated October 16, 2009.

(g) Repeat the maintenance procedures of paragraph (f) of this AD within every 210 operating hours.

Optional Terminating Action

(h) Modifying the HMU to Modification TU 149 terminates the repetitive inspection requirements specified in paragraph (g) of this AD. You can find guidance on modifying the HMU to Modification TU 149 in Turboméca Service Bulletin 292 73 2149, Version C, dated August 10, 2009.

Previous Credit

(i) Maintenance performed prior to the effective date of this AD using Turboméca MSB A292 73 2814, Version C, dated December 19, 2006, or an earlier version of this MSB, satisfies the maintenance requirements of paragraph (f) of this AD.

Alternative Methods of Compliance

(j) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(k) EASA airworthiness directive 2009–00246, dated November 10, 2009, also addresses the subject of this AD.

(l) Contact Kevin Dickert, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: kevin.dickert@faa.gov;* telephone (781) 238–7117, fax (781) 238–7199, for more information about this AD.

Material Incorporated by Reference

(m) You must use Turboméca Mandatory Service Bulletin (MSB) A292 73 2814, Version D, dated October 16, 2009, to perform the actions required by this AD. The Director of the Federal Register approved the incorporation by reference of MSB A292 73 2814, Version D, dated October 16, 2009, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Turboméca S.A., 40220 Tarnos, France; telephone 33 05 59 74 40 00, fax 33 05 59 74 45 15, for a copy of this service information. You may review copies at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Burlington, Massachusetts, on September 15, 2010.

Thomas A. Boudreau,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2010–23581 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0380; Directorate Identifier 2009–NM–009–AD; Amendment 39–16444; AD 2010–20–10]

RIN 2120–AA64

Airworthiness Directives; The Cessna Aircraft Company Model 750 Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD), which applies to all Model 750 airplanes. That AD currently requires inspecting the inboard-hinge brackets of the left and right elevators for cracking and doing related investigative and corrective actions if necessary. For certain airplanes, this new AD requires inspecting for cracks of the bracket of the inboard horizontal stabilizer and measuring the lug thickness of the horizontal stabilizer hinges; doing corrective actions if necessary; and modifying the left and right elevators and left and right horizontal stabilizer. For all airplanes, this new AD requires replacing the existing elevator

assemblies with new elevator assemblies, which terminates the requirements of the existing AD. This new AD also revises the applicability to remove certain airplanes. This AD results from a report of cracking found on the elevator inboard-hinge brackets and the horizontal stabilizer hinges. We are issuing this AD to prevent such cracking of the elevator inboard-hinge brackets and the horizontal stabilizer hinges, which could result in structural failure of the elevators and consequent loss of control of the airplane.

DATES: This AD becomes effective November 1, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of November 1, 2010.

On November 22, 2006 (71 FR 65047, November 7, 2006), the Director of the Federal Register approved the incorporation by reference of a certain other publication listed in the AD.

ADDRESSES: For service information identified in this AD, contact Cessna Aircraft Co., P.O. Box 7706, Wichita, Kansas 67277; telephone 316–517–6215; fax 316–517–5802; e-mail *citationpubs@cessna.textron.com;* Internet *https://www.cessnasupport.com/newlogin.html.*

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: T.N. Baktha, Aerospace Engineer, Airframe Branch, ACE–118W, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946–4155; fax (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 2006–23–05, amendment 39–14817 (71 FR 65047, November 7, 2006). The existing AD applies to all Model 750 airplanes. That NPRM was published in the **Federal Register** on April 8, 2010 (75 FR 17879). That NPRM proposed to continue to require inspecting the inboard-hinge brackets of the left and right elevators for cracking and doing related investigative and corrective actions if necessary. For certain airplanes that NPRM proposed to require an inspection for cracks and corrosion of the bracket of the inboard horizontal stabilizer and measuring the lug thickness of the horizontal stabilizer hinges; doing corrective actions if necessary; and modifying the left and right elevators and left and right horizontal stabilizer. For all airplanes, that NPRM proposed to require replacing the existing elevator assemblies with new elevator assemblies, which would terminate the requirements of the existing AD. That NPRM also proposed to revise the applicability to remove certain airplanes.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments that have been received on the NPRM.

Request To Remove References to Corrosion

Cessna Aircraft Company requests that in the "Differences Between the Proposed AD and Service Bulletin" section of the NPRM the sentence, "This proposed AD would also require an inspection for corrosion and replacement of any corroded brackets," be removed. Cessna states that corrosion of the brackets has not been an issue, and current maintenance practices are sufficient. Cessna states that the requirement to inspect the horizontal hinge brackets for corrosion will complicate compliance for operators that have already complied with previous revisions of Cessna Service Bulletin SB750–27–62. Cessna states that the addition of an inspection for corrosion of the horizontal inboard hinge in paragraph (k)(1) of the NPRM is not specified in Cessna Service Bulletin SB750–27–62, Revision 3, dated August 21, 2009.

We agree with Cessna's request. Since the NPRM was issued, we have received sufficient technical information to support the request. We have changed the AD to remove references to corrosion.

Request To Clarify Table 1 of the NPRM

Cessna states that it is unclear which requirements of paragraph (k) of the NPRM are covered by previous revisions of Cessna Service Bulletin SB750–27–62. Cessna requests that we amend Table 1 of the NPRM to reference paragraphs (k)(1), (k)(2), and (k)(3) of the NPRM.

We partially agree with Cessna's request. In lieu of revising Table 1 of this AD, we have changed paragraph (l) of this AD to show that actions accomplished before the effective date of this AD, in accordance with the service bulletins identified in Table 1 of this AD, are considered acceptable for compliance with the corresponding requirements of paragraphs "(k)(1), (k)(2), and (k)(3) of this AD."

Request To Clarify the Effect of Previous Compliance

JATEC requests that we explain how the NPRM affects airplanes that have already complied with Cessna Service Bulletin SB750–27–62, Revision 3, dated August 21, 2009. JATEC asks if anything further is required once Revision 3 has been incorporated.

As specified in paragraph (f) of this AD, you are responsible for having the actions required by this AD performed within the compliance time specified, unless the actions have already been done. In addition, as specified in paragraph (k) of this AD, once the actions required by that paragraph are accomplished, the requirements of paragraphs (g) through (j) of this AD are terminated; no further action is required. No changes to this AD are necessary in this regard.

Conclusion

We have carefully reviewed the available data, including the comments that have been received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Inspection (required by AD 2006–23–05).	2	$85	$0	$170	253	$43,010.
Modification and Replacement (new actions).	Up to 200	85	The manufacturer states that it will supply parts to the operators at no cost.	Up to $17,000	253	Up to $4,301,000.

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

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

(1) Is not a "significant regulatory action" under Executive Order 12866;

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. *See* the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14817 (71 FR 65047, November 7, 2006) and by adding the following new airworthiness directive (AD):

2010–20–10 The Cessna Aircraft Company: Amendment 39–16444. Docket No. FAA–2010–0380; Directorate Identifier 2009–NM–009–AD.

Effective Date

(a) This AD becomes effective November 1, 2010.

Affected ADs

(b) This AD supersedes AD 2006–23–05, Amendment 39–14817.

Applicability

(c) This AD applies to The Cessna Aircraft Company Model 750 airplanes, certificated in any category, as identified in Cessna Service Bulletin SB750–27–62, Revision 3, dated August 21, 2009.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight Controls.

Unsafe Condition

(e) This AD results from a report of cracking found on the elevator inboard-hinge brackets and the horizontal stabilizer hinges. The Federal Aviation Administration is issuing this AD to prevent cracking of the elevator inboard-hinge brackets and the horizontal stabilizer hinges, which could result in structural failure of the elevators and consequent loss of control of the airplane.

Compliance

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

Restatement of Requirements of AD 2006–23–05, With No Changes

Inspection

(g) After the airplane accumulates 2,500 total flight hours: Perform a general visual inspection for cracking of the inboard-hinge brackets of the left and right elevators in accordance with the Accomplishment Instructions of Cessna Alert Service Letter ASL750–27–21, dated October 13, 2006. Do the inspection before the airplane accumulates 3,000 total flight hours, or within 10 flight hours after November 22, 2006 (the effective date of AD 2006–23–05), whichever is later.

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

Related Investigative and Corrective Actions

(h) If any crack is found during the inspection required by paragraph (g) of this AD: Before further flight, perform an eddy current inspection of the inboard-hinge brackets to determine the crack length, in accordance with the Accomplishment Instructions of Cessna Alert Service Letter ASL750–27–21, dated October 13, 2006; and do the actions specified in paragraph (h)(1) or (h)(2) of this AD, as applicable, at the time specified. All corrective actions must be done using a method approved by the Manager, Wichita Aircraft Certification Office (ACO), FAA. For a replacement method to be approved by the Manager, Wichita ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

(1) If the crack is 0.30 inch or more: Replace the bracket before further flight.

(2) If the crack is less than 0.30 inch: Continued flight for a maximum of 10 flight hours for repositioning of the airplane and replacement of the bracket is allowed, within the restricted flight envelope included in the attachment to Cessna Alert Service Letter ASL750–27–21, dated October 13, 2006, titled "Flight Restrictions."

Special Flight Permits

(i) Special flight permits, as described in Section 39.23 of the Federal Aviation Regulations (14 CFR 39.23), are allowed with the limitations required by paragraph (h)(2) of this AD.

No Reporting or Return of Parts to Manufacturer

(j) Cessna Alert Service Letter ASL750–27–21, dated October 13, 2006, specifies submitting a sheet related to inspection results to the manufacturer; this AD does not include that requirement. The service letter also specifies sending the elevator assembly to the manufacturer for replacement of the inboard-hinge bracket if a crack is found that is 0.30 inch or more; however, this AD requires corrective actions be done using a method approved by us.

New Requirements of This AD

(k) Within 60 months after the effective date of this AD, do the applicable actions required by paragraphs (k)(1), (k)(2), (k)(3), and (k)(4) of this AD, in accordance with the Accomplishment Instructions of Cessna Service Bulletin SB750–27–62, Revision 3, dated August 21, 2009. Accomplishing the actions required by paragraph (k) of this AD terminates the requirements of paragraphs (g) through (j) of this AD.

(1) For all airplanes except those having S/Ns 288 through 305 inclusive: Do an eddy current inspection for cracks of the bracket of the inboard horizontal stabilizer. Before further flight, replace any cracked bracket of the inboard horizontal stabilizer with a serviceable bracket.

(2) For all airplanes except those having S/Ns 288 through 305 inclusive: Measure the lug thickness of the horizontal stabilizer hinges. If the lug thickness is not within the acceptable tolerance range, as identified in Cessna Service Bulletin SB750–27–62, Revision 3, dated August 21, 2009, before further flight, replace the bearing plate with a serviceable bearing plate.

(3) For all airplanes except those having S/Ns 288 through 305 inclusive: Modify the left and right horizontal stabilizer; and add the modification part number of the horizontal stabilizer to the modification section of the MS27253–1 identification plate.

(4) For all airplanes: Replace the existing elevator assemblies with new elevator assemblies having part numbers 6734000–17 (for the left side) and 6734000–18 (for the right side).

Credit for Actions Done Using the Previous Service Information

(l) Actions accomplished before the effective date of this AD in accordance with the service bulletins identified in Table 1 of this AD are considered acceptable for compliance with the corresponding requirements of paragraphs (k)(1), (k)(2), and (k)(3) of this AD.

TABLE 1—CREDIT FOR PREVIOUS SERVICE BULLETINS

Service Bulletin	Revision level	Date
Cessna Service Bulletin SB750–27–62	(1)	October 13, 2008.
Cessna Service Bulletin SB750–27–62	1	October 22, 2008.
Cessna Service Bulletin SB750–27–62	2	December 17, 2008.

[1] Original.

Alternative Methods of Compliance (AMOCs)

(m)(1) The Manager, Wichita ACO, 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: T.N. Baktha, Aerospace Engineer, Airframe Branch, ACE–118W, FAA, Wichita ACO, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946–4155; fax (316) 946–4107.

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

Material Incorporated by Reference

(n) You must use Cessna Alert Service Letter ASL750–27–21, excluding the attachment titled "Inspection Results Form" and including the attachment titled "Flight Restrictions," dated October 13, 2006; and Cessna Service Bulletin SB750–27–62, Revision 3, dated August 21, 2009, including Service Bulletin Supplemental Data, Revision D, dated September 18, 2009; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of Cessna Service Bulletin SB750–27–62, Revision 3, dated August 21, 2009, including Service Bulletin Supplemental Data, Revision D, dated September 18, 2009, under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The Director of the Federal Register previously approved the incorporation by reference of Cessna Alert Service Letter ASL750–27–21, excluding the attachment titled "Inspection Results Form" and including the attachment titled "Flight Restrictions," dated October 13, 2006, on November 22, 2006 (71 FR 65047, November 7, 2006).

(3) For service information identified in this AD, contact Cessna Aircraft Co., P.O. Box 7706, Wichita, Kansas 67277; telephone 316–517–6215; fax 316–517–5802; e-mail *citationpubs@cessna.textron.com;* Internet *https://www.cessnasupport.com/newlogin.html.*

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

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

Issued in Renton, Washington, on September 15, 2010.

Robert D. Breneman,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–23834 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28077; Directorate Identifier 2007–NE–20–AD; Amendment 39–16445; AD 2009–09–03R1]

RIN 2120–AA64

Airworthiness Directives; Turboméca S.A. Arriel 2B and 2B1 Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are revising an existing airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing

airworthiness information (MCAI) issued 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:

Since issuance of AD 2007–0109, Turboméca has released modification TU166 which consists in inserting HP blade dampers between the HP disc and the HP blade platform. Introduction of these dampers has demonstrated to limit axial displacement of the HP blade relative to the disk in case of blade lock rupture or opening, therefore eliminating the need for inspection and replacement.

We are issuing this AD to prevent an uncommanded in-flight engine shutdown which could result in an emergency autorotation landing or an accident.

DATES: This AD becomes effective November 1, 2010. The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of November 1, 2010. The Director of the Federal Register approved the incorporation by reference of Turboméca S.A. Mandatory Service Bulletin No. 292 72 2825, dated April 5, 2007, listed in this AD as of June 1, 2009 (74 FR 18981, April 27, 2009).

ADDRESSES: The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: Richard Woldan, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7136; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on May 12, 2010 (75 FR 26681). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states that:

Since issuance of AD 2007–0109, Turboméca has released modification TU166 which consists in inserting HP blade dampers between the HP disc and the HP blade platform. Introduction of these dampers has demonstrated to limit axial displacement of the HP blade relative to the disk in case of blade lock rupture or opening, therefore eliminating the need for inspection and replacement.

Therefore, this AD revises AD 2007–0109 by retaining the same requirements of AD 2007–0109 except that applicability is limited to ARRIEL 2B, 2B1 and 2B1A engines which do not incorporate modification TU166.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

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 required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are described in a separate paragraph of the AD. These requirements take precedence over the actions copied from the MCAI.

Costs of Compliance

Based on the service information, we estimate that this AD would affect about 248 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the AD on U.S. operators to be $42,160.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–15889 (74 FR 18981), and adding a new airworthiness directive, Amendment 39–16445, to read as follows:

2009–09–03R1 Turboméca S.A.: Amendment 39–16445. Docket No.

FAA–2007–28077; Directorate Identifier 2007–NE–20–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective November 1, 2010.

Affected ADs

(b) This AD revises AD 2009–09–03, Amendment 39–15889.

Applicability

(c) This AD applies to Turboméca S.A. ARRIEL 2B and 2B1 turboshaft engines that don't incorporate modification TU166. These engines are installed on, but not limited to, Eurocopter AS 350 B3 and EC 130 B4 helicopters.

Reason

(d) This AD results from:

Since issuance of AD 2007–0109, Turboméca has released modification TU166 which consists in inserting HP blade dampers between the HP disc and the HP blade platform. Introduction of these dampers has demonstrated to limit axial displacement of the HP blade relative to the disk in case of blade lock rupture or opening, therefore eliminating the need for inspection and replacement.

We are issuing this AD to prevent an uncommanded in-flight engine shutdown which could result in an emergency autorotation landing or an accident.

Actions and Compliance

(e) Unless already done, do the following actions:

Initial Inspection

(1) Perform an initial high-pressure (HP) turbine borescope inspection according to Turboméca S.A. Mandatory Service Bulletin (MSB) No. 292 72 2825, Version B, dated September 21, 2009, or earlier version as follows:

(i) For engines with fewer than 500 hours and 450 cycles since new or since the last HP turbine borescope inspection, inspect before reaching 600 hours or 500 cycles whichever occurs first. Replace HP turbine modules with rearward turbine blade displacement greater than 0.5 mm.

(ii) For the remaining engines, inspect within the next 100 hours. Replace HP turbine modules with rearward turbine blade displacement greater than 0.5 mm.

Repetitive Inspections

(2) Perform repetitive HP turbine borescope inspections according to Turboméca S.A. MSB No. 292 72 2825, Version B, dated September 21, 2009 or earlier version:

(i) Within 600 hours or 500 cycles from the previous inspection, whichever occurs first, if the rearward displacement of the turbine blades was less than 0.2 mm. Replace HP turbine modules with rearward turbine blade displacement greater than 0.5 mm.

(ii) Within 100 hours of the previous inspection if the rearward displacement of the turbine blades was between 0.2 mm and 0.5 mm. Replace HP turbine modules with rearward turbine blade displacement greater than 0.5 mm.

Optional Terminating Action

(f) Incorporating modification TU166 terminates the repetitive inspection requirements of paragraphs (e)(2)(i) and (e)(2)(ii) of this AD.

FAA AD Differences

(g) For clarification, we restructured the actions and compliance wording of this AD.

(h) We deleted the Turboméca reporting requirement from the AD.

(i) Although EASA Airworthiness Directive 2007–0109R1, dated November 9, 2009, applies to the ARRIEL 2B1A engine, this AD does not apply to that model because it has no U.S. type certificate.

Alternative Methods of Compliance (AMOCs)

(j) The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(k) Refer to EASA Airworthiness Directive 2007–0109R1, dated November 9, 2009, and Turboméca S.A. MSB No. 292 72 2825, Version B, dated September 21, 2009, or earlier version, for related information.

(l) Contact Richard Woldan, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7136; fax (781) 238–7199, for more information about this AD.

Material Incorporated by Reference

(m) You must use Turboméca S.A. Mandatory Service Bulletin No. 292 72 2825, Version B, dated September 21, 2009, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register previously approved the incorporation by reference of Turboméca S.A. Mandatory Service Bulletin No. 292 72 2825, dated April 5, 2007, on June 1, 2009 (74 FR 18981, April 27, 2009).

(2) For service information identified in this AD, contact Turboméca, 40220 Tarnos, France; telephone 33 05 59 74 40 00, fax 33 05 59 74 45 15.

(3) You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on September 17, 2010.

Robert J. Ganley,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2010–23833 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1100; Directorate Identifier 2009–NE–37–AD; Amendment 39–16441; AD 2010–20–07]

RIN 2120–AA64

Airworthiness Directives; International Aero Engines AG V2500–A1, V2522–A5, V2524–A5, V2525–D5, V2527–A5, V2527E–A5, V2527M–A5, V2528–D5, V2530–A5, and V2533–A5 Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all International Aero Engines AG (IAE) V2500–A1, V2525–D5 and V2528–D5 turbofan engines and certain serial numbers (S/Ns) of IAE V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 turbofan engines. For certain S/Ns of V2500–A1, V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 series turbofan engines, this AD requires initial and repetitive on-wing ultrasonic inspections of the high-pressure compressor (HPC) stage 3 to 8 drum for cracks. As mandatory terminating action to the repetitive inspections, this AD requires removal from service of the fully silver plated nuts attaching the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum, removal of silver residue from the HPC stage 3 to 8 drum, and fluorescent penetrant inspection (FPI) of the stage 3 to 8 drum within a specified time. For all other engines, this AD requires removal from service of the fully silver plated nuts attaching the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum, removal of silver residue from the HPC stage 3 to 8 drum, and FPI of the HPC stage 3 to 8 drum at the next drum piece-part exposure. This AD results from reports of 39 HPC stage 3 to 8 drums found cracked since March 2009. We are issuing this AD to prevent uncontained failure of the HPC stage 3 to 8 drum, which could result in damage to the airplane.

DATES: This AD becomes effective November 1, 2010. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of November 1, 2010.

ADDRESSES: You can get the service information identified in this AD from

International Aero Engines AG, 400 Main Street, East Hartford, CT 06108; *telephone:* (860) 565–5515; fax: (860) 565–5510.

The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: Mark Riley, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: mark.riley@faa.gov;* telephone (781) 238–7758, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 with a proposed AD. The proposed AD applies to all IAE V2500–A1, V2525–D5 and V2528–D5 turbofan engines and certain S/Ns of IAE V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 turbofan engines. We published the proposed AD in the **Federal Register** on February 12, 2010 (75 FR 6860). That action proposed to require:

- For certain S/Ns of IAE V2500–A1, V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 turbofan engines:
  - Initial and repetitive on-wing ultrasonic inspections of HPC stage 3 to 8 drums for cracks; and
  - As mandatory terminating action to the repetitive ultrasonic inspections, within 27 months from the effective date of this AD, removal from service of the fully silver plated nuts attaching the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum, removal of silver residue from the HPC stage 3 to 8 drums, and FPI of the HPC stage 3 to 8 drums.
- For all other engines, at the next piece-part exposure of the HPC stage 3 to 8 drum, removal from service of the fully silver plated nuts attaching the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum, removal of silver residue from the HPC stage 3 to 8 drums, and FPI of the HPC stage 3 to 8 drums.

Examining the AD Docket

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

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments received.

Request To Mandate Inspection of Group B and Group C Engines

One commenter, Airbus, requests that we mandate inspection for the S/N engines identified in Group B and Group C of IAE Service Bulletin (SB) No. V2500–ENG–72–0594, Revision 5, as these engines may have operated in a similar environment as the Group A engines.

We do not agree. Engines identified in Groups B and C have not exhibited cracking similar to that seen in engines listed in Groups A and D. Therefore, it is not appropriate to mandate inspections on Group B or C engines at this time. We did not change the AD.

Claim That Root Cause Is Not Yet Determined

Airbus claims that the proposed AD would mandate the inspection only on engines identified in IAE SB No. V2500–ENG–72–0594 (Groups A and D) and IAE SB No. V2500–ENG–72–0603 (Group A) without determining root cause. To properly identify the suspect population, determining the root cause of the HPC stage 3–8 drum cracking is required.

We do not agree. While we do not yet know the specific root cause of the contamination causing the corrosion cracking of the HPC stage 3–8 drum, we do know that engines specified in IAE SB No. V2500–ENG–72–0594 (Groups A and D) and IAE SB No. V2500–ENG–72–0603 (Group A) may exhibit HPC stage 3–8 drum corrosion cracking. We did not change the AD.

Request To Include a Fleetwide Introduction of a Final Fix

Airbus requests that the proposed AD should include a fleet-wide introduction of the final fix (nuts modification), and in the interim, the ultrasonic inspection, to correct the cause of HPC stage 3–8 drum cracking for the entire V2500 fleet.

We partially agree. Paragraph (f)(4)(i) of this AD requires that all operators of engines requiring these repetitive ultrasonic inspections remove the fully silver plated nuts, P/N AS44862, or equivalent, that attach the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum, within 27 months after the effective date of the AD. Paragraph (g) of this AD also requires those operators of all other affected engines to remove the fully silver plated nuts at the next piece-part exposure of the HPC stage 3–8 drum after the effective date of the AD. Ultrasonic inspection(s) per IAE SB No. V2500–ENG–72–0594 (Groups A and D) and IAE SB No. V2500–ENG–72–0603 only affect certain engines and are not required for the entire fleet. We did not change the AD.

Claim That Proposed AD Is Less Restrictive Than IAE SB

Airbus claims that the proposed AD is less restrictive than the IAE service bulletins, and it does not recommend immediate action for V2500–A5 drums above 7,545 cycles-since-new and for V2500–A1 drums above 10,305 cycles-since-new. It therefore does not meet the criteria for maximum allowable individual risk per flight.

We do not agree. All "high cycle" HPC stage 3 to 8 drums in the field that required inspections at reduced thresholds, as referenced in the IAE SBs, have already been inspected. Therefore, an equivalent level of fleet risk is maintained for the AD action, and meets FAA criteria. We did not change the AD.

FAA Should Mandate the Nut Removal for the Complete V2500 Fleet

Airbus states that the proposed AD does not put a compliance date for removal of the fully plated silver nuts for the complete V2500 fleet. Removal of the fully silver plated nuts should be mandated for the complete V2500 fleet.

We agree that the fully silver plated nuts should be removed from service for the entire V2500 fleet. However, all engines do not need to be retrofitted before a specific compliance date. V2500 engines that have been determined to require repetitive ultrasonic inspections are at an elevated risk level, and therefore require removal of the fully silver plated nuts within a specified time period to prevent corrosion and potential failure of the HPC 3–8 drum. The remaining V2500 engines that do not require repetitive ultrasonic inspections have been determined to be at a much lower risk level, and therefore, are only required to have the fully silver plated nuts removed at the next piece part exposure. We did not change the AD.

Request To Reference the Latest Service Bulletins

IAE and Japan Airlines request that we reference the latest revisions of the service bulletins, which are IAE SB No. V2500–ENG–72–0594, Revision 6, IAE SB No. V2500–ENG–72–0603, Revision 2, and V2500–ENG–72–0601, Revision 2, as they have been updated to include additional engine S/Ns and other clarification changes.

We agree. We changed the AD to reference the revised service bulletins.

Request To Correct Typos in the Proposed AD

Two commenters request that we change the following:

Paragraph (f)(4) should be revised from "HPC Stage 8 to 12 drum" to "HPC Stage 3 to 8 drum".

Paragraphs (f)(1), (f)(4)(ii), and (g)(2) should be revised from "using paragraph 3 of the Accomplishment Instructions of" to "using the paragraph 3 Accomplishment Instructions of".

We partially agree. We agree that paragraph (f)(4) should be revised from "HPC Stage 8 to 12 drum" to "HPC Stage 3 to 8 drum," We changed the AD.

We also agree that our reference in paragraphs (f)(1), (f)(4)(ii), and (g)(2) should be revised, but not as recommended. We changed paragraphs (f)(1), (f)(4)(ii), and (g)(2) from "using paragraph 3 of the Accomplishment Instructions of" to "use IAE SB No. V2500–ENG–72–0601, Revision 2, dated April 12, 2010, Accomplishment Instructions, paragraph 3."

Material Incorporated by Reference Section Missing From Proposed AD

One commenter states that paragraphs (f)(1), (f)(4)(ii), and (g)(2) require ultrasonic inspection and cleaning to be performed using the Accomplishment Instructions of specified revisions of IAE SBs V2500–ENG–72–0594, V2500–ENG–603, and V2500–ENG–72–0601. These SBs should be listed in the Material Incorporated by Reference section, which is missing from the NPRM.

We agree. This Final Rule AD includes the Material Incorporated by Reference section, which includes those SBs.

Request To Revise the Relevant Service Information

IAE commented to revise the last sentence of the "Relevant Service Information" in the preamble of the AD to change: "* * * 27 months from the effective date of the proposed AD" to "27 months after the effective date of this AD". The commenter states that this could be interpreted incorrectly as 27 months from February 12, 2010 (date of the NPRM).

We do not agree that the compliance date could be misinterpreted. Paragraph (4) of this AD correctly states "27 months after the effective date of this AD." We did not change the AD.

Request To Revise the Mandatory Terminating Action Compliance Time

IAE requests that we revise the mandatory terminating action compliance time of "27 months after the effective date of this AD" to a calendar end date of October 31, 2012, to be consistent with the IAE risk assessment.

We do not agree. Due to the uncertainty of the actual publication date of the AD, revising the mandatory terminating action from 27 months after the effective date of this AD to a calendar date of October 31, 2012, may result in a compliance time that is more restrictive than what was proposed in the NPRM. We did not change the AD.

Request To Revise the Definition of Piece-Part Exposure

IAE requests that we revise the AD to change paragraph (i) of the definition of piece-part exposure for the HPC stage 3 to 8 drum from "removal of the drum from the engine and removal of all blades from the drum" to "separation of the rotating drum hardware from the static cases and removal of all blades from the HPC stage 3 to 8 drum". IAE is concerned that confusion could occur with the current statement.

We do not agree. The current description is accurate. We did not change the AD.

Request To Eliminate the Mandatory Terminating Action

One commenter requests that we revise paragraph (f)(4) of the AD to eliminate the 27-month mandatory terminating action requirement to remove the fully silver plated nuts that attach the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum. The commenter states that performing repetitive ultrasonic inspections will provide an acceptable level of safety, and that incorporation of the 27-month mandatory terminating action requirement is an unacceptable cost burden to operators.

We do not agree. We have determined that removal of the fully silver plated nuts within 27 months from the effective date of the AD is required to maintain an acceptable level of safety. We did not change the AD.

Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

We estimate that this AD will affect 848 IAE V2500–A1, V2522–A5, V2524–A5, V2525–D5, V2527–A5, V2527E–A5, V2527M–A5, V2528–D5, V2530–A5, and V2533–A5 turbofan engines installed on airplanes of U.S. registry. We estimate that 29 of these engines will require ultrasonic inspections, and that it will take about 3 work-hours per engine to perform one ultrasonic inspection. We estimate that it will take about 2 work-hours per engine to perform the FPI of the HPC stage 3 to 8 drum, and that the average labor rate is $85 per work-hour. We also estimate that removal of silver residue from the engine will cost about $2,600 per engine. Required parts will cost about $795 per engine. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $3,030,515.

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

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

(1) Is not a "significant regulatory action" under Executive Order 12866;

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2010–20–07 International Aero Engines AG: Amendment 39–16441. Docket No. FAA–2009–1100; Directorate Identifier 2009–NE–37–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective November 1, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to:

(1) All International Aero Engines AG (IAE) V2500–A1 turbofan engines; and

(2) All IAE V2525–D5 and V2528–D5 turbofan engines; and

(3) IAE V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 turbofan engines with serial numbers (S/Ns) up to and including V13181, and with S/Ns from V15000 up to and including V15245.

(4) These engines are installed on, but not limited to, Airbus A319, A320, and A321, and McDonnell Douglas MD–90 airplanes.

Unsafe Condition

(d) This AD results from reports of 39 high-pressure compressor (HPC) stage 3 to 8 drums found cracked since March 2009. We are issuing this AD to prevent uncontained failure of the HPC stage 3 to 8 drum, which could result in damage to the airplane.

Compliance

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

Engines Requiring Ultrasonic Inspections of the HPC Stage 3 to 8 Drum

(f) For IAE V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, and V2533–A5 turbofan engines with S/Ns in "Group A" or "Group D" in IAE Service Bulletin (SB) No. V2500–ENG–72–0594, Revision 6, dated April 12, 2010, and for V2500–A1 turbofan engines with S/Ns in "Group A" in IAE SB No. V2500–ENG–72–0603, Revision 2, dated March 17, 2010, do the following:

(1) Perform an initial ultrasonic inspection of the HPC stage 3 to 8 drum using IAE SB No. V2500–ENG–72–0594, Revision 6, dated April 12, 2010, Accomplishment Instructions, paragraph 3, or IAE SB No. V2500–ENG–72–0603, Revision 2, dated March 17, 2010, Accomplishment Instructions, paragraph 3, before accumulating 5,200 cycles-since-new (CSN) or within 500 cycles from the effective date of this AD, whichever occurs later.

(2) Thereafter, perform repetitive ultrasonic inspections of the HPC stage 3 to 8 drum for cracks within every 500 cycles-since-last-inspection.

(3) If cracks or crack indications are identified, remove the drum from service before further flight.

Mandatory Terminating Action

(4) As mandatory terminating action to the repetitive inspections required by this AD, at the next engine shop visit, but no later than 27 months after the effective date of this AD, do the following before returning any HPC stage 3 to 8 drum to service:

(i) Remove from service fully silver plated nuts, part number (P/N) AS44862 or equivalent, that attach the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum.

(ii) Remove the silver residue from the HPC stage 3 to 8 drum using the IAE SB No. V2500–ENG–72–0601, Revision 2, dated April 12, 2010, Accomplishment Instructions, paragraph 3. Drums cleaned before the effective date of this AD using engine manual task 72–41–11–110–001 satisfy this requirement.

(iii) Fluorescent penetrant inspect (FPI) the HPC stage 3 to 8 drum for cracks, and remove from service any drum found cracked. You can find guidance on performing an FPI of the HPC stage 3 to 8 drum in IAE engine manual task 72–41–11–200–001.

(iv) Installation of a zero-time HPC stage 3 to 8 drum or a drum that has never operated with fully silver plated nuts, P/N AS44862 or equivalent, that attach the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum eliminates the need for the cleaning and FPI required by paragraphs (f)(4)(ii) and (f)(4)(iii) of this AD.

All Other Engines

(g) For all other engines, at the next piece-part exposure of the HPC stage 3 to 8 drum after the effective date of this AD, do the following before returning the drum to service:

(1) Remove from service fully silver plated nuts, P/N AS44862 or equivalent, that attach the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum.

(2) Remove the silver residue from the HPC stage 3 to 8 drum using IAE SB No. V2500–ENG–72–0601, Revision 2, dated April 12, 2010, Accomplishment Instructions, paragraph 3. Drums cleaned before the effective date of this AD using engine manual task 72–41–11–110–001 satisfy this requirement.

(3) FPI the HPC stage 3 to 8 drum for cracks, and remove from service any drum found cracked. You can find guidance on performing an FPI of the HPC stage 3 to 8 drum in IAE engine manual task 72–41–11–200–001.

(4) Installation of a zero-time HPC stage 3 to 8 drum or a drum that has never operated with fully silver plated nuts, P/N AS44862 or equivalent, that attach the HPC stage 3 to 8 drum to the HPC stage 9 to 12 drum eliminates the need for the cleaning and FPI required by paragraphs (g)(2) and (g)(3) of this AD.

Definitions

(h) For the purpose of this AD, an engine shop visit is the induction of an engine into the shop for maintenance involving the separation of a pair of major mating engine flanges, except that the separation of engine flanges solely for the purposes of transportation without subsequent engine maintenance is not an engine shop visit.

(i) For the purpose of this AD, piece-part exposure is removal of the HPC stage 3 to 8 drum from the engine and removal of all blades from the drum.

Previous Credit

(j) Initial or repetitive ultrasonic inspections of the HPC stage 3 to 8 drum using IAE SB No. V2500–ENG–72–0594, Revision 3, dated August 7, 2009, or Revision 4, dated October 13, 2009, or Revision 5, dated November 23, 2009, before the effective date of this AD, meets the inspection requirements of paragraphs (f)(1) through (f)(3) of this AD.

(k) Initial or repetitive ultrasonic inspections of the HPC stage 3 to 8 drum using IAE SB No. V2500–ENG–72–0603, Original Issue, dated November 24 2009, or Revision 1, dated December 18, 2009, before the effective date of this AD, meets the inspection requirements of paragraphs (f)(1) through (f)(3) of this AD.

Alternative Methods of Compliance (AMOCS)

(l) The Manager, Engine Certification Office, has the authority to approve AMOCs for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(m) Contact Mark Riley, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: mark.riley@faa.gov;* telephone (781) 238–7758, fax (781) 238–7199, for more information about this AD.

(n) Contact International Aero Engines AG, 400 Main Street, East Hartford, CT 06108; *telephone:* (860) 565–5515; *fax:* (860) 565–5510, for a copy of the service information referenced in this AD.

Material Incorporated by Reference

(o) You must use the service information specified in the following Table 1 to perform the inspections and silver residue removal required by this AD. The Director of the Federal Register approved the incorporation by reference of the documents listed in the following Table 1 in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact International Aero Engines AG, 400 Main Street, East Hartford, CT 06108; *telephone:*

(860) 565–5515; *fax:* (860) 565–5510, for a copy of this service information. You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

TABLE 1—INCORPORATION BY REFERENCE

International Aero Engines Service Bulletin No.	Page	Revision	Date
V2500–ENG–72–0594 Total Pages: 61.	ALL	6	April 12, 2010.
V2500–ENG–72–0601 Total Pages: 9.	ALL	2	April 12, 2010.
V2500–ENG–72–0603 Total pages: 46.	ALL	2	March 17, 2010.

Issued in Burlington, Massachusetts, on September 15, 2010.

Robert J. Ganley,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2010–23832 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0439; Directorate Identifier 2010–NM–029–AD; Amendment 39–16437; AD 2010–20–03]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Model CL–600–2B16 (CL–604 Variants (Including CL–605 Marketing Variant)) Airplanes

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

ACTION: Final rule.

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

Following five reported cases of * * * balance washer screw failure on similar ADGs [air-driven generators]/ram air turbines installed on other aircraft types, investigation by Hamilton Sundstrand determined that a specific batch of the screws had a metallographic non-conformity that increased their susceptibility to brittle fracture. * * *

Failure of a balance washer screw can result in loss of the related balance washer, with consequent turbine imbalance. Such imbalance could potentially result in ADG structural failure (including blade failure), loss of ADG electrical power and structural damage to the aircraft and, if deployment was activated by a dual engine shutdown, could also result in loss of hydraulic power for the flight controls [and consequent reduced ability of the flightcrew to maintain the safe flight and landing of the airplane].

* * * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective November 1, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of November 1, 2010.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Christopher Alfano, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7340; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on June 2, 2010 (75 FR 30740). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Following five reported cases of * * * balance washer screw failure on similar ADGs [air-driven generators]/ram air turbines installed on other aircraft types, investigation by Hamilton Sundstrand determined that a specific batch of the screws had a metallographic non-conformity that increased their susceptibility to brittle fracture. Subsequently, it was established that 152 "dry" ADGs [Hamilton Sundstrand Part Numbers (P/Ns) in the 761339 series and 1711405; see Note] either had non-conforming screws installed during production or possibly during maintenance or repair at Hamilton Sundstrand repair stations.

Failure of a balance washer screw can result in loss of the related balance washer, with consequent turbine imbalance. Such imbalance could potentially result in ADG structural failure (including blade failure), loss of ADG electrical power and structural damage to the aircraft and, if deployment was activated by a dual engine shutdown, could also result in loss of hydraulic power for the flight controls [and consequent reduced ability of the flightcrew to maintain the safe flight and landing of the airplane].

This [Canadian] directive mandates checking of the ADG and replacing the balance washer screws, if required. It also prohibits future installation of unmodified ADGs.

Note: ADGs with Hamilton Sundstrand P/Ns in the 761339 series and 1711405 are installed on the aircraft model listed in the Applicability section above in addition to Bombardier Inc. Models CL–600–2B19, CL–600–2C10 and CL–600–2D24. The latter three models are covered in a separate directive.

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

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a NOTE within the AD.

Costs of Compliance

We estimate that this AD will affect 155 products of U.S. registry. We also estimate that it will take about 10 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $131,750, or $850 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

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 the NPRM, 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.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2010–20–03 Bombardier, Inc.: Amendment 39–16437. Docket No. FAA–2010–0439; Directorate Identifier 2010–NM–029–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective November 1, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier, Inc. Model CL–600–2B16 (CL–604 Variant) airplanes; certificated in any category; serial numbers (S/N) 5408 and subsequent.

Note 1: Some Model CL–600–2B16 (CL–604 Variant) airplanes might be referred to by a marketing designation of CL–605.

Subject

(d) Air Transport Association (ATA) of America Code 24: Electrical power.

Reason

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

Following five reported cases of * * * balance washer screw failure on similar ADGs [air-driven generators]/ram air turbines installed on other aircraft types, investigation by Hamilton Sundstrand determined that a specific batch of the screws had a metallographic non-conformity that increased their susceptibility to brittle fracture. Subsequently, it was established that 152 "dry" ADGs [Hamilton Sundstrand Part Numbers (P/Ns) in the 761339 series and 1711405; see Note] either had non-conforming screws installed during production or possibly during maintenance or repair at Hamilton Sundstrand repair stations.

Failure of a balance washer screw can result in loss of the related balance washer, with consequent turbine imbalance. Such imbalance could potentially result in ADG structural failure (including blade failure), loss of ADG electrical power and structural damage to the aircraft and, if deployment was activated by a dual engine shutdown, could also result in loss of hydraulic power for the flight controls [and consequent reduced ability of the flightcrew to maintain the safe flight and landing of the airplane].

This [Canadian] directive mandates checking of the ADG and replacing the balance washer screws, if required. It also prohibits future installation of unmodified ADGs.

Note: ADGs with Hamilton Sundstrand P/Ns in the 761339 series and 1711405 are installed on the aircraft model listed in the Applicability section above in addition to Bombardier Inc. Models CL–600–2B19, CL–600–2C10 and CL–600–2D24. The latter three models are covered in a separate directive.

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.

Actions

(g) At the earliest of the times identified in paragraphs (g)(1), (g)(2), (g)(3), and (g)(4) of this AD, do an inspection to determine the serial number of the installed ADG. A review of airplane maintenance records is acceptable in lieu of this inspection if the serial number of the ADG can be conclusively determined from that review.

(1) Within 400 flight hours or 12 months after the effective date of this AD, whichever occurs first, or

(2) Prior to the next in-flight or on-ground functional test of the ADG, whichever occurs first after the effective date of this AD, or

(3) Prior to the next in-flight or on-ground operational test of the ADG, whichever occurs first after the effective date of this AD, or

(4) Prior to the next scheduled ADG in-flight deployment.

(h) If the ADG serial number, as determined in paragraph (g) of this AD, is not listed in paragraph 1.A of the applicable Bombardier service bulletin listed in Table 1 of this AD, no further action is required by this AD, except as required by paragraph (j) of this AD.

TABLE 1—SERVICE BULLETINS

Model—	Bombardier Service Bulletin—	Dated—
CL–600–2B16 (CL–604) airplanes	604–24–021	July 13, 2009.
CL–600–2B16 (CL–605) airplanes	605–24–001	July 13, 2009.

(i) If the ADG serial number determined in paragraph (g) of this AD is identified in paragraph 1.A. of the applicable service bulletin listed in Table 1 of this AD, before further flight, do an inspection to determine if the symbol "24–5" is marked on the ADG identification plate. A review of airplane maintenance records is acceptable in lieu of this inspection if the symbol "24–5" can be conclusively determined from that review.

(1) If the symbol "24–5" is marked on the ADG identification plate, and the balance washer screws have already been replaced, no further action is required by this AD, except as required by paragraph (j) of this AD.

(2) If the symbol "24–5" is not marked on the ADG identification plate, before further flight, replace all balance washer screws with new screws having part number MS24667–14 and mark the ADG identification plate with symbol "24–5", in accordance with the Accomplishment Instructions of the applicable service bulletin listed in Table 1 of this AD.

(j) As of the effective date of this AD, no person may install on any airplane a replacement or spare ADG, Hamilton Sundstrand part number in the 761339 or 1711405 series, having one of the serial numbers identified in paragraph 1.A. of the applicable service bulletin listed in Table 1 of this AD, unless the ADG is identified with the symbol "24–5" on the identification plate.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: The MCAI specifies to inspect only airplanes having certain serial numbers that are part of the MCAI applicability. Because the affected part could be rotated onto any of the airplanes listed in the applicability, this AD requires the inspection be done on all airplanes. We have coordinated this difference with TCCA.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York, 11590; telephone 516–228–7300; fax 516–794–5531. 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

(l) Refer to MCAI Canadian Airworthiness Directive CF–2009–50, dated December 17, 2009; and Bombardier Service Bulletins 604–24–021, dated July 13, 2009, and 605–24–001, dated July 13, 2009; for related information.

Material Incorporated by Reference

(m) You must use Bombardier Service Bulletin 604–24–021, dated July 13, 2009; or Bombardier Service Bulletin 605–24–001, dated July 13, 2009; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

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

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

Issued in Renton, Washington, on September 10, 2010.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–23742 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0375; Directorate Identifier 2010–NM–014–AD; Amendment 39–16443; AD 2010–20–09]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes; Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) Airplanes; Model CL–600–2D15 (Regional Jet Series 705) and Model CL–600–2D24 (Regional Jet Series 900) Airplanes

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

ACTION: Final rule.

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

Following five reported cases of balance washer screw failure on similar ADGs [air-driven generators]/ram air turbines installed on other aircraft types, investigation by Hamilton Sundstrand determined that a specific batch of the screws had a metallographic non-conformity that increased their susceptibility to brittle fracture. * * *

Failure of a balance washer screw can result in loss of the related balance washer,

with consequent turbine imbalance. Such imbalance could potentially result in ADG structural failure (including blade failure), loss of ADG electrical power and structural damage to the aircraft and, if deployment was activated by a dual engine shutdown, could also result in loss of hydraulic power for the flight controls.

* * * * *

The unsafe condition is the reduced ability of the flightcrew to maintain the safe flight and landing of the airplane. We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective November 1, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of November 1, 2010.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Christopher Alfano, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7340; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on April 8, 2010 (75 FR 17884). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Following five reported cases of balance washer screw failure on similar ADGs [air-driven generators]/ram air turbines installed on other aircraft types, investigation by Hamilton Sundstrand determined that a specific batch of the screws had a metallographic non-conformity that increased their susceptibility to brittle fracture. Subsequently, it was established that 152 "dry" ADGs [Hamilton Sundstrand Part Numbers (P/Ns) in the 761339 series and 1711405; *see* Note] either had non-conforming screws installed during production or may possibly have had non-conforming screws installed during maintenance or repair at Hamilton Sundstrand repair stations.

Failure of a balance washer screw can result in loss of the related balance washer, with consequent turbine imbalance. Such imbalance could potentially result in ADG structural failure (including blade failure), loss of ADG electrical power and structural damage to the aircraft and, if deployment was activated by a dual engine shutdown, could also result in loss of hydraulic power for the flight controls [and consequent reduced ability of the flightcrew to maintain the safe flight and landing of the airplane].

This [Canadian] directive mandates checking the ADG and replacing the balance washer screws, if required. It also prohibits future installation of unmodified ADGs.

Note: ADGs with Hamilton Sundstrand P/Ns in the 761339 series and 1711405 are installed on the aircraft models listed in the Applicability section above in addition to Bombardier Inc. Model CL–600–2B16. The latter model is covered in a separate directive.

The unsafe condition is the reduced ability of the flightcrew to maintain the safe flight and landing of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Request To Remove the Phrase "Before Further Flight" From Paragraph (i) of the AD

Comair requests that the phrase "before further flight" be changed from paragraph (i) of the AD. Comair suggests that the intent of paragraph (i) is that if the air-driven generator (ADG) is deployed to allow inspection of the data plate for the symbol "24–5," and it is discovered that there is no symbol "24–5," before further flight comply with the service bulletin. Comair suggests using the phrase "within the timeframe determined in (g) or (h)."

We agree with the request to change the wording in paragraph (i) of this AD. This change does not compromise safety or the intent of the AD; therefore, we have changed the wording to "within the applicable time in paragraph (g) or (h) of this AD."

Request To Eliminate "24–5" Marking on the ADG Identification Plate

Air Wisconsin requests that the "24–5" marking on the ADG identification plate be eliminated from the identification plate. Air Wisconsin states that it is the operator's record keeping system that is required to show compliance with the AD, and Air Wisconsin's record keeping system has been approved to sufficiently ensure AD compliance.

We disagree with the request to remove the "24–5" marking on the ADG identification plate. The "24–5" marking on the identification plate of the affected ADG identifies that the suspect balance washer screws have been replaced and are in compliance with the AD. No change has been made to the AD in this regard.

Request for Clarification Regarding Term "All Airplanes"

Air Wisconsin requests clarification regarding the term "all airplanes," which is used in Note 1 of the NPRM specifying that the inspection is to be done on all airplanes.

We agree that clarification is needed. The term "all airplanes" refers to the applicable airplane models listed in paragraph (c) of this AD. It is possible that an affected part could be rotated onto any of the airplanes listed in the applicability, and the affected part could be missed unless the inspection specified in paragraph (g) of this AD applies to all of the airplanes identified in paragraph (c) of this AD. No change has been made to the AD in this regard.

Request To Reclassify as Appliance AD

Air Wisconsin requests that this AD be classified as an appliance AD. Air Wisconsin requests that if we cannot reclassify it as an appliance AD, we include a statement ensuring compliance on all units in inventory so that affected units are not installed on airplanes.

We disagree with the request to reclassify the AD as an appliance AD. When the unsafe condition results from the installation of the appliance on an aircraft, the AD action is issued against the aircraft, not the appliance. We also disagree with the request to include a statement ensuring compliance on all units in inventory, because paragraph (j) of this AD already addresses the issue of installing a replacement or spare ADG on any airplane. No change has been made to the AD in this regard.

Clarification of Paragraph (g)

We have clarified the compliance times in paragraph (g) of this AD by requiring the inspection at the earliest of the times identified in paragraphs (g)(1), (g)(2), (g)(3), and (g)(4) of this AD.

Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a NOTE within the AD.

Costs of Compliance

We estimate that this AD will affect 1,008 products of U.S. registry. We also estimate that it will take about 10 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $856,800, or $850 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

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 the NPRM, 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.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2010–20–09 Bombardier, Inc.: Amendment 39–16443. Docket No. FAA–2010–0375; Directorate Identifier 2010–NM–014–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective November 1, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7305 through 7990 inclusive and 8000 and subsequent; Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes, serial numbers 10003 and subsequent; Model CL–600–2D15 (Regional Jet Series 705) and Model CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 and subsequent; certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 24: Electrical power.

Reason

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

Following five reported cases of balance washer screw failure on similar ADGs [air-driven generators]/ram air turbines installed on other aircraft types, investigation by Hamilton Sundstrand determined that a specific batch of the screws had a metallographic non-conformity that increased their susceptibility to brittle fracture. Subsequently, it was established that 152 "dry" ADGs [Hamilton Sundstrand Part Numbers (P/Ns) in the 761339 series and 1711405; see Note] either had non-conforming screws installed during production or may possibly have had non-conforming screws installed during maintenance or repair at Hamilton Sundstrand repair stations.

Failure of a balance washer screw can result in loss of the related balance washer, with consequent turbine imbalance. Such imbalance could potentially result in ADG structural failure (including blade failure), loss of ADG electrical power and structural damage to the aircraft and, if deployment was activated by a dual engine shutdown, could also result in loss of hydraulic power for the flight controls.

This [Canadian] directive mandates checking the ADG and replacing the balance washer screws, if required. It also prohibits future installation of unmodified ADGs.

Note: ADGs with Hamilton Sundstrand P/Ns in the 761339 series and 1711405 are installed on the aircraft models listed in the Applicability section above in addition to Bombardier Inc. Model CL–600–2B16. The latter model is covered in a separate directive.

The unsafe condition is the reduced ability of the flightcrew to maintain the safe flight and landing of the airplane.

Compliance

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

Actions

(g) For Model CL–600–2C10, CL–600–2D15 and CL–600–2D24 airplanes: At the earliest of the times identified in paragraphs (g)(1), (g)(2), (g)(3), and (g)(4) of this AD, do an inspection to determine the serial number of the installed air-driven generator (ADG), in accordance with the Accomplishment Instructions of the applicable service bulletin listed in Table 1 of this AD. A review of airplane maintenance records is acceptable in

lieu of this inspection if the serial number of the ADG can be conclusively identified from that review.

(1) Within 4,000 flight hours or 18 months after the effective date of this AD, whichever occurs first; or

(2) Prior to the next in-flight or on-ground functional check of the ADG, whichever occurs first after the effective date of this AD; or

(3) Prior to the next in-flight or on-ground operational check of the ADG, whichever occurs first after the effective date of this AD; or

(4) Before the next scheduled ADG in-flight deployment.

(h) For Model CL–600–2B19 airplanes: At the earliest of the times identified in paragraphs (h)(1), (h)(2), (h)(3), and (h)(4) of this AD, do an inspection to determine the serial number of the installed ADG, in accordance with the Accomplishment Instructions of the applicable service bulletin listed in Table 1 of this AD. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number of the ADG can be conclusively identified from that review.

(1) Within 4,000 flight hours after the effective date of this AD; or

(2) Prior to the next in-flight or on-ground functional check of the ADG, whichever occurs first after the effective date of this AD; or

(3) Prior to the next in-flight or on-ground operational check of the ADG, whichever occurs first after the effective date of this AD; or

(4) Before the next scheduled ADG in-flight deployment.

TABLE 1—SERVICE BULLETINS

Model—	Bombardier Service Bulletin—	Revision—	Dated—
CL–600–2B19 airplanes	601R–24–127	A	February 25, 2010.
CL–600–2C10, CL–600–2D15, and CL–600–2D24 airplanes	670BA–24–026	Original	October 23, 2009.

(i) If the ADG serial number determined in paragraph (g) or (h) of this AD is identified in paragraph 1.A. of the applicable service bulletin listed in Table 1 of this AD, within the applicable time in paragraph (g) or (h) of this AD do an inspection to determine if the symbol "24–5" is marked on the ADG identification plate. A review of airplane maintenance records is acceptable in lieu of this inspection if the symbol "24–5" mark can be conclusively identified from that review.

(1) If the symbol "24–5" is marked on the ADG identification plate, the balance washer screws have already been replaced, and no further action is required by this paragraph.

(2) If the symbol "24–5" is not marked on the ADG identification plate, before further flight replace all balance washer screws with new balance washer screws, part number MS24667–14, and mark the ADG identification plate with symbol "24–5," in accordance with the Accomplishment Instructions of the applicable service bulletin listed in Table 1 of this AD.

(j) As of the effective date of this AD, no person may install on any airplane, a replacement or spare ADG, Hamilton Sundstrand part number in the 761339 or 1711405 series, having one of the serial numbers identified in paragraph 1.A. of the applicable service bulletin identified in Table 1 of this AD, unless the ADG is identified with the symbol "24–5" on the identification plate.

Actions Accomplished According to Previous Issue of Service Bulletin

(k) Inspections accomplished before the effective date of this AD according to Bombardier Service Bulletin 601R–24–127, dated October 23, 2009, are considered acceptable for compliance with the corresponding action specified in this AD.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: The MCAI specifies to inspect only airplanes having certain serial numbers that are part of the MCAI applicability. Because the affected part could be rotated onto any of the airplanes listed in the applicability, this AD requires the inspection be done on all airplanes. We have coordinated this with the TCCA.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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:* Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York, 11590; telephone 516–228–7300; fax 516–794–5531. 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

(m) Refer to MCAI Canadian Airworthiness Directive CF–2009–48, dated December 14, 2009; and Bombardier Service Bulletins 601R–24–127, Revision A, dated February 25, 2010, and 670BA–24–026, dated October 23, 2009; for related information.

Material Incorporated by Reference

(n) You must use Bombardier Service Bulletin 601R–24–127, Revision A, dated February 25, 2010; or Bombardier Service Bulletin 670BA–24–026, dated October 23, 2009; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

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

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

Issued in Renton, Washington, on September 15, 2010.

Robert D. Breneman,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–23838 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0260; Directorate Identifier 2010–CE–015–AD; Amendment 39–16440; AD 2010–20–06]

RIN 2120–AA64

Airworthiness Directives; GROB-WERKE (Type Certificate Previously Held by BURKHART GROB Luft- und Raumfahrt) Models G115C, G115D and G115D2 Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued 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:

The manufacturer has received a report of a failed canopy jettison test, during a regular maintenance check. The investigation revealed that a cable shroud of the jettison system protruded the canopy structure, which probably caused the malfunction. Inability to jettison the canopy in flight would prevent evacuation of the aeroplane in case of need.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective November 1, 2010.

On November 1, 2010, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Greg Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4130; *fax:* (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That SNPRM was published in the **Federal Register** on June 4, 2010 (75 FR 31734). That SNPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

The manufacturer has received a report of a failed canopy jettison test, during a regular maintenance check. The investigation revealed that a cable shroud of the jettison system protruded the canopy structure, which probably caused the malfunction. Inability to jettison the canopy in flight would prevent evacuation of the aeroplane in case of need.

For the reason stated above, this AD mandates an additional one time canopy jettison test and repair if necessary.

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

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the SNPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

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 required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the AD.

Costs of Compliance

We estimate that this AD will affect 3 products of U.S. registry. We also estimate that it will take about 3 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of this AD on U.S. operators to be $765 or $255 per product.

In addition, we estimate that any necessary follow-on actions will take about 3 work-hours and require parts costing $68, for a cost of $323 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866;

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

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

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

Examining the AD Docket

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

available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2010–20–06 GROB-WERKE (Type Certificate Previously Held by BURKHART GROB Luft- und Raumfahrt): Amendment 39–16440; Docket No. FAA–2010–0260; Directorate Identifier 2010–CE–015–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective November 1, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to GROB-WERKE (Type Certificate Previously Held by BURKHART GROB Luft- und Raumfahrt) Models G115C, G115D, and G115D2 airplanes, all serial numbers, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 52: Doors.

Reason

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

The manufacturer has received a report of a failed canopy jettison test, during a regular maintenance check. The investigation revealed that a cable shroud of the jettison system protruded the canopy structure, which probably caused the malfunction. Inability to jettison the canopy in flight would prevent evacuation of the aeroplane in case of need.

For the reason stated above, this AD mandates an additional one time canopy jettison test and repair if necessary.

Actions and Compliance

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

(1) Before further flight after November 1, 2010 (the effective date of this AD), fabricate a placard (using at least 1/8-inch letters) with the following words and install the placard on the instrument panel within the pilot's clear view: "AEROBATIC FLIGHT PROHIBITED."

(2) Before the next aerobatic flight after November 1, 2010 (the effective date of this AD), do a canopy jettison test following Grob Aircraft AG Service Bulletin No. MSB1078–164, dated July 21, 2009.

(3) If the canopy jettison fails the test required in paragraph (f)(2) of this AD, before further aerobatic flight, contact Grob Aircraft AG, Customer Service, 86874 Tussenhausen-Mattsies, Germany, telephone: + 49 (0) 8268–998–105; fax; + 49 (0) 8268–998–200; e-mail: *productsupport@grob-aircraft.com,* for an FAA-approved repair scheme and incorporate the repair scheme.

(4) Within 7 days after doing the canopy jettison test required in paragraph (f)(2) of this AD or within 7 days after November 1, 2010 (the effective date of this AD), whichever occurs later, submit a report of the test results using Appendix 1 of Grob Aircraft AG Service Bulletin No. MSB1078–164, dated July 21, 2009, to Grob Aircraft AG at the address specified in paragraph (f)(3)(i) of this AD.

(5) After the corrective actions specified in paragraph (f)(3) or if the canopy jettison passed the test required in paragraph (f)(2) of this AD, before further flight, remove the placard that was installed in accordance with paragraph (f)(1) of this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: The MCAI does not have a placard requirement. To eliminate any confusion and to ensure pilot awareness of the unsafe condition, we added a temporary placard requirement to this AD.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Greg Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(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

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD No. 2009–0279, dated December 23, 2009; and Grob Aircraft AG Service Bulletin No. MSB1078–164, dated July 21, 2009, for related information.

Material Incorporated by Reference

(i) You must use Grob Aircraft AG Service Bulletin No. MSB1078–164, dated July 21, 2009, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Grob Aircraft AG, Customer Service, 86874 Tussenhausen-Mattsies, Germany, Internet: *http://www.grob-aircraft.eu/.*

(3) You may review copies of the service information incorporated by reference for this AD at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the Central Region, call (816) 329–3768.

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

Issued in Kansas City, Missouri, on September 16, 2010.

William J. Timberlake,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–23740 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0806]

RIN 1625–AA00

Safety Zone; Ledge Removal Project, Bass Harbor, ME

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone around a ledge removal project in Bass Harbor, Maine. The United States Army Corps of Engineers (USACE) has contracted Prock Marine Company to remove a section of ledge in order to expand an anchorage area for the Town of Tremont. This regulation establishes a temporary safety zone around the

work area where explosive charges will be used. This safety zone is necessary to protect waterway users from the hazards associated with explosive blasting and subsequent debris removal.

DATES: This rule is effective beginning at 6 a.m. on October 1, 2010 through 11:59 p.m. on November 15, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0806 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0806 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 interim rule, call or e-mail Lieutenant Junior Grade Laura van der Pol, Waterways Management Division at Coast Guard Sector Northern New England, telephone 207–741–5421, e-mail *Laura.K.vanderPol1@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because this project has already been subject to extensive public review and comment through the Army Corps of Engineers (USACE), Town of Tremont public meetings, and outreach by the Prock Marine Company. A complete description of the project was made available as a Public Notice at the New England District USACE Web site: *http://www.nae.usace.army.mil/projects/me/bassharbor/bassharbor.htm*. No objections have been raised by maritime interests or the local community. The Coast Guard finds that issuing a NPRM for this temporary rule unnecessary and contrary to public interest as immediate action is necessary to protect the public from the hazards associated with explosive blasting.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** for the reasons enumerated above. In addition, there is an immediate need to protect waterway users from hazards associated with the explosive charges. A delay in the effective dates of this regulation would delay the start of the ledge removal; such a delay would be contrary to public interest. The USACE has given Prock Marine Company a limited time period beginning on October 1, 2010 in which the ledge removal can take place. A delay in the start date could jeopardize the project as on site weather conditions deteriorate as the fall season progresses, and any delay to the project completion would be contrary to public interest.

Basis and Purpose

The USACE plans to remove 1,800 cubic yards of a ledge in the navigable waterway in and around Bass Harbor both to increase mooring capacity for fishing trawlers and recreational vessels and to provide a channel connecting the inner and outer harbor anchorages. This project will last approximately 30 days beginning October 1, 2010 and will involve using explosive charges to remove a section of ledge. As blasting projects introduce significant hazards to waterway users, including risk of injury or death from near or actual contact with the blasting and dredge equipment, a safety zone around the blast area is necessary to ensure the safety of waterway users in Bass Harbor. This rule prevents vessels from entering, transiting, mooring or anchoring within the area designated as a safety zone unless authorized by the Captain of the Port or his designated representative.

The USACE, Town of Tremont, and Prock Marine Company have conducted extensive public outreach regarding this proposed ledge removal project with no negative feedback. This temporary safety zone will facilitate this project by ensuring that the safety of waterway users is not compromised while blasting operations take place.

Discussion of Rule

This rule establishes a temporary safety zone located 500 feet east of the Tremont Town Pier. The safety zone covers an area approximately 900 feet by 600 feet including all navigable waters from surface to bottom extending 300 feet around the following coordinates: 44°14′27.9″ N, 068°21′01.8″ W to the northwest; 44°14′28.5″ N, 068°20′59.9″ W to the northeast; 44°14′25.6″ N, 068°20′59″ W to the southeast; and 44°14′25.3″ N, 068°21′00.1″ W to the southwest. The zone will be marked with four, red, inflatable markers indicating the edges of the zone.

During the enforcement period of the safety zone, persons and vessels are prohibited from entering, transiting, anchoring or mooring within the zone unless specifically authorized by the Captain of the Port (COTP) or his designated representative. The "designated representative" is any Coast Guard commissioned, warrant, or petty officer who has been designated by the COTP to act on his behalf. On-scene patrol personnel may also assist with the enforcement of this regulation. Patrol personnel may be comprised of local, State, or Federal officials authorized to act in support of the Coast Guard. In addition, members of the Coast Guard Auxiliary or Prock Marine Company may be present to inform waterway users of this regulation.

The Coast Guard anticipates little negative impact on vessel traffic from this temporary safety zone as the ledge that is being removed already renders the area unsuitable for navigation by the majority of vessels transiting the area. In addition, the safety zone does not block vessel traffic to any other area of Bass Harbor, as the main channel lies to the west of the safety zone. Once the ledge has been removed and the Coast Guard has verified there are no remaining obstructions in the area, the enforcement of this safety zone may be suspended prior to the cancellation date. In order to facilitate public notice and vessel compliance with this regulation, details of the safety zone will be made via the Local Notice to Mariners and Safety Marine Information Broadcasts.

Regulatory Analyses

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

Regulatory Planning and Review

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

Order. The Office of Management and Budget has not reviewed it under that Order.

This rule is not a significant regulatory action because there is no commercial traffic in the region. Also, traffic will be allowed to pass through the zone with the permission of the Coast Guard Captain of the Port.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to enter, transit, anchor or moor in the designated safety zone during the enforcement period stated in the *List of Subjects.*

The safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: The safety zone will be of limited size and duration, and vessels that can safely do so may navigate in all portions of the waterway except for the area designated a safety zone. Additionally, before the effective period, the Coast Guard will issue notice of the time and location of the safety zone through the Local Notice to Mariners and Safety Marine Information Broadcast.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and

have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction as this rule involves establishing a safety zone.

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T01–0806 to read as follows:

§ 165.T01–0806 Safety zone; Ledge Removal Project, Bass Harbor, Maine.

(a) *Location.* The following area is a designated safety zone:

All navigable waters from surface to bottom extending 300 feet around the following coordinates: 44°14′27.9″ N, 068°21′01.8″ W to the northwest; 44°14′28.5″ N, 068°20′59.9″ W to the northeast; 44°14′25.6″ N, 068°20′59″ W to the southeast; and 44°14′25.3″ N, 068°21′00.1″ W to the southwest. The zone will be marked with four, red, inflatable markers indicating the edges of the zone.

(b) *Notification.* Coast Guard Sector Northern New England will cause notice of the enforcement of this temporary safety zone to be made by all appropriate means to affect the widest publicity among the effected segments of the public, including publication in the Local Notice to Mariners and Safety Marine Information Broadcast.

(c) *Effective Period.* This rule is effective from 6 a.m. on October 1, 2010 through 11:59 p.m. on November 15, 2010.

(d) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply. During the enforcement period, entering, transiting, anchoring or mooring within the safety zone is prohibited unless authorized by the COTP or his designated representatives.

(2) This temporary safety zone is closed to all vessel traffic, except as may be permitted by the COTP or his designated representatives. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or his designated representative. Vessels that are granted permission to enter or remain within the safety zone may be required to be at anchor or moored to a waterfront facility such that the vessel's location will not interfere with dredging operations.

(3) The "designated representative" is any Coast Guard commissioned, warrant or petty officer who has been designated by the COTP to act on his behalf. The on-scene representative may be on a Coast Guard vessel, a State or local law enforcement vessel, or other designated craft, or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. On-scene patrol personnel may also assist with the enforcement of this regulation. Patrol personnel may be comprised of local, State, or Federal officials authorized to act in support of the Coast Guard. In addition, members of the Coast Guard Auxiliary or Prock Marine Company may be present to inform waterway users of this regulation.

(4) Vessel operators desiring to enter or operate within the safety zone shall request permission to do so by contacting the COTP Sector Northern New England by telephone at 207–767–0303 or on VHF radio channel 16.

Dated: September 2, 2010.

J.B. McPherson,

Captain, U.S. Coast Guard, Captain of the Port Sector Northern New England.

[FR Doc. 2010–24157 Filed 9–24–10; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0657; FRL–9205–6]

Approval and Promulgation of Air Quality Implementation Plans; Michigan; PSD Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Michigan State Implementation Plan (SIP). The revisions serve to meet specific requirements of the prevention of significant deterioration (PSD) construction permit program under the Federal Clean Air Act (CAA). This program affects major stationary sources in Michigan that are subject to or potentially subject to the PSD construction permit program. On July 16, 2010, Michigan submitted revisions pertaining to the "net emission increase" definition and the "reasonable possibility" recordkeeping and reporting requirements, and EPA has found the revisions acceptable.

DATES: This direct final rule will be effective November 26, 2010, unless EPA receives adverse comments by October 27, 2010. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0657, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: blakley.pamela@epa.gov.*
- *Fax:* (312) 692–2450.
- *Mail:* Pamela Blakley, Chief, Air Permits Section, (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand Delivery:* Pamela Blakley, Chief, Air Permits Section, (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Deliveries are only accepted during the regional office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The regional office's hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2010–0657. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov* or email information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment.

If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Pamela Blakley, Chief, Air Permits Section, at (312) 886–4447 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Pamela Blakley, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–4447, *blakley.pamela@epa.gov.*

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

I. Background
II. What Proposed Revisions Are Included in This Approval?
III. Final Action
IV. Statutory and Executive Order Reviews

I. Background

On December 21, 2006, Michigan submitted to EPA the Michigan Air Pollution Control Rules, part 18, rules R 336.2801 [(a) through (tt) except (j) and (ff)] to R 336.2819 and R 336.2823(1) to (14) ("part 18") for approval into the Michigan SIP. Part 18 relates to the State of Michigan's PSD permit program. Revisions to part 18 were adopted by Michigan Department of Natural Resources and Environment (MDNRE) on December 4, 2006. EPA proposed to conditionally approve the PSD SIP rules under section 110 of the CAA on January 9, 2008 (73 FR 1570). EPA received several comments on its proposal. On September 16, 2008, after considering the comments, EPA finalized its conditional approval of the submittal, except for Michigan rule R 336.2816, "Sources Impacting Federal Class I Areas—Additional Requirements" (73 FR 53366). In a separate action on September 16, 2008, EPA addressed that excepted section by proposing to partially disapprove the portion of Michigan's SIP revision submission consisting of Michigan rule R 336.2816 (73 FR 53401).

On September 30, 2008, MDNRE submitted additional revisions to the SIP which incorporated the corrections required by EPA in the conditional approval. Specifically, the rules revised are R 336.2801(r)(ii)(definition of "emission unit") and R 336.2801(hh) (definition of "potential to emit"). EPA concluded that the submitted revisions to the SIP satisfied the conditions listed in EPA's conditional approval, and converted its prior conditional approval to full approval on March 25, 2010 (75 FR 14401).

II. What proposed revisions are included in this approval?

On July 16, 2010, Michigan submitted two SIP revisions pertaining to the "net emission increase" definition and the "reasonable possibility" recordkeeping and reporting requirements. As part of its December 21, 2006 submittal, Michigan had established and EPA had approved the definition of "net emissions increase" in R 336.2801(ee). As allowed by 40 CFR 51.166(b), this definition was more stringent than the corresponding Federal definition at 40 CFR 51.166(b). However, in a letter dated May 17, 2007, Michigan indicated that it was revising the definition of "net emissions increase" so that it would follow the same requirements as the Federal rule. The revision was approved by the State on September 11, 2008, and Michigan submitted it to EPA on July 16, 2010, for approval into the Michigan SIP. The definition in the July 16, 2010, submittal is consistent with the definition in 40 CFR 51.166(b)(3).

Michigan also established the "reasonable possibility" recordkeeping and reporting requirements in R 336.2818(3) and submitted the rule for approval into the Michigan SIP as part of the December 21, 2006, submittal. Michigan rule R 336.2818 places specific requirements on the PSD permit, including recordkeeping requirements for applicants using certain methods for determining if a project results in a significant emissions increase. However, the MDNRE's minor source permitting program—Michigan rule R 336.201—requires this information to be submitted for all sources as part of a complete Permit To Install application before beginning actual construction on the proposed project (rather than where there is a "reasonable possibility" that the source may exceed the projected actual emissions, as required by the Federal regulations). Therefore, on September 11, 2008, Michigan adopted a revised rule R 336.2818(3) and, on July 16, 2010, submitted it to EPA for approval into the Michigan SIP. The revision is consistent with the requirements of 40 CFR 51.166(r)(6).

III. Final Action

As explained above, MDNRE submitted revisions to R 336.2801(ee) and R 336.2818(3). The revisions are consistent with the requirements of 40 CFR 51.166. Therefore, EPA is taking direct final action to approve Michigan's SIP revisions.

We are publishing this action without prior proposal because we view this as a noncontroversial revision and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the State plan if relevant adverse written comments are filed. This rule will be effective November 26, 2010 without further notice unless we receive relevant adverse written comments by October 27, 2010. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. If we do not receive any comments, this action will be effective November 26, 2010.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA 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 regulations, provided that they meet the criteria of the CAA. 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 CAA; 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 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 of 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 26, 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 11, 2010.

Susan Hedman,

Regional Administrator, Region 5.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart X—Michigan

■ 2. In § 52.1170, the table in paragraph (c) entitled "EPA-Approved Michigan Regulations" is amended by adding new entries in numerical order for part 18 to read as follows:

§ 52.1170 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED MICHIGAN REGULATIONS

Michigan citation	Title	State effective date	EPA approval date	Comments
*	*	*	*	*
Part 18. Prevention of Significant Deterioration of Air Quality				
*	*	*	*	*
R 336.2801	Definitions	September 11, 2008	September 27, 2010, [Insert page number where the document begins].	Section (ee).
*	*	*	*	*
R 336.2818	Source Obligation	September 11, 2008	September 27, 2010, [Insert page number where the document begins].	Section (3).
*	*	*	*	*

* * * * *

[FR Doc. 2010–23987 Filed 9–24–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0525; FRL–9206–4]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Control Technique Guidelines for Paper, Film, and Foil Coatings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a State Implementation Plan (SIP) revision submitted by the State of Maryland. This SIP revision pertains to the control of volatile organic compound (VOC) emissions from paper, film, and foil coatings. Specifically, Maryland is amending its regulations by adopting the requirements of EPA's Control Technique Guidelines (CTG) for Paper, Film, and Foil Coatings. These amendments will reduce VOC emissions from this source category. This action is being taken in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on November 26, 2010 without further notice, unless EPA receives adverse written comment by October 27, 2010. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2010–0525 by one of the following methods:

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

B. *E-mail: pino.maria@epa.gov.*

C. *Mail:* EPA–R03–OAR–2010–0525, Maria A. Pino, Acting Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2010–0525. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov,* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov,* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov,* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Ellen Wentworth, (215) 814–2034, or by e-mail at wentworth.ellen@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Throughout this document, whenever "we," "us," or "our" is used, we mean EPA.

On April 23, 2010, the Maryland Department of the Environment (MDE) submitted a formal revision to its SIP. This SIP revision (#10–02) consists of amendments to Regulation .07, Paper, Fabric, Vinyl and Other Plastic Parts Coating, under the Code of Maryland Regulations (COMAR) 26.11.19, Control of VOC from Specific Processes. These amendments are necessary since Maryland has adopted the recommendations contained in EPA's CTG (EPA 453/R–07–003, September 2007), for Paper, Film, and Foil Coatings for the control of VOC emissions from this source category.

Section 172(c)(1) of the CAA provides that SIPs for nonattainment areas must include reasonably available control measures (RACM), including reasonably available control technology (RACT) for sources of emissions. Section 182(b)(2) provides that States must revise their ozone SIP to include RACT for VOC sources covered by any CTG document issued after November 15, 1990, and prior to the date of attainment. EPA defines RACT as "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility" (44 FR 53761, September 17, 1979). In subsequent **Federal Register** notices, EPA has addressed how States can meet the RACT requirements of the CAA. EPA provides States with guidance concerning what types of controls could constitute RACT for a given source category through issuance of a CTG. The recommendations in the CTG are based on available data and information and may not apply to a particular situation based upon the circumstances. The State of Maryland has adopted the recommendations contained in the September 2007 (EPA 453/R–07–003) CTG for Paper, Film, and Foil Coatings as RACT for this source category. The paper, film, and foil coatings product category includes coatings that are applied to paper, film, or foil surfaces in the manufacturing of several major product types for the following industry sectors: pressure sensitive tape and labels (including fabric coated for use in pressure sensitive tapes and labels), photographic film, industrial and decorative laminates, abrasive products (including fabric coated for use in abrasive products), and flexible packaging (including coating of non-woven polymer substrates for use in

flexible packaging). The category also includes coatings applied during miscellaneous coating operations for several products including: corrugated and solid fiber boxes, die-cut paper paperboard, and cardboard, converted paper and paperboard not elsewhere classified, folding paperboard boxes, including sanitary boxes, manifold business forms and related products, plastic asceptic packaging, and carbon paper and inked ribbons. Coatings performed on or in-line with any offset lithographic, screen, letterpress, flexographic, rotogravure, or digital printing press is not part of the paper, film, and foil coating category.

II. Summary of SIP Revision

The amendments to Regulation .07 of COMAR 26.11.19 consist of revisions to the existing sections .07A—Definitions, and .07B—Applicability, and the addition of a new Section D—Emission Standards for Paper, Film, and Foil Product Coatings with VOC Emissions (Potential to Emit) of 25 Tons or Greater Per Year. Since Maryland adopted the recommendations contained in EPA's 2007 CTG for Paper, Film, and Foil Coatings, these revisions to the Maryland SIP are necessary. Specifically, the amendment to COMAR 26.11.19.07A—Definitions, adds the following definitions used in the substantive provisions of the regulation: coating line, coating solids applied, flash-off area, paper, film, and foil product, paper, film, and foil product coating, and pressure sensitive tape and label surface coating. COMAR 26.11.19.07, section .07B—Applicability, has been revised to reflect the applicability requirements which are specific to coating lines that have the potential to emit 25 tons per year (tpy) or greater of VOC from this source category. Sources subject to this regulation may either meet VOC emission limits or use an add-on emission control device to reduce VOC emissions by 90 percent. In addition, the SIP revision amends COMAR 26.11.19.07 by adding a new Section .07D—Emission Standards for Paper, Film, and Foil Product Coatings with VOC Emissions (Potential to Emit) of 25 Tons or Greater Per Year which contains the emissions standards and air pollution control equipment requirements for this source category. Specifically, a person who meets the applicability level in Section B of MDE's regulation shall: (a) Use add-on air pollution control equipment to reduce VOCs from the coating line by an overall capture and control efficiency of at least 90 percent, by weight, or (b) meet the following emission standards for each coating line installation:

Paper, film, and foil coatings	Emission standard (ratio)	
	lb VOC/lb solids or kg VOC/kg solids	lb VOC/lb coating or kg VOC/kg coating
Paper Film, and Foil Coating other than a Pressure Sensitive Tape and Label Surface Coating	0.40	0.08
Pressure Sensitive Tape and Label Surface Coating	0.20	0.06

III. Final Action

EPA is approving the amendments to COMAR 26.11.19.07, "Volatile Organic Compounds from Specific Processes," submitted by MDE on April 23, 2010 because they meet the recommendations for RACT contained in EPA's September, 2007 CTG for Paper, Film, and Foil Coatings. Implementation of these amendments will result in additional reductions of VOC emissions from this source category. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on November 26, 2010 without further notice unless EPA receives adverse comment by October 27, 2010. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

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

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

practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 26, 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action pertaining to Maryland's adoption of the CTG standards for paper, film, and foil coatings 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, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 7, 2010.

W.C. Early,

Acting Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart V—Maryland

■ 2. In § 52.1070, the table in paragraph (c) is amended by revising the entry for COMAR 26.11.19.07 to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE MARYLAND SIP

Code of Maryland Administrative Regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/citation at 40 CFR 52.1100
*	*	*	*	*
26.11.19 Volatile Organic Compounds From Specific Processes				
*	*	*	*	*
26.11.19.07	Paper, fabric, vinyl and other plastic parts coating.	4/19/10	9/27/10 [Insert page number where the document begins].	Revisions to Section .07A, .07B and the addition of new Section .07D.
*	*	*	*	*

* * * * *

[FR Doc. 2010–23980 Filed 9–24–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0484; FRL–9205–9]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Adoption of Control Techniques Guidelines for Flexible Packaging Printing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a State Implementation Plan (SIP) revision submitted by the Maryland Department of the Environment (MDE). This SIP revision includes amendments to Maryland's regulation for Volatile Organic Compounds from Specific Processes, and meets the requirement to adopt Reasonably Available Control Technology (RACT) for sources covered by EPA's Control Techniques Guidelines (CTG) standards for flexible packaging printing. These amendments will reduce emissions of volatile organic compound (VOC) emissions from flexible packaging printing. Therefore, this revision will help Maryland attain and maintain the national ambient air

quality standard (NAAQS) for ozone. This action is being taken under the Clean Air Act (CAA).

DATES: This rule is effective on November 26, 2010 without further notice, unless EPA receives adverse written comment by October 27, 2010. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2010–0484, by one of the following methods:

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

B. *E-mail: pino.maria@epa.gov*

C. *Mail:* EPA–R03–OAR–2010–0484, Maria A. Pino, Acting Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2010–0484. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Irene Shandruk, (215) 814–2166, or by e-mail at *shandruk.irene@epa.gov.*

SUPPLEMENTARY INFORMATION: On April 23, 2010, MDE submitted to EPA a SIP revision concerning the adoption of the EPA CTG for flexible packaging printing.

I. Background

Section 172(c)(1) of the CAA provides that SIPs for nonattainment areas must include reasonably available control measures (RACM), including RACT for sources of emissions. Section 182(b)(2)(A) provides that for certain nonattainment areas, States must revise their SIPs to include RACT for sources of VOC emissions covered by a CTG document issued after November 15, 1990 and prior to the area's date of attainment.

The CTG for flexible package printing is intended to provide state and local air pollution control authorities information that should assist them in determining RACT for VOC from flexible package printing facilities. In developing this CTG, EPA, among other things, evaluated the sources of VOC emissions from this industry and the available control approaches for addressing these emissions, including the costs of such approaches. Based on available information and data, EPA provides recommendations for RACT for VOC from flexible package printing facilities.

In December 1978, EPA published a CTG for graphic arts (rotogravure printing and flexographic printing) that included flexible package printing. The 1978 CTG discusses the flexible package printing industry, the nature of VOC emissions from that industry, available control technologies for addressing such emissions, the costs of available control options, and other items. EPA also published a national emission standard for hazardous air pollutants (NESHAP) for the printing and publishing industry (40 CFR Part 60, Subpart KK) in May 1996, which is applicable to flexible package printing.

Under section 183(e) of the CAA, EPA conducted a study of VOC emissions from the use of consumer and commercial products to assess their potential to contribute to levels of ozone that violate the NAAQS for ozone, and to establish criteria for regulating VOC emissions from these products. Section 183(e) of the CAA directs EPA to list for regulation those categories of products that account for at least 80 percent of the VOC emissions, on a reactivity-adjusted basis, from consumer and commercial products in areas that violate the NAAQS for ozone (i.e., ozone nonattainment areas), and to divide the list of categories to be regulated into four groups.

EPA published the original list of product categories and the original schedule that established the four groups of categories in the **Federal Register** on March 23, 1995 (60 FR 15264). Flexible package printing materials was included in that list. EPA noted in that notice that EPA may amend the list of products for regulation, and the groups of products for regulation, and the groups of product categories, in order to achieve an effective regulatory program in accordance with the Agency's discretion under CAA section 183(e). EPA published a revised schedule and grouping on March 18, 1999 (64 FR 13422). EPA again revised the list to regroup the product categories on November 17, 2005 (70 FR 69759). On May 16, 2006 (71 FR 28320), EPA modified the section 183(e) list and schedule for regulation by adding one category and removing one category of consumer and commercial products. Flexible package printing materials remained on the list and are still included on the current section 183(e) list under Group II.

In September 2006, after conducting a review of currently existing state and local VOC emission reduction approaches for flexible package printing, reviewing the 1978 CTG and the 1996 NESHAP for the printing and publishing industry (40 CFR part 60, subpart KK), which is applicable to

flexible package printing, and taking into account the information that has become available since then, EPA developed a new CTG for flexible package printing entitled "Control Techniques Guidelines for Flexible Package Printing" (Publication No. EPA 453/R–06–003).

Flexible packaging refers to any package or part of a package the shape of which can be readily changed. There are two types of printing processes used by flexible package printing facilities: (1) Rotogravure printing; and (2) flexographic printing. There are two main sources of VOC emissions from flexible package printing for both rotogravure and flexographic: (1) Evaporation of VOC from inks, coatings, and adhesives, and (2) evaporation of VOC from cleaning materials. There are two approaches to reducing VOC emissions from inks, coatings, and adhesives used in the flexible package printing industry: (1) Adding/improving add-on controls, and (2) material reformulation or substitution.

II. Summary of SIP Revision

On April 23, 2010, MDE submitted to EPA a SIP revision (#10–04) concerning the adoption of the EPA CTG for flexible packaging printing. EPA develops CTGs as guidance on control requirements for source categories. States can follow the CTGs or adopt more restrictive standards. MDE has adopted EPA's CTG standards for flexible packaging printing and work practices (*see* EPA 453/R–06–003, September 2006). This SIP revision includes amendments to COMAR 26.11.19.10 and a new regulation .10–1 under COMAR 26.11.19, Volatile Organic Compounds from Specific Processes. This action affects sources that use flexographic and rotogravure presses to print flexible packaging materials.

New regulation COMAR 26.11.19.10–1 contains the following requirements and standards for flexible packaging printing lines: Emissions are either reduced by using water-based inks that contain less than 25 percent VOC by volume of the volatile portion of the ink, or high solids inks that contain not less than 60 percent nonvolatiles. If compliance cannot be achieved through use of the water-based inks or high solids inks described above, the source shall reduce the VOC content of each ink, or reduce the average VOC content of inks used at each press as follows:

(a) 60 percent reduction for flexographic presses;

(b) 65 percent reduction for packaging rotogravure presses; and

(c) 75 percent reduction for publication rotogravure presses.

Additional emission standards and requirements for a flexible packaging printing line with potential to emit VOCs of 25 tons or more per year are limiting the VOC content of each flexible packaging coating or limiting the average VOC content of flexible packaging coatings of the line to not more than:

(a) 0.8 lb VOC/lb or kg VOC/kg solids applied; or

(b) 0.16 lb VOC/lb or kg VOC/kg materials applied; or

(c) Venting the dryer exhaust of the line through a control device that is constructed, operated, and maintained to achieve an overall control efficiency of:

- 65 percent overall control for a press that was first installed prior to March 14, 1995 and that is controlled by an add-on air pollution control device (APCD) whose first installation date was prior to the effective date.
- 70 percent overall control for a press that was first installed prior to March 14, 1995 and that is controlled by an add-on APCD whose first installation date was on or after the effective date of the rule.
- 75 percent overall control for a press that was first installed on or after March 14, 1995 and that is controlled by an add-on APCD whose first installation date was prior to the effective date of the rule.
- 80 percent overall control for a press that was first installed on or after March 14, 1995 and that is controlled by an add-on APCD whose first installation date was on or after the effective date of the rule.

III. Final Action

Maryland's April 23, 2010 SIP revision meets the CAA requirement to include RACT for sources covered by the EPA CTG for flexible package printing. Therefore, EPA is approving the Maryland SIP revision for adoption of the CTG standards for flexible packaging printing. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on November 26, 2010 without further notice unless EPA receives adverse comment by October 27, 2010. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

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

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

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

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 26, 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action pertaining to Maryland's adoption of the CTG standards for flexible packaging printing 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, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 7, 2010.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart V—Maryland

■ 2. In § 52.1070, the table in paragraph (c) is amended by revising the entry for COMAR 26.11.19.10 and adding an entry for COMAR 26.11.19.10–1 to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c)* * *

EPA-APPROVED REGULATIONS IN THE MARYLAND SIP

Code of Maryland Administrative Regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.1100
*	*	*	*	*
26.11.19 Volatile Organic Compounds from Specific Processes				
*	*	*	*	*
26.11.19.10	Flexographic and rotogravure printing	4/19/10	September 27, 2010 [Insert page number where the document begins].	Revision to section .10(B)(2).
26.11.19.10–1	Flexible packaging printing	4/19/10	September 27, 2010 [Insert page number where the document begins].	New Regulation.
*	*	*	*	*

* * * * *

[FR Doc. 2010–24000 Filed 9–24–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R09–OAR–2010–0585; FRL–9204–9]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of Nevada; Redesignation of Las Vegas Valley to Attainment for the Carbon Monoxide Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve the State of Nevada's request to redesignate to attainment the Las Vegas Valley nonattainment area for the carbon monoxide national ambient air quality standard. EPA is also taking final action to approve the carbon monoxide maintenance plan and motor vehicle emissions budgets for the area, as well as certain additional revisions to the Nevada state implementation plan that relate to Las Vegas Valley. These revisions include the suspension of a local wintertime cleaner burning gasoline rule, and the relaxation of a State rule governing wintertime gasoline in Clark County. EPA's proposed approval of the redesignation request and maintenance plan had been made contingent upon receipt of a supplemental submittal from the State of Nevada containing a commitment to seek reinstatement of the existing vapor pressure limit in the State wintertime gasoline rule, if necessary, to implement the related contingency measure in the maintenance plan. Nevada has now submitted, and EPA is today approving, the necessary commitment as a revision to the Nevada state implementation plan.

DATES: *Effective Date:* This rule is effective on September 27, 2010.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2010–0585 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: Karina O'Connor, EPA Region IX, (775) 833–1276, *oconnor.karina@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, the terms "we," "us," and "our" refer to EPA. This supplementary information is organized as follows:

Table of Contents

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

I. Proposed Action

On July 29, 2010 (75 FR 44734), we proposed to approve the Nevada Division of Environmental Protection's (NDEP's) request to redesignate to attainment the Las Vegas Valley [1] carbon monoxide (CO) nonattainment area located within Clark County, Nevada, and related revisions to the Nevada state implementation plan (SIP). The specific SIP revision submittals that we proposed to approve are listed in the following table:

Plan or rule	Adoption date(s)	State of Nevada submittal date(s)
Carbon Monoxide Redesignation Request and Maintenance Plan, Las Vegas Valley Nonattainment Area, Clark County, Nevada (September 2008).	Adopted by the Clark County Board of Commissioners on September 2, 2008.	Submitted by NDEP by letter dated September 18, 2008.
Clark County Air Quality Regulations, Section 54 ("Cleaner Burning Gasoline (CBG): Wintertime Program") (Suspended).	Adopted by the Clark County Board of Commissioners on September 15, 2009, effective September 29, 2009.	Submitted by NDEP by letter dated March 26, 2010.
Nevada Administrative Code (NAC) section 590.065 (amended)	Adopted by the Nevada Board of Agriculture on December 9, 2009, effective January 28, 2010.	Submitted by NDEP by letter dated March 26, 2010.

We proposed to approve NDEP's redesignation request because we found that the area meets all of the criteria for redesignation under section 107(d)(3)(E)(i) through (v) of the Clean Air Act (CAA or "Act"), as discussed in the following paragraphs.

• Based on our review of the monitoring network and complete, quality-assured data for 2008–2009 up to the present time, we proposed to find that Las Vegas Valley has attained, and continues to attain, the CO standard and thus meets the criterion for redesignation set forth in section 107(d)(3)(E)(i). *See* the July 29, 2010 proposed rule at pages 44738–44739.

• Based on our review of previous rulemakings approving various rules and plans affecting the Las Vegas Valley CO nonattainment area, we proposed to find that, with the sole exception of the CO milestone requirement, the area has a fully approved SIP under CAA section 110(k) that meets all of the applicable requirements under CAA section 110 and part D for the purposes of redesignation and thereby meets the criteria for redesignation under CAA section 107(d)(3)(E)(ii) and (v). *See* the July 29, 2010 proposed rule at pages 44739–44743. With respect to the CO milestone requirement under CAA section 187(d), we proposed to adapt to CO nonattainment areas the provisions of our Clean Data Policy, which was initially established for ozone (see discussion at 75 FR 44742). Under the Clean Data Policy, certain CAA Part D

[1] Specifically, the Las Vegas Valley CO nonattainment area is defined by reference to State hydrographic area #212. See 40 CFR 81.329. The Las Vegas Valley encompasses roughly 1,500 square miles within Clark County and includes the cities of Las Vegas, North Las Vegas, and Henderson. Roughly two million people reside in Clark County, mostly within Las Vegas Valley. NDEP is the state agency under state law that is responsible for SIP matters for the State of Nevada. Within Clark County, the Clark County Board of Commissioners, acting through the Department of Air Quality and Environmental Management (DAQEM), is empowered under state law to develop air quality plans and to regulate stationary sources within the county with the exception of certain types of power plants, which lie exclusively within the jurisdiction of NDEP.

requirements—including, among others, the CO Milestone requirement—no longer apply because the area has already attained the NAAQS.

• We proposed to find that the improvement in ambient CO concentrations in Las Vegas Valley is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollution control regulations and other permanent and enforceable regulations and that the area thereby meets the criterion for redesignation under CAA section 107(d)(3)(E)(iii). *See* the July 29, 2010 proposed rule at pages 44743–44744. The specific measures that have improved ambient CO conditions in Las Vegas Valley include the Federal Motor Vehicle Control Program; the State's vehicle I/M program; State regulations establishing a low Reid vapor pressure (RVP) specification for wintertime gasoline in Clark County [Nevada Administrative Code (NAC) section 590.065 (herein referred to as the "Low RVP Rule")]; Clark County's wintertime gasoline requirements, including Clark County Air Quality Regulations (AQR) Section 53 ("Oxygenated Gasoline Program"), and Section 54 ("Cleaner Burning Gasoline: Wintertime Program") (herein, referred to as the "CBG Rule"); and to a lesser extent, the State's Alternative Fuels for Government Fleets Program and the Regional Transportation Commission of Southern Nevada's (RTC's) voluntary transportation control measure/transportation demand management (TCM/TDM) program. All of these measures are Federal measures or are State and local measures that have been approved into the SIP and are thus federally enforceable.

• We proposed to approve NDEP's maintenance plan submittal dated September 18, 2008 titled *Carbon Monoxide Redesignation Request and Maintenance Plan, Las Vegas Valley Nonattainment Area, Clark County, Nevada* (September 2008) ("Las Vegas Valley CO Maintenance Plan" or "Maintenance Plan") [2] as a revision to the Nevada SIP because we found the plan to satisfy the applicable CAA requirements, including CAA section 175A. *See* the July 29, 2010 proposed rule at pages 44744–44749. On the basis of our proposed approval of the Maintenance Plan, we proposed to find that the area meets the criterion for redesignation under CAA section 107(d)(3)(E)(iv). In connection with the Maintenance Plan, we proposed to approve the motor vehicle emissions budgets (MVEBs) for years 2008, 2010, and 2020 for the purposes of transportation conformity based on our conclusion that they meet the criteria for such budgets in 40 CFR 93.118(e).

In addition to proposing action on the State's 2008 redesignation request and submittal of the Las Vegas Valley Maintenance Plan, in our July 29, 2010 proposed rule, we also proposed action on a SIP revision from NDEP submitted on March 26, 2010 of changes related to rules establishing wintertime gasoline requirements in Las Vegas Valley. *See* the July 29, 2010 proposed rule at pages 44749–44752. These are the County's CBG Rule, which establishes certain wintertime gasoline specifications related to sulfur and aromatic hydrocarbons ("aromatics"), and the State's Low RVP Rule, which establishes a low Reid vapor pressure (RVP) specification for gasoline sold during the late fall and winter months in Clark County. In our July 29, 2010 proposed rule, we proposed to approve the suspension of Clark County's CBG Rule and the relaxation of the State's Low RVP Rule because we concluded, in accordance with CAA section 110(l), that doing so would not interfere with attainment or maintenance of any of the NAAQS or any applicable requirement of the Clean Air Act.[3]

The Las Vegas Valley CO Maintenance Plan includes reinstatement of the CBG Rule and the Low RVP Rule as contingency measures, as required under CAA section 175A(d).[4] However, while Clark County, through adoption of the maintenance plan, has committed to reinstatement of the CBG Rule in accordance with the contingency provisions of the plan, the Nevada State Department of Agriculture, which is responsible for the Low RVP Rule, had not, as of the date of our July 29, 2010 proposed rule, made a similar commitment with respect to the Low RVP Rule. Thus, we made our approval of the Maintenance Plan and redesignation request contingent upon the submittal, and EPA approval, of such a commitment as a revision to the Nevada SIP.

In footnote 4 of our July 29, 2010 proposed rule, we noted that the Nevada Department of Agriculture had initiated a 30-day comment period to solicit comment (or request a public hearing) on the draft commitment regarding implementation of the contingency measure in the Maintenance Plan related to reinstatement of the Low RVP Rule and that, based on our review of the draft commitment, we expected to approve it if the commitment ultimately submitted to us was not significantly modified relative to the draft version.

On August 30, 2010, NDEP submitted the Nevada Department of Agriculture's commitment (to seek reinstatement of the Low RVP Rule) as a revision to the Nevada SIP. NDEP's August 30, 2010 SIP submittal also contains documentation of the public process used by the Nevada Department of Agriculture in adopting the commitment. We have reviewed the August 30, 2010 submittal and find that the State has met the procedural requirements for adopting SIP revisions, and as anticipated in our July 29, 2010 proposed rule, the commitment itself mirrors the public draft version, which we had found acceptable. Thus, we are taking final action today to approve the Department's commitment as a revision to the Nevada SIP.

Please see our July 29, 2010 proposed rule for a detailed discussion of the regulatory background for today's action and for a more complete discussion of the rationale for our actions in connection with the Las Vegas Valley CO Maintenance Plan and redesignation request.

II. Public Comments

EPA's July 29, 2010 proposed rule provided a 30-day public comment period, which closed on August 30, 2010. We received only one comment during the comment period. The comment notes a typographical error in the pre-publication version of the proposed rule. Specifically, the date on which we posted the announcement of the Maintenance Plan and related motor vehicle emissions budgets for public comment on EPA's adequacy Web page was September 30, 2008, not September 30, 3008, as shown in the pre-publication version. This typographical error was fixed prior to publication and did not appear in the proposed rule as

[2] The Las Vegas Valley CO Maintenance Plan consists of the main body of the plan and three appendices: Appendix A ("Wintertime Gasoline Fuel Specification Study"), Appendix B (Technical Support Document, Carbon Monoxide Modeling for the Clark County Maintenance Plan"), Appendix C ("Documentation of the Public Review Process").

[3] We did not include subsection (7) of amended NAC 590.065 in our proposed approval because the limits in subsection (7) of the amended rule are unrelated to the vapor pressure requirement and associated CO emissions reductions, and are severable from the rest of the rule.

[4] In relevant part, CAA section 175A(d) states: "Each plan revision submitted under this section shall contain contingency provisions as the Administrator deems necessary to assure that the State will promptly correct any violation of the standard which occurs after the redesignation of the area as an attainment area. Such provisions shall include a requirement that the State will implement all measures with respect to the control of the air pollutant concerned which were contained in the state implementation plan for the area before redesignation of the area as an attainment area."

published in the **Federal Register** on July 29, 2010.

III. EPA Action

For the reasons given in our proposed rule and summarized above, EPA is taking final action under CAA section 110(k)(3) to approve NDEP's submittal dated September 18, 2008 of the Las Vegas Valley CO Maintenance Plan as a revision to the Nevada SIP because we find that it satisfies the requirements of section 175A of the CAA to include a reasonably accurate and comprehensive attainment inventory, an adequate maintenance demonstration, contingency provisions, and commitments to continue operation of an acceptable ambient monitoring network to verify continued attainment. In connection with the contingency provisions of the Maintenance Plan, EPA is approving NDEP's SIP revision dated August 30, 2010 containing a commitment from the Nevada Department of Agriculture to seek reinstatement by the Nevada Board of Agriculture of the Low RVP Rule if called upon to do so through the contingency provisions of the Maintenance Plan to address future CO violations in Las Vegas Valley.

Final approval of the Las Vegas Valley CO Maintenance Plan makes federally enforceable the commitments, such as the commitment to continue operation of an adequate CO monitoring network, and the contingency provisions, contained therein. In addition, we are approving for transportation conformity purposes the motor vehicle emissions budgets (MVEBs) in the Las Vegas Valley CO Maintenance Plan for years 2008, 2010, and 2020 because we find they meet the criteria found in 40 CFR 93.118(e). The budgets for 2008, 2010 and 2020 are 658 tons per day, 686 tons per day, and 704 tons per day, respectively (based on typical weekday during the winter). As a result, RTC (which is the area's Metropolitan Planning Organization) and the U.S. Department of Transportation must use the CO MVEBs from the Maintenance Plan for future transportation conformity determinations.[5]

Based in part on our approval of the Las Vegas Valley CO Maintenance Plan, we are also approving NDEP's September 18, 2008 request to redesignate Las Vegas Valley to attainment for the CO NAAQS. In doing so, we find that the area has met all of the criteria for redesignation under CAA section 107(d)(3)(E), *i.e.,* the area has attained the CO standard; EPA has fully approved the Las Vegas Valley SIP for all requirements under section 110 and part D of the CAA that are applicable for purposes of redesignation (or that no longer apply because the area has attained the CO standard); the improvement in CO conditions in Las Vegas Valley is due to permanent and enforceable reductions; and as described above, the State has submitted a maintenance plan for the area that meets the requirements of section 175A.

We are also approving, under section 110(k)(3) of the CAA, NDEP's March 26, 2010 submittal of the suspension of the County's CBG Rule and amendments to the State's Low RVP Rule (in NAC section 590.065), including the relaxation in the State's wintertime gasoline RVP requirement for Clark County from 9.0 to 13.5 psi, because we find that doing so would not interfere with attainment or maintenance of any of the NAAQS or any applicable requirement of the Clean Air Act for the purposes of CAA section 110(l). We are not including subsection (7) of amended NAC section 590.065 in our approval because the limits in subsection (7) of the amended rule are unrelated to the vapor pressure requirement and associated CO emissions reductions, and are severable from the rest of the rule.[6] Lastly, because we have synchronized our final actions on the Maintenance Plan and the (suspended) CBG Rule (and thereby avoided a gap in time when the CBG Rule would not be either an active or contingency measure in the SIP), we are not removing CBG from the boutique fuels list.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for this action to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. In addition, a delayed effective date is unnecessary because in today's action we are approving changes to certain fuel rules that relieve gasoline suppliers from the requirement to meet certain specifications for wintertime gasoline in Clark County. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which after publication it provides that rulemaking actions may become effective less than 30 days after publication if the rule "grants or recognizes an exemption or relieves a restriction," and section 553(d)(3), which allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule relieves the State of Nevada, Clark County, and gasoline suppliers of various requirements for the Las Vegas Valley area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for this action to become effective on the date of publication of this action.

IV. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by State law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, 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, these actions merely approve a State plan and redesignation request as meeting Federal requirements and do not impose additional requirements beyond those imposed by State law. For these reasons, these actions:

- Are not "significant regulatory actions" subject to review by the Office

[5] The current approved CO motor vehicle emissions budgets from the 2005 CO (Attainment) Plan are: 690, 768, and 817 tons per winter weekday for 2010, 2015, and 2020, respectively. *See* 71 FR 44587 (August 7, 2006). The Maintenance Plan does not explicitly indicate that the budgets set forth therein are intended to replace the budgets from the 2005 CO Plan. With our approval today of the MVEBs in the Maintenance Plan, two sets of CO budgets now apply for the area (i.e., those from the 2005 CO Plan, and those from the Maintenance Plan) because they relate to different CAA requirements for the same years. As a practical matter, however, the Maintenance Plan budgets, being lower than the 2005 CO Plan budgets, represent the constraining budgets for determining conformity.

[6] For the purposes of the Nevada SIP, our final approval of amended NAC section 590.065 will supersede the version of NAC section 590.065 approved by EPA on September 21, 2004 (69 FR 56351, at 56355). *See* 40 CFR 52.1470(c)(49)(i)(A)(2).

of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Are 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.*);

• Do 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);

• Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

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

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

• Are 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

• Do 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. section 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. section 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 November 26, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

Environmental protection, Air pollution control, Carbon monoxide, National parks, Wilderness areas.

Dated: September 16, 2010.

Jared Blumenfeld,

Regional Administrator, Region IX.

■ 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 DD—Nevada

■ 2. Section 52.1470 is amended by adding paragraphs (c)(73), (c)(74), and (c)(75) to read as follows:

§ 52.1470 Identification of plan.

* * * * *

(c) * * *

(73) The following plan revision was submitted on September 18, 2008, by the Governor's designee.

(i) [Reserved]

(ii) Additional material.

(A) Resolution of the Clark County Board of Commissioners Adopting the Clark County Carbon Monoxide Redesignation Request and Maintenance Plan, adopted by the Clark County Board of Commissioners on September 2, 2008.

(B) Carbon Monoxide Redesignation Request and Maintenance Plan, Las Vegas Valley Nonattainment Area, Clark County, Nevada (September 2008), adopted by the Clark County Board of Commissioners on September 2, 2008 (excluding the appendices).

(74) The following plan revision was submitted on March 26, 2010 by the Governor's designee.

(i) Incorporation by reference.

(A) Clark County Department of Air Quality and Environmental Management.

(*1*) Clark County Board of County Commissioners, Ordinance No. 3809, "An Ordinance to Suspend the Applicability and Enforceability of All Provisions of Clark County Air Quality Regulation Section 54, the Cleaner Burning Gasoline Wintertime Program; and Provide for Other Matters Properly Relating Thereto," adopted September 15, 2009, effective (for state purposes) on September 29, 2009.

(B) Nevada Department of Agriculture.

(*1*) Nevada Board of Agriculture, Adopted Regulation of the State Board of Agriculture LCB File No. R111–08, including an amended version of Nevada Administrative Code (NAC) section 590.065, effective (for state purposes) on January 28, 2010, (excluding newly designated subsection (7) of NAC section 590.065).

(75) The following plan revision was submitted on August 30, 2010, by the Governor's designee.

(i) [Reserved]

(ii) Additional material.

(A) Letter from Anthony Lesperance, Director, Nevada Department of Nevada, to Lewis Wallenmeyer, Director, Clark County Department of Air Quality and Environmental Management, dated June 22, 2010, setting forth the Nevada Department of Agriculture's commitment to seek reinstatement of the Low RVP wintertime gasoline requirement in Clark County if necessary under the Las Vegas Valley Carbon Monoxide Maintenance Plan to address future carbon monoxide violations.

* * * * *

PART 81—[AMENDED]

■ 3. The authority citation for part 81 continues to read as follows:

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

Subpart C—[AMENDED]

■ 4. Section 81.329 is amended in the table for "Nevada—Carbon Monoxide" by revising the entry for "Las Vegas Area" to read as follows:

§ 81.329 Nevada.

* * * * *

NEVADA—CARBON MONOXIDE

Designated area	Designation		Classification	
	Date [1]	Type	Date [1]	Type
* *	*	*	* *	*
Las Vegas Area: Clark County (part). Las Vegas Valley. Hydrographic Area 212.	September 27, 2010	Attainment.		
* *	*	*	* *	*

[1] This date is November 15, 1990, unless otherwise noted.

[FR Doc. 2010–24135 Filed 9–24–10; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 301–10, 301–11, and 301–70

[FTR Amendment 2010–04; FTR Case 2010–305; Docket 2010–0017; Sequence 1]

RIN 3090–AJ07

Federal Travel Regulation; Miscellaneous Amendments

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: This final rule amends the Federal Travel Regulation (FTR) by updating statutory references in a number of sections, by providing additional guidance for determining distance measurements when traveling by privately owned aircraft, by clarifying provisions regarding the use of personally owned vehicles (POV) for official travel, by updating the addresses to which per diem review requests should be sent, and by changing the method by which agencies must report the use of Government aircraft to carry senior Federal officials and non-Federal travelers.

DATES: *Effective Date:* This final rule is effective September 27, 2010.

Applicability Date: This final rule is applicable for official travel performed on or after October 27, 2010.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat (MVCB), Room 4041, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Cy Greenidge, Program Analyst, Office of Governmentwide Policy, at (202) 219–2349. Please cite FTR Amendment 2010–XX; FTR case 2010–305.

SUPPLEMENTARY INFORMATION:

A. Background

This amendment updates statutory references concerning when travel on Government aircraft is not reported; adds additional guidance for determining distance measurements when traveling on official business by privately owned aircraft; amends the heading regarding POV mileage reimbursement between an employee's residence, office and/or common carrier; updates the addresses for submitting per diem review requests; requires agencies to use an electronic reporting tool to report travel on Government aircraft by senior Federal officials and non-Federal travelers; and updates statutory references in certain sections.

Accordingly, this final rule amends the FTR by:

1. *Sections 301–10.261, 301–10.264, and 301–10.265*—Updating statutory references.

2. *Section 301–10.302*—Revising the information to determine distance measurements when traveling by privately owned aircraft in conjunction with official travel.

3. *Section 301–10.306*—Revising the question portion to clarify what an employee will be reimbursed if authorized to use a POV between the employee's residence, office and/or common carrier terminal.

4. *Section 301–11.26*—Updating the chart with current address information.

5. *Sections 301–70.801, 301–70.803, 301–70.804, and 301–70.902*—Updating statutory references.

6. *Section 301–70.906*—Updating the requirement of agencies to report the use of Government aircraft to carry senior Federal officials and non-Federal travelers by using an electronic reporting tool and updating a statutory reference.

B. Executive Order 12866

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

C. Regulatory Flexibility Act

This final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the revisions are not considered substantive. This final rule is also exempt from the Regulatory Flexibility Act per 5 U.S.C. 553(a)(2) because it applies to agency management or personnel. However, this final rule is being published to provide transparency in the promulgation of Federal policies.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FTR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*

E. Small Business Regulatory Enforcement Fairness Act

This final rule is also exempt from Congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Parts 301–10, 301–11, and 301–70

Government employees, Travel, Transportation and Per Diem expenses,

Administrative practices and procedures.

Dated: August 3, 2010.

Martha Johnson,

Administrator of General Services.

■ For the reasons set forth in the preamble, under 5 U.S.C. 5701–5709, GSA amends 41 CFR parts 301–10, 301–11, and 301–70 as set forth below:

PART 301–10—TRANSPORTATION EXPENSES

■ 1. The authority citation for 41 CFR part 301–10 continues to read as follows:

Authority: 5 U.S.C. 5707, 40 U.S.C. 121(c); 49 U.S.C. 40118, OMB Circular No. A–126, revised May 22, 1992.

§ 301–10.261 [Amended]

■ 2. Amend § 301–10.261 by removing from paragraph (c)(3) "10 U.S.C. 4744" and adding "10 U.S.C. 2648" in its place.

§ 301–10.264 [Amended]

■ 3. Amend § 301–10.264 by removing from paragraph (b)(2) "10 U.S.C. 4744" and adding "10 U.S.C. 2648" in its place.

§ 301–10.265 [Amended]

■ 4. Amend § 301–10.265 by removing "10 U.S.C. 6744" and adding "10 U.S.C. 2648" in its place.

§ 301–10.302 [Amended]

■ 5. Amend the table in § 301–10.302 in the second column, in the second entry, by adding "You must convert nautical miles to statute or regular miles when submitting a claim (1 nautical mile equals 1.15077945 statute miles)." after the third sentence.

■ 6. Revise the heading of § 301–10.306 to read as follows:

§ 301–10.306 What will I be reimbursed if authorized to use a POV between my residence and office and then from my office to a common carrier terminal, or from my residence directly to a common carrier terminal?

* * * * *

PART 301–11—PER DIEM EXPENSES

■ 7. The authority citation for 41 CFR part 301–11 continues to read as follows:

Authority: 5 U.S.C. 5707.

■ 8. Amend § 301–11.26 by revising the table to read as follows:

§ 301–11.26 How do I get a per diem rate increased?

* * * * *

For CONUS locations	For non-foreign area locations	For foreign area locations
General Services Administration, Office of Governmentwide Policy, Attn: Travel Policy (MTT), 1800 F St. NW., Washington, DC 20405.	Defense Travel Management Office, Attn: SP&P/Allowances Branch, 4601 N. Fairfax Dr, Suite 800, Arlington, VA 22203.	Director, Office of Allowances, Department of State, Annex 1, Suite L–314, Washington, DC 20522–0103.

PART 301–70—INTERNAL POLICY AND PROCEDURE REQUIREMENTS

■ 9. The authority citation for 41 CFR part 301–70 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); Sec. 2, Pub. L. 105–264, 112 Stat. 2350 (5 U.S.C. 5701, note), OMB Circular No. A–126, revised May 22, 1992, and OMB Circular No. A–123, Appendix B, revised January 15, 2009.

§ 301–70.801 [Amended]

■ 10. Amend § 301–70.801 in paragraph (c)(3) by removing "10 U.S.C. 4744" and adding "10 U.S.C. 2648" in its place.

§ 301–70.803 [Amended]

■ 11. Amend § 301–70.803 in paragraph (d)(2) by removing "10 U.S.C. 4744" and adding "10 U.S.C. 2648" in its place.

§ 301–70.804 [Amended]

■ 12. Amend § 301–70.804 in paragraph (b)(2) by removing "10 U.S.C. 4744" and adding "10 U.S.C. 2648" in its place.

■ 13. Revise § 301–70.906 to read as follows:

§ 301–70.906 Must we report use of our Government aircraft to carry senior Federal officials and non-Federal travelers?

Yes, except when the trips are classified, you must report to GSA's Office of Governmentwide Policy (MTT) all uses of your aircraft for travel by any senior Federal official or non-Federal traveler, by using an electronic reporting tool found at *http://www.gsa.gov/sftr,* unless travel is authorized under 10 U.S.C. 2648 and regulations implementing that statute.

[FR Doc. 2010–23882 Filed 9–24–10; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003]

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated in the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3461, or (e-mail) *roy.e.wright@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Federal Insurance and Mitigation Administrator has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104,

and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community. The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Phillips County, Arkansas, and Incorporated Areas Docket No.: FEMA–B–1045			
Mississippi River	At River Mile 618	+174	Unincorporated Areas of Phillips County.
	At River Mile 662	+197	
	At River Mile 664	+198	
	At River Mile 673	+202	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Phillips County

Maps are available for inspection at 620 Cherry Street, Suite 208, Helena, AR 72342.

Harvey County, Kansas, and Incorporated Areas Docket No.: FEMA–B–1047			
Sand Creek	Approximately 865 feet upstream of Northeast 24th Street	+1,434	City of North Newton.
	Approximately 1,590 feet upstream of Northeast 24th Street.	+1,434	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of North Newton

Maps are available for inspection at 2601 North Main Street, North Newton, KS 67117.

Roosevelt County, New Mexico, and Incorporated Areas Docket No.: FEMA–B–1061			
17th and 18th Street Shallow Flooding.	Flooding effects extending southward approximately 2,250 feet from East 18th Street.	+4,001–4,003	Unincorporated Areas of Roosevelt County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected

ADDRESSES

Unincorporated Areas of Roosevelt County

Maps are available for inspection at 109 West 1st Street, Portales, NM 88130.

Taos County, New Mexico, and Incorporated Areas
Docket No.: FEMA–B–1065

Bitter Creek	At the confluence with the Red River	+8,659	Town of Red River, Unincorporated Areas of Taos County.
	Approximately 1,150 feet upstream of High Creek	+8,696	
Red River	Just upstream of High Cost Trail	+8,612	Town of Red River, Unincorporated Areas of Taos County.
	Approximately 1.08 mile downstream of Goose Lake Trail 66.	+8,782	
Rio Lucero	At the confluence with the Rio Pueblo De Taos	+6,886	Taos Pueblo.
	Approximately 0.56 mile upstream of Paseo Del Pueblo Norte Road.	+6,995	
Rio Pueblo De Taos	Just upstream of Karavas Road	+6,886	Town of Taos, Taos Pueblo.
	Approximately 600 feet downstream of Paseo Del Pueblo Norte Road.	+6,952	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Taos Pueblo

Maps are available for inspection at the Floodplain Administrator's Office, 105 Albright Street, Suite A, Taos, NM 87571.

Town of Red River

Maps are available for inspection at 100 East Main Street, Red River, NM 87558.

Town of Taos

Maps are available for inspection at the Planning Department, 400 Camino De La Placita, Taos, NM 87571.

Unincorporated Areas of Taos County

Maps are available for inspection at the Floodplain Administrator's Office, 105 Albright Street, Suite A, Taos, NM 87571.

Brooks County, Texas, and Incorporated Areas
Docket No.: FEMA–B–1066

Cibolo Creek	At the confluence with Palo Blanco Creek	+106	Unincorporated Areas of Brooks County.
	Just downstream of State Highway 325	+113	
Palo Blanco Creek	At the confluence with Cibolo Creek	+106	Unincorporated Areas of Brooks County.
	Just downstream of State Highway 325	+113	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Brooks County

Maps are available for inspection at 408 West Travis Street, Falfurrias, TX 78355.

Howard County, Texas, and Incorporated Areas
Docket No.: FEMA–B–1066

Beals Creek	Just upstream of Midway Creek	+2,375	City of Big Spring.
	At the confluence with One Mile Lake	+2,414	
Big Spring Draw	At the confluence with Beals Creek	+2,375	City of Big Spring, Unincorporated Areas of Howard County.
	Approximately 1,000 feet upstream of Country Club Road	+2,639	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Reals Draw	At the confluence with Beals Creek	+2,408	City of Big Spring, Unincorporated Areas of Howard County.
	Just downstream of Hilltop Road	+2,483	
Stream BSP1	At the confluence with Big Spring Draw	+2,580	City of Big Spring.
	Just upstream of Parkway Road	+2,603	
Stream BSP2	At the confluence with Big Spring Draw	+2,632	City of Big Spring, Unincorporated Areas of Howard County.
	Approximately 885 feet upstream of Driver Road	+2,645	
Stream BSP3	At the confluence with Beals Creek	+2,410	City of Big Spring.
	Just upstream of Frontage Road	+2,487	
Stream BSP4	At the confluence with Stream BSP3	+2,448	City of Big Spring.
	Just upstream of Frontage Road	+2,495	
Stream BSP5	At the confluence with Beals Creek and One Mile Lake	+2,413	City of Big Spring.
	Just upstream of Frontage Road	+2,469	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Big Spring
Maps are available for inspection at 310 Nolan Street, Big Spring, TX 79720.

Unincorporated Areas of Howard County
Maps are available for inspection at 300 Main Street, Big Spring, TX 79720.

Oconto County, Wisconsin and Incorporated Areas
Docket No.: FEMA–B–1061

Anderson Lake	Entire shoreline	+860	Unincorporated Areas of Oconto County.
Bass Lake/Crooked Lake/Gilkey Lake.	Entire shoreline	+951	Unincorporated Areas of Oconto County.
Brookside Creek	Approximately 0.41 mile upstream of U.S. Route 41	+616	Unincorporated Areas of Oconto County.
	Approximately 655 feet upstream of Cross Road	+681	
Christie Brook	Approximately 1.3 mile downstream of Quarterline Road	+740	City of Gillett, Unincorporated Areas of Oconto County.
	Approximately 0.3 mile upstream of Klaus Lake Road	+819	
City of Oconto Tributary No. 4	Approximately 344 feet downstream of County Highway S	+591	City of Oconto, Unincorporated Areas of Oconto County.
	Just upstream of Cook Road	+595	
Hayes Creek	Just upstream of Hayes Road	+832	Unincorporated Areas of Oconto County.
	Just downstream of County Highway R	+844	
Jones Creek	Just upstream of U.S. Route 141	+697	Village of Lena, Unincorporated Areas of Oconto County.
	Approximately 0.8 mile upstream of Harley Street	+708	
Kirchner Creek	Approximately 225 feet downstream of Sampson Road	+599	Unincorporated Areas of Oconto County.
	Approximately 1.1 mile downstream of East Frontage Road.	+633	
Little Suamico River	Approximately 500 feet upstream of Cross Road	+644	Unincorporated Areas of Oconto County, Village of Pulaski.
	Approximately 0.2 mile upstream of 4th Avenue North	+793	
McCaslin Brook	Approximately 410 feet upstream of Old 32 Road	+1,174	Unincorporated Areas of Oconto County.
	Immediately downstream of Townsend Dam Road	+1,314	
North Branch Oconto River	Approximately 0.8 mile upstream of Riverside Road	+1,161	Unincorporated Areas of Oconto County.
	Approximately 1.5 mile upstream of Riverside Road	+1,185	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Oconto River Tributary No. 2	Just upstream of Mill Street	+590	City of Oconto.
	Approximately 95 feet downstream of Charles Street	+598	
Oconto River Tributary No. 22	Approximately 150 feet downstream of South Maple Street.	+641	City of Oconto Falls, Unincorporated Areas of Oconto County.
	Approximately 0.6 mile upstream of South Flatley Avenue	+742	
Pensaukee River	Approximately 0.3 mile upstream of County Highway J	+620	Unincorporated Areas of Oconto County.
	Approximately 428 feet downstream of Safian Road	+760	
Round Lake	Entire Shoreline	+827	Unincorporated Areas of Oconto County.
Spring Creek	Just downstream of U.S. Route 141	+653	Unincorporated Areas of Oconto County.
	Approximately 0.7 mile upstream of County Highway E	+717	
Spring Creek Tributary No. 6	At the confluence with Spring Creek	+706	Unincorporated Areas of Oconto County.
	Approximately 450 feet upstream of Burdosh Road	+717	
Tibbet Creek	Approximately 600 feet downstream of Rost Road	+585	Unincorporated Areas of Oconto County.
	Approximately 1.7 mile upstream of Lade Beach Road	+627	
Town Creek	Approximately 0.6 mile downstream of Palmer Lane	+920	Unincorporated Areas of Oconto County.
	Just downstream of State Highway 32/64	+980	
Waupee Creek	Just upstream of State Highway 32/64	+859	Unincorporated Areas of Oconto County.
	Immediately downstream of the Waupee Dam	+937	
Wescott Lake	Entire Shoreline	+845	Unincorporated Areas of Oconto County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Gillett
Maps are available for inspection at 150 North McKenzie Avenue, Gillett, WI 54124.

City of Oconto
Maps are available for inspection at 1210 Main Street, Oconto, WI 54153.

City of Oconto Falls
Maps are available for inspection at 500 North Chestnut Avenue, Oconto, WI 54154.

Unincorporated Areas of Oconto County
Maps are available for inspection at 301 Washington Street, Oconto, WI 54153.

Village of Lena
Maps are available for inspection at 117 East Main Street, Lena, WI 54139.

Village of Pulaski
Maps are available for inspection at 421 South Augustine Street, Pulaski, WI 54162.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: September 13, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–24147 Filed 9–24–10; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket No. 92–266, FCC 95–397]

Cable Television Act of 1992

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: This document announces the effective date of rules published in the **Federal Register** on October 5, 1995. The Commission simplified rules affecting cable operators' rates and provided cable operators with an additional option for adjusting their rates.

DATES: Amendments to §§ 76.923(n) and (o), 76.933(a), (b), and (e) through (g), 76.934(f), and 76.960, published at 60 FR 52106, October 5, 1995, are effective September 27, 2010.

FOR FURTHER INFORMATION CONTACT: For additional information contact Katie Costello, *Katie.Costello@fcc.gov*, 202–

418–2120, Media Bureau, Policy Division.

SUPPLEMENTARY INFORMATION: In a Thirteenth Order on Reconsideration released on September 22, 1995, FCC 95–397, and published in the **Federal Register** on October 5, 1995, 60 FR 52106, the Commission adopted rules which contained information collection requirements subject to the Paperwork Reduction Act. The document stated that the rule changes requiring OMB approval would become effective upon announcement in the **Federal Register** of OMB approval. On December 15, 1995, the Office of Management and Budget (OMB) approved the information collection requirements contained in §§ 76.923(n) and (o), 76.933(a), (b), and (e) through (g), 76.934(f), and 76.960. This information collection is assigned to OMB Control No. 3060–0685.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–24158 Filed 9–24–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

47 CFR Part 301

[Docket No. 100910444–0444–01]

RIN 0660–AA23

Removal of Regulations That Implement and Administer a Coupon Program for Digital-to-Analog Converter Boxes

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Final rule.

SUMMARY: The National Telecommunications and Information Administration (NTIA) issues this final rule to remove its regulations to implement and administer the Digital-to-Analog Converter Box Program (Coupon Program). The regulations implemented provisions of section 3005 of the Digital Television Transition and Public Safety Act of 2005, as subsequently amended. The final coupons were issued on August 12, 2009, and expired on November 9, 2009. NTIA is removing its regulations because the Coupon Program is closed and the regulations are now obsolete.

DATES: This rule becomes effective on November 9, 2010.

FOR FURTHER INFORMATION CONTACT: Milton Brown, Deputy Chief Counsel, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 4713, Washington, DC 20230; *telephone:* (202) 482–1816; *facsimile:* (202) 501–8013; or *electronic mail: mbrown@ntia.doc.gov.*

I. Background Information

The Digital Television Transition and Public Safety Act of 2005 (the Act), Public Law 109–171, as amended by the DTV Delay Act, Public Law 111–4, directed the Federal Communications Commission (FCC) to require full-power television stations to cease analog broadcasting and to broadcast solely digital transmissions after June 12, 2009.[1] The returned analog television spectrum was auctioned and proceeds were deposited into the Digital Television Transition and Public Safety Fund (the Fund).[2]

Section 3005 of the Act authorized NTIA to establish and implement the Coupon Program and provided that eligible U.S. households could obtain a maximum of two coupons of $40 each to apply toward the purchase of Coupon-Eligible Converter Boxes (CECB).[3] Accordingly, on March 15, 2007, NTIA issued a final rule entitled, "Rules to Implement and Administer a Coupon Program for Digital-to-Analog Converter Boxes."[4] The purpose of the program was to provide consumers who wished to continue receiving over-the-air broadcast programming on their analog-only televisions $40 coupons to offset the cost of digital-to-analog converter boxes. Consumers had the option to apply by mail, over the phone, via fax, or online. Consumers had 90 days to redeem their $40 coupon(s) at participating retailers.[5] The converter boxes were manufactured according to NTIA minimum technical specifications based on ATSC Guidelines A/74 and 47 CFR part 73.[6] Retailers were required to provide NTIA with redemption information and payment receipts related to coupons used in the purchase of CECBs, specifically tracking each serialized coupon by number with a corresponding CECB purchase. Participating retailers also were required to accept coupons for, and receive payment resulting from, only authorized purchases made for CECBs.[7] The regulations required retailers to maintain sales records for one year following the sales transaction date for auditing purposes.[8]

NTIA subsequently amended its regulations to waive the "eligible household" requirements in the regulations for individuals residing in nursing homes, intermediate care facilities, and assisted living facilities.[9] NTIA also amended its regulations to permit otherwise eligible households to utilize post office boxes in applying for and receiving coupons.[10]

On March 31, 2009, NTIA amended the regulations to conform to the DTV Delay Act, which extended the deadline for the digital conversion and the coupon application period for an additional four months.[11] The amended regulations also permitted households to request replacement coupons, and gave NTIA flexibility in the manner in which it distributed coupons.[12]

II. Removal of the Regulations To Implement and Administer a Coupon Program for Digital-to-Analog Converter Boxes

Section 3005 of the Act required NTIA to issue coupons through July 31, 2009, and administer the program until the last coupon expired 90 days from issuance. The final coupons were issued on August 12, 2009, and expired on November 9, 2009. Retailers are required to maintain sales records for one year following the sales transaction date, which would be November 8, 2010. NTIA is removing its regulations because the statute no longer obligates NTIA to implement and administer the program, and after November 8, 2010, the regulations are obsolete.

Administrative Procedure Act

The Assistant Secretary for Communications and Information Administration for NTIA finds good cause under the Administrative Procedure Act, 5 U.S.C. 553(b)(B) to waive prior notice and opportunity for public comment because it is unnecessary and contrary to the public interest. This rulemaking would remove from the Code of Federal Regulations those regulations that implement provisions of section 3005 of the Act, which authorized NTIA to establish and implement a coupon program in which

[1] *See* Title III of the Deficit Reduction Act of 2005, Public Law 109–171, 120 Stat. 4, 21 (Feb. 8, 2006), amended by the DTV Delay Act, Public Law 111–4, 123 Stat. 112 (Feb. 11, 2009).

[2] Act at § 3004, 120 Stat. at 22.

[3] Act at § 3005, 120 Stat. at 23.

[4] 72 FR 12,097 (Mar. 15, 2007). The regulations were codified at 47 CFR part 301.

[5] 47 CFR 301.4(e).

[6] 72 FR 12,118–12,121 (Mar. 15, 2007).

[7] 47 CFR 301.6(b)(2)(E)–(F).

[8] 47 CFR 301.6(a)(5).

[9] 47 CFR 301.7.

[10] 47 CFR 301.3(a)(2); *see also* 73 FR 54,325, 54,333 (Sept. 19, 2008).

[11] 74 FR 10,686 (March 12, 2009).

[12] 47 CFR 301.3(e).

eligible U.S. households could obtain a maximum of two coupons of $40 each to apply toward the purchase of CECBs. The agency is taking this action because these regulations are obsolete after November 8, 2010. The Act permitted consumers to request coupons from NTIA through July 31, 2009. The final coupons were issued on August 12, 2009, and the last issued coupon expired on November 9, 2009. NTIA has fulfilled its statutory mandate to administer the Coupon Program, and is removing the regulations as they are unnecessary. If these regulations are not removed, it may suggest that the program is still active and may cause confusion regarding the status of the program.

Executive Order 12866

This rule has been determined to be not significant under Executive Order 12866.

Executive Order 13132

This rule does not contain policies with federalism implications as that term is defined in EO 13132.

Regulatory Flexibility Act

As prior notice and an opportunity for public comment are not required under 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act are inapplicable. Thus, no regulatory flexibility analysis is required and none has been prepared.

Paperwork Reduction Act

This action contains no information collection requirements. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 is not required. The OMB collection numbers 0660–0026 and 0660–0027 associated with the regulations are discontinued effective November 9, 2010.

Lists of Subjects in 47 CFR Part 301

Antennas, Broadcasting, Cable television, Communications, Communications equipment, Electronic products, Telecommunications, Television.

PART 301—[REMOVED AND RESERVED]

■ For the reasons stated above, 47 CFR chapter III is amended by removing and reserving part 301 pursuant to authority contained in Public Law 109–171, as amended by Public Law 111–4.

Dated: September 21, 2010.

Lawrence E. Strickling,

Assistant Secretary for Communications and Information Administration.

[FR Doc. 2010–24048 Filed 9–24–10; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

Defense Federal Acquisition Regulation Supplement; DoD Office of the Inspector General Address (DFARS Case 2010–D015)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to provide the address for the agency Office of the Inspector General as referenced in FAR clause 52.203–13, Contractor Code of Business Ethics and Conduct.

DATES: *Effective Date:* September 27, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060. Telephone 703–602–0328; facsimile 703–602–0350. Please cite DFARS Case 2010–D015.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Regulation (FAR) Case 2007–006, "Contractor Business Ethics Compliance Program and Disclosure Requirements," was published as a final rule in the **Federal Register** on November 12, 2008, with an effective date of December 12, 2008. The contract clause entitled "Contractor Code of Business Ethics and Conduct" requires the contractor to disclose to the agency office of the Inspector General (with a copy to the contracting officer), when the contractor has credible evidence that a principal, employee, agent, or subcontractor of the contractor has committed a violation of criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in title 18 U.S.C. or a violation of the civil False Claims Act. This final rule provides the address for the DoD Office of the Inspector General.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant DFARS revision within the meaning of 41 U.S.C. 418b and FAR 1.501, and publication for public comment is not required. However, DoD will consider comments from small entities concerning the affected DFARS parts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.,* in correspondence.

C. Paperwork Reduction Act

This rule does not impose any new information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 203 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 203 and 252 continues to read as follows:

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

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Section 203.1004 is amended by adding paragraph (a) to read as follows:

203.1004 Contract clauses.

(a) Use the clause at 252.203–7003 in solicitations and contracts that include the FAR clause 52.203–13, Contractor Code of Business Ethics and Conduct.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Section 252.203–7003 is added to read as follows:

252.203–7003 Agency Office of the Inspector General.

As prescribed in 203.1004(a), use the following clause:

AGENCY OFFICE OF THE INSPECTOR GENERAL (SEP 2010)

The agency office of the Inspector General referenced in paragraphs (c) and (d) of FAR clause 52.203–13, Contractor Code of Business Ethics and Conduct, is the DoD Office of the Inspector General at the following address:

DoD Office of the Inspector General, Investigative Policy and Oversight, 400 Army Navy Drive, Suite 1037, Arlington, VA 22202–4704, Toll Free Telephone: 866–429–8011.

(End of clause)

[FR Doc. 2010–23653 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 204

Defense Federal Acquisition Regulation Supplement; Part 204, Administrative Matters

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

ACTION: Final rule; Technical amendment.

SUMMARY: DoD is issuing this technical amendment to direct contracting officers to the location of procedures relating to obtaining an account in the Electronic Document Access system. Further, current business systems across DoD have each developed methods of indexing contracts independently leading to data integrity problems between data sources. This technical amendment also provides the location of guidance on a uniform contract indexing methodology across DoD.

DATES: *Effective Date:* September 27, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Ynette R. Shelkin, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 703–602–8384; facsimile 703–602–0350.

SUPPLEMENTARY INFORMATION: Current business systems across DoD have each developed methods of indexing contracts independently leading to data integrity problems between data sources. Defense Procurement and Acquisition Policy letter dated July 8, 2010, subject: Contract Indexing Standard, provides detailed guidance on mapping procurement instrument identification and supplementary procurement instrument identification numbers stored in the Electronic Document Access system to data elements reported in the Federal Procurement Data System. This memorandum aims to eliminate this confusion by establishing a uniform contract indexing methodology across DoD. This technical amendment adds language to the Defense Federal Acquisition Regulation directing contracting officers to the location of this memorandum and its detailed guidance and of procedures relating to obtaining an account in the Electronic Document Access system.

List of Subjects in 48 CFR Part 204

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

■ Therefore 48 CFR part 204 is amended as follows:

PART 204—ADMINISTRATIVE MATTERS

■ 1. The authority citation for 48 CFR part 204 continues to read as follows:

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

■ 2. Add section 204.270 to read as follows:

204.270 Electronic Document Access.

Follow the procedures at PGI 204.270 relating to obtaining an account in the Electronic Document Access system.

■ 3. Add section 204.7006 to read as follows:

204.7006 Cross reference to Federal Procurement Data System.

Detailed guidance on mapping PII and supplementary PII numbers stored in the Electronic Document Access system to data elements reported in the Federal Procurement Data System can be found in PGI 204.7006.

[FR Doc. 2010–23665 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 211 and 252

Defense Federal Acquisition Regulation Supplement; Government-Assigned Serial Number Marking (DFARS Case 2008–D047)

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

ACTION: Final Rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require contractors to apply Government-assigned serial numbers in human-readable format on major end items when required by law, regulation, or military operational necessity.

DATES: *Effective Date:* September 27, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Overstreet, 703–602–0311.

SUPPLEMENTARY INFORMATION:

A. Background

Contractors are required to apply Government-assigned serial numbers, such as tail numbers/hull numbers and equipment registration numbers, in human-readable format on major end items when required by law, regulation, or military operational necessity. This final rule establishes a standard DoD method of specifying Government-assigned serial numbers contractually and requires the contractor to associate these serial numbers with the Unique Item Identifier (UII) assigned by the contractor and to register them in the DoD Item Unique Identification (IUID) Registry along with the UII. The rule also requires agreement between the Government and contractor prior to use of the serial numbers in constructing the end item UII.

DoD published a proposed rule in the **Federal Register** on April 30, 2010 (75 FR 22727). The comment period closed on June 29, 2010, and no comments were received.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

DoD does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

DoD requires that the use of Government-assigned serial numbers be limited to satisfy requirements of law or regulation or to facilitate the identification of major end items consistent with military operational requirements, *e.g.,* aircraft tail numbers or ship hull numbers in military

operations. Since the rule generally will apply to DoD major end-item contractors, and there are a limited number of end items for which the Government assigns these serial numbers, the number of small entities impacted by this rule is not expected to be substantial.

The clause at 252.211–7008, Use of Government-Assigned Serial Numbers, requires the Contractor to mark the Government-assigned serial numbers on those major end items as specified by line item in the Schedule, in accordance with the technical instructions for the placement and method of application identified in the terms and conditions of the contract, and to register the Government-assigned serial number along with the major end item's UII at the time of delivery in accordance with the provisions of the clause at DFARS 252.211–7003(d).

The rule does not duplicate, overlap, or conflict with any other Federal rules. DoD considers the approach described in the rule to be the most practical and beneficial for both Government and industry.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96–511) does not apply because the rule does not impose additional information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 211 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 211 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 211 and 252 continues to read as follows:

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

PART 211—DESCRIBING AGENCY NEEDS

211.274–5 [Redesignated as 211.274–6]

■ 2. Redesignate Section 211.274–5 as 211.274–6.

■ 3. Add new section 211.274–5 to read as follows:

211.274–5 Policy for assignment of Government-assigned serial numbers.

It is DoD policy that contractors apply Government-assigned serial numbers, such as tail numbers/hull numbers and equipment registration numbers, in human-readable format on major end items when required by law, regulation, or military operational necessity. The latest version of MIL–STD–130, Marking of U.S. Military Property, shall be used for the marking of human-readable information.

■ 4. In newly redesignated section 211.274–6, add paragraph (c) to read as follows:

211.274–6 Contract clauses.

* * * * *

(c) Use the clause at 252.211–7008, Use of Government-Assigned Serial Numbers, in solicitations and contracts that—

(1) Contain the clause at 252.211–7003, Item Identification and Valuation; and

(2) Require the contractor to mark major end items under the terms and conditions of the contract.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Section 252.211–7003 is amended by revising the introductory text to read as follows:

252.211–7003 Item identification and valuation.

As prescribed in 211.274–6(a), use the following clause:

* * * * *

■ 6. Section 252.211–7007 is amended by revising the introductory text to read as follows:

252.211–7007 Reporting of Government-Furnished Equipment in the DoD Item Unique Identification (IUID) Registry.

As prescribed in 211.274–6(b), use the following clause:

* * * * *

■ 7. Section 252.211–7008 is added to read as follows:

252.211–7008 Use of Government-Assigned Serial Numbers

As prescribed in 211.274–6(c), use the following clause:

USE OF GOVERNMENT-ASSIGNED SERIAL NUMBERS (SEP 2010)

(a) *Definitions.* As used in this clause—

Government-assigned serial number means a combination of letters or numerals in a fixed human-readable information format (text) conveying information about a major end item, which is provided to a contractor by the requiring activity with accompanying technical data instructions for marking the Government-assigned serial number on major end items to be delivered to the Government.

Major end item means a final combination of component parts and/or materials which is ready for its intended use and of such importance to operational readiness that review and control of inventory management functions (procurement, distribution, maintenance, disposal, and asset reporting) is required at all levels of life cycle management. Major end items include aircraft; ships; boats; motorized wheeled, tracked, and towed vehicles for use on highway or rough terrain; weapon and missile end items; ammunition; and sets, assemblies, or end items having a major end item as a component.

Unique item identifier (UII) means a set of data elements permanently marked on an item that is globally unique and unambiguous and never changes in order to provide traceability of the item throughout its total life cycle. The term includes a concatenated UII or a DoD-recognized unique identification equivalent.

(b) The Contractor shall mark the Government-assigned serial numbers on those major end items as specified by line item in the Schedule, in accordance with the technical instructions for the placement and method of application identified in the terms and conditions of the contract.

(c) The Contractor shall register the Government-assigned serial number along with the major end item's UII at the time of delivery in accordance with the provisions of the clause at DFARS 252.211–7003(d).

(d) The Contractor shall establish the UII for major end items for use throughout the life of the major end item. The Contractor may elect, but is not required, to use the Government-assigned serial number to construct the UII.

(End of clause)

[FR Doc. 2010–23662 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 247 and 252

RIN 0750–AG30

Defense Federal Acquisition Regulation Supplement; Motor Carrier Fuel Surcharge (DFARS Case 2008–D040)

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

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with changes, an interim rule that implements section 884 of the National Defense Authorization Act for Fiscal Year 2009. Section 884 requires DoD to ensure that, to the maximum extent practicable, in all carriage contracts in which a fuel-related adjustment is provided for, any fuel-related adjustment is passed through to the person who bears the cost of the fuel to which the adjustment relates.

DATES: *Effective Date:* September 27, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Overstreet, Defense Acquisition Regulations System, OUSD (AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060. Telephone 703–602–0311; facsimile 703–602–0350. Please cite DFARS Case 2008–D040.

SUPPLEMENTARY INFORMATION:

A. Background

DoD published an interim rule at 74 FR 37652 on July 29, 2009, to implement section 884 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417). Section 884 requires DoD to ensure that, to the maximum extent practicable, in all carriage contracts for which a fuel-related adjustment is provided, any fuel-related adjustment is passed through to the person who bears the cost of the fuel to which the adjustment relates. Section 884 also applies to commercial contracts for carriage.

Two respondents submitted comments on the interim rule. A discussion of the comments received and the changes to the rule as a result of these comments is provided below:

1. *Comment.* One respondent stated that it is customary in the motor carrier freight industry to assume a fixed cost of diesel fuel with a cost recovery mechanism (fuel surcharge) for a time period exceeding 30 days. In the majority of instances, approximately 99 percent of the time, industry passes fuel surcharges to the party that pays for the fuel. The respondent is concerned that the new law will require documenting 100 percent of all activity and as a result, there will be additional administrative work and cost for no appreciable benefit.

Response. DoD does not agree. The statute requires that, to the maximum extent practicable, any fuel-related adjustment is passed through to the person who bears the cost. Since, for the majority of instances, industry passes the fuel surcharges to the party that pays for the fuel, contractor records would reflect this. The only additional documentation requirement would be for the estimated one percent of actions where the fuel-adjustment is not passed through.

2. *Comment.* Both respondents stated that there are some instances where it is not practicable to mandate an absolute requirement to pass the fuel-related adjustment to the party that paid for the fuel, and one respondent proposed the following remedy:

"(a) Except in instances where doing so would be impracticable, or pose a disproportionate administrative burden, the contractor shall pass through any motor carrier fuel-related surcharge adjustments to the person, corporation, or entity that directly bears the cost of fuel for shipment(s) transported under this contract.

(i) Examples of impracticable instances may include but not be limited to, spot bids, one-time-only bids, or other services that are provided within 30 days of the time service was ordered."

Response. DoD agrees with the respondents in part. The examples of impracticable instances provided, however, are for short-term arrangements where there would not generally be a fuel surcharge and where the clause would not apply. DoD recognizes there may be limited instances where pass-through of fuel surcharge may not be feasible. Since the statute provides for application to the maximum practicable extent, the clause will include a statement that "Unless an exception is approved by the Contracting Officer," the contractor shall pass through any motor carrier fuel-related surcharge adjustments to the person, corporation, or entity that directly bears the cost of fuel for shipment(s) transported under this contract.

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

B. Regulatory Flexibility Act

DoD does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This final rule amends the DFARS to implement section 884 of the National Defense Authorization Act for Fiscal Year 2009. Section 884 requires DoD to ensure that, to the maximum extent practicable, in all carriage contracts in which a fuel-related adjustment is provided for, any fuel-related adjustment is passed through to the person who bears the cost of the fuel to which the adjustment relates. The objective of the rule is to establish a DoD contract clause with appropriate flow-down requirements addressing the statutory requirement for fuel-related contract adjustments to be passed to the entity bearing the cost of the fuel. The clause is to be inserted in all contracts with motor carriers, brokers, or freight forwarders providing or arranging truck transportation services that provide for a fuel-related adjustment.

An interim rule was published on July 29, 2009, at 74 FR 37652 to which two responses were received. The responses indicated that current commercial marketplace practices already reflect the requirement to flow down any fuel surcharge to the party that incurs the cost of the fuel. Therefore, any impact of this rule on small entities is expected to be minimal.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this rule does not impose any new information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 247 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

■ Accordingly, the interim rule amending 48 CFR parts 247 and 252, which was published at 74 FR 37652 on July 29, 2009, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 247 and 252 continues to read as follows:

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

PART 247—TRANSPORTATION

■ 2. Section 247.207 is revised to read as follows:

247.207 Solicitation provisions, contract clauses, and special requirements.

Use the clause at 252.247–7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer, in solicitations and contracts for carriage in which a motor carrier, broker, or freight forwarder will provide or arrange truck transportation services that provide for a fuel-related adjustment.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 252.2—Text of Provisions and Clauses

252.212–7001 [Amended]

■ 3. Section 252.212–7001 is amended by revising the clause date, and the

dates of the clauses in paragraphs (b)(22) and (c)(2) to read "(SEP 2010)".

■ 4. Section 252.247–7003 is revised to read as follows:

252.247–7003 Pass-Through of Motor Carrier Fuel Surcharge Adjustment To The Cost Bearer.

As prescribed in 247.207, use the following clause:

PASS-THROUGH OF MOTOR CARRIER FUEL SURCHARGE ADJUSTMENT TO THE COST BEARER (SEP 2010)

(a) This clause implements section 884 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417).

(b) Unless an exception is authorized by the Contracting Officer, the Contractor shall pass through any motor carrier fuel-related surcharge adjustments to the person, corporation, or entity that directly bears the cost of fuel for shipment(s) transported under this contract.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts with motor carriers, brokers, or freight forwarders.

(End of clause)

[FR Doc. 2010–23664 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket DOT–OST–2010–0161]

RIN 2105–AE03

Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Federal Drug Testing Custody and Control Form; Technical Amendment

AGENCY: Office of the Secretary, DOT.

ACTION: Interim Final rule.

SUMMARY: The Department of Health and Human Services recently issued a new Federal Drug Testing Custody and Control Form for use in both the Federal employee and Department of Transportation drug testing programs. In order to accommodate the form's use within our transportation industry program, the Department is making a few necessary regulation changes in order for collectors, laboratories, and Medical Review Officers to know how to use the new form. The form's use is authorized beginning October 1, 2010. The Department is also making a technical amendment to its drug testing procedures. The purpose of the technical amendment is to add a provision of the rule which was inadvertently omitted from the final rule in August 2010.

DATES: The rule is effective October 1, 2010. Comments to this interim final rule should be submitted by October 27, 2010. Late-filed comments will be considered to the extent practicable.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor Room W12–140, Washington, DC 20590–0001;
- *Hand Delivery:* West Building Ground Floor Room W12–140, 1200 New Jersey Ave., SE., between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329;

Instructions: You must include the agency name and docket number DOT–OST–2010–0161 or the Regulatory Identification Number (2105–AE03) for the rulemaking at the beginning of your comments. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Bohdan Baczara, U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; 202–366–3784 (voice), 202–366–3897 (fax), or *bohdan.baczara@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background

All urine specimens collected under the Department of Transportation (DOT) drug testing regulation, 49 CFR Part 40, must be collected using chain-of-custody procedures that incorporate the use of the Federal Drug Testing Custody and Control Form (CCF) promulgated by the Department of Health and Human Services (HHS). On November 17, 2009, HHS published a proposal to revise the CCF. [74 FR 59196] All the comments submitted were thoroughly reviewed by HHS and taken into consideration in fashioning the new CCF. The Department worked closely with HHS on the new CCF. Recently, HHS announced the new CCF in the **Federal Register** [75 FR 41488] which has an effective date of October 1, 2010.

The following items in the revised CCF are worth noting for the DOT transportation industry drug testing program:

(1) In Step 1 of the CCF, the Federal testing authorities—HHS; DOT; and Nuclear Regulatory Commission (NRC)—are noted, with further specificity for the DOT Agencies—Federal Motor Carrier Safety Administration (FMCSA); Federal Aviation Administration (FAA); Federal Railroad Administration (FRA); Federal Transit Administration (FTA); Pipeline and Hazardous Materials Safety Administration (PHMSA); and the United States Coast Guard (USCG) [1]—also noted;

(2) In Step 5A on Copy 1 of the CCF, the new drug analytes MDMA, MDA, and MDEA are added, as are "Δ9–THCA" after "Marijuana Metabolite" and "BZE" after "Cocaine Metabolite" to specify the drug analytes;

(3) In Step 6 on Copy 2 of the CCF, a line has been included on which the Medical Review Officer (MRO) would write the drug for which a positive result is verified, and a new line item "other" was added to assist the MRO in documenting other "refusal to test" situations—for example, when there is no legitimate medical explanation for the employee providing an insufficient amount of urine;

(4) In Step 7 on Copy 2 of the CCF, a box has been added for the MRO to check if the split specimen is reported as cancelled; and

(5) On the reverse side of Copy 5—the "Donor Copy"—of the CCF, are the revised instructions for completing the CCF.

Because HHS sought and received comments on the form and its use, we seek only to receive comments on the actual implementation of the new CCF, and not on the form itself.

In addition, the technical amendment is intended to address an omission which has been called to our attention since the publication of the Department's final rule in August 2010 [75 FR 49850] which was intended to create consistency with many of the new drug testing requirements established by HHS. Specifically, the HHS Guidelines require laboratories to report the concentration of the drug or drug metabolite for a positive result to the MRO. This was omitted from our rule text in the section that directs what laboratories are to report and how they are to report it. We have amended the rule text to reflect this requirement.

[1] For purposes of following the requirements of 49 CFR Part 40, "*DOT, The Department, DOT Agency*" is defined, at 40.3, to include the United States Coast Guard.

Implementation Guidance

DOT-regulated employers and their service agents are authorized to begin use of the new CCF on October 1, 2010. However, we recognize there will be large supplies of old CCFs available after the start date. To avoid wasting the old forms, the Department will permit use of the old CCF until September 30, 2011. After this date, collectors and laboratories are not to use any of the old CCFs in the DOT testing program. The rule text has been changed to reflect this one-full-year transition period from old CCF to new CCF.

However, when the old CCF is used on or before September 30, 2011, the collector will need to write in the specific DOT Agency under which the specimen is collected and must do so in the remarks section in Step 2 on Copy 1 of the CCF. This DOT Agency designation is a new feature in the new CCF. So, if an old CCF is used and the employee's specimen is collected under, for example, authority of the FMCSA regulation, the collector will write in "DOT—FMCSA" in the remarks section in Step 2 of the CCF.

Likewise, when an old CCF is used on or before September 30, 2011, before transmitting a confirmed positive drug test for MDMA, MDA, or MDEA, as appropriate, to the MRO, the laboratory—in addition to checking the "positive" box—must write in the specific MDMA, MDA, or MDEA analyte in the "Remarks" section in Step 5–A of Copy 1 of the CCF.

Like now, use of a CCF past its expiration date will not be a fatal flaw. Use of the old CCF after September 30, 2011, must be corrected using the procedures at § 40.205(b)(2).

Regarding the completion of the new Step 1–D of the CCF, the Department would like to emphasize that neither the employer nor the collector should find it difficult to complete this new data item. DOT-regulated employers and their Consortium/Third Party Administrators (C/TPAs) currently provide the collector and the collection site with specific instructions—the test reason, whether the test is to be conducted under direct observation, the MRO name and address, and employee information (*e.g.,* name and SSN or ID number), among others. Adding one additional data element to what is already provided by employers or their C/TPAs to collectors should not prove significantly difficult. An employer and its C/TPA should be readily aware of the DOT Agency regulating the employee's safety-sensitive duties. We have added a new § 40.14 to put into one place the items that employers and their C/TPAs have been routinely providing collectors, and if they have not been doing so, the information they should have always been providing collectors, in addition to this new requirement for DOT Agency designations.

If the information in Step 1–D of the CCF is not completed, the laboratory will not delay testing the specimen and reporting the confirmed result to the MRO. Similarly, the MRO will not delay the medical review process and reporting the verified result to the employer. The Department believes the laboratory and MRO should note that the testing authority box was not checked and continue with processing, testing, verifying, and reporting the specimen result, as appropriate. To reduce the potential failure of the collector to check the appropriate box in Step 1–D, the Department will permit the checkmark to be pre-printed in the appropriate box prior to the collection. We amended our rule text to reflect these situations.

As more of the DOT Agencies go toward having employee drug testing violations reported to them, these designations will prove invaluable to the process.

Regarding Step 6 of Copy 2 of the CCF, HHS provided more space for identifying the positive drug(s) and a new line item "Other" was added to assist the MRO in documenting other "Refusal to Test" situations—for example, when there is no legitimate medical explanation for the employee providing an insufficient amount of urine. In Step 7 of Copy 2 of the CCF, HHS added a box for "Test Cancelled" for the MRO to check when a test is cancelled if a split specimen fails to reconfirm. We amended our rule text to reflect these modifications. As a reminder to MROs, the "Test Cancelled" box should only be used when the split fails to reconfirm for *all* the results verified and reported for the primary specimen.

In light of the modifications HHS made to Step 7 of Copy 2 of the CCF, we have taken this opportunity to incorporate into § 40.187(f) rule text on how MROs are to document split specimen results. It is our understanding that MROs have been completing this section correctly even though the rule text did not instruct the MRO to check the "Reconfirmed" and/or "Failed to Reconfirm" boxes. The amendment to § 40.187(f) makes this a requirement.

On the back of Copy 5—the "Donor Copy"—of the CCF, the instructions to the collector on completing the CCF are revised and updated.

Regulatory Analyses and Notices

Authority

The statutory authority for this rule derives from the Omnibus Transportation Employee Testing Act of 1991 (49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 54101 *et seq.*) and the Department of Transportation Act (49 U.S.C. 322).

Administrative Procedure Act

The Department has determined this rule may be issued without a prior opportunity for notice and comment because providing prior notice and comment would be unnecessary, impracticable, or contrary to the public interest. This rule will authorize DOT-regulated employers to use the CCF beginning October 1, 2010. Providing an opportunity for prior notice and comment would be unnecessary, and would seem redundant, because the public already had an opportunity to comment and did provide comments to HHS on the proposed CCF. In their Notice of Proposed Revisions to the Federal Custody and Control Form, HHS stated that the CCF is used for the Federal workplace drug testing program but also pointed out that "* * * the Department of Transportation (DOT) requires its regulated industries to use the Federal CCF." [74 FR 59196] Because many of the commenters were transportation industry employers, C/TPAs, and associations, we are confident they understood that the new CCF would be used in the DOT-regulated program. And, because the DOT utilizes the CCF for our drug testing program, the DOT and HHS collaborated in preparing the final CCF.

Providing an opportunity for prior notice and comment would be impracticable because there is such a short time frame from when HHS published the new CCF [75 FR 41488] to its October 1, 2010 effective date. In addition, this Interim Final Rule makes minor procedural amendments to its rule text to merely reflect the changes to the revised CCF and a technical amendment to correct an inadvertent oversight from a prior rulemaking. For these reasons, the Department finds there is good cause to make the rule effective immediately.

Executive Order 12866 and Regulatory Flexibility Act

This Interim Final Rule is not significant for purposes of Executive Order 12866 or the DOT's regulatory policies and procedures. The rule makes minor procedural amendments to its rule text to merely reflect the changes to the revised CCF and a technical

amendment to correct an inadvertent oversight. The use of the revised CCF does not increase costs on regulated parties because it authorizes regulated employers to continue using the old CCF for an additional twelve months, until September 30, 2011. After this date, the revised CCF must be used. This allows employers to use their current supply of old CCFs rather than discarding them. The rule will impose no new burdens on any parties. While small entities are among those who may use the revised CCF, the Department certifies, under the Regulatory Flexibility Act, that this rule does not have a significant economic impact on a substantial number of small entities.

List of Subjects in 49 CFR Part 40

Administrative practice and procedures, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

Issued September 20, 2010, at Washington, DC.

Ray LaHood,

Secretary of Transportation.

■ For reasons discussed in the preamble, the Department of Transportation amends Title 49 of the Code of Federal Regulations, Part 40, as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

■ 1. The authority citation for 49 CFR part 40 continues to read as follows:

Authority: 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 54101 *et seq.*

■ 2. A new § 40.14 is added, to read as follows:

§ 40.14 What collection information must employers provide to collectors?

As an employer, or an employer's service agent—for example a C/TPA, you must ensure the collector has the following information when conducting a urine specimen collection for you:

(a) Full name of the employee being tested.

(b) Employee SSN or ID number.

(c) Laboratory name and address (can be pre-printed on the CCF).

(d) Employer name, address, phone number, and fax number (can be pre-printed on the CCF at Step 1–A).

(e) DER information required at § 40.35 of this part.

(f) MRO name, address, phone number, and fax number (can be pre-printed on the CCF at Step 1–B).

(g) The DOT Agency which regulates the employee's safety-sensitive duties (the checkmark can pre-printed in the appropriate box on the CCF at Step 1–D).

(h) Test reason, as appropriate: Pre-employment; Random; Reasonable Suspicion/Reasonable Cause; Post-Accident; Return-to-Duty; and Follow-up.

(i) Whether the test is to be observed or not (see § 40.67 of this part).

(j) (Optional) C/TPA name, address, phone, and fax number (can be pre-printed on the CCF).

■ 3. In § 40.23, paragraph (f)(4) is revised, to read as follows:

§ 40.23 What actions do employers take after receiving verified test results?

* * * * *

(f) * * *

(4) You must instruct the collector to note on the CCF the same reason (*e.g.,* random test, post-accident test) and DOT Agency (e.g., check DOT and FMCSA) as for the original collection.

* * * * *

■ 4. In § 40.45, revise paragraphs (b) and (c)(3), to read as follows:

§ 40.45 What form is used to document a DOT urine collection?

* * * * *

(b) You must not use a non-Federal form or an expired CCF to conduct a DOT urine collection. As a laboratory, C/TPA or other party that provides CCFs to employers, collection sites, or other customers, you must not provide copies of an expired CCF to these participants. You must also affirmatively notify these participants that they must not use an expired CCF (*e.g.,* that after September 30, 2011, they may not use an expired CCF for DOT urine collections).

(c) * * *

(3) As an employer, in Step 1–D of the CCF you may preprint the box for the DOT Agency under whose authority the test will occur.

* * * * *

■ 5. In § 40.63, paragraph (e) is revised, to read as follows:

§ 40.63 What steps does the collector take in the collection process before the employee provides a urine specimen?

* * * * *

(e) You must pay careful attention to the employee during the entire collection process to note any conduct that clearly indicates an attempt to tamper with a specimen (*e.g.,* substitute urine in plain view or an attempt to bring into the collection site an adulterant or urine substitute). If you detect such conduct, you must require that a collection take place immediately under direct observation (*see* § 40.67) and complete Step 2 by noting the conduct in the "Remarks" line of the CCF and the fact that the collection was observed by checking the "Observed" box. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

■ 6. In § 40.83, paragraph (a) is revised, to read as follows:

§ 40.83 How do laboratories process incoming specimens?

* * * * *

(a) You are authorized to receive only Copy 1 of the CCF. You are not authorized to receive other copies of the CCF or any copies of the alcohol testing form.

* * * * *

■ 7. In § 40.97, paragraphs (a)(2)(i) and (ii), and (e)(1) are revised, to read as follows:

§ 40.97 What do laboratories report and how do they report it?

(a) * * *

(2) * * *

(i) Positive, with drug(s)/metabolite(s) noted, with numerical values for the drug(s) or drug metabolite(s).

(ii) Positive-dilute, with drug(s)/metabolite(s) noted, with numerical values for the drug(s) or drug metabolite(s) and with numerical values for creatinine and specific gravity;

* * * * *

(e) * * *

(1) You must provide quantitative values for confirmed positive drug test results to the MRO.

* * * * *

■ 8. In § 40.129, paragraph (c) is revised, to read as follows:

§ 40.129 What are the MRO's functions in reviewing laboratory confirmed non-negative drug test results?

* * * * *

(c) With respect to verified positive test results, place a checkmark in the "Positive" box in Step 6 on Copy 2 of the CCF, indicate the drug(s)/metabolite(s) verified positive, and sign and date the verification statement.

* * * * *

■ 9. In § 40.163:

■ a. Paragraph (c)(8) is amended by removing "and".

■ b. Paragraph (c)(9) is amended by removing the period at the end and adding "; and" in its place.

■ c. Paragraph (c)(10) is added.

The addition reads as follows:

§ 40.163 How does the MRO report drug test results?

* * * * *

(c) * * *

(10) The DOT Agency, if noted on the CCF.

* * * * *

■ 10. In § 40.187, paragraph (f) is revised to read as follows:

§ 40.187 What does the MRO do with split specimen laboratory results?

* * * * *

(f) For all split specimen results, as the MRO you must in Step 7 of Copy 2 of the CCF:

(1) Report split specimen test results by checking the "Reconfirmed" box and/or the "Failed to Reconfirm" box, or the "Test Cancelled" box, as appropriate.

(2), Enter your name, sign, and date.

(3) Send a legible copy of Copy 2 of the CCF (or a signed and dated letter, see § 40.163) to the employer and keep a copy for your records. Transmit the document as provided in § 40.167.

■ 11. In § 40.191, paragraph (d)(2) is revised, to read as follows:

§ 40.191 What is a refusal to take a DOT drug test, and what are the consequences?

* * * * *

(d) * * *

(2) As the MRO, you must note the refusal by checking the "Refusal to Test" box in Step 6 on Copy 2 of the CCF, checking whether the specimen was adulterated or substituted and, if adulterated, noting the adulterant/reason. If there was another reason for the refusal, check "Other" in Step 6 on Copy 2 of the CCF, and note the reason next to the "Other" box and on the "Remarks" lines, as needed. You must then sign and date the CCF.

* * * * *

■ 12. In § 40.193, paragraph (d)(2)(i) is revised, to read as follows:

§ 40.193 What happens when an employee does not provide a sufficient amount of urine for a drug test?

* * * * *

(d) * * *

(2) * * *

(i) Check the "Refusal to Test" box and "Other" box in Step 6 on Copy 2 of the CCF and note the reason next to the "Other" box and on the "Remarks" lines, as needed.

* * * * *

■ 13. In § 40.203, paragraphs (d)(2) and (d)(3) are revised, to read as follows:

§ 40.203 What problems cause a drug test to be cancelled unless they are corrected?

* * * * *

(d) * * *

(2) The certifying scientist's signature is omitted on Copy 1 of the CCF for a positive, adulterated, substituted, or invalid test result.

(3) The collector uses a non-Federal form or an expired CCF for the test. This flaw may be corrected through the procedure set forth in § 40.205(b)(2), provided that the collection testing process has been conducted in accordance with the procedures of this part in an HHS-certified laboratory. During the period of October 1, 2010–September 30, 2011, you are not required to cancel a test because of the use of an expired CCF. Beginning October 1, 2011, if the problem is not corrected, you must cancel the test.

■ 14. In § 40.209, paragraphs (b)(1) and (b)(9) are revised, to read as follows:

§ 40.209 What procedural problems do not result in the cancellation of a test and do not require corrective action?

* * * * *

(b) * * *

(1) A minor administrative mistake (*e.g.,* the omission of the employee's middle initial, a transposition of numbers in the employee's social security number, the omission of the DOT Agency in Step 1–D of the CCF.)

* * * * *

(9) Personal identifying information is inadvertently contained on the CCF (*e.g.,* the employee signs his or her name on Copy 1); or

* * * * *

■ 15. In § 40.355, paragraph (l) is revised, to read as follows:

§ 40.355 What limitations apply to the activities of service agents?

* * * * *

(l) In transmitting documents to laboratories, you must ensure that you send to the laboratory that conducts testing only Copy 1 of the CCF. You must not transmit other copies of the CCF or any ATFs to the laboratory.

* * * * *

[FR Doc. 2010–24038 Filed 9–24–10; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 236

[Docket No. FRA–2008–0132, Notice No. 4]

RIN 2130–AC03

Positive Train Control Systems

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule amendments.

SUMMARY: FRA is issuing amendments to the final rule regarding the development, testing, implementation, and use of Positive Train Control (PTC) systems for railroads as mandated by the Rail Safety Improvement Act of 2008. With publication of the final rule on January 15, 2010, FRA sought further comment on certain specific issues. These amendments are being made partially in response to the applicable comments filed and to further clarify certain provisions of the final rule.

DATES: The amendments to the final rule are effective November 26, 2010.

FOR FURTHER INFORMATION CONTACT: Thomas McFarlin, Office of Safety Assurance and Compliance, Staff Director, Signal & Train Control Division, Federal Railroad Administration, Mail Stop 25, West Building 3rd Floor, Room W35–332, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*telephone:* 202–493–6203) (*e-mail: Thomas.McFarlin@dot.gov*); or Jason Schlosberg, Trial Attorney, Office of Chief Counsel, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W31–217, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*telephone:* 202–493–6032) (*e-mail: Jason.Schlosberg@dot.gov*).

SUPPLEMENTARY INFORMATION: Table of Contents for Supplementary Information:

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A. Removal From PTCIP of Track Segments Not Yet Implemented With PTC Systems
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I. Introduction and Background

Partially as a consequence and severity of certain very public accidents, coupled with a series of other less publicized accidents, Congress passed the Rail Safety Improvement Act of 2008 § 104, Public Law 110–432, 122 Stat.

4854 (Oct. 16, 2008) (codified at 9 U.S.C. 20157) [hereinafter "RSIA08"]. The RSIA08 was signed into law by President George W. Bush on October 16, 2008, marking a public policy decision that, despite the implementation costs, railroad employee and general public safety warranted mandatory and accelerated installation and operation of Positive Train Control (PTC) systems.

On January 15, 2010, FRA issued regulations ("final rule") implementing the PTC requirements under RSIA08. The final rule, among other things, contained the process for submission of statutorily required PTC Implementation Plans for FRA review and approval. The final rule also established 2008 as a statistical baseline for determining which track segments must be outfitted and operated with PTC systems, a process to request modification of that baseline, and standards for approval of such requests.

While that document is a final rule, FRA identified specific provisions for which it would consider making changes and sought comments on those provisions. FRA indicated that it would only consider comments falling within the scope of those provisions.

Following the issuance of the final rule, FRA received several comments. In this document, FRA responds to those comments that fell within the scope of the comments requested and amends the final rule accordingly.

II. Scope of Further Comments Sought

While the final rule became effective on March 16, 2010, FRA believed that certain issues warranted further discussion. Accordingly, FRA sought comments limited to increasing the clarity, certainty, and transparency of the criteria governing the removal from a PTC Implementation Plan (PTCIP) (and therefore from the requirement to install PTC) of any track segments on which PTC systems have yet to be installed for which a railroad seeks relief from the requirement to install PTC. FRA continues to consider this issue separate and distinct from the discontinuance of any already installed or existing PTC systems, which is governed under § 236.1021, part 236 of title 49, and the "Signal Inspection Act" (codified at 49 U.S.C. 20501–20505). FRA indicated that any comments should be limited to the scope of those issues to which FRA requested further comment.

As explained in the preamble to the final rule, 2008 traffic data will be used as an initial baseline in each PTCIP to determine the breadth and scope of PTC system implementation. In recognition of the fact that traffic patterns are likely to change to some degree before December 31, 2015, the final rule also provides a means of adjusting the track segments on which PTC must be installed where adjustments are appropriately justified. These issues relate to a railroad's potential request to scale back the breadth and scope of that baseline contemporaneously or subsequently to PTCIP submission and prior to actual PTC system implementation. Since those issues should not affect the PTCIP required to be filed by the April 16, 2010, statutory deadline, FRA believed that time was available for some further consideration.

In § 236.1005(b)(4)(i)(A)(*2*), the final rule provided three tests that must be satisfied to remove a line due to cessation of poison by inhalation (PIH, also commonly referred to as toxic by inhalation or TIH) materials traffic over the track segment; each of these tests will be discussed in greater detail but are summarized here. First, § 236.1005(b)(4)(i)(A)(*2*)(*i*), provides that the requesting railroad must show that the line segment will be free from local PIH materials traffic. Second, under § 236.1005(b)(4)(i)(A)(*2*)(*ii*), the requesting railroad must submit a routing analysis that assumes that the line segment and all of the carrier's practicable alternative routes that the carrier considers using to transport the PIH materials traffic are equipped with PTC. The analysis must show that any rerouting of PIH materials traffic from the subject track segment is justified based upon the route analysis submitted or that an alternative route is substantially as safe and secure as the track segment in question. FRA sought comments on how the elements of a route analysis should be weighed by FRA when determining whether rerouting as provided under this paragraph is sufficiently justified.

Third, under § 236.1005(b)(4)(i)(A)(*2*)(*iii*) the requesting railroad must establish that the remaining risk arising from rail operations on the track segment is less than the average equivalent risk per route mile on line segments required to be equipped with PTC because of gross tonnage and the presence of PIH materials traffic. FRA sought comment on how to measure the appropriate level of risk established. No railroad had supplied data supporting further track exceptions from PTC system installation consistent with statutory and safety requirements. Thus, in the final rule, FRA requested additional data to support commenters' positions. FRA also sought comment and information on ways that it might consider risk mitigations other than by a compensating extension of PTC or PTC technologies. Section 236.1005(b)(4)(i)(A)(*2*)(*iii*) also provides that if the railroad would otherwise be required to install PTC on a line segment under paragraph (*iii*), that the railroad would be able to make a compensating extension of PTC on a different line segment rather than installing PTC on the line segment.

In § 236.1005(b)(4)(ii), the final rule provides an exception to PTC system implementation where there is a *de minimis* risk of release of PIH materials on the line segment. While in the proposed rule FRA sought means to reduce the railroads' burdens associated with this rule, no specific *de minimis* exception was proposed. AAR mentioned this possibility in its comment filed during the final rule's comment period and offered to work with FRA on this issue in supplementary comments filed after that comment period. FRA believes that the *de minimis* exception provided in the final rule fell within the scope of the issues set forth in the proposed rule. However, since none of the parties has had an opportunity to comment on this specific exception as provided in this final rule, FRA sought comments on the extent of the *de minimis* exception.

III. Further Comments Filed and FRA's Response

In the comment period following issuance of the final rule, documents were filed by Association for American Railroads (AAR), Fred Millar, Invensys Rail Corporation (Invensys), the Metropolitan Transportation Authority of New York (NYMTA), the National Transportation Safety Board (NTSB), and the Rail Interoperability Group (RIG). However, the four comments filed by Fred Millar, Invensys, NYMTA, and RIG were squarely outside of the scope of further comments requested. For instance, Mr. Millar's comments regarding what should be done under the PHMSA rail routing rule are outside the scope of this rulemaking and do not require a change in the PTC final rule. Accordingly, FRA has elected to treat those four comments as Petitions for Reconsideration. FRA also received three formal Petitions for Reconsideration from AAR, Siemens Industry, Inc., and the Chlorine Institute. FRA will respond to all Petitions for Reconsideration, including those comments FRA is treating as Petitions for Reconsideration, in a separate document that will be mailed to the Petitioners and made part of the public docket in this proceeding.

The purpose of this document is to respond to comments that are within the scope of FRA's request for comments contained in the final rule. As previously noted, these issues include the pre-installation removal of track segments from PTCIPs and the *de minimis* exception.

A. Removal From PTCIP of Track Segments Not Yet Implemented With PTC Systems

Section 236.1005(b)(4) of the final rule provided for exclusions or removal of track segments from the PTC baseline. Paragraph (b)(4) provides that a railroad may request FRA review of the requirement to install PTC on a track segment where a PTC system is otherwise required by the rule, but has not yet been installed, based upon changes in rail traffic such as reductions in total traffic volume or cessation of passenger or PIH materials service. More specifically, paragraph (b)(4)(i)(A)(*2*) provides that in the case of cessation of PIH materials traffic over a track segment, and absent special circumstances, FRA will approve an exclusion of a line from the PTCIP (determined on the basis of 2008 traffic levels) upon a showing by the railroad that:

(i) There is no remaining local PIH traffic expected on the track segment;

(ii) Either any rerouting of PIH traffic from the subject track segment is justified based upon the route analysis submitted, which shall assume that each alternative route will be equipped with PTC, and shall take into consideration any significant interline routing impacts; or the next preferred alternative route in the analysis is shown to be substantially as safe and secure as the route employing the track segment in question and demonstrated considerations of practicability indicate consolidation of the traffic on that next preferred alternative route; and

(iii) After cessation of PIH traffic on the subject line, the remaining risk associated with PTC-preventable accidents per route mile on the track segment will not exceed the average comparable risk per route mile on Class I lines in the United States required to be equipped with PTC because of gross tonnage and the presence of PIH traffic. If the subject risk is greater than the average risk on those PIH lines, and if the railroad making the application for removal of the track segment from the PTCIP offers no compensating extension of PTC or PTC technologies from the minimum required to be equipped, FRA may deny the request.

NTSB filed comments expressing its belief that the final rule as written provides enough flexibility to railroads either at the time of initial filing or through a request for amendment to subsequently address changes in traffic patterns. NTSB noted that in the final rule FRA delineated the requirements it will consider before approving any exclusion. According to NTSB, it appears that both the railroads and FRA have an understanding of the term "consistent with safety and in the public interest" for conventional signal systems covered by subparts A through F of part 236. Railroads routinely submit block signal applications in accordance with part 235, "Instructions Governing Applications for Approval of a Discontinuance or Material Modification of a Signal System or Relief From the Requirements of Part 236," to modify or retire these conventional signal systems. FRA also has demonstrated use of its discretionary authority to review these Block Signal Applications and to either approve or deny them. The NTSB believes that any justified adjustments to the track segments on which PTC must be installed are an extension of FRA's use of its discretionary authority to review and consider any amendments to ensure they meet the requirements of this rule and are consistent with safety and in the public interest.

AAR also filed comments regarding the exclusions provided by paragraph (b)(4). These comments fall into three subcategories.

First, AAR contested FRA's multiple uses of the phrase "absent special circumstances." After consideration of AAR's concerns, FRA has decided to remove this language from the rule.

Second, AAR challenged paragraph (b)(4)(i)(A)(*2*)(*ii*), which provides that where the request involves prior or planned rerouting of PIH materials traffic, the railroad must provide a supporting route analysis that takes into consideration the requirements of the Pipeline and Hazardous Materials Safety Administration (PHMSA) Rail Route Analysis Rule, 49 CFR § 172.820 (PHMSA rail routing rule). The paragraph also assumes that the subject route and each practicable alternative route that the carrier considers using to transport the PIH materials traffic is PTC equipped. FRA has decided to clarify § 236.1005 and the relationship between the PHMSA rail routing rule and the PTC final rule. FRA has also slightly modified the substance of paragraph (b)(4)(i)(A)(*2*)(*ii*) in response to AAR's comments and has moved the text to a new § 236.1020.

Finally, AAR disputes the residual risk analysis requirements under paragraph (b)(4)(i)(A)(2)(iii) of § 236.1005. FRA has slightly modified the substance of this paragraph in response to AAR's comments and has also moved this text to the new § 236.1020, and has delayed the effective date of the residual risk analysis requirement under paragraph (b)(4)(i)(A)(*2*)(*iii*), as revised herein, until an appropriate notice and comment period can be conducted on the risk analysis tool currently being developed by FRA.

1. "Absent Special Circumstances" Language

Section 236.1005(b)(4)(i)(A)(*1*) of the final rule provides that, in the case of a requested exclusion based on cessation of passenger service or a decline in gross tonnage below 5 million gross tons as computed over a 2-year period, the removal will be approved absent "special circumstances." AAR recommended that FRA remove the special circumstances proviso to provide clarity, certainty, and transparency. While § 236.1005(b)(4)(i)(A)(*1*) gives an example of a special circumstance (anticipated traffic growth), AAR states that the regulations address traffic growth in § 236.1005(b)(3) and it is unnecessary to address traffic growth here. According to AAR, the "special circumstances" language is too vague to provide sufficient guidance to the regulated community and if FRA were to insist it is necessary to address traffic growth in § 236.1005(b)(4)(i)(A)(*1*), it can do so specifically.

In any event, AAR asserts that there should be no discretion in deciding whether to approve the withdrawal of a line segment from the PTCIP if the criteria in the PTC regulation are met. According to AAR, the "special circumstances" clauses are inconsistent with FRA's stated aim of clarity, certainty, and transparency and should be deleted.

FRA believes that there is merit in AAR's request and, in order to ensure consistency and certainty in decision making, FRA is removing the "special circumstances" language in paragraph (b)(4)(i)(A)(1). FRA can address special circumstances (such as an extreme grade approaching major interlocking or a moveable bridge location), if necessary, using its general authority to install signal and train control systems. *See* 49 U.S.C. 20502.

2. Alternative Route Analysis and the PHMSA Rail Routing Rule

AAR recommends that paragraph (b)(4)(i)(A)(*2*)(*ii*) be deleted. AAR objects to the requirement that the railroads have to perform an analysis that assumes that the subject route and each practicable alternative route that the carrier considers for the movement of PIH materials are PTC equipped. AAR asserts that the criteria addressing the

cessation of PIH materials service are confusing and inconsistent with PHMSA rail routing rule. AAR notes that the PHMSA rail routing rule does not require an analysis assuming that all routes are equipped with PTC or the railroads to "take into consideration any significant interline routing impacts," but only to "consider the use of interchange agreements with other rail carriers." Moreover, AAR does not understand what "next" means, since there is no rank ordering of alternatives to be considered under PHMSA's routing regulations, and how to quantify "as safe and secure," which is not the same as the PHMSA criterion, which focuses on the "overall safety and security risk." AAR is also confused by the last sentence, not understanding why a railroad would choose a route that is less practicable than an alternative and asks what evidence FRA would expect to see pursuant to this requirement.

AAR notes that the PHMSA rail routing rule requires railroads to analyze a line currently used to move PIH materials traffic (as well as other security-sensitive materials) and all practicable alternative routes, and to utilize the line posing the least overall safety and security risk. *See* 49 CFR 172.820. AAR indicates its belief that RSIA08 cannot be read to require PTC installation on routes used for PIH materials and routes that could be used for PIH materials if only a different routing analysis than that mandated by PHMSA rail routing rule were used.

AAR argues that a decision to require the installation of PTC based on FRA's determination as to where TIH should be routed as opposed to the route chosen pursuant to the PHMSA routing analysis would, as a practical matter, place the two agencies in conflict. According to AAR, "[i]f under the PHMSA analysis of two routes one route was found to pose the least overall safety and security risk and FRA mandated PTC on the other route because its analysis of safety concerns disagreed with the PHMSA outcome, the two agencies would be in disagreement as to which route should be used for TIH."

AAR also claims that this FRA requirement conflicts with RSIA08. AAR states that:

> [i]f FRA decides that TIH should be routed on a line segment different than the line segment chosen pursuant to the PHMSA routing analysis and requires PTC on its favored route, FRA would be mandating PTC on both the route of its choice and the route actually used for TIH pursuant to the PHMSA routing analysis. Certainly, RSIA08 cannot be read to require installation of PTC on routes used for TIH and routes that could be used for TIH if only a different routing analysis than that mandated by PHMSA were used.

AAR believes that any perceived deficiency in the rail routing rule should be remedied by amending that regulation, not engaging in a separate, conflicting analysis in the PTC regulation. Accordingly, AAR believes that FRA should delete § 236.1005(b)(4)(i)(A)(2)(ii).

AAR is incorrect in assuming that FRA does not intend the railroads to follow the requirements of the PHMSA rail routing rule in determining whether to reroute PIH materials traffic and FRA will make this explicit.

Routing analysis is useful for two entirely different purposes. Routing analysis under the PHMSA rule, which FRA participated in developing and has the responsibility to administer, governs current routing of PIH materials, certain explosives, and certain high level nuclear waste and is based upon an annual analysis that a carrier performs to select the routes that pose the least overall safety and security risks based on conditions as they exist at the time of the analysis and changes that may reasonably be anticipated to occur in the upcoming year. Nothing in the PTC final rule disturbs this regime in any way. Carriers will continue to do their analysis and route traffic as they are today, with the caveat described below.

However, there are two unbreakable policy links between this rulemaking and the operation of the PHMSA rule:

First, RSIA08 is clear that PTC must be installed on lines carrying PIH materials and at least 5 million gross tons of traffic. Thus, to the extent this rulemaking permits PTC to be installed on a distinct subset of the alternative routes available for overhead (non-local) transportation of PIH materials, those routes will *de facto* and *de jure* be the only routes available for PIH materials transportation on and after December 31, 2015—regardless of overriding safety or security concerns that might argue for alternative routing. There is nothing in the PHMSA rule that specifically requires PTC to be installed as a mitigation measure, and although railroads would be free do so, that structure is not designed to deal with the full range of issues related to PTC (including other pertinent risks). It was the RSIA08, not the 9/11 Commission Implementation Act of 2004, Public Law 108–548, 118 Stat. 3638 (Dec. 17, 2004) (9/11 Commission Act), that addressed the requirement for PTC on PIH materials lines, and the PHMSA structure is not the place to address the RSIA08 mandate.

Second, even before this PTC rule is fully implemented it will begin to have an inevitable impact on some routing decisions. One of the 27 factors called out for analysis under the PHMSA rule is "method of operation." As used in rail parlance, "method of operation" can be understood in either a very narrow sense to mean the source of movement authorities for train operations or in a broader sense to include all means by which train movements are authorized and controlled. It is the latter sense intended for purposes of the PHMSA rule.[1] PTC is part of the method of operation wherever installed. It is already installed on portions of the Northeast Corridor and on Amtrak's Michigan line. When installed in a new territory, and when most lead locomotives operating over the territory have PTC onboard apparatus installed and operative, PTC will reduce the safety risk associated with transporting PIH commodities by something on the order of one-third. Thus, over time, installation of PTC will affect some routing choices even before the end of 2015.

The PTC final rule could have ignored these inevitable interrelationships. However, the responsible path was to recognize the interrelationships and try to craft an approach to PTC planning that took them fully into account. That is what FRA has attempted to do. In this response to comments, and with final rule amendments, we endeavor to assure that all parties fully understand what is intended and to ensure that the language we employ in rule text is as clear as we can make it.

FRA's comments in the preamble to the final rule were not intended to criticize the PHMSA rail routing rule, but rather to illuminate the significance of the difference between the two rules and to point out that a decision under the PHMSA rail routing rule concerning where PIH materials traffic will be routed is not necessarily determinative concerning which routes will receive

[1] Thus, for example, in most non-signal territory we would say that the method of operation is by track warrants. In territory with automatic block signals, the method of operation is typically by track warrant supplemented by indications of the automatic block signal system. In territory equipped with a traffic control system, the method of operation is by indications of the signal system. In territory equipped with a traffic control system and cab signals (with or without train control or train stop), the method of operation is still by indications of the signal system while the cab signals could provide authority for movement between interlockings. On the Northeast Corridor today between New Haven and Boston, the method of operation is by indications of the traffic control system and cab signals, supplemented by automatic train control and the Advanced Civil Speed Enforcement System (which together make up a form of PTC).

PTC. The two decisions, though related, differ significantly. At the same time, FRA does not intend to "redo" under the PTC rule any decisions made under the PHMSA rail routing rule. Although they are complementary, the two rules are not the same and do not have the same purposes. Again, under the PHMSA rail routing rule, routing of PIH materials shipments is reconsidered annually based on the overall safety and security risks posed at the time. Under the PTC rule, there is an orderly process for moving from signal systems and traffic patterns extant in 2008 to installation and operation of PTC systems by December 31, 2015. The presence of PIH materials shipments is a criterion for requiring installation of PTC if the traffic volume level on the line is 5 million gross tons or more. However, as noted above, the railroad's analysis under the PHMSA rail routing rule would not consider the positive safety effects of the installation of PTC unless the railroad intended to promptly install a PTC system on a particular line (risk mitigations planned for future years are not considered). By the same token, routing analysis conducted under the PTC rule will not affect current routings, since this could result in PIH materials traffic moving off of a line in 2010 despite the fact that PTC will not be installed until 2014 or 2015. Paragraph (b)(4)(i)(A)(*2*)(*ii*) attempts to bridge the timing differences between the two rules in a manner that achieves the goals of both rules while respecting the way each rule works. It appears that FRA did not succeed in doing so with the clarity intended, so FRA will clarify this provision.

FRA wishes to emphasize that the interrelationships between the PHMSA rule and this rulemaking are fundamental; not transient or topical. As PTC becomes fully effective on rail lines over the coming years, those routes will come to carry the overwhelming bulk of PIH materials traffic. If only a small network of PTC lines is built out on each railroad, impacts on PIH materials routing could be dramatic. Routing alternatives would diminish. Unlike today, when the great majority of the PIH materials traffic that takes the most direct route to destination with the least amount of switching and least exposure to derailment hazards, constricting PIH materials to a small PTC network has the potential to drive circuitous routings that could increase switching, introduce delays in transportation related to marshalling of trains, increase derailment and miscellaneous hazards, and even increase security risks due to routing through high threat urban areas. The final rule limits these potential adverse consequences by asking that—for planning purposes only—the railroads submit alternative routing analysis to support any requests to drop lines from the 2008 base (a period during which, it is undisputed, that most of the subject PIH materials traffic was moving by the most direct and expeditious route).

AAR is also incorrect in its reading of RSIA08. Under RSIA08, FRA is given the authority—reconfirming its pre-existing authority—to require PTC to be installed on lines whether or not they carry PIH materials traffic; FRA will discuss its statutory authority further in the response to AAR's comments to paragraph (b)(4)(i)(A)(2)(iii). As described in this document's section-by-section analysis, FRA is clarifying the substance of this paragraph in response to AAR's comments and has moved the text to a new § 236.1020.

3. Residual Risk Analysis

AAR also objected to and urges the deletion of § 236.1005(b)(4)(i)(A)(*2*)(*iii*), arguing that the RSIA08 directive is to address lines on which PIH materials or passengers are transported, and that a line with no PIH materials or passenger traffic poses no risk of the type that RSIA08 addresses through its PTC mandate. AAR does not believe there is a need for the industry to make the calculation required by paragraph (b)(4)(i)(A)(*2*)(*iii*). Accordingly, AAR believes that FRA should delete § 236.1005(b)(4)(i)(A)(*2*)(*iii*).

AAR believes that this requirement contrasts with § 236.1005(b)(4)(ii)(C), which contains a *de minimis* exception applicable where a railroad can show the risk of a PIH materials release to be negligible. According to AAR, it would appear that if the risk of a PIH materials release is negligible, that would be more significant under the RSIA08 than an analysis of the risk of PTC-preventable accidents. AAR asserts that if PIH materials were removed from a line segment, then the risk of a PIH materials release clearly would be negligible, thus providing no reason to require PTC. AAR believes that removal of PIH materials from a segment is the ultimate risk mitigation strategy.

If FRA were to retain § 236.1005(b)(4)(i)(A)(*2*)(*iii*), AAR asserts that its second sentence should be revised to plainly state that a railroad indeed has the discretion to make a compensating extension of PTC. Otherwise, according to AAR, that sentence implies, but does not clearly state, that if the analysis shows that the risk associated with the track segment exceeds the average comparable risk on lines required to be equipped with PTC because of PIH, then the railroad can choose not to install PTC on the track segment if it makes a compensating extension of PTC elsewhere.

AAR also notes that risk comparison requirements should be clearer. For instance, AAR states that FRA needs to determine the time period over which risk is to be measured. Comparing risk per route mile requires certain knowledge of the applicable host railroad track segments, which is not available to all tenant railroads that may be filing for an exception here. The analysis only becomes more difficult when determining whether an accident is PTC-preventable, which must be made on a case-by-case basis.

We disagree. RSIA08 clearly gives FRA the authority to require PTC on lines other than those identified in § 20157(a)(1)(C) of the statute and the need for this requirement is discussed in the final rule. The fact that the PHMSA rail routing rule may result in some rerouting of PIH materials traffic does not mean that FRA should ignore the residual safety risks to train crews, roadway workers, and the public at large of train operations and the transportation of non-PIH hazardous materials on the line formerly used to move the PIH materials traffic. Congress obviously wanted to make sure that passenger and PIH materials lines were addressed in FRA's PTC rule, and we did so in the final rule. But there is no reason to believe that the Congress was indifferent to the safety of employees or other members of the public or to communities whose water supplies might be polluted by non-PIH hazardous materials or spilled diesel fuel. Moreover, deaths of crew members from train collisions have exceeded deaths from release of PIH commodities over the past two decades. The public interest requires FRA to take this and other factors into consideration in determining whether to require the installation of PTC on lines from which PIH materials traffic is being removed, consistent with RSIA08 statutory authority. At a future date, FRA may also examine the appropriateness of requiring PTC to be installed on other rail lines not covered by the final rule.

AAR indicated that should FRA decide to retain paragraph (b)(4)(i)(A)(*2*)(*iii*), further clarification is needed as to how a railroad can compare the risk of PTC-preventable accidents on the line in question with the risk of PTC-preventable accidents on Class I lines in the U.S. required to be equipped with PTC because of the presence of PIH materials. AAR also requested that FRA plainly state that

where PTC would otherwise be required because the risk associated with the track segment exceeds the average comparable risk on lines required to be equipped with PTC, that the railroad has discretion to make a compensating extension of PTC elsewhere. The final rule amendments contained in this document provide that confirmation.

AAR correctly points out that details regarding the risk assessment technique used to make the comparison required under paragraph (b)(4)(i)(A)(*2*)(*iii*) need to be worked out and provided to the industry. The preamble to the final rule notes that this will be done, and FRA is working on risk evaluation methodology that was discussed at a meeting of the RSAC PTC Working Group conducted by webinar on March 24, 2010. As these amendments to the final rule were being prepared, FRA was working to place development of this methodology under contract, and the PTC Working Group was forming a task force to provide peer review for this effort. FRA expects to subsequently submit the methodology for notice and comment.

Given the limited time that has been available to arrive at this point in the regulatory process, a final risk assessment tool was not available by April 16, 2010, when each PTCIP was required to be filed. It is for this reason that FRA has decided to delay the effective date of paragraph (b)(4)(i)(A)(*2*)(*iii*), as revised, pending further notice. After the risk model is developed, AAR and other interested parties will be provided an opportunity for peer review of the methodology through the RSAC before the final agency decision-making process commences. FRA will solicit public comments on the model and will consider the public comments in deciding what final risk model should become effective, and will issue a notice announcing its decision. FRA contemplates that, when the provision goes into effect, FRA will determine the average risk value for lines with PIH materials required to be equipped with PTC and conduct the comparison utilizing the line segment data provided by the railroads for the subject lines. The risk evaluation methodology will also be made available to the railroads for their planning purposes (including proposal of any "risk swaps" that may be desirable, as further discussed below). A railroad may not remove a track segment from its PTCIP in accordance with § 236.1005(b)(4)(i) until the replacement for paragraph (b)(4)(i)(A)(*2*)(*iii*) contained in the new § 236.1020 becomes effective. However, under the new section, the line is not required to be equipped with PTC until the request for removal has been ruled upon.

AAR is correct that if a railroad would otherwise be required to install PTC on a line segment under paragraph (b)(4)(i)(A)(*2*)(*iii*), that railroad would be able to make a compensating extension of PTC rather than installing PTC on the line segment. FRA is therefore amending paragraph (b)(4)(i)(A)(*2*)(*iii*) to make explicit that if the railroad is required to install PTC on the subject line under the paragraph, it can avoid having to install PTC on the line if it agrees to install PTC on a line segment that would not otherwise be required to be equipped under the rule and the railroad demonstrates that the increment of risk reduction is at least as great as would be achieved by equipping the segment sought to be removed from the PTCIP. FRA is moving the substance of the modified paragraph to a new § 236.1020.

B. De Minimis Exception

Paragraph (b)(4)(ii)(A) provides for exclusion or removal of track segments carrying less than 100 PIH materials cars per year (loaded or residue) from the PTC baseline where there is a *de minimis* PIH materials safety risk and the line segments are not used for intercity or commuter passenger service. Paragraphs (b)(4)(ii)(B) and (b)(4)(ii)(C) include further requirements for the *de minimis* exception. AAR has filed comments on both provisions.

Paragraph (b)(4)(ii)(B) provides that absent special circumstances related to specific hazards presented by operations of the line segment, FRA will approve a request for relief under this paragraph for a rail line segment:

(*1*) Consisting exclusively of Class 1 or 2 track;

(*2*) That carries less than 15 million gross tons annually;

(*3*) Has a ruling grade of less than 1 percent; and

(*4*) On which any train transporting a car containing PIH materials (including a residue car) is operated under conditions of temporal separation from other trains using the line segment.

The NTSB believes that a broad-based type of *de minimis* exception like the one proposed by AAR and its member railroads in response to the notice of proposed rulemaking (NPRM) preceding the final rule and based solely on the number of PIH material cars transported annually cannot be supported on a safety basis and would represent a departure from the intent of the statute. According to the NTSB, without proper federal oversight—including a detailed safety assessment of each affected railroad territory—unforeseen circumstances might affect the safe operation of trains.

The NTSB believes that if a *de minimis* exception is allowed based solely on the number of PIH materials cars transported annually, some railroads might consider establishing annual PIH materials car limits on segments of track in order to be exempt from the requirements of implementing a PTC system on that segment. Therefore, the NTSB supports the exclusion criteria that FRA uses in this section to evaluate each request on a case-by-case basis for each segment of track to allow the FRA to apply its inherent discretionary authority to grant *de minimis* exceptions that are consistent with safety and in the public interest.

AAR states that FRA needs to modify the *de minimis* exception provided under § 236.1005(b)(4)(ii)(B). AAR notes that the preamble to the final rule at 75 FR 2,622 explains that this exception is limited to Class 1 and 2 track because, "[l]imiting maximum authorized train speed reduces the kinetic energy available in any accident, and the forces impinging on the tank should be sustainable." Accordingly, AAR asserts that the exception should not be limited to Class 1 and 2 track, but should instead apply to operations subject to a maximum speed of 25 miles per hour.

AAR suggests that FRA should use contemporaneous train speeds, rather than track class to define the limits of this portion of the *de minimis* exception. According to AAR, it would make the provision more "usable." But in order to have confidence that appropriate speed restrictions were imposed and complied with, PTC would be required. Crews operating on particular rail lines are qualified on the physical characteristics of those lines, including the prevailing maximum authorized speed. They are acclimated to observing those speeds. What AAR proposes is that, in order to limit collision speeds on lines where trains may operate at 49 miles per hour or more, speeds be temporarily reduced for any train carrying PIH materials. But that would require special designation of trains carrying PIH materials, special attention by dispatchers to imposition and removal of appropriate speed restrictions on other trains using the line segment, and rigorous compliance by crews with these speed restrictions. Those steps would introduce multiple new opportunities for human error, and PTC is largely about prevention of human errors. FRA does not find this suggestion practical or consistent with safety.

AAR also urges FRA to specify the showing required to remove a line from the PTCIP on the grounds that the risk of a TIH release is negligible. AAR points to § 236.1005(b)(4)(ii)(C), which provides that FRA will "consider" relief from the obligation to install PTC for line segments with annual traffic levels under 15 million gross tons (and under 100 TIH shipments) where the risk of a release of PIH materials is "negligible." It is unclear to AAR what constitutes a "negligible" risk and what discretion FRA would exercise should there be a showing of negligible risk. AAR further requests that FRA set a quantitative threshold for negligible risk, and suggests "one in a million" as the criterion. AAR references standard MIL–STD–882C.

FRA notes that standard MIL–STD–882C is recognized in Appendix C to 49 CFR part 236 as an available standard for evaluating the safety of train control systems. The difficulties with using this type of criterion as a decisional criterion, as opposed to a convention in hazard analysis, are manifold. First, the actual metric is always unclear. We will assume that AAR may refer to release of a reportable quantity of a PIH material. The apparent suggestion is probability per route mile. However, it is unclear what should be the level of chance and the measurable time period (*e.g.,* calendar hours, operating hours, PTC system life-cycle). Given that PIH materials releases are already infrequent events, and the potential for catastrophe from a single release is significant, it is also unclear how this criterion would relate to the judgments that the Congress has already made with respect to PIH materials transportation. AAR does not provide any reasoning or evidence sufficient to prove that the criterion is satisfied. AAR should be aware that the industry and FRA have experienced significant difficulty in developing tools for comparative risk assessment related to train control, which is the easier task in contrast with use of absolute risk criteria. Further, FRA is not persuaded that what is required here is the expenditure of large amounts of money to avoid a statutory mandate. Available funds should be expended to satisfy the mandate. FRA will, of course, welcome well-presented hazard analyses of a simple and direct sort (*see* FRA's *Collision Analysis Guide,* available at *http://www.fra.dot.gov/us/content/1900*). At the end of the day, in this particular frame of reference, FRA will be looking to achieve confidence that the chance of an unintended release of PIH material is negligible (which, given emphatic congressional action in this arena is best described as "improbable" in conventional risk assessment terminology), given the chances for severe mishaps on the particular line segment in question. Quantitative proofs are neither feasible nor required.

IV. Section-by-Section Analysis

Section 236.100 Requirements for Positive Train Control Systems

In the final rule, FRA attempted to describe in §§ 236.1005(b)(4)(i)(A)(*2*)(*ii*) and (*iii*) exactly what analysis was required and what standard would be applied if a railroad wished to remove from its PTCIP a line that carried PIH materials in 2008. FRA continues to believe that the language expresses what was intended unambiguously, as further amplified in the preamble. However, without question the provision compresses into a few words concepts that some have had difficulty in parsing; and that presents an important challenge. Clarity in expression is always a central objective in writing a rule. Accordingly, FRA has taken another run at this drafting problem; and, in doing so, has broken out both this and the next provision (dealing with residual risk) for separate treatment.

For the reasons stated above, FRA first removes from § 236.1005(b)(4)(i)(A)(*1*) the words "absent special circumstances as set forth in writing (e.g., because of anticipated traffic growth in the near future)."

FRA then removes the current text of (b)(4)(i)(A)(*2*) and inserts in its place a cross reference to a new section 236.1020. This new section follows the section on passenger "main line" exceptions, and it is intended that utilizing a separate section will provide flexibility to express the necessary concepts with greater clarity.

Section 236.1011 PTC Implementation Plan Content Requirements

While not part of the scope of the further comments requested, FRA would like to take this opportunity to make some minor, non-substantive, clarifying amendments.

First, FRA recognizes that there was a typographical error in § 236.1011(a)(6)(iv)(B). In that paragraph, there is a cross-reference to paragraph (a)(6)(iii)(A). While that cross-referenced paragraph existed in the proposed rule, it was moved to (a)(6)(iv)(A) in the final rule. The cross-reference should have been changed. We do so here.

Section 236.1019 Main Line Track Exceptions

Second, FRA would also like to clarify its intent regarding § 236.1019(c). With this language, FRA merely meant to remind regulated entities that observance of § 236.1019(c) does not diminish or obviate the applicability of § 236.0. FRA intended to state that a "limited operations exception" would not be considered for any segment of track that did not comport with the requirements of § 236.0. The qualifying language "(at speeds not exceeding those permitted under § 236.0 of this part)" was meant to highlight that the requirements § 236.0, based partially on speed limits, were still applicable.

FRA recognizes that the parenthetical language in that paragraph reading "(at speeds not exceeding those permitted under § 236.0 of this part)" may be confusing.

FRA intended to indicate that if a limited operations exception were provided under § 236.1019(c), thus allowing a railroad not to implement and operate a PTC system on a particular track segment, the railroad would still be required to implement and operate any other systems required by § 236.0. For instance, if a limited operations exception is approved and applied to a particular track segment where trains may operate at or in excess of 80 miles per hour, the railroad would be required to install, or more likely maintain, and operate an automatic cab signal, automatic train stop, or automatic train control system in accordance with § 236.0(d).

While FRA's intent remains as stated above, FRA hereby amends § 236.1019(c) for the purposes of ensuring clarity. Thus, FRA will strike the aforementioned qualifying language so that the parenthetical text reads: "(operating in accordance with § 236.0 of this part)".

Section 236.1020 Exclusion of Track Segments for Implementation Due to Cessation of PIH Materials Service or Rerouting

As noted above, FRA is adding a new section that specifically addresses exclusion of track segments due to cessation or rerouting of PIH materials. Section 236.1020 begins with paragraph (a), which explains that it sets forth the conditions under which track segments identified in the 2008 baseline described in § 236.1005(b)(2) may be removed from the PTCIP. A track segment qualified for removal may be removed after FRA approves a request contained in the PTCIP or a request for amendment (RFA) filed prior to

required installation of PTC on the subject track segment. This process would thus be available throughout the initial implementation period that extends to the end of 2015.

Paragraph (b) contains the three tests that must be satisfied to remove a line due to cessation of PIH materials transportation over the track segment. Paragraph (b)(1) deals with local traffic. In railroad parlance, local traffic is freight traffic that originates or terminates on the particular rail line or terminal. A railroad that wishes to remove a line segment under paragraph (b)(1) must first establish that the line is free of local PIH materials traffic or will be before the line would otherwise be required to be equipped. Where there are still local customers whose business involves production or use of PIH materials that could request service but are not expected to do so, the section explains that obtaining statements from those customers that they have no plan to do so should be sufficient. Railroads are not required to anticipate future requests for service. (The Chlorine Institute suggests that substantially the entire rail system should be equipped, so that shippers are not chilled from requesting service at new locations; however, there is already provision for requesting service at new locations, after which PTC must be installed if traffic levels meet the required threshold.)

Paragraph (b)(2) deals with "overhead" traffic, which in rail parlance is traffic that does not originate or terminate on the line in question. Here it must be shown that the traffic has been rerouted or will be rerouted in accordance with the PHMSA rule. However, exclusively for the purpose of analysis, the analysis must introduce the hypothetical condition that all of the carrier's practicable alternative routes for moving the PIH materials traffic are assumed to be equipped with PTC. This is a valid assumption for purposes of this rulemaking, since PTC must be installed on all Class I railroad routes carrying PIH materials and more than 5 million gross tons of traffic according to RSIA08; FRA provided relief from this requirement for lines with *de minimis* PIH materials safety risk. The required analysis permits FRA to determine whether selective installation of PTC would create routing distortions under the PHMSA rule, which FRA administers and enforces. If installing PTC only on one or more alternative routes to the route under examination would result in or facilitate rerouting off the subject line to a more circuitous route—a route that might involve greater risk of derailment, greater exposure to collisions and secondary derailments at highway-rail crossings, more switching (which increases the likelihood of accidents), a longer time in transportation, and even more traversing of high threat urban areas—then the rule would generally require that PTC be installed on the subject line. This approach would uphold the values of both the 9/11 Commission Act and the RSIA08 while ensuring that PTC is provided on a reasonable scale across the core of the national rail system. However, the paragraph also allows for exceptions where the overall safety and security risks on the track segment in question is substantially the same as that on the alternate route, assuming both to be equipped with PTC—i.e., where the difference is small. FRA also referred in the final rule to whether "demonstrated considerations of practicability indicate consolidation of the traffic on that next preferred alternative route." FRA had intended this to be an open invitation for each railroad to state its case regarding issues of operational and engineering practicability (*e.g.,* more effective use of key trains that are subject to the 50 miles per hour restriction in the PHMSA rail routing rule, cost considerations related to equipping of the subject line, etc.). However, on the railroads' behalf, AAR asserted only that the provision is "confusing." FRA is satisfied that AAR missed the point of the larger provision and thus lacked context within which to recognize and affirm language favorable to its members. FRA is hopeful that the global redrafting of the subject provisions, together with further explanation language with regard to this specific provision, is helpful in that regard.

Paragraph (b)(3) deals with line segments that pass the first two tests. This provision is included because PTC is not just directed at the reduction of risk from transportation of PIH materials and rail passengers. As evidenced by NTSB reports and recommendations, testimony before Congress on legislation leading to RSIA08, and the PTC core functions themselves, PTC confers safety benefits that include the following:

- Prevention of crew fatalities and injuries in train-to-train collisions;
- Protection of roadway workers within the limits of their authorities; and
- Protection of communities and natural resources from release of other hazardous materials in PTC-preventable accidents.

FRA reviewed PTC-preventable accidents over the period 2002–2008 and determined that 35 train crew fatalities occurred in the period, only two of which resulted from PIH materials and only 1 of which occurred in a passenger train accident. This can be compared with 29 passenger fatalities in the same period (24 of them a Chatsworth, CA) and 10 fatalities from release of PIH materials (9 of which were at Graniteville, SC—the single most serious accident of its kind since at least 1978). For further comparison, the most deadly rail accident which involved hazardous materials was at Waverly, Tennessee, in 1978. The Waverly accident involved release and ignition of flammable compressed gas (not a PIH material) during a re-railing operation and illustrates the risk posed by hazardous materials other than PIH materials.

Accordingly, FRA is seeking to ensure that the core of the national rail network, which would be equipped with PTC under the absolute minimum mandate of the RSIA08 strictly construed, is at least seriously reviewed for installation of PTC. In that regard, FRA notes that the rule would satisfy the requirements of the statute and work perfectly well if the flexibility afforded the railroads by §§ 236.1005(b)(4)(i)(A)(2) and 236.1020 were not included in the rule. Those provisions are severable. Paragraph (b)(3) thus describes the showing that will be necessary to evaluate the residual risks after removal of PIH materials traffic from a subject line.

At the time of the final rule, FRA called attention to the need to develop a risk evaluation methodology to estimate residual risk on rail lines and compare that risk to the national average risk on non-passenger lines with 5 million gross tons of annual freight traffic and some PIH materials traffic. That developmental process is underway and must be completed before railroads are required to commit resources for installation of PTC on any track segments pending for review under paragraph (b)(3).

Paragraph (b)(3)(i) informs the regulated community that FRA will develop the risk evaluation methodology through a separate rulemaking proceeding. As detailed earlier in the preamble discussion of "Residual Risk Analysis", FRA has retained an independent contractor to help it initially develop the risk evaluation methodology. FRA intends to utilize the RSAC and a PTC Working Group to provide peer review of the initially developed methodology. After completion of peer review and changes made based upon that review, FRA intends to issue an NPRM to solicit public comments on the sufficiency of the developed methodology and the

advisability of using such a model. FRA will consider the public comments before deciding what, if any, final risk evaluation methodology should become effective. Once a determination is made, FRA will then issue a final rule to complete the proceeding, which will either implement the risk evaluation methodology or remove the residual risk provision from the regulation.

If FRA determines that a particular risk model should be implemented in the final rule, then when the provision goes into effect, FRA will determine the average risk value for lines with PIH materials required to be equipped with PTC and conduct the comparison utilizing the line segment data provided by the railroads for the subject lines. In this scenario, FRA also anticipates that the methodology and related notices might identify automatic approval of specific types of line segments, when such line segments pose minimal risks. This approach could be similar to that utilized in regard to lines considered to have *de minimis* PIH risks identified in § 236.1005(b)(4)(ii) of the final rule.

Lines identified for removal by the railroad will be considered to be pending for decision during the period that the methodology is being developed, and should be noted as such in the PTCIP. Any such line may be placed at the back of the order for PTC installation (within the sequence required to be shown in the PTCIP) if the railroad believes that it is warranted, subject to subsequent FRA review and a final decision. A railroad will not be required to equip any line with PTC under paragraph (b)(3) until the risk evaluation methodology is finalized, the railroad is provided an opportunity to supplement its request, and a final decision is made regarding the railroads request for removal of that track line or track segment.

Paragraph (c) recognizes that the 2008 baseline for analysis should not become a restraint that bars recognition of changing or equally relevant risk elsewhere. Accordingly, the provision states that, if a track segment qualifies for removal from the PTCIP under paragraphs (b)(1) and (b)(2) of this section but does not meet the test of paragraph (b)(3), the railroad may nevertheless request that the PTCIP be amended to remove the track segment based upon compensating reductions in the risk related to PTC-preventable accidents based on installation of PTC technology on one or more track segments not otherwise required to be equipped. Upon a proper showing that the other installation(s) fully compensate using the risk evaluation methodology accepted for use under paragraph (b)(3), FRA approves the substitution. AAR seemed to be receptive to this flexibility, but asked that its understanding be confirmed. We attempt to do so in this revision.

V. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

These amendments to the final rule have been evaluated in accordance with existing policies and procedures, and determined to be significant under both Executive Order 12866 and DOT policies and procedures. 44 FR 11034 (Feb. 26, 1979). Although the final rule met the criteria for being considered an economically significant rule under those policies and procedures, the amendments contained in this document are not considered economically significant because they either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the final rule. The economic impact of the amendments and clarifications contained in this document will generally reduce the cost of compliance with the rule. However, the cost reduction is not easily quantified and does not significantly alter FRA's original analysis of the cost and benefits associated with the final rule. Consequently, FRA strongly supports the economic arguments and estimates advanced in its RIA for the final rule.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities. FRA certifies that these amendments to the final rule do not have a significant impact on a substantial number of small entities. Because the amendments contained in this document either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, FRA has concluded that there are no substantial economic impacts on small units of government, businesses, or other organizations.

C. Paperwork Reduction Act

These amendments of the final rule do not significantly change any of the information collection requirements contained in the original final rule. The OMB control number for that information collection is 2130–0553, and it has been approved through May 31, 2013.

D. Federalism Implications

FRA believes it is in compliance with Executive Order 13132, "Federalism." *See* 64 FR 43255 (Aug. 4, 1999). Because these amendments to the final rule either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, this document will not have a substantial 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. This document will not have federalism implications that impose any direct compliance costs on state and local governments.

E. Environmental Impact

FRA has evaluated these amendments to the final rule in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this document is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c) of FRA's Procedures.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $140,800,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. Because the amendments

contained in this response document either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, this document will not result in the expenditure, in the aggregate, of $100,000,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated these amendments to the final rule in accordance with Executive Order 13211. Because the amendments contained in this document either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, FRA has determined that this document will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

H. Privacy Act

FRA wishes to inform all interested parties that anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Interested parties may also review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or visit *http://www.regulations.gov.*

List of Subjects in 49 CFR Part 236

Penalties, Positive train control, Railroad safety, Reporting and recordkeeping requirements.

The Rule

■ In consideration of the foregoing, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 236—[AMENDED]

■ 1. The authority citation for part 236 is revised to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20157, 20301–20303, 20306, 20501–20505, 20701–20703, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. In § 236.1005, revise paragraph (b)(4)(i)(A)(*2*) to read as follows:

§ 236.1005 Requirements for Positive Train Control systems.

* * * * *

(b) * * *

(4) * * *

(i) * * *

(A) * * *

(*2*) In the case of current or planned cessation of PIH materials traffic over a track segment, FRA will approve an exclusion of a line from the PTCIP if the railroad satisfies the requirements of § 236.1020.

* * * * *

■ 3. In § 236.1011, revise paragraph (a)(6)(iv)(B) to read as follows:

§ 236.1011 PTC Implementation Plan content requirements.

(a) * * *

(6) * * *

(iv) * * *

(B) Include each tenant railroad's response to the host railroad's written request made in accordance with paragraph (a)(6)(iv)(A) of this section;

* * * * *

■ 4. In § 236.1019, revise the introductory text of paragraph (c) to read as follows:

§ 236.1019 Main line track exceptions.

* * * * *

(c) *Limited operations exception.* FRA will consider an exception in the case of a track segment used for limited operations (operating in accordance with § 236.0 of this part) under one of the following sets of conditions:

* * * * *

■ 5. Add a new § 236.1020 to subpart I to part 236 to read as follows:

§ 236.1020 Exclusion of track segments for implementation due to cessation of PIH materials service or rerouting.

(a) *Purpose and scope.* This section sets forth the conditions under which track segments identified in the 2008 baseline described in § 236.1005(b)(2) may be removed from the PTCIP. A track segment qualified for removal under this section may be removed after FRA approves a request contained in the PTCIP or an RFA filed prior to the required and scheduled PTC installation date for the subject track segment.

(b) *Cessation of PIH materials service.* Except as provided in paragraph (c) of this section, the following three conditions must all be satisfied in order to justify removal of a track segment from the PTCIP:

(1) *Local service.* The railroad must affirm that there is no remaining local PIH materials traffic expected on the track segment, or that service is expected to cease as of a date certain prior to December 31, 2015. In the case of future cessation of local service, the expectation may be documented by statements from all current PIH materials shippers and/or consignees. The railroad is not required to anticipate future requests for service not in keeping with prior service patterns. (*See* § 236.1005(b)(3)).

(2) *Overhead traffic.*

(i) To the extent that the track segment carried PIH materials traffic other than local traffic in 2008, the railroad must establish that current or prospective rerouting to one or more alternate track segments is justified. In making this showing, the railroad must assume, for purposes of analysis only, that both the subject track segment and the alternative route(s) will be equipped and operated with PTC. Rerouting will be justified if the analysis is conducted in accordance with the same procedures and using the same methodology as required for safety and security route analysis under 49 CFR 172.820, with appropriate quantitative weight given to risk reduction effected by installation of a PTC system. If the track segment in question is not clearly the route posing the least overall safety and security risks, then removal of the line from the PTCIP may be granted.

(ii) However, unlike analysis under part 172, FRA will consider the case for rerouting and removal of the line from the PTCIP to be made if the alternative(s) to the track segment sought to be removed has substantially the same overall safety and security risks as the subject routes under the stipulated conditions for analysis. In determining whether risk is substantially the same, FRA will consider the volume of traffic diverted, and such other factors as safety may require.

(3) *Residual risk.* In the case of a track segment for which cessation of local service is established under paragraph (b)(1) of this section and for which analysis shows any overhead PIH materials traffic could properly be

rerouted under paragraph (b)(2) of this section, the railroad shall also establish that the remaining risk arising from rail operations on the track segment—pertaining to events that can be prevented or mitigated in severity by a PTC system—is less than the average equivalent risk per route mile on track segments required to be equipped with PTC because of annual gross tonnage and the presence of PIH materials traffic (excluding track segments also carrying passenger traffic). Such average equivalent risk shall be determined as of a time prior to installation of PTC on the line segments. This provision of the rule requires a future rulemaking to finalize and implement a risk evaluation methodology. Lines identified for removal subject to this provision will not be required to be equipped with PTC prior to the issuance of a final rule detailing the methodology.

(i) FRA will develop a risk evaluation methodology for the purpose of conducting the analysis required pursuant to paragraph (b)(3) of this section. The risk evaluation methodology will be finalized through a separate rulemaking proceeding that will permit all interested parties to provide input on the specific methodology and, whether that methodology should be employed. If in the rulemaking proceeding FRA determines that a risk methodology should not be employed, then FRA will amend this final rule to eliminate the residual risk provisions.

(ii) Any track segment qualifying for consideration under paragraph (b)(3) of this section and identified by the railroad for requested removal from the PTCIP shall be considered to be "pending for decision" until such time as FRA has published the risk evaluation methodology identified in paragraph (b)(3)(i) of this section. If a final risk evaluation methodology is employed, the railroad may be requested to provide supplemental information related to its request for removal of specific lines. The railroad is not required to commence installation of PTC on any track segment "pending for decision" under this paragraph, until a final FRA determination is made.

(c) If a track segment qualifies for removal from the PTCIP under paragraphs (b)(1) and (b)(2) of this section but does not meet the test of paragraph (b)(3) of this section, the railroad may nevertheless request that the PTCIP be amended to remove the track segment based upon compensating reductions in the risk related to PTC-preventable accidents based on installation of PTC technology on one or more track segments not otherwise required to be equipped. Upon a proper showing that the increment of risk reduction is at least as great on the substitute line as it would be on the line sought to be excluded from the PTCIP, FRA may approve the substitution.

Issued in Washington, DC, on September 15, 2010.

Joseph C. Szabo,

Administrator.

[FR Doc. 2010–24102 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 383, 384, 390, 391, and 392

[Docket No. FMCSA–2009–0370]

RIN 2126–AB22

Limiting the Use of Wireless Communication Devices

AGENCY: Federal Motor Carrier Safety Administration, DOT.

ACTION: Final rule.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) prohibits texting by commercial motor vehicle (CMV) drivers while operating in interstate commerce and imposes sanctions, including civil penalties and disqualification from operating CMVs in interstate commerce, for drivers who fail to comply with this rule. Additionally, motor carriers are prohibited from requiring or allowing their drivers to engage in texting while driving. FMCSA amends its commercial driver's license (CDL) regulations to add to the list of disqualifying offenses a conviction under State or local traffic laws or ordinances that prohibit texting by CDL drivers while operating a CMV, including school bus drivers. Recent research commissioned by FMCSA shows that the odds of being involved in a safety-critical event (e.g., crash, near-crash, unintentional lane deviation) is 23.2 times greater for CMV drivers who engage in texting while driving than for those who do not. This rulemaking increases safety on the Nation's highways by reducing the prevalence of or preventing certain truck- and bus-related crashes, fatalities, and injuries associated with distracted driving.

DATES: The final rule is effective October 27, 2010.

ADDRESSES: For access to the docket to read background documents, including those referenced in this document, or to read comments received, go to *http://www.regulations.gov* at any time and insert FMCSA–2009–0370 in the "Keyword" box, and then click "Search." You may also view the docket online by visiting the Docket Management Facility in Room W12–140, DOT Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, contact the Federal Motor Carrier Safety Administration, Vehicle and Roadside Operation Division, at 202–366–1225 or *FMCSA_MCPSV@dot.gov*.

SUPPLEMENTARY INFORMATION:

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I. Abbreviations

AAMVA	American Association of Motor Vehicle Administrators.
Advocates	Advocates for Highway and Auto Safety.
AIA	American Insurance Association.
APTA	American Public Transportation Association.
ATA	American Trucking Associations, Inc.
ATU	Amalgamated Transit Union.
CDL	Commercial Driver's License.
CeRI	Cornell eRulemaking Initiative.
CMV	Commercial Motor Vehicle.
CTA	Chicago Transit Authority.

CVSA	Commercial Vehicle Safety Alliance.
DOT	U.S. Department of Transportation.
FARS	Fatality Analysis Reporting System.
FMCSA	Federal Motor Carrier Safety Administration.
FMCSRs	Federal Motor Carrier Safety Regulations.
FR	Federal Register.
FRA	Federal Railroad Administration.
GES	General Estimates System.
MCSAC	Motor Carrier Safety Advisory Committee.
MCSAP	Motor Carrier Safety Assistance Program.
NAICS	North American Industry Classification System.
NCSL	National Conference of State Legislators.
NGA	National Governors Association.
NHTSA	National Highway Traffic Safety Administration.
NMVCCS	National Motor Vehicle Crash Causation Survey.
NPRM	Notice of Proposed Rulemaking.
NSC	National Safety Council.
NTSB	National Transportation Safety Board.
OMB	Office of Management and Budget.
OOIDA	Owner-Operator Independent Drivers Association, Inc.
PAR	Population Attributable Risk.
TTD	Transportation Trades Department, AFL–CIO.
TWU	Transportation Workers Union of America, AFL–CIO.
UMA	United Motorcoach Association.
VTTI	Virginia Tech Transportation Institute.

II. Background

On April 1, 2010, FMCSA published a notice of proposed rulemaking in the **Federal Register** (75 FR 16391). FMCSA reviewed the over 400 public comments and made some changes in the final rule in response. These changes are described in part IV, Discussion of the Final Rule, Section-by-Section, of the preamble.

A. Legal Authority

FMCSA amends the Federal Motor Carrier Safety Regulations (FMCSRs): (1) To prohibit texting using electronic devices by certain drivers while operating CMVs in interstate commerce; (2) to provide sanctions for certain drivers convicted of texting while operating a CMV in interstate commerce, including civil penalties and/or disqualification from driving CMVs, as defined in 49 CFR 390.5, for a specified period of time; and (3) to provide sanctions for CDL drivers convicted of violating a State or local traffic law or ordinance prohibiting texting while operating a CMV, specifically, a disqualification for a specified period of time from operating any CMV. The authority for this rule derives from the Motor Carrier Safety Act of 1984 (Pub. L. 98–554, Title II, 98 Stat. 2832, Oct. 30, 1984), 49 U.S.C. chapter 311 (1984 Act), and the Commercial Motor Vehicle Safety Act of 1986 (Title XII of Pub. L. 99–570, 100 Stat. 3207–170, Oct. 27, 1986), 49 U.S.C. chapter 313 (1986 Act).

The 1984 Act provides authority to regulate the safety of operations of CMV drivers and motor carriers and vehicle equipment. It requires the Secretary of Transportation to "prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles" (49 U.S.C. 31136(a)). Although this authority is very broad, the 1984 Act also includes specific requirements:

> At a minimum, the regulations shall ensure that—(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators. *Id.*

This rule is based primarily on 49 U.S.C. 31136(a)(1), which requires regulations that ensure that CMVs are operated safely, and secondarily on section 31136(a)(2), to the extent that drivers' texting activities might impact their ability to operate CMVs safely. The changes improve the safety of drivers operating CMVs. This rule does not address the physical condition of drivers (49 U.S.C. 31136(a)(3)), nor does it impact possible physical effects caused by driving CMVs (49 U.S.C. 31136(a)(4)).

The applicability to CMV drivers of the relevant provisions of the FMCSRs (49 CFR subtitle B, chapter III, subchapter B), is governed by whether the drivers involved are employees operating a CMV. The 1984 Act defines a CMV as a self-propelled or towed vehicle used on the highways to transport persons or property in interstate commerce that either: (1) Has a gross vehicle weight/gross vehicle weight rating of 10,001 pounds or greater; (2) is designed or used to transport more than 8 passengers (including the driver) for compensation; (3) is designed or used to transport more than 15 passengers (including the driver), not for compensation; or (4) is transporting any quantity of hazardous materials requiring placards to be displayed on the vehicle (49 U.S.C. 31132(1)). All employees operating CMVs are subject to the FMCSRs, except those who are employed by Federal, State, or local governments (49 U.S.C. 31132(2)).

In addition to the statutory exemption of government employees, there are several other regulatory exemptions in the FMCSRs that are authorized under the 1984 Act, including, among others, one for school bus operations and one for CMVs designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation (49 CFR 390.3(f)(1) and (3)—(7)). The school bus operations exemption only applies to interstate transportation of school children and/or school personnel between home and school. This exemption is not based on any statutory provisions, but is instead a discretionary rule promulgated by the Agency. Therefore, FMCSA has authority to modify the exemption. Modification of the school bus operations exemption requires the Agency to find that such action "is necessary for public safety, considering all laws of the United States and States applicable to school buses"

(former 49 U.S.C. 31136(e)(1)).[1] Likewise, FMCSA has authority to modify the non-statutory exemption for small passenger-carrying CMVs not for direct compensation; however, FMCSA is not required to make a finding that such action is "necessary for public safety."[2] Other than transportation covered by statutory exemptions, FMCSA has authority to prohibit texting by drivers operating CMVs, as defined above.

For any violations by CMV drivers or employers of the requirements adopted in this final rule, civil penalties may be imposed on drivers, in an amount up to $2,750, and on employers, in an amount up to $11,000 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and Appendix B, paragraphs (a)(3) and (4)). Disqualification of a CMV driver for violations of the Act and its regulations is also within the scope of the Agency's authority under the 1984 Act. Such disqualifications are specified by regulation for other violations (49 CFR 391.15). In summary, both a texting prohibition and associated sanctions, including civil penalties and disqualifications, are authorized by statute and regulation for operators of CMVs, as defined above, in interstate commerce, with limited exceptions. However, before prescribing any regulations under the 1984 Act, FMCSA must consider their costs and benefits (49 U.S.C. 31136(c)(2)(A)).

The 1986 Act, which authorized creation of the CDL program, is the basis for State licensing programs for certain large CMVs. There are several key distinctions between the authority conferred under the 1984 Act and that under the 1986 Act. First, the CMV for which a CDL is required is defined under the 1986 Act, in part, as a motor vehicle operating "in commerce," a term separately defined to cover broadly both interstate commerce and operations that "affect" interstate commerce (49 U.S.C. 31301(2), (4)). Also under the 1986 Act, a CMV means a motor vehicle used in commerce to transport passengers or property that: (1) Has a gross vehicle weight/gross vehicle weight rating of 26,000 pounds or greater; (2) is designed to transport 16 or more passengers including the driver; or (3) is used to transport certain quantities of "hazardous materials," as defined in 49 CFR 383.5 (49 U.S.C. 31301(4)). In addition, a provision in the FMCSRs implementing the 1986 Act recognizes that all school bus drivers (whether government employees or not) and other government employees operating vehicles requiring a CDL (*i.e.,* vehicles above 26,000 pounds in most States, or designed to transport 16 or more passengers) are subject to the CDL standards set forth in 49 CFR 383.3(b).

There are several statutory and regulatory exceptions from the CDL requirements, which include the following individuals: active duty military service members who operate a CMV for military purposes (a mandatory exemption for the States to follow) (49 CFR 383.3(c)), farmers, firefighters, CMV drivers employed by a unit of local government for the purpose of snow/ice removal, and persons operating a CMV for emergency response activities (all of which are permissive exemptions for the States to implement at their discretion) (49 CFR 383.3(d)). Certain other drivers could be issued restricted CDLs under 49 CFR 383.3(e)–(g), such drivers may be covered by a texting disqualification under the 1986 Act.

The 1986 Act does not expressly authorize the Agency to adopt regulations governing the safety of operations of CMVs by drivers required to obtain a CDL. Most of these drivers are subject to safety regulations under the 1984 Act, as described above. The 1986 Act, however, specifically authorizes the disqualification of CDL drivers for various types of offenses. This is true even if drivers have not obtained a CDL and are therefore operating a CMV illegally. Related rulemaking authority exists to include serious traffic violations as grounds for such disqualifications (49 U.S.C. 31301(12) and 31310).

Further, in addition to specifically enumerated "serious traffic violations," the 1986 Act allows FMCSA to designate violations by rulemaking if the underlying offense is based on the CDL driver committing a violation of a "State or local law on motor vehicle traffic control" (49 U.S.C. 31301(12)(G)). The FMCSRs state, however, that unless and until a CDL driver is convicted of the requisite number of specified offenses within a certain time frame (described below), the required disqualification may not be applied (49 CFR 383.5 (defining "conviction" and "serious traffic violation") and § 383.51(c)).

Under the statute, a driver who, in a 3-year period, commits 2 serious traffic violations involving a CMV operated by the individual must be disqualified from operating a CMV for at least 60 days. A driver who, in a 3-year period, commits 3 or more serious traffic violations involving a CMV operated by the individual must be disqualified from operating a CMV for at least 120 days (49 U.S.C. 31310(e)(1)–(2)). FMCSA determined that violations by CDL drivers of State motor vehicle traffic control laws prohibiting texting while driving CMVs should result in a disqualification under this provision, because texting results in distracted driving and increases the risk of CMV crashes, fatalities, and injuries. Consequently, under its statutory authority to find that the violation of a State texting law constitutes a serious traffic violation for CMV drivers, FMCSA may exercise its rulemaking authority to address this major safety risk by requiring the States to disqualify CDL drivers who violate such laws.

FMCSA is authorized to carry out these statutory provisions by delegation from the Secretary of Transportation as provided in 49 CFR 1.73(e) and (g).

B. Overview of Driver Distraction and Texting

This rulemaking addresses one type of driver distraction. Driver distraction can be defined as the voluntary or involuntary diversion of attention from the primary driving tasks due to an object, event, or person that shifts the attention away from the fundamental driving task. The diversion reduces a driver's situational awareness, decision making, or performance; and it may result in a crash, near-crash, or unintended lane departure by the driver.

In an effort to understand and mitigate crashes associated with driver distraction, the U.S. Department of Transportation (DOT) has been studying the distracted driving issue with respect to both behavioral and vehicle safety countermeasures. Researchers and writers classify distraction into various categories, depending on the nature of their work. In work involving equipment such as vehicles, one distraction classification system includes three categories: visual (taking

[1] Former section 31136(e)(1) was amended by section 4007(c) of the Transportation Equity Act for the 21st Century, Public Law 105–178, 112 Stat. 107, 403 (June 9, 1998) (TEA–21). However, TEA–21 also provides that the amendments made by section 4007(c) "shall not apply to or otherwise affect a waiver, exemption, or pilot program in effect on the day before the date of enactment of [TEA–21] under * * * section 31136(e) of title 49, United States Code." Section 4007(d), TEA–21, 112 Stat. 404 (set out as a note under 49 U.S.C. 31136). The exemption for school bus operations in 49 CFR 390.3(f)(1) became effective on November 15, 1988, and was adopted pursuant to section 206(f) of the 1984 Act, later codified as section 31136(e) (*Federal Motor Carrier Safety Regulations; General,* 53 FR 18042–18043, 18053 (May 19, 1988) and section 1(e), Pub. L. 103–272, 108 Stat 1003 (July 5, 1994)). Therefore, any action by FMCSA affecting the school bus operations exemption would require the Agency to comply with former section 31136(e)(1).

[2] The exemption in 49 CFR 390.3(f)(6) was not adopted until 2003, after the enactment of TEA–21. See *Safety Requirements for Operators of Small Passenger-Carrying Commercial Motor Vehicles Used In Interstate Commerce,* at 68 FR 47860 (Aug. 12, 2003).

one's eyes off the road), physical (taking one's hands off the wheel), and cognitive (thinking about something other than the road/driving). Texting while driving applies to these three types of driver distraction (visual, physical, and cognitive), and thus may pose a considerably higher safety risk than other sources of driver distraction.

Prevalence of Texting

Texting while driving is a relatively new phenomenon among cell phone and personal digital assistant (PDA) users. DOT acknowledges that the potential for the problem is increasing, especially with young drivers on our roadways, as noted in a Pew Research Center Report, "Teens and Distracted Driving." [3] According to the CTIA—The Wireless Association, the overall number of text messages transmitted by its members' customers increased from 32.6 billion in the first 6 months of 2005 to 740 billion in the first 6 months of 2009. This represents a 2,200 percent increase in 5 years. While FMCSA's research reveals significant insight into the safety risks associated with texting while driving, the Agency does not have, at this time, data on the prevalence of texting by motorists in general or CMV drivers specifically. Considering the increase in texting, FMCSA maintains that texting by CMV drivers while operating on public roads has the potential of becoming a widespread safety problem in the absence of an explicit Federal prohibition. FMCSA prohibits this inherently unsafe practice to reduce the risks of crashes, injuries, and fatalities.

C. Support for a Texting Prohibition

Based on the response to the Distracted Driving Summit, the Secretary's appearances on national television and this rulemaking, FMCSA determined there is a considerable amount of public support for a ban on texting while operating a motor vehicle. It is likely that most Americans either had firsthand experience with or know someone who had a motor vehicle crash or near-crash event involving a distracted driver. With the exponentially increasing use of electronic devices, numerous crashes, and other incidents related to distracted driving in recent years, expedited Federal action is required.

FMCSA's Motor Carrier Safety Advisory Committee's Recommendation

Section 4144 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1144, 1748 (Aug. 10, 2005), required the Secretary of Transportation to establish a Motor Carrier Safety Advisory Committee (MCSAC). The committee provides advice and recommendations to the FMCSA Administrator on motor carrier safety programs and regulations and operates in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2).

In its March 27, 2009, report to FMCSA, "Developing a National Agenda for Motor Carrier Safety," MCSAC recommended that FMCSA adopt new Federal rules concerning distracted driving, including texting.[4] MCSAC believed the available research shows that cognitive distractions pose a safety risk and that there will be increases in crashes from cell phone use and texting unless the problem is addressed. Therefore, one of MCSAC's recommendations for the National Agenda for Motor Carrier Safety was that FMCSA initiate a rulemaking to prohibit texting while driving.

Distracted Driving Summit

The information and feedback DOT received during its Distracted Driving Summit, held September 30–October 1, 2009, in Washington, DC, demonstrated both a need and widespread support for a ban against texting while driving. Attendees included safety experts; researchers; elected officials, including four United States Senators and several State legislators; safety advocacy groups; senior law enforcement officials; the telecommunications industry; and the transportation industry. At the conclusion of the Summit, Secretary LaHood stated, "Keeping Americans safe is without question the Federal government's highest priority—and that includes safety on the road, as well as on mass transit and rail." [5] In addition, the Secretary pledged to work with Congress to ensure that the issue of distracted driving is appropriately addressed.

Summit participants shared their expertise, experiences, and ideas for reducing distracted driving behaviors. They addressed the safety risk posed by this growing problem across all modes of surface transportation. At the conclusion of the Summit, U.S. Transportation Secretary Ray LaHood announced a series of concrete actions that the Obama Administration and DOT are taking to address distracted driving. On October 1, 2009, the President issued Executive Order 13513 entitled "Federal Leadership on Reducing Text Messaging While Driving" (74 FR 51225; October 6, 2009), which prohibited texting by Federal employees (details are discussed later in this preamble).

Actions following the Summit included DOT's plan to immediately start rulemakings that would ban texting and restrict, to the extent possible, the use of cell phones by truck and interstate bus operators, as well as to initiate rulemaking by the Federal Railroad Administration (FRA) to codify provisions of the FRA's Emergency Order No. 26 regarding restricting distracting electronic devices (*see* discussion below in Part E). As a result of the Summit, and based on data from studies on distracted driving, FMCSA is considering a number of actions to combat distracted driving by CMV drivers.

General Public

Several surveys show that there is public support for a texting prohibition. For example, a survey in December 2008 by the AAA Foundation for Traffic Safety determined that 94.1 percent of drivers consider it unacceptable for a driver to send text messages or e-mail while driving; 86.7 percent consider text messaging and e-mailing by drivers to be a very serious threat to their personal safety.[6] A CBS News/New York Times poll reported that 90 percent of Americans think texting behind the wheel should be outlawed. Over 94 percent of those who admit to texting or e-mailing while driving acknowledge that it makes them at least a little bit more likely to be involved in a crash.[7] Finally, a nationally representative survey by Nationwide Insurance, conducted in August 2009, found that 80 percent of Americans support laws

[3] Madden, M. & Lenhart, A. (November 2009). Teens and distracted driving. Pew Research Center's Pew Internet and American Lifer Project. Available in the docket: FMCSA–2009–0370–0004.

[4] Parker, David R., Chair, Motor Carrier Safety Advisory Committee (March 27, 2009). Letter to Rose A. McMurray on MCSAC national agenda for motor vehicle safety. Retrieved August 24, 2010, from: *http://mcsac.fmcsa.dot.gov/documents/MCSACTask09–01FinalReportandLetterto Administrator090428.pdf.*

[5] DOT press release 156–09, Thursday, October 1, 2009.

[6] AAA Foundation for Traffic Safety (October 12, 2009). Safety culture: text messaging and cell phone use while driving. Retrieved August 24, 2010, from: *http://www.aaafoundation.org/pdf/TextingFS091012.pdf.*

[7] Connelly, M. (November 1, 2009). Many in U.S. want texting at the wheel to be illegal. NYTimes.com. Retrieved August 24, 2010, from: *http://www.nytimes.com/2009/11/02/technology/02textingside.html.*

prohibiting text messaging or e-mailing while driving.[8]

Safety Advocacy Organizations

Many safety advocacy groups have voiced support for a prohibition on texting while driving. In January 2009, the National Safety Council (NSC) called for a nationwide prohibition on all cell phone use while driving.[9] NSC is focused on alerting the American public to the fact that different distractions have different levels of crash risk. NSC stated that sending text messages has a much higher risk than most other actions that drivers take while driving. Additionally, Advocates for Highway and Auto Safety (Advocates) applauded DOT's effort to ban texting by truck and motor coach drivers.[10]

Transportation Industry Associations

The American Trucking Associations (ATA) believe that the use of hand-held electronic devices and the act of texting with such devices while a motor vehicle is in motion should be prohibited.[11] In 2009, ATA's executive committee voted overwhelmingly to support S.1536, the "Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009 (the "ALERT Drivers Act") a pending bill introduced by Senator Schumer on July 29, 2009, that seeks to prohibit texting while driving by all motorists.[12] The ALERT Drivers Act also amends title 23, of the U.S. Code, to reduce the amount of Federal highway funding available to States that do not enact a law prohibiting an individual from writing, sending, or reading text messages while operating a motor vehicle.

ATA also conducted an opinion survey of its safety committees on the use of "non-integrated electronic devices" and found that many motor carriers do not allow drivers to operate any electronic devices at all while the vehicle is moving, including dispatching equipment. From the responses of these industry leaders, ATA found that 67 percent of respondents had a policy restricting or limiting the use of portable electronic devices while driving. United Parcel Service, Inc. has an existing policy of no distractions while behind the wheel (*e.g.,* two hands on the wheel and no two-way communication) and FedEx does not allow drivers to use any electronic device while operating FedEx vehicles.[13] Additionally, ExxonMobil and Shell are examples of large companies that prohibit employees' use of any type of cell phone while driving during work hours.[14] Because numerous large commercial trucking operations already have policies that prohibit the use of electronic devices while driving, which would presumably include texting, a prohibition on texting is not expected to have an adverse impact on a majority of trucking fleets.

School Bus Operations

School bus operations have been the focus of distracted driving policies; many cities, towns, and counties prohibit cell phone use or texting by school bus operators. The National Association of State Directors of Pupil Transportation Services, in a letter to the U.S. Senate dated August 7, 2009, stated that it supports the ALERT Drivers Act (S. 1536).[15]

Transit Agencies

The importance of the distracted driving issue has led virtually all transit agencies to ban the use of cell phones and electronic devices or specifically to ban texting while operating a vehicle in passenger service. For example, the Chicago Transit Authority (CTA) prohibits texting by employees and discharges offenders. Furthermore, several large transit agencies (Massachusetts Bay Transportation Authority, CTA, and Greater Cleveland Region Transit Authority) have prohibited operators from carrying cell phones or other electronic devices in the cab, presumably prohibiting texting.

D. Investigations and Studies on Driver Distraction

On November 14, 2004, a motorcoach crashed into a bridge overpass on the George Washington Memorial Parkway in Alexandria, Virginia. This crash was the impetus for a National Transportation Safety Board (NTSB) investigation and subsequent recommendation (Safety Recommendation H–06–27) to FMCSA regarding cell phone use by passenger-carrying CMVs. The NTSB determined that one probable cause of the crash was the use of a hands-free cell phone, resulting in cognitive distraction; therefore, the driver did not "see" the low bridge warning signs.

In a letter to NTSB dated March 5, 2007, the Agency agreed to initiate a study to assess:

- The potential safety benefits of restricting cell phone use by drivers of passenger-carrying CMVs,
- The applicability of an NTSB recommendation to property-carrying CMV drivers,
- Whether adequate data existed to warrant a rulemaking, and
- The availability of statistically meaningful data regarding cell phone distraction. Subsequently, the report "Driver Distraction in Commercial Vehicle Operations" was published on October 1, 2009.

Driver Distraction in Commercial Vehicle Operations ("the VTTI Study")—Olson *et al.,* 2009[16]

Under contract with FMCSA, the Virginia Tech Transportation Institute (VTTI) completed its "Driver Distraction in Commercial Vehicle Operations" study[17] and released the final report on October 1, 2009. The purpose of the study was to investigate the prevalence

[8] Gillespie, C. (August 31, 2009). New Nationwide Insurance survey shows overwhelming support for laws banning texting while driving: Data suggests legislation alone will not solve the problem. Nationwide.com. Retrieved January 11, 2010, from: *http://www.nationwide.com/newsroom/twd-survey-results.jsp.*

[9] National Safety Council, (n.d.). Distracted driving. Retrieved August 24, 2010, from: *http://www.nsc.org/safety_road/Distracted_Driving/Pages/distracted_driving.aspx.*

[10] Gillan, J.S. (October 1, 2009). Safety Advocates respond to U.S. DOT Secretary's announcement on measures to reduce distracted driving by commercial operators. Retrieved August 24, 2010, from the Advocates for Highway and Auto Safety Web site: *http://www.saferoads.org/files/file/Distracted%20Driving%20Statement%20by%20Judith%20Stone%20October%201,%202009.pdf.*

[11] American Trucking Associations (October 29, 2009). Addressing the problem of distracted driving. Written testimony to the Subcommittee on Highways and Transit, U.S. House of Representatives' Transportation and Infrastructure Committee. Retrieved August 24, 2010, from: *http://www.truckline.com/Newsroom/Testimony1/Randy%20Mullett%20—%20Distracted%20Driving%20testimony.pdf.*

[12] American Trucking Associations (October 14, 2009). ATA leaders vote overwhelmingly to support anti-texting bill. Retrieved August 24, 2010, from: *http://www.truckline.com/pages/article.aspx?id=52%2F0599B3C5-1DA2-463F-8FE5-AF9814303C64.*

[13] Halsey, A. (October 2, 2009). Obama Bans Federal Employees From Texting While Driving. Washingtonpost.com. Retrieved August 24, 2010, from: *http://www.washingtonpost.com/wp-dyn/content/article/2009/10/01/AR2009100103447_pf.html.*

[14] Insurance Information Institute (December 2009). Cellphones and driving. Retrieved August 24, 2010, from: *http://www.iii.org/IU/Cellphone-and-driving/.*

[15] Hood, C., President of the National Association of State Directors of Pupil Transportation Services (August 7, 2009). Letter to Senators Schumer, Menendez, Hagan and Landrieu. Retrieved August 24, 2010, from: *http://www.nasdpts.org/documents/alert_act-nasdpts-support.pdf.*

[16] Olson, R. L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009) Driver distraction in commercial vehicle operations. (Document No. FMCSA–RRR–09–042) Washington, DC: Federal Motor Carrier Safety Administration, July 2009. Available in the docket: FMCSA–2009–0370–0005.

[17] The formal peer review of the "Driver Distraction in Commercial Vehicle Operations Draft Final Report" was completed by a team of three technically qualified peer reviewers who are qualified (via their experience and educational background) to critically review driver distraction-related research.

of driver distraction in CMV safety-critical events (*i.e.,* crashes, near-crashes, lane departures, as explained in the VTTI study) recorded in a naturalistic data set that included over 200 truck drivers and 3 million miles of data. The dataset was obtained by placing monitoring instruments on vehicles and recording the behavior of drivers conducting real-world revenue-producing operations. The study found that drivers were engaged in non-driving related tasks in 71 percent of crashes, 46 percent of near-crashes, and 60 percent of all safety-critical events. Tasks that significantly increased risk included texting, looking at a map, writing on a notepad, or reading.

Odds ratios (OR) were calculated to identify tasks that were high risk. For a given task, an odds ratio of "1.0" indicated the task or activity was equally likely to result in a safety-critical event as it was a non-event or baseline driving scenario. An odds ratio greater than "1.0" indicated a safety-critical event was more likely to occur, and odds ratios of less than "1.0" indicated a safety-critical event was less likely to occur. The most risky behavior identified by the research was "text message on cell phone," [18] with an odds ratio of 23.2. This means that the odds of being involved in a safety-critical event are 23.2 times greater for drivers who text message while driving than for those who do not.

Texting drivers took their eyes off the forward roadway for an average of 4.6 seconds during the 6-second interval surrounding a safety-critical event. At 55 mph (or 80.7 feet per second), this equates to a driver traveling 371 feet, the approximate length of a football field, including the end zones, without looking at the roadway. At 65 mph (or 95.3 feet per second), the driver would have traveled approximately 439 feet without looking at the roadway. This clearly creates a significant risk to the safe operation of the CMV.

Other tasks that drew drivers' eyes away from the forward roadway in the study involved the driver interacting with technology: Calculator (4.4 seconds), dispatching device (4.1 seconds), and cell phone dialing (3.8 seconds). Technology-related tasks were not the only ones with high visual demands. Non-technology tasks with high visual demands, including some common activities, were: reading (4.3 seconds), writing (4.2 seconds), looking at a map (3.9 seconds), and reaching for an object (2.9 seconds).

The study further analyzed population attributable risk (PAR), which incorporates the frequency of engaging in a task. If a task is done more frequently by a driver or a group of drivers, it will have a greater PAR percentage. Safety could be improved the most if a driver or group of drivers were to stop performing a task with a high PAR. The PAR percentage for texting is 0.7 percent, which means that 0.7 percent of the incidence of safety-critical events is attributable to texting, and thus, could be avoided by not texting.

TABLE 1—ODDS RATIO AND POPULATION ATTRIBUTABLE RISK PERCENTAGE BY SELECTED TASK

Task	Odds ratio	Population attributable risk percentage*
Complex Tertiary** Task:		
Text message on cell phone	23.2	0.7
Other—Complex (e.g., clean side mirror)	10.1	0.2
Interact with/look at dispatching device	9.9	3.1
Write on pad, notebook, etc.	9.0	0.6
Use calculator	8.2	0.2
Look at map	7.0	1.1
Dial cell phone	5.9	2.5
Read book, newspaper, paperwork, etc.	4.0	1.7
Moderate Tertiary** Task:		
Use/reach for other electronic device	6.7	0.2
Other—Moderate (e.g., open medicine bottle)	5.9	0.3
Personal grooming	4.5	0.2
Reach for object in vehicle	3.1	7.6
Look back in sleeper berth	2.3	0.2
Talk or listen to hand-held phone	1.0	0.2
Eating	1.0	0
Talk or listen to CB radio	0.6	*
Talk or listen to hand-free phone	0.4	*

* Calculated for tasks where the odds ratio is greater than one.
** Non-driving related tasks.

A complete copy of the final report for this study is included in the docket referenced at the beginning of this rulemaking notice.

In addition to FMCSA-sponsored research, the Agency considered other research reports and studies that highlight the safety risks of distracted driving, in general, or of texting, specifically. These studies conclude that texting is extremely risky and that it impairs a driver's ability to respond to driving situations. Most of these studies were small simulator studies, involving young automobile drivers. However, they provide support for the conclusions of the comprehensive study of CMV operations commissioned by FMCSA and conducted by VTTI. One limitation of the VTTI study was that the data used were collected naturalistically, and not in a controlled environment; the "cognitive distraction" effects of driver behaviors could not easily be determined. This information, which includes ongoing research, is summarized below.

[18] Although the final report does not elaborate on texting, the drivers were engaged in the review, preparation, and transmission of typed messages via wireless phones.

Text Messaging During Simulated Driving—Drews, *et al.,* 2009 [19]

This research was designed to identify the impact of text messaging on simulated driving performance. Using a high fidelity driving simulator, researchers measured the performance of 20 pairs of participants while: (1) Only driving, and (2) driving and text messaging. Participants followed a pace car in the right lane, which braked 42 times, intermittently. Participants were 0.2 seconds slower in responding to the brake onset when driving and text messaging, compared to driving-only. When drivers are concentrating on texting, either reading or entering, their reaction times to braking events are significantly longer.

Driver Workload Effects of Cell Phone, Music Player, and Text Messaging Tasks With the Ford SYNC Voice Interface Versus Handheld Visual-Manual Interfaces ("The Ford Study")—Shutko, *et al.,* 2009 [20]

A recent study by Ford Motor Company,[21] involving 25 participants, compared using a hands-free voice interface to complete a task while driving with using personal handheld devices (cell phone and music player) to complete the same task while driving. Of particular interest were the results of this study with regard to total eyes-off-road time when texting while driving. The study found that texting, both sending and reviewing a text, was extremely risky. The median total eyes-off-road time when reviewing a text message on a handheld cell phone while driving was 11 seconds. The median total eyes-off-road time when sending a text message using a handheld cell phone while driving was 20 seconds.

The Effects of Text Messaging on Young Novice Driver Performance—Hosking, *et al.,* 2006[22]

Hosking studied a very different driver population, but obtained similar results. This study used an advanced driving simulator to evaluate the effects of text messaging on 20 young, novice Australian drivers. The participants were between 18 and 21 years old, and they had been driving 6 months or less. Legislation in Australia prohibits hand-held phones, but a large proportion of the participants said that they use them anyway.

The young drivers took their eyes off the road while texting, and they had a harder time detecting hazards and safety signs, as well as maintaining the simulated vehicle's position on the road than they did when not texting. While the participants did not reduce their speed, they did try to compensate for the distraction of texting by increasing their following distance. Nonetheless, retrieving and particularly sending text messages had the following effects on driving:

- Difficulty maintaining the vehicle's lateral position on the road.
- Harder time detecting hazards.
- Harder time detecting and responding to safety signs.
- Up to 400 percent more time with drivers' eyes off the road than when not texting.

The Effect of Text Messaging on Driver Behavior: A Simulator Study — Reed and Robbins, 2008[23]

The RAC Foundation commissioned this report [24] to assess the impact of text messaging on driver performance and the attitudes surrounding that activity in the 17 to 24-year old driver category. There were 17 participants in the study. The results demonstrated that driving was impaired by texting. Researchers reported that "failure to detect hazards, increased response times to hazards, and exposure time to that risk have clear implications for safety." They reported an increased stopping distance of 12.5 meters, or three car lengths, and increased variability of lane position.

Cell Phone Distraction in Commercial Trucks and Buses: Assessing Prevalence in Conjunction With Crashes and Near-Crashes—Hickman[25]

The purpose of this research was to conduct an analysis of naturalistic data collected by DriveCam®. The introduction of naturalistic driving studies that record drivers (through video and kinematic vehicle sensors) in actual driving situations created a scientific method to study driver behavior under the daily pressures of real-world driving conditions. The research documented the prevalence of distractions while driving a CMV, including both trucks and buses, using an existing naturalistic data set. This data set came from 183 truck and bus fleets comprising a total of 13,306 vehicles captured during a 90-day period. There were 8,509 buses and 4,797 trucks. The data sets in the current study did not include continuous data; it only included recorded events that met or exceeded a kinematic threshold (a minimum g-force setting that triggers the event recorder). These recorded events included safety-critical events (*e.g.,* hard braking in response to another vehicle) and baseline events (*i.e.,* an event that was not related to a safety-critical event, such as a vehicle that traveled over train tracks and exceeded the kinematic threshold). A total of 1,085 crashes, 8,375 near-crashes, 30,661 crash-relevant conflicts, and 211,171 baselines were captured in the dataset.

Odds ratios were calculated to show a measure of association between involvement in a safety-critical event and performing non-driving related tasks, such as dialing or texting. The odds ratios show the odds of being involved in a safety-critical event when a non-driving related task is present compared to situations when there is no non-driving related task. The odds ratios for text/e-mail/accessing the Internet tasks were very high, indicating a strong relationship between text/e-mail/accessing the Internet while driving and involvement in a safety-critical event. Very few instances of this behavior were observed during safety-critical events in the current study and even fewer during control events. Although truck and bus drivers do not text frequently, the data

[19] Drews, F.A., Yazdani, H., Godfrey, C.N., Cooper, J.M., & Strayer, D.L. (Dec. 16, 2009). Text messaging during simulated driving. Salt Lake City, Utah: *The Journal of Human Factors and Ergonomics Society Online First.* Published as doi:10.1177/0018720809353319. Available in the docket: FMCSA–2009–0370–0006.

[20] Shutko, J., Mayer, J., Laansoo, E., & Tijerina, L. (2009). Driver workload effects of cell phone, music player, and text messaging tasks with the Ford SYNC voice interface versus handheld visual-manual interfaces (paper presented at SAE World Congress & Exhibition, April 2009, Detroit, MI). Warrendale, PA: Society of Automotive Engineers International. Available in the docket: FMCSA–2009–0370–0007.

[21] The Engineering Meetings Board has approved this paper for publication. It has successfully completed SAE's peer review process under the supervision of the session organizer. This process requires a minimum of three (3) reviews by industry experts.

[22] Hosking, S., Young, K., & Regan, M. (February 2006). The effects of text messaging on young novice driver performance. Victoria, Australia: Monash University Accident Research Centre. Available in the docket: FMCSA–2009–0370–0008.

[23] Reed, N. & Robbins, R. (2008). The effect of text messaging on driver behaviour: A simulator study. Report prepared for the RAC Foundation by Transport Research Laboratory. Available in the docket: FMCSA–2009–0370–0009.

[24] The work described in this report was carried out in the Human Factors and Simulation group of the Transport Research Laboratory. Andrew Parkes carried out the technical review and auditing of this report.

[25] Hickman, J., Hanowski, R., & Bocanegra, J. (2010). Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction with Crashes and Near-Crashes. Washington, DC: FMCSA, September 2010. *http://www.fmcsa.dot.gov/facts-research/art-public-reports.aspx.*

suggest that truck and bus drivers who use their cell phone to text, e-mail, or access the Internet are very likely to be involved in a safety-critical event.

E. Existing Texting Prohibitions and Restrictions by Federal, State, and Local Governments

Executive Order 13513

The President immediately used the feedback from the DOT Summit on Distracted Driving and issued Executive Order 13513, which ordered that:

> Federal employees shall not engage in text messaging (a) when driving a Government Owned Vehicle, or when driving a Privately Owned Vehicle while on official Government business, or (b) when using electronic equipment supplied by the Government while driving.

The Executive Order is applicable to the operation of CMVs by Federal government employees carrying out their duties and responsibilities, or using electronic equipment supplied by the government. This order also encourages contractors to comply while operating CMVs on behalf of the Federal government.

Regulatory Guidance

On January 27, 2010, FMCSA published regulatory guidance concerning the applicability of 49 CFR 390.17, Additional equipment and accessories, to any CMV operator engaged in "texting" on an electronic device while driving a CMV in interstate commerce (75 FR 4305). The guidance interpreted § 390.17 as prohibiting texting on electronic devices while driving because it decreases the safety of operations. As of the effective date of this final rule, the guidance will be withdrawn because this final rule makes the guidance on texting no longer necessary. The Agency does not intend to remove the authority to cite drivers under § 390.17 for unsafe operation of a CMV. Section 390.17 still applies to any use of additional equipment and accessories that decreases the safety of operation of the CMVs on which they are used.

Federal Railroad Administration

On October 7, 2008, FRA published Emergency Order 26 (73 FR 58702). Pursuant to FRA's authority under 49 U.S.C. 20102 and 20103, the order, which took effect on October 1, 2008, restricts railroad operating employees from using distracting electronic and electrical devices while on duty. Among other things, the order prohibits both the use of cell phones and texting. FRA cited numerous examples of the adverse impact that electronic devices can have on safe operations. These examples included fatal accidents that involved operators who were distracted while texting or talking on a cell phone. In light of these incidents, FRA is imposing restrictions on the use of such electronic devices, both through its order and a rulemaking that seeks to codify the order. In a notice of proposed rulemaking (NPRM) published May 18, 2010, FRA proposed to amend its railroad communications regulations by restricting the use of mobile telephones and other distracting electronic devices by railroad operating employees (75 FR 27672).

State Restrictions

Texting while driving is prohibited in 30 States, the District of Columbia, the Virgin Islands, and Guam. A list of States and Territories that have taken such actions can be found at the following DOT Web site: *http://www.distraction.gov/state-laws.* Generally, the State requirements are applicable to all drivers operating motor vehicles within those jurisdictions, including CMV operators. Because some States do not currently prohibit texting while driving, there is a need for a Federal regulation to address the safety risks associated with texting by CMV drivers. This final rule restriction provides uniform language applicable to CMV drivers engaged in interstate commerce, regardless of the presence or absence of a State law or regulation. Generally, State laws and regulations remain in effect and could continue to be enforced with regard to CMV drivers, provided those laws and regulations are compatible with the Federal requirements. This rule does not affect the ability of States to institute new prohibitions on texting while driving. For more information *see* the **Federalism** section later in this document.

III. Discussion of Comments

FMCSA received approximately 400 comments in response to the NPRM.[26] The commenters included associations representing trucking, motorcoaches, public transportation, highway safety, the legal and law enforcement communities, the insurance industry, and bicyclists. Three unions representing drivers submitted comments, as well as representatives of State governments. Commenters from the general public included motorists and bicyclists concerned with their safety when operating around CMVs. In addition, FMCSA received comments from the new Cornell eRulemaking Initiative (CeRI), summarizing the points raised by participants in a pilot project called Regulation Room (*http://www.regulationroom.com*).

Most commenters supported the proposal because of the potential safety benefits for all vehicle and pedestrian traffic sharing the roadway with CMVs. Commenters felt that texting while driving, especially while driving a CMV, is dangerous and should be prohibited. Many commenters cited crashes or near-crashes with a distracted driver in which they, or someone they knew, were involved; in some cases a fatality occurred. Many commenters felt that the use of mobile telephones has become so much a part of people's lives that it will be difficult to get people to stop using these devices in vehicles. A few commenters suggested that, just as with seat belts, airbags, and driving while impaired, the government must establish regulations concerning texting to protect public health and safety.

Only a few commenters did not support a ban on texting. Some commenters said that the responsibility should be addressed by the States, with guidance from the Federal government. Several commenters suggested that the Agency mandate outreach, education, and company policies in lieu of a prohibition.

The Agency approached the distracted driving issue by taking action on the riskiest issue first, by initiating rulemaking to prohibit texting by CMV drivers. The use of mobile telephones, including texting, is occurring increasingly. By approaching this complex subject with a focus, on the unsafe behavior regardless of the technology, FMCSA received the support of its stakeholders to act quickly to stop texting in CMVs. Subsequently, FMCSA will evaluate other aspects of distracted driving and consider future actions.

Dispatching Devices and Fleet Management Systems

Many commenters were concerned that FMCSA excepted texting on dispatching devices from this rulemaking. The American Association for Justice believed that FMCSA should go further and prohibit CMV operators from using on-board computers while driving. The Commercial Vehicle Safety Alliance (CVSA) commented that FMCSA should prohibit not only dispatching devices, but many other technologies that cause distractions. NSC held that fleet management devices and on-board and laptop systems should not be exempt from the rule. Advocates noted that it interpreted the NPRM to prohibit all texting while driving, even

[26] *See* 75 FR 16391 (April 1, 2010).

when using such systems as dispatch devices and laptop computers. The Owner-Operator Independent Drivers Association (OOIDA) also stated that small-business motor carriers use different electronic devices, such as laptops, to perform many of the same functions served by fleet management systems. OOIDA believed that it was not fair to ban these devices and not other dispatch or fleet management devices.

Some commenters agreed with the proposed exception for other electronic devices in this rulemaking. ATA supported the exclusion of in-cab fleet management systems, global positioning systems, and navigation systems, while noting that potential safety risks of using these other systems are not fully known. The American Moving and Storage Association and the National Solid Wastes Management Association agreed that the prohibition should not include the use of electronic dispatching tools and fleet management equipment.

FMCSA Response:

Notwithstanding the position of industry associations, the blanket exception to the texting ban has been revised to prohibit texting on a dispatching device or a device that is part of a fleet management system. However, it does not prohibit use of the other functions of such devices for purposes other than texting, as defined in the final rule. Texting on a dispatching device is indistinguishable from texting on another text-capable device and is, therefore, prohibited in this final rule. Texting is risky because it causes the driver to remove his or her eyes from the forward roadway, regardless of the device used to text. The Agency does not see any necessity for drivers to read text messages or type text responses on any device while the vehicle is being operated on public roads. Using a device, including a dispatch device or in-cab fleet management system, for functions other than texting is not prohibited by this rule. Consequently, the Agency is revising the definition of texting and clarifying the regulatory text to make it clear that the rule prohibits texting on any device.

Other Texting Exceptions

Several commenters requested clarification of the definition of texting and other activities that could be considered a form of texting. Advocates and the American Insurance Association (AIA) were concerned with the exception for "entering a telephone number, an extension number, or voicemail retrieval codes and commands into an electronic device. * * *" They believe that the physical actions required to enter a telephone number and perform other excepted tasks involve at least visual and physical distraction, if not cognitive as well. They appear to differ from text messaging only in terms of duration. In addition, AIA was concerned that these exceptions, if not carefully provided for, might undercut the ability of law enforcement to effectively enforce the ban. AHAS also stated that the Agency should use the definition of texting contained in E.O. 13513.

FMCSA Response:

The Agency agrees that drivers should always concentrate on the road and, therefore, does not condone any unsafe activity while driving a CMV. In order to respond quickly to an unsafe driving behavior by CMV drivers on our Nation's highways, FMCSA chose to address the texting issue first because research indicates that it is a very dangerous activity based on the VTTI study.

Small Passenger-Carrying Vehicles

Advocates commented that texting by drivers operating small buses, transporting 9 to 15 passengers including a driver, who are not required to have a CDL, would not be prohibited by this regulation. Advocates also stated that, given the serious safety problems involving small buses and 15 passenger vans used in interstate commerce, leaving non-school bus passenger-carrying CMVs without Federal protection from texting while driving is inappropriate.

FMCSA Response:

FMCSA agrees that these drivers should be included in the final rule; and, in fact, most would have been covered. On February 1, 2010, in response to section 4136 of SAFETEA–LU, FMCSA published a final rule that removed the regulatory exception for small vehicles transporting passengers for direct compensation operated within 75 miles of the driver's starting location (Safety Requirements for Operators of Small Passenger-Carrying Commercial Motor Vehicles Used in Interstate Commerce, 75 FR 4996). Drivers employed by such carriers were covered by the proposed texting rule, and are still covered by this final rule. Beyond that, however, the final rule will also now cover drivers of small-passenger carrying vehicles (designed or used to transport 9–15 passengers), not receiving direct compensation, that are otherwise exempt from most of the FMCSRs under 49 CFR 390.3(f)(6), for example hotel and rental car shuttle services. The Agency includes this driver group in the final rule to cover as many vehicle drivers as possible, within its statutory authority.

Enforcement Mechanisms

The Transportation Trades Department, AFL CIO (TTD) and the Amalgamated Transit Union (ATU) expressed concern that, although proposed § 392.80 states that "no motor carrier shall allow or require its drivers to engage in texting while driving," the NPRM does not articulate any enforcement mechanism to hold employers responsible for violations of the provision.

ATA also asked the Agency to modify the regulatory text to more clearly define the term "allow" in proposed § 392.80. For example, if the motor carrier has a policy that prohibits texting and has evidence that it has imposed progressive discipline on drivers found in violation of the policy, the motor carrier should not be held accountable for texting violations. The United Motorcoach Association (UMA) and the National Association of Motorcoach Operators had similar comments on part 392. UMA stated a preference for language that directs carriers to develop policy and training that instructs drivers to comply with Federal laws pertaining to texting while driving.

FMCSA Response:

FMCSA believes that enforcement mechanisms are already in place. Many commenters may not realize that motor carriers and employers that allow or require their drivers to text would be subject to civil penalties of up to $11,000, as already provided in 49 U.S.C. 521(b)(2)(A), 49 CFR 386.81, and Appendix B to 49 CFR part 386, paragraph (a)(3). The prohibition as it applies to motor carriers, to not "allow or require its drivers to engage in texting while driving," is similar to other regulations applicable to carriers and employers, which have been in effect for many decades (49 CFR 390.11). Therefore, FMCSA does not believe a clearer definition of "allow" is necessary. FMCSA notes that neither the industry nor unions have expressed difficulty achieving compliance with similar, if not identical, regulatory language elsewhere in the FMCSRs.

In response to UMA and NAMO comments, due to the serious nature of texting while driving, FMCSA believes a regulatory duty should be imposed on the carrier directly. Carriers may institute internal policies and programs, including educational programs, to meet this duty.

School Bus Operations

ATU believed it is unnecessary to extend the ban to public school bus drivers.

FMCSA Response:

FMCSA is precluded by statute from applying the FMCSRs to employees of Federal, State and local governments, even when they are engaged in transportation in interstate commerce (49 U.S.C. 31132(2) and (3)). This would include drivers of school buses employed by such government entities. However, drivers employed by private entities providing school bus transportation under contract to government entities will be covered, if they are engaged in interstate transportation. In addition, both government and private drivers of school buses requiring a CDL would be subject to the CDL disqualification if they are convicted of 2 or more serious traffic violations, which can include a conviction for violating a State traffic law prohibiting texting while driving.

Transit Agencies

In response to a request in the NPRM, comments were received from representatives of several transit industry interests (*i.e.,* the American Public Transportation Association (APTA), ATU, Simi Valley Transit) outlining existing policies that include the prohibition of texting on any device, personal or transit agency-specific, while operating transit vehicles. APTA expressed its support for the rule, and provided its recommended practice that outlines distractions that should be prohibited, including personal electronic devices, as well as other common distractions such as reading print material and consuming food.

ATU stated that it is unnecessary to extend the ban on texting to transit employees because virtually all transit agencies already have a ban on the use of cell phones and electronic devices while operating a vehicle. ATU commented that it is important to recognize the differences between a long-haul bus system and a local transit system, and allow exceptions for transit agencies, whether operated by Federal, State, or local government. Simi Valley Transit supports the prohibition and notes that its operators are prohibited from texting on any type of communication systems in their vehicles.

FMCSA Response:

It is unsafe to text while operating a CMV regardless of the operating differences among motorcoach, school bus, or local transit system vehicles. There have been instances where transit vehicles were involved in an incident or crash while the driver was using a mobile phone or electronic device and that activity was noted as a possible contributing factor. In June 2008, a video of a San Antonio bus crash was aired on major news networks. The video shows a city bus driver texting at the wheel moments before crashing into a sport utility vehicle.

However, FMCSA acknowledges that the government exemption applies to many transit and school bus operations and their drivers. These drivers are only subject to the CDL disqualification if the violation occurs in a State that has State or local traffic laws prohibiting texting while driving as a serious traffic offense. However, the Agency included as many passenger-carrying drivers as possible, within the scope of its statutory authority.

Preemption of State and Local Laws

In response to a request for comments on both texting policies and their enforcement and on the applicability of State laws and local ordinances to school bus drivers, the Transportation Workers Union of America, AFL–CIO (TWU) stated that "this proposal needs to minimize the preemption and keep guidelines leveled," citing the provisions of 49 U.S.C. 31136(c)(2)(B). CVSA commented that the rules should not preempt the States' ability to take additional measures with respect to non-CDL commercial drivers operating in intrastate commerce. They were concerned that the proposed rules might directly or indirectly require the States to "categorize" all currently exempted non-CDL drivers operating in intrastate commerce into the regulations. CVSA suggested that such actions should be left to the States through their individual laws as they deem appropriate. Any intent to bring these drivers into the regulations should be accomplished through a separate rulemaking.

FMCSA Response:

In the most general sense, under long-standing principles, the FMCSRs establish minimum safety regulations that may be supplemented by the States, as long as they are consistent with the regulations. The NPRM described the effect of the proposed rules in accordance with provisions already in the FMCSRs, which establish the basis for the scope of any preemption (75 FR at 16398). Specifically, 49 CFR 390.9 states:

> Except as otherwise specifically indicated, subchapter B of this chapter [III of Title 49, CFR] is not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the persons subject thereto.

This provision allows the States and their subdivisions to enforce their laws and regulations relating to safety, as long as that would not preclude persons subject to the FMCSRs from fully complying with them. This provision satisfies the requirements of 49 U.S.C. 31136(c)(2)(B) by minimizing unnecessary preemption and allowing the States to establish additional regulations that do not prevent full compliance with the FMCSRs. (*See also* 49 U.S.C. 31141(c).)

In the case of States receiving grants under the Motor Carrier Safety Assistance Program (MCSAP), however, there has been a continuous progression towards uniform CMV safety standards for both interstate and intrastate transportation since MCSAP was first enacted as part of the Surface Transportation Assistance Act of 1982, §§ 401–404, Public Law 97–424, 96 Stat. 2097, 2154 (Jan. 6, 1983). The statute directs the Agency to provide grants to the States for, among other things, "the enforcement of regulations, standards, and orders of the [Federal] Government on commercial motor vehicle safety * * * and compatible State regulations, standards and orders" (49 U.S.C. 31102(a)).

Following the enactment of section 4002(l) of Intermodal Surface Transportation Efficiency Act of 1991, Public Law 102–240, 105 Stat. 1914, 2144 (Dec. 19, 1991) (ISTEA), the Agency utilized that statutory authority to establish conditions for States that received MCSAP grants to preempt incompatible State regulation of CMV safety (Motor Carrier Safety Assistance Program, 57 FR 13572, 13579–81 (Apr. 16, 1992) (NPRM) and 57 FR 40946, 40951–52 (Sep. 8, 1992) (final rule)). The Agency noted (at 57 FR 13580) that:

> Section 4002(l) of the ISTEA directs the Secretary to issue final regulations specifying tolerance guidelines and standards for ensuring compatibility of intrastate commercial motor vehicle safety laws and regulations with the Federal motor carrier safety regulations under the MCSAP. The [Agency] has always administered the MCSAP in a way that would promote the enforcement by State agencies regardless whether the inspected commercial motor vehicles, drivers or motor carriers were involved in interstate or intrastate commerce. The [Agency] has consistently taken the position that this was the intent of MCSAP as originally enacted in the STAA of 1982, and this provision confirms that position.

The Agency has issued tolerance guidelines that allow certain limited departures from the Federal standards

by intrastate CMV regulations, and those guidelines were first codified, along with procedures for periodic State and Agency review of compatibility, in the 1992 MCSAP final rule. (*See* 57 FR 40951–52, 40957–58 (former 49 CFR 350.11) and 40961–62 (49 CFR part 350, former App. C).) In addition, the process for determining compatibility of State laws with Federal regulations and standards under the authority of 49 U.S.C. 31141 was combined with the process for reviewing State funding under MCSAP (57 FR 40952).

More recently, FMCSA reiterated that:

> [T]he congressional intent and purpose of the MCSAP [is] to ensure uniformity of regulations and enforcement among the States. Since the inception of the program, the agency has required each State to enforce uniform motor carrier safety and hazardous materials regulations for both interstate and intrastate motor carriers and drivers. Safety standards in one State must be compatible with the requirements in another State in order to foster a uniform national safety environment.

(Motor Carrier Safety Assistance Program, 65 FR 15092, 15098 (Mar. 21, 2000)). The MCSAP rules adopted in 2000 recodified and strengthened the tolerance guidelines, which are now found at 49 CFR 350.339–350.345.

With regard to CVSA's comments on the preemption of State safety regulation of intrastate CMV drivers, FMCSA did not propose in this rulemaking any departure from the compatibility requirements for intrastate CMVs and drivers that are an essential element of MCSAP. As explained in the NPRM, the States receiving MCSAP grants will be required, as a condition of receiving the grants, to adopt compatible regulations with regard to texting by CMV drivers in accordance with the requirements of 49 CFR part 350. At the same time, those States have the ability, at their discretion, to utilize the limited variances from MCSAP compatibility allowed by 49 CFR 350.341, which FMCSA is not modifying in this rulemaking. Section 350.341 sets the boundaries for the allowable variances from the uniform Federal standard governing texting by CMV drivers for intrastate motor carrier operations in the States receiving MCSAP grants.

State Adoption

The National Conference of State Legislators (NCSL) requested that DOT provide States with more than 3 years to adopt the necessary laws and regulations. NCSL recommended that these new requirements be "excluded from the sanctions and withholds that exist in the underlying statute and regulations."

FMCSA Response:

The Agency does not believe the request is appropriate given the safety risks of texting while driving. Three years is more than enough time to adopt this regulation, even if a State legislature meets every other year to pass new legislation. The Agency has consistently allowed a maximum of 3 years for adoption of MCSAP compatible regulations (49 CFR 350.331(d)). With regard to CDL regulations, FMCSA is only adding a new offense to an existing category of "Serious Traffic Violations." No new penalties have to be created by State legislatures; they already exist in State statutes and laws for existing serious traffic violations set forth in § 383.51. Furthermore, States have consistently demonstrated their ability to implement more complex and expansive regulations in the past in fewer than 3 years.

Enforcement

Several commenters noted that enforcement will be difficult and highlighted the current lack of enforcement of existing laws. Some commenters were concerned that enforcement may take place only after there is a crash. To the extent possible, CVSA felt that regulations should not be prescriptive, but rather performance-based, and efforts should be made to use existing authorities for enforcement. Several commenters worried about the mechanics of enforcement.

In addition, OOIDA commented that an enforcement plan is necessary to ensure that enforcement of a restriction on texting conforms to the requirements of the Fourth Amendment's provisions governing searches and seizures. OOIDA is most concerned about explaining what, if any, access enforcement personnel would have to electronic devices present in a CMV and to the information stored on the devices.

FMCSA Response:

FMCSA does not believe that questions about specific enforcement procedures are a basis for not taking action to restrict texting while driving. Enforcement of this rule will involve a period of familiarization for both Federal and State enforcement agencies. If FMCSA were considering a rule allowing texting under certain circumstances, performance-based standards might be suitable; they are not a viable option for this rule, which requires specific restriction concerning an activity that compromises safety. As part of its continuing effort to combat distracted driving, DOT kicked off pilot programs in Hartford, Connecticut, and Syracuse, New York, to test whether increased law enforcement efforts can lead distracted drivers to put down their cell phones and focus on the road. During one week of the pilot program in Hartford, police cited more that 2,000 drivers for talking on mobile phones and 200 more for texting while driving. With regard to the Fourth Amendment issues raised by OOIDA, enforcement activities related to the implementation of the final rule that involve acquisition of evidence will be governed by the principles established in judicial precedents interpreting and applying the Fourth Amendment and related statutory provisions, such as the Electronic Communications Privacy Act of 1986, Public Law No. 99–508, 100 Stat. 1848 (1986). It is FMCSA's view that these principles should address the concerns raised by OOIDA.

Penalties

Several commenters said that the proposed penalties are not harsh enough. AIA stated that, since research shows that texting while driving can have an effect that is the same as or worse than severely intoxicated driving, the CDL penalties for texting should be identical to those applicable to intoxicated driving. On the other hand, TTD and ATU stated the proposal correctly sanctions CDL holders for texting while driving only when they are "operating a CMV" and not "while operating a vehicle for which a CDL is not required."

FMCSA Response:

FMCSA, to a degree, is constrained by the applicable statutes in establishing new CDL qualifications. Under 49 U.S.C. 31310(e), a CDL driver may only be disqualified for committing multiple violations of "serious traffic violations involving a commercial motor vehicle operated by the" CDL driver. This has always been interpreted as requiring that the offense be committed while operating a CMV (*see* 49 CFR 383.51, Table 2). This is the statutory authority that FMCSA must rely on to add texting while operating a CMV to the list of serious traffic violations to provide the basis for a possible disqualification of a CDL driver. On the other hand, a different statutory provision, 49 U.S.C. 31310(g), requires longer disqualifications of a CDL driver with multiple convictions involving a motor vehicle (other than a CMV) of either: (1) A serious offense "that has resulted in the revocation, cancellation, or suspension of the individual's license"; or (2) a "drug or alcohol related offense" (Cf. 49 CFR 383.51, Table 2).

FMCSA is unaware of any State law that provides for the revocation, cancellation, or suspension of a driver's

license when the driver is convicted of texting while driving a non-CMV. Therefore, the longer disqualification period provided in Section 31310(g) is not available for application to texting in violation of State or local traffic laws.

Section 31310(e) does allow FMCSA to specify that the period of disqualification should be "at least 60 days" for obtaining two convictions within a 3-year period and "at least 120 days" for obtaining three or more convictions within a 3-year period. However, the Agency decided that the penalties for texting should be similar to the disqualification periods for other traffic violations already in place for CMV drivers. The Agency considered the severity of the penalties in the development of the NPRM. FMCSA based its decision on the level of severity of the current penalty for other serious violations such as reckless driving and speeding, as provided by 49 U.S.C. 31310(e) and 49 CFR 383.51(c).

Use of Federal Civil Penalties and State Fines

Some commenters, including the League of American Bicyclists, suggested that any fines collected be routed toward awareness programs, marketing campaigns, street safety, and targeted traffic enforcement. Others suggested providing the funds to infrastructure programs for other modes of transportation such as walking, cycling, and public transportation.

FMCSA Response:

While the Agency agrees with the view that bicyclists and pedestrians are vulnerable to distracted driving behaviors, the Agency does not have discretion in the use of Federal civil penalties. The Agency cannot control the use of funds collected by local enforcement agencies through fines received from traffic violations. Its authority to direct the use of fines and penalties collected by State and local enforcement agencies receiving MCSAP grants is limited to ensuring that the States provide "satisfactory assurances the [State] has or will have the legal authority * * * necessary to enforce" CMV safety regulations (49 U.S.C. 31102(b)(1)(C)). FMCSA is required by statute to deposit all civil penalties it collects in the Highway Trust Fund (49 U.S.C. 521(b)(10)).

Data and Research on Texting by CMV Drivers

While commenters generally agreed that existing research shows that texting may seriously compromise safety, some commenters found the existing research to be inadequate. Though ATA supported the NPRM, it commented that regulations should be based solely on research and facts. CVSA believed that there needs to be more research on the issue of distracted driving, especially as it relates to crashes and the different types of distractions—both technology- and non-technology-related. TWU noted that the basis for this rule has been overall statistics, but not specific data on texting by CMV drivers.

FMCSA Response:

In response to the NPRM, the Agency did not receive any additional research data on texting from the public. The Agency reviewed existing research and other data and concluded that texting while driving is a dangerous activity. FMCSA has data on texting by CMV drivers, included in the VTTI study that FMCSA published in 2009, "Driver Distraction in Commercial Vehicle Operations." FMCSA finds that the results from that study provide sufficient data to justify a prohibition against texting. The data demonstrate safety-critical events that occurred while texting by CMV drivers.

There is no basis for deferring a ban against texting until additional research is completed. If the industry believes texting should be allowed under certain circumstances, the Agency welcomes the opportunity to engage in an open forum to identify those circumstances and the research which indicates that safety would not be compromised by the visual, cognitive, and manual distraction associated with texting. FMCSA notes that the VTTI study was peer reviewed. The study data highlighted the need for action rather than the need for additional research. Because limited CMV-specific data is available, the rule is based in part, but not entirely, on research studies of all driver types, as described extensively in both the NPRM and previously in this final rule. FMCSA supports further research that examines distracted driving by CMV drivers and DOT continues to conduct research on distracted driving.

Outreach

FMCSA received multiple comments on the necessity of public education, outreach, and awareness campaigns. CVSA commented that safety efforts on distracted driving need to include enforcement, engineering, and education initiatives. CVSA stated that DOT and the appropriate modal administrations, as well as Transport Canada, will need to make adequate resources available to the States and other jurisdictions for enforcement and education activities. NSC urged FMCSA to support the rule's effectiveness with high-visibility enforcement campaigns, proven to reduce unsafe driver behaviors and boost compliance, in order to raise awareness, a necessary step with new rules and laws. Several commenters suggested that the Agency mandate certain training curricula and company policies in lieu of a prohibition.

FMCSA Response:

The Agency agrees that enforcement and outreach efforts are essential to increase public awareness. DOT campaigns, such as those addressing seat belt use and drunk driving, have proven to reduce injuries and fatalities. DOT already has in place campaigns to educate all vehicle drivers on distracted driving. Platforms for sharing information include the Web site *http://www.Distraction.gov,* as well as outreach on radio and television, which have proven to reduce unsafe driver behaviors and boost compliance awareness.

For more information on research, outreach, and education, the reader may reference the National Highway Traffic Safety Administration (NHTSA) Driver Distraction Program. This program is a plan to communicate NHTSA's priorities to the public with regard to driver distraction safety challenges, focusing on the long-term goal of eliminating crashes that are attributable to distraction. The complete overview can be found at *http://www.distraction.gov/files/dot/6835_DriverDistractionPlan_4-14_v6_tag.pdf.* The Secretary considers preventing distracted driving a priority for the Department and has put $50 million into his Fiscal Year 2011 Budget for education, awareness, and outreach.

Effect of a Texting Ban on Small Businesses

OOIDA stated that FMCSA did not identify nor analyze the effect of the proposed rule on small businesses under the Regulatory Flexibility Act.

FMCSA Response:

As required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) the Agency conducted an economic analysis of the impact of this rule on small entities and certified that a Regulatory Flexibility Analysis is not necessary because the rule will not have a significant economic impact on a substantial number of small entities subject to the requirements of this rule (See the Final Regulatory Evaluation in the docket for this rulemaking).

Non-CMV Drivers

Many commenters, including unions, trade associations and bicyclists suggested that this texting prohibition be applied to all vehicle drivers,

including passenger car drivers, motorcyclists, and bicyclists.

FMCSA Response:

While FMCSA agrees that no vehicle driver should text while driving, FMCSA is limited by its statutory authority in its ability to regulate distracted driving. The Agency's direct authority is limited to drivers of CMVs in interstate commerce (49 U.S.C. 31136(a)). The Agency cannot address any aspects of distracted driving by non-CMV drivers, motorcyclists, pedestrians, or bicyclists.

Limiting the Use of Cell Phones and Other Interactive Devices in CMVs

Approximately 50 commenters requested a complete ban on cell phones while driving CMVs. Many commenters believed that other electronic devices should be limited in the current rule or recommended such a course for future rulemaking. There was also concern that the proposed rule might not go far enough in addressing broader issues related to distracted driving. While NTSB acknowledged that FMCSA views the prohibition of texting as a first step and plans to proceed with additional rulemaking on this issue in the near future, NTSB wanted to ensure that the larger issue of cell phone use by drivers of CMVs is adequately addressed.

A number of comments addressed other electronic devices generally found in CMVs, such as citizens band radios, GPS devices, and laptop computers, and stated that they should be prohibited by FMCSA. TTD noted that FMCSA plans to address the use of other electronic devices in separate rulemaking proceedings, although they had concerns regarding motor vehicle operators who, they say, "are often required to be dispatched by citizens band radio, global position devices, and other electronic technologies."

FMCSA Response:

FMCSA acknowledges there are safety concerns about the level of distraction associated with cell phone use. Also, it is the subject of both an NTSB (H–06–27) and a MCSAC recommendation. The use of cell phones and other electronic devices by CMV drivers for functions other than texting, however, is outside the scope of consideration in this rulemaking. In order to address expeditiously the dangers of texting while driving and prevent future crashes, injuries, and fatalities, the Agency chose to first focus on texting, as an especially risky behavior that can cause physical, visual, and cognitive distraction. FMCSA will evaluate other aspects of distracted driving and consider future actions.

Disabling Cell Phones

Many commenters suggested using technology to limit a driver's ability to operate a mobile telephone when driving by having the phone automatically disabled in a moving vehicle. CVSA stated that electronic devices, whether they are built into the dash or nomadic devices, need to have an "in-motion" mode to prevent their use (unless in emergency situations) during vehicle movement. CeRI commenters suggested requiring all cell phones to be programmed to shut down texting, e-mail, and internet functions whenever the phone travels faster than 5 or 10 miles per hour (mph) and stated that manufacturers should be required to add such functionality to all cell phones.

FMCSA Response:

Requiring that such capabilities be installed is beyond the scope of this rulemaking. However, carriers are free to explore and implement such capabilities as they see fit.

IV. Discussion of Rule

The general structure of this final rule follows the outline contained in the NPRM (75 FR 16399). Any changes from the NPRM are described below.

Section-by-Section Analysis

Federal Prohibition Against Texting by Interstate CMV Drivers

Section 390.3

The Agency determined that it has the authority to modify several regulatory exemptions in the FMCSRs, including one for school bus operations and one for CMVs designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation (49 CFR 390(f)(1) and (6)). This action is necessary for public safety regarding school bus transportation by interstate motor carriers. In addition, the Agency determined that the rule should apply to the operation by drivers of small-passenger carrying vehicles (designed to transport 9–15 passengers) that are not receiving direct compensation that are otherwise exempt from most of the FMCSRs under 49 CFR 390.3(f)(6).

Section 390.5

The Agency adds new definitions for the terms "electronic device" and "texting," for general application. The definition of "driving" is incorporated into the prohibition of texting while driving a CMV in new § 392.80, in order to restrict the use of the term to texting activities and to avoid limiting the scope of the term as used in other provisions of the FMCSRs.

The Agency did not incorporate explanatory adjectives such as "handheld," "portable," and "personal" that had been included in other documents because the Agency wanted to focus on the behavior—not the device. After consideration of the comments, the texting definition clarifies that any non-texting functions, which include functions on dispatching devices, fleet management systems, smart phones, and similar "multi-function" devices (e.g., Global Positioning System, hours of service tracking capabilities, and music playing), are not prohibited by this rulemaking.

Section 391.2

FMCSA amends 49 CFR 391.2, which provides certain exceptions to the requirements of part 391 for custom farm operations, apiarian industries, and specific farm vehicle drivers, to enable the Agency to make violations of the Federal texting prohibition a disqualifying offense for such drivers. While the explicit Federal prohibition against texting applies directly to these drivers, the disqualification provision would not apply without this amendment to the current exception under 49 CFR 391.2.

Section 391.15

The Agency adds a new paragraph (e) to this section to provide for the disqualification of any driver convicted of two or more violations of the new prohibition set forth in § 392.80 from operating a CMV in interstate commerce. The change mirrors the corresponding new provisions governing the disqualification of CDL drivers in § 383.51(c). The required number of convictions to cause a disqualification and the period of disqualification are the same: 60 days for the second offense within 3 years and 120 days for three or more offenses within 3 years. In addition, the first and each subsequent violation of such a prohibition are subject to civil penalties imposed on such drivers, in an amount up to $2,750 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and App. B, ¶ A(4)).

Section 392.80

In this section the Agency prohibits texting while driving a CMV, as defined in 49 CFR 390.5. In addition, the first and each subsequent violation of such a prohibition are subject to civil penalties imposed on such drivers, in an amount up to $2,750 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and App. B, ¶ A(4)). Furthermore, this rule states that motor carriers must not allow nor require drivers to text while driving. Employers

may also be subject to civil penalties in an amount up to $11,000 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and Appendix B, paragraphs (a)(3) and (4)). FMCSA also includes a provision in this section to apply this new prohibition to "school bus operations notwithstanding the general exception in 49 CFR 390.3(f)(1)." Therefore, school bus drivers who are employed by non-government entities and who transport school children and/or school personnel between home and school in interstate commerce are subject to the prohibition. FMCSA determined this rule is necessary for public safety regarding school bus transportation by interstate motor carriers. A definition of driving is included in the rule. In addition, the Agency applies the rule to the operation by drivers of small-passenger carrying vehicles (designed to transport 9–15 passengers) that are not receiving direct compensation that are otherwise exempt from most of the FMCSRs under 49 CFR 390.3(f)(6).

The rule provides for a limited exception to the texting while driving prohibition to allow CMV drivers to text if necessary to communicate with law enforcement officials or other emergency services.

Federal Disqualification Standard for CDL Drivers

Section 383.5

FMCSA adds new definitions for the terms "electronic device" and "texting" for application in part 383. The Agency adds a broad definition of electronic device in order to cover the multitude of devices that allow users to enter and read text messages. However, the Agency is not prohibiting the use of such devices by CMV drivers for purposes other than texting. The definition of texting identifies the type of activity that is covered by this rule.

Section 383.51

In Table 2, FMCSA adds a new serious traffic violation that will result in a CDL driver being disqualified. This serious traffic violation is a conviction for violating a State or local law or ordinance prohibiting texting while driving a CMV. FMCSA adds a description of what is considered "driving" for the purpose of this disqualification. FMCSA notes that the conviction must involve "texting" while operating a CMV and excludes convictions for texting by a CDL driver while operating a vehicle for which a CDL is not required. The Agency's decision is consistent with the provisions of 49 U.S.C. 31310(e), which indicates the serious traffic violation must occur while the driver is operating a CMV that requires a CDL; the operative provisions in the revised table limit the types of violations that could result in a disqualification accordingly.

Every State that issues CDLs is required to impose this disqualification on a driver required to have a CDL issued by that State whenever that CDL driver is convicted of the necessary number of violations (for 60 days for the second offense within 3 years and for 120 days for 3 or more offenses within 3 years) while operating in States where such conduct is prohibited. This is the case even if the State issuing the disqualification does not have its own law on motor vehicle traffic control prohibiting texting while operating a CMV. (*See* 49 U.S.C. 31310(e) and 31311(a)(15), and 49 CFR 384.218 and 384.219.)

Section 384.301

New paragraph (e) of § 384.301 requires all States that issue CDLs to implement the new provisions in § 383.51(c) that relate to disqualifying CDL drivers for committing the new serious traffic violation of texting while driving a CMV as soon as practicable, but not later than 3 years after the effective date of this regulation.

State Compatibility

Motor Carrier Safety Assistance Program (MCSAP)

States that receive MCSAP grant funds are required, as a condition of receiving the grants, to adopt regulations on texting that are compatible with these final regulations (49 U.S.C. 31102(a) and 49 CFR 350.201(a)). States under MCSAP will have to adopt regulations compatible with the prohibition on texting (in § 392.80) and the related disqualification (in § 391.15(e)) applicable to both interstate and intrastate transportation as soon as practicable, but not later than 3 years after the effective date of this regulation (49 CFR 350.331(d)). If States do not adopt compatible regulations prohibiting texting while driving a CMV and related disqualifications, they may not receive full MCSAP grant funding.

Because States perform the overwhelming majority of commercial vehicle roadside inspections and perform all traffic stops, enforcement of the final rule would be carried out primarily by the States. The requirement for States to adopt and enforce compatible rules does not, in and of itself, establish enforcement priorities for States. Each year, States submit to FMCSA a Commercial Vehicle Safety Plan (CVSP) in which the States set safety performance goals and priorities. Therefore, FMCSA assumes that the adoption of compatible State rules would not necessarily result in increased enforcement costs. The States would include enforcement of a texting ban in their CVSPs as warranted by their analysis of truck and bus crash data, but they would not be required to prioritize enforcement based solely on the issuance of this rule. States that currently have texting prohibitions may not incur much in costs, whereas states that do not may have to allocate new resources and undertake new expenses. FMCSA did not quantify additional costs that these states might bear as a result of this rule. Participating States may use MCSAP grant money for enforcement of this rule.

CDL Program

States that issue CDLs are required to adopt and implement the CDL disqualification provisions that require disqualification for two or more convictions of violating a State or local traffic law or ordinance prohibiting texting while driving a CMV. States should be in compliance as soon as practicable, but not later than 3 years after the effective date of these regulations. If they do not comply, they may be subject to the loss of up to 5 percent in the first year of substantial non-compliance and up to 10 percent in subsequent years of certain Federal-aid highway amounts apportioned to the State (49 U.S.C. 31311(a) and 31314).

V. Regulatory Analyses

FMCSA amends the FMCSRs to restrict texting, including texting while using dispatching devices and fleet management systems, by certain drivers while operating CMVs in interstate commerce. The Agency also amends the FMCSRs to impose sanctions, including civil penalties and disqualification, on such drivers who do not comply with this final rule. The goal of the regulatory revision is to prevent or reduce the prevalence of truck and bus crashes, fatalities, and injuries on our Nation's highways due to texting while driving. In addition, the revisions will reduce the financial and environmental burdens associated with these crashes, and promote the efficient movement of traffic and commerce on interstate highways.

Recent studies, including one commissioned by FMCSA, show that texting is among the riskiest behaviors of the distracting activities that are undertaken by CMV drivers. Because texting while driving is a fairly recent phenomenon, empirical research on its

impact on safety is limited. FMCSA carefully evaluated all available national-level crash data and found the data do show that distracted driving often results in crashes. While these data do not identify the number of fatalities or crashes attributable to texting, there are numerous studies on driver distraction in general. FMCSA analyzed those studies and found that many of their findings can be applied as a supplementary explanation to a texting prohibition. With regard to the current data on texting, the regulatory analysis focuses on one particular study—"Driver Distraction in Commercial Vehicle Operations" (VTTI Study)—which, though limited in scope and application, does shed light on the potential harm of texting while driving CMVs.

Currently, FMCSA does not have sufficient data that show an explicit empirical link between texting and CMV crashes. Therefore, the Agency exercised its professional judgment consistent with Office of Management and Budget Circular A–4 ("Regulatory Analysis") and conducted a threshold analysis. A threshold or break-even analysis is called for when it is impossible, or difficult, to express in monetary units all of the important benefits and costs of a rule. The most efficient alternative will not necessarily be the one with the largest quantified and monetized net-benefit estimate. In such cases, the Agency is required to make a determination of how important the non-quantified benefits or costs may be in the context of the overall analysis. The threshold analysis approach therefore answers the question: How small does the value of the non-quantified benefits (safety benefits in terms of crash prevention) have to be in order for the rule to yield zero net benefits (*i.e.,* break even)?

This regulatory evaluation considers the following potential costs: (a) Loss in carrier productivity due to time spent while parking or pulling over to the side of the roadway to perform texting activities; (b) increased fuel usage due to idling as well as exiting and entering the travel lanes of the roadway; (c) increased crash risk due to CMVs that are parked on the side of the roadway and exiting and entering the travel lanes of the roadway; and (d) costs to the States.

The Agency estimates that this rule will cost $3.8 million annually. Current guidance from the Office of the Secretary of Transportation (OST) places the value of a statistical life at $6.0 million. Consequently, the texting restriction would have to eliminate at most one fatality every year in order for the benefits of this rule to at least equal the costs. Given the unchecked expansion of texting, FMCSA believes the rule will save lives and prevent a substantial number of crashes. Therefore, the rule is justified based on the safety benefits. The table below presents a summary of the estimated costs of this rule and a threshold analysis of the number of fatalities that would need to be avoided in order to break even.

SUMMARY OF COSTS AND THRESHOLD ANALYSIS (FIRST YEAR)

Lost Carrier Productivity (millions)	$0.3
Increased Fuel Consumption (millions)	$1.1
Parking, Entering, and Exiting Roadway Crashes (millions)	$0.2
Costs to the States	*$2.2
Total Costs	$3.8
Benefit of Eliminating One Fatality (millions)	$6.0
Break-even Number of Lives Saved	<1

* One-time cost.

The productivity losses, as well as other costs, were estimated for only one year, as the entire threshold analysis was performed as an undiscounted annual estimation. The loss of productivity is expected to diminish, (but not necessarily vanish within one year), as the motor carrier industry adjusts to the texting restriction and as new (permissible) technologies arise that compensate for the loss of the texting functionality. FMCSA is unaware of the specific future technologies that might arise, but we continue to research and monitor technological changes in the market.

States are responsible for adopting compatible State rules within three years of the date of the final rule. Because States perform the overwhelming majority of commercial vehicle roadside inspections and perform all traffic stops, enforcement of the final rule would be carried out primarily by the States. The requirement for States to adopt and enforce compatible rules does not, in and of itself, establish enforcement priorities for States. Each year, States submit to FMCSA a Commercial Vehicle Safety Plan (CVSP) in which the States set safety performance goals and priorities. Therefore, FMCSA assumes that the adoption of compatible State rules would not necessarily result in increased enforcement costs. The States would include enforcement of a texting ban in their CVSPs as warranted by their analysis of truck and bus crash data, but they would not be required to prioritize enforcement based solely on the issuance of this rule. States that currently have texting prohibitions may not incur much in costs, whereas states that do not may have to allocate new resources and undertake new expenses. FMCSA did not quantify additional costs that these states might bear as a result of this rule. Participating States may use MCSAP grant money for enforcement of this rule.

FMCSA also conducted a 10-year annualized projection of the discounted costs and benefits of the rule, in which the benefits are simply the value of statistical life saved (i.e., $6 million). The results, summarized below, show that the net benefits, under both a 3% discount rate and a 7% discount rate, are positive.

SUMMARY OF ESTIMATED NET BENEFITS

10-Year discounting	3% discount rate (millions)	7% discount rate (millions)
Total Costs	$15.7	$14.0
Total Benefits*	52.7	45.0
Net Benefits	37.0	31.0

* $6 million VSL.

FMCSA also conducted a sensitivity analysis (the details of which are contained in Appendix A of the regulatory evaluation) whereby the extent of texting while using a dispatching device or fleet management system is varied. The results of that analysis show an estimated minimum total cost of this rule of approximately $1.4 million and an estimated maximum total cost of approximately $2.0 million.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

FMCSA has determined that this rulemaking action is a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, and significant under DOT regulatory policies and procedures because of the substantial Congressional and public interest concerning the crash risks associated with distracted driving, even though the economic costs of the rule do not exceed the $100 million annual threshold.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term "small entities" comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. DOT policy also requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses.

FMCSA has conducted an economic analysis of the impact of this rule on small entities and certifies that a Regulatory Flexibility Analysis is not necessary because the rule will not have a significant economic impact on a substantial number of small entities subject to the requirements of this rule. This rulemaking will affect all of the approximately 493,480 [27] small entities. However, the direct costs of this rule that small entities may incur are only expected to be minimal. They consist of the costs of lost productivity from foregoing texting while on duty and fuel usage costs for pulling to the side of the road to idle the truck or passenger-carrying vehicle and send or receive a text message. The majority of motor carriers are small entities. Therefore, FMCSA will use the total cost of the rule in the first year ($3.8 million) applied to the number of small entities (493,480) as a worst case evaluation which would average $7.70 per carrier. In subsequent years, the cost of the rule per carrier is estimated to be $3.30.

[27] This number represents 99% of 498,465, the current number of interstate motor carriers with recent activity (source: MCMIS data 6/17/2010).

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), FMCSA wants to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the FMCSA personnel listed in the **FOR FURTHER INFORMATION CONTACT** section of this rule. FMCSA will not retaliate against small entities that question or complain about this rule or any policy or action of FMCSA.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1–888–REG–FAIR (1–888–734–3247).

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $140.8 million (which is the value of $100 million in 2009 after adjusting for inflation) or more in any 1 year. Though this rule would not result in such expenditure, FMCSA discusses the effects of this rule elsewhere in this preamble.

Paperwork Reduction Act

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

Privacy Impact Assessment

FMCSA conducted a Privacy Threshold Analysis (PTA) for the rule on limiting the use of wireless communication devices and determined that it is not a privacy-sensitive rulemaking because the rule will not require any collection, maintenance, or dissemination of Personally Identifiable Information (PII) from or about members of the public.

Executive Order 13132 (Federalism)

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments, on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government.

FMCSA recognizes that, as a practical matter, this rule may have an impact on the States. Accordingly, the Agency sought advice from the National Governors Association (NGA), NCSL, and the American Association of Motor Vehicle Administrators (AAMVA) on the topic of texting by letters dated December 18, 2009. (A copy of these letters is available in the docket for this rulemaking). In addition, FMCSA met with representatives from NGA, NCSL, and AAMVA on February 3, 2010, to discuss FMCSA's rulemaking initiatives. The State interests that met with FMCSA did not express any concerns, then or later, with the proposed course of action, and did not file any comments.

For a full discussion of any preemption issues, see section III. Discussion of Comments, Preemption of State and Local Laws.

Executive Order 12630 (Taking of Private Property)

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

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

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

FMCSA analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. FMCSA

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

Technical Standards

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

The Agency is not aware of any technical standards used to address texting and therefore did not consider any standards.

National Environmental Policy Act

The Agency analyzed this rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined under our environmental procedures Order 5610.1, published March 1, 2004, in the **Federal Register** (69 FR 9680), that this action requires an Environmental Assessment (EA) to determine if a more extensive Environmental Impact Statement (EIS) is required. FMCSA finds the impacts to the environment do not warrant the more extensive EIS, thus FMCSA issues a Finding of No Significant Impact (FONSI). The findings of the EA reveal that there are no significant positive or negative impacts on the environment expected to result from the rulemaking action. There could be minor impacts on emissions, hazardous materials spills, solid waste, socioeconomics, and public health and safety.

FMCSA has also analyzed this rule under section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it would not result in any potential increase in emissions that is above the general conformity rule's *de minimis* emission threshold levels (40 CFR 93.153(c)(2)). Moreover, based on our analysis, it is reasonably foreseeable that the rule would not significantly increase total CMV mileage, nor would it change the routing of CMVs, how CMVs operate, or the CMV fleet mix of motor carriers. This action merely establishes requirements to prohibit texting while driving for CMV drivers and establishes a procedure for disqualification.

List of Subjects

49 CFR Part 383

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 391

Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 392

Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

■ For the reasons discussed in the preamble, FMCSA amends 49 CFR parts 383, 384, 390, 391, and 392 as follows:

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

■ 1. The authority citation for part 383 continues to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 et seq., and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1766, 1767; sec. 1012(b) of Pub. L. 107–56; 115 Stat. 397; sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1726; and 49 CFR 1.73.

■ 2. Amend § 383.5 by adding the following definitions in alphabetical order.

§ 383.5 Definitions.

* * * * *

Electronic device includes, but is not limited to, a cellular telephone; personal digital assistant; pager; computer; or any other device used to input, write, send, receive, or read text.

* * * * *

Texting means manually entering alphanumeric text into, or reading text from, an electronic device.

(1) This action includes, but is not limited to, short message service, e-mailing, instant messaging, a command or request to access a World Wide Web page, or engaging in any other form of electronic text retrieval or entry, for present or future communication.

(2) Texting does not include:

(i) Reading, selecting, or entering a telephone number, an extension number, or voicemail retrieval codes and commands into an electronic device for the purpose of initiating or receiving a phone call or using voice commands to initiate or receive a telephone call;

(ii) Inputting, selecting, or reading information on a global positioning system or navigation system; or

(iii) Using a device capable of performing multiple functions (e.g., fleet management systems, dispatching devices, smart phones, citizens band radios, music players, etc.) for a purpose that is not otherwise prohibited in this part.

* * * * *

■ 3. Amend § 383.51 by adding a new paragraph (c)(9) to Table 2 to read as follows:

§ 383.51 Disqualifications of Drivers.

* * * * *

(c) * * *

TABLE 2 TO § 383.51

If the driver operates a motor vehicle and is convicted of:	For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for . . .	For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for . . .	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for . . .	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for . . .
*	* *	*	* *	*
(9) Violating a State or local law or ordinance on motor vehicle traffic control prohibiting texting while driving.[2]	60 days	Not applicable	120 days	Not applicable.

* * * * *

[2] *Driving, for the purpose of this disqualification, means operating a commercial motor vehicle, with the motor running, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle with or without the motor running when the driver has moved the vehicle to the side of, or off, a highway, as defined in 49 CFR 390.5, and has halted in a location where the vehicle can safely remain stationary.*

* * * * *

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

■ 4. The authority citation for part 384 continues to read as follow:

Authority: 49 U.S.C. 31136, 31301 *et seq.,* and 31502; secs. 103 and 215 of Pub. L. 106–159, 113 Stat. 1753, 1767; and 49 CFR 1.73.

■ 5. Amend § 384.301 by adding a new paragraph (e) to read as follows:

§ 384.301 Substantial compliance—general requirements.

* * * * *

(e) A State must come into substantial compliance with the requirements of subpart B of this part in effect as of October 27, 2010 as soon as practical, but not later than October 28, 2013.

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

■ 6. The authority citation for part 390 continues to read as follows:

Authority: 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31144, 31151, 31502, 31504; sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 217, 229, Pub. L. 106–159, 113 Stat. 1748, 1767, 1773; and 49 CFR 1.73.

■ 7. Amend § 390.3 by revising paragraph (f)(1) and (f)(6) to read as follows:

§ 390.3 General applicability.

* * * * *

(f) * * *

(1) All school bus operations as defined in § 390.5 except for the provisions of §§ 391.15(e) and 392.80;

* * * * *

(6) The operation of commercial motor vehicles designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation, provided the vehicle does not otherwise meet the definition of a commercial motor vehicle except for the texting provisions of §§ 391.15(e) and 392.80, and except that motor carriers operating such vehicles are required to comply with §§ 390.15, 390.19, and 390.21(a) and (b)(2).

* * * * *

■ 8. Amend § 390.5 by adding the following definitions in alphabetical order.

§ 390.5 Definitions.

* * * * *

Electronic device includes, but is not limited to, a cellular telephone; personal digital assistant; pager; computer; or any other device used to input, write, send, receive, or read text.

* * * * *

Texting means manually entering alphanumeric text into, or reading text from, an electronic device.

(1) This action includes, but is not limited to, short message service, e-mailing, instant messaging, a command or request to access a World Wide Web page, or engaging in any other form of electronic text retrieval or electronic text entry for present or future communication.

(2) Texting does not include:

(i) Reading, selecting, or entering a telephone number, an extension number, or voicemail retrieval codes and commands into an electronic device for the purpose of initiating or receiving a phone call or using voice commands to initiate or receive a telephone call;

(ii) Inputting, selecting or reading information on a global positioning system or navigation system; or

(iii) Using a device capable of performing multiple functions (e.g., fleet management systems, dispatching devices, smart phones, citizens band radios, music players, etc.) for a purpose that is not otherwise prohibited in part 392.

* * * * *

PART 391—QUALIFICATIONS OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTIONS

■ 9. The authority citation for part 391 continues to read as follows:

Authority: 49 U.S.C. 322, 504, 508, 31133, 31136, and 31502; sec. 4007(b) of Pub. L. 102–240, 105 Stat. 2152; sec. 114 of Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 215 of Pub. L. 106–159, 113 Stat. 1767; and 49 CFR 1.73.

■ 10. Revise § 391.2 to read as follows:

§ 391.2 General exceptions.

(a) *Farm custom operation.* The rules in this part except for § 391.15(e) do not apply to a driver who drives a commercial motor vehicle controlled and operated by a person engaged in custom-harvesting operations, if the commercial motor vehicle is used to—

(1) Transport farm machinery, supplies, or both, to or from a farm for custom-harvesting operations on a farm; or

(2) Transport custom-harvested crops to storage or market.

(b) *Apiarian industries.* The rules in this part except for § 391.15(e) do not apply to a driver who is operating a commercial motor vehicle controlled and operated by a beekeeper engaged in the seasonal transportation of bees.

(c) *Certain farm vehicle drivers.* The rules in this part except for § 391.15(e) do not apply to a farm vehicle driver except a farm vehicle driver who drives an articulated (combination) commercial motor vehicle, as defined in § 390.5. For limited exemptions for farm vehicle drivers of articulated commercial motor vehicles, see § 391.67.

■ 11. Amend § 391.15 by adding a new paragraph (e) to read as follows:

§ 391.15 Disqualification of drivers.

* * * * *

(e) Disqualification for violation of prohibition of texting while driving a commercial motor vehicle—

(1) *General rule.* A driver who is convicted of violating the prohibition of texting in § 392.80(a) of this chapter is disqualified for the period of time specified in paragraph (e)(2) of this section.

(2) *Duration.* Disqualification for violation of prohibition of texting while driving a commercial motor vehicle—

(i) *Second violation.* A driver is disqualified for 60 days if the driver is convicted of two violations of § 392.80(a) of this chapter in separate incidents during any 3-year period.

(ii) *Third or subsequent violation.* A driver is disqualified for 120 days if the driver is convicted of three or more violations of § 392.80(a) of this chapter in separate incidents during any 3-year period.

PART 392—DRIVING OF COMMERCIAL MOTOR VEHICLES

■ 12. The authority citation for part 392 continues to read as follows:

Authority: 49 U.S.C. 13902, 31136, 31151, 31502; and 49 CFR 1.73.

■ 13. Amend part 392 by adding a new subpart H to read as follows:

Subpart H—Limiting the Use of Electronic Devices

§ 392.80 Prohibition against texting.

(a) *Prohibition.* No driver shall engage in texting while driving.

(b) *Motor Carriers.* No motor carrier shall allow or require its drivers to engage in texting while driving.

(c) *Definition.* For the purpose of this section only, *driving* means operating a commercial motor vehicle, with the motor running, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle with or without the motor running when the driver moved the vehicle to the side of, or off, a highway, as defined in 49 CFR 390.5, and halted in a location where the vehicle can safely remain stationary.

(d) *Exceptions.* (1) *School bus operations and vehicles designed or used to transport 9 to 15 passengers, including the driver, not for direct compensation.* The provisions of § 390.3(f)(1) and (6) are not applicable to this section.

(2) *Emergency Use.* Texting while driving is permissible by drivers of a commercial motor vehicle when necessary to communicate with law enforcement officials or other emergency services.

Issued on: September 17, 2010.

Anne S. Ferro,

Administrator.

[FR Doc. 2010–23861 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 080228336–0435–02]

RIN 0648–AW09

Implementation of Regional Fishery Management Organizations' Measures Pertaining to Vessels That Engaged in Illegal, Unreported, or Unregulated Fishing Activities

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

ACTION: Final rule.

SUMMARY: NMFS publishes this final rule to implement international conservation and management measures that pertain to vessels that have been identified by any one of several regional fishery management organizations (RFMOs), identified below, as having engaged in illegal, unreported, and unregulated (IUU) fishing activities and added to IUU vessel lists. The United States is a member of, and obligated to implement measures adopted by, the International Commission for the Conservation of Atlantic Tunas (ICCAT), Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), Northwest Atlantic Fisheries Organization (NAFO), Western and Central Pacific Fisheries Commission (WCPFC), Inter-American Tropical Tuna Commission (IATTC), and the Agreement on the International Dolphin Conservation Program (AIDCP). This rule provides the NOAA Assistant Administrator for Fisheries (Assistant Administrator) with authority to restrict entry into any port or place of the United States of, and access to port services by, foreign vessels on the IUU vessel lists of the aforementioned RFMOs. It also gives the Assistant Administrator authority to prohibit such vessels from engaging in commercial transactions, including, but not limited to, landing and transshipping products. Furthermore, the rule prohibits persons and business entities subject to U.S. jurisdiction from providing certain services to, or engaging in commercial transactions with, such vessels.

DATES: Effective October 27, 2010.

ADDRESSES: Copies of supporting documents that were prepared for this final rule, such as the proposed rule, are available via the Federal e-Rulemaking portal, at *http://www.regulations.gov*. These documents are also available from the Trade and Marine Stewardship Division, Office of International Affairs, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Mi Ae Kim, Trade and Marine Stewardship Division, Office of International Affairs, NMFS ((phone) 301–713–9090, (fax) 301–713–9106, or (e-mail) *mi.ae.kim@noaa.gov*).

SUPPLEMENTARY INFORMATION:

Background

On January 11, 2010, NMFS published a proposed rule in the **Federal Register** (75 FR 1324) to address vessels that are on the IUU vessel lists maintained by RFMOs to which the United States is a party. As mentioned in the proposed rule, the effective management of certain marine resources is dependent on compliance with conservation and management measures of RFMOs. The vessels that are included on the IUU vessels lists were identified by RFMOs as having engaged in activities that undermine the effectiveness of conservation and management measures. Examples of such IUU fishing activity include:

- Fishing in an RFMO's management (or convention) area without authorization;
- Failing to record or declare their catches, or making false reports;
- Using prohibited fishing gear in contravention of conservation measures; or
- Transshipping with, or participating in joint operations with, re-supplying, or re-fueling vessels included in IUU vessel lists.

The proposed rule was open for public comment through February 25,

2010. Our evaluation of the comments did not lead to substantial changes between the proposed rule and this final rule.

NMFS is issuing these regulations pursuant to its authority to administer and enforce the statutes that implement the conventions of the following RFMOs: ICCAT, CCAMLR, NAFO, WCPFC, IATTC, and the AIDCP (the AIDCP is not an RFMO per se, but is referred to as such for the purposes of this action). Statutes that authorize rulemaking to implement RFMO conservation and management measures include the Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971 *et seq.,* the Antarctic Marine Living Resources Convention Act of 1984, 16 U.S.C. 2431 *et seq.,* the Northwest Atlantic Fisheries Convention Act of 1995, 16 U.S.C. 5601 *et seq.,* the Western and Central Pacific Fisheries Convention Implementation Act, 16 U.S.C. 6901 *et seq.,* the Tuna Conventions Act of 1950, 16 U.S.C. 951 *et seq.,* and the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.* These statutes authorize the promulgation of regulations as necessary to carry out the purposes and management measures of each RFMO convention.

These regulations detail the authorities of the Assistant Administrator to take actions, in accordance with the requirements of the appropriate RFMO conservation measure, against foreign vessels that are included on the final IUU vessel lists of the above RFMOs. The regulations provide the Assistant Administrator some discretion, albeit in accordance with the relevant RFMO measures, in determining the appropriate action to take with respect to a listed IUU vessel seeking entry into, or use of, a U.S. port. These regulations also specify the prohibitions applicable to listed IUU vessels, as well as those persons or entities subject to the jurisdiction of the United States who may consider business relationships with listed vessels. NMFS and the NOAA Office of Law Enforcement will cooperate with the U.S. Coast Guard, U.S. Customs and Border Protection, and other State and Federal agencies as appropriate in the implementation of the rule.

Comments and Responses

NMFS received 29 comments electronically and by mail from members of the public, a seafood company, non-profit organizations, the Mid-Atlantic Fishery Management Council, and the Marine Mammal Commission. Several comments expressed strong support for the rule and encouraged NMFS to publish the final rule as soon as possible.

Key issues and suggestions in the comments are summarized below, each followed by our responses.

Comment 1: Several commenters suggested that we impose additional penalties on foreign listed IUU vessels. Suggestions included, but were not limited to, charging fines, detaining the captain until fines are paid, and impounding or confiscating vessels.

Response: The suggested penalties are outside the scope of this rulemaking. This rule implements conservation and management measures pertaining to IUU vessels for those RFMOs of which the United States is a member (including ICCAT, CCAMLR, NAFO, WCPFC, IATTC, and AIDCP). These RFMOs obligate the United States to restrict port entry or access by listed IUU vessels and limit commercial transactions between U.S. persons and listed IUU vessels. Violations of these regulations will be enforced under the authority of the relevant RFMO convention implementing statute.

Comment 2: A commenter recommended that NMFS take advantage of this opportunity to implement measures to combat IUU fishing as envisioned by the recently concluded Agreement on Port State Measures to Prevent, Deter, and Eliminate IUU Fishing (PSMA), adopted by the Food and Agriculture Organization of the United Nations on November 22, 2009. The commenter also suggested that the United States apply the PSMA provisionally, as foreseen in Article 32, or incorporate some essential measures of the PSMA, such as (a) denying port entry or access to any vessel listed on any RFMO IUU vessel list, regardless of whether the United States is a member of the RFMO; (b) prohibiting port entry to all IUU vessels, in accordance with procedures established in Part 2 of the PSMA, regardless of whether the vessel is listed on an RFMO IUU vessel list; (c) denying port services whenever there is denial of other forms of port use, such as landing, transshipping, packaging, and processing of fish; and (d) transmitting inspection results and other information to relevant States and international organizations.

Response: The measures included in the PSMA are beyond the scope of this rulemaking, which implements only the conservation and management measures of RFMOs to which the United States is a party. The United States, as a signatory to the PSMA, supports the agreement and took it into consideration when developing this final rule. However, any efforts to implement PSMA provisions that go beyond the requirements of applicable RFMO IUU measures would be through separate processes.

Comment 3: A commenter suggested that we establish a common rule to be applied to all vessels listed in the different IUU vessel lists, selecting the actions that are most effective in combating IUU fishing and mirroring Parts 2 and 3 of the PSMA, or at least the measures of the PSMA noted under Comment 2.

Response: NMFS considered applying a common rule to all vessels listed in the different IUU vessel lists, as this approach would have simplified implementation and enforcement procedures. However, NMFS determined that the best course of action was to promulgate a rule that would allow for a case-by-case treatment of listed IUU vessels, in accordance with the relevant conservation and management measure. This approach ensures that actions taken against IUU vessels pursuant to this rule are consistent with the specific obligations under the applicable RFMO conservation and management measure, which differ to some extent from RFMO to RFMO. With regard to applying measures of the PSMA to all IUU vessels, regardless of whether the United States is a member of the RFMO that listed the vessel, please refer to the response to Comment 2.

Comment 4: A couple of commenters suggested that all listed IUU vessels should be denied port privileges, with limited exceptions for safety, health and welfare or in cases of *force majeure,* regardless of which RFMO conservation and management measure applies.

Response: NMFS agrees that the denial of port privileges should be applied as broadly as possible, but given the scope of this rulemaking the actions taken must be supported by the relevant RFMO measure.

Comment 5: A commenter noted that entry of IUU vessels and IUU seafood creates unfair competition with legitimate fishing operations and results in entry of fish and fish products that may not be subject to the scrutiny for freshness, quality, labeling, bycatch, and other standards. The commenter suggested all IUU vessels and seafood need to be prohibited from entering the United States.

Response: A listed IUU vessel may or may not be denied entry, depending on the requirements of the relevant RFMO conservation and management measure. For those vessels that are allowed to enter a port or place of the United States, they will be subject to inspection and also prohibited from engaging in

commercial activities such as landing and transshipment and obtaining port services such as refueling and resupplying except in cases of *force majeure* or where such services are necessary for the health and safety of the crew. As explained in the response to Comment 2, denial of entry to all IUU vessels, including those on lists of RFMOs to which the United States is not a party, is beyond the scope of this rulemaking. A prohibition on importing all seafood that is caught during IUU fishing is also beyond the scope of this rulemaking.

Comment 6: Two commenters noted that because the proposed rule addresses only vessels as point of origin for IUU fishing, NMFS overlooks land-based IUU fishing. For example, the prohibitions on landings and transshipment do not prevent or deter the importation of salmon that is illegally harvested without the use of vessels. The commenters acknowledged this may be beyond the reach of this rulemaking, but would like to see NMFS consider such prohibitions in subsequent actions.

Response: The comment has been noted. As recognized by the commenters, this suggestion is beyond the scope of this rulemaking.

Comment 7: Two commenters noted that the North Pacific Anadromous Fish Commission (NPAFC) could identify vessels engaged in IUU fishing within the Convention Area and include those vessels on a list. They believe that NMFS should also include the NPAFC as one of the RFMOs considered under this regulation.

Response: Unlike the RFMOs that are the subject of this rulemaking, NPAFC does not have a conservation and management measure whereby it compiles a list of IUU vessels and requires members to implement actions against those vessels. NPAFC prohibits direct fishing for anadromous fish (chum, coho, pink, sockeye, chinook, and cherry salmon and steelhead trout) by NPAFC members within its Convention Area. Enforcement of this prohibition, and other provisions of the Convention, is carried out through patrols coordinated among the parties. Such patrolling can and has resulted in vessels being apprehended. While the list of apprehended vessels is available on the NPAFC Web site, members are not required to take any particular actions with respect to denying these vessels port entry or access. Therefore, applying the provisions of this rule to such vessels would go beyond the scope of this rulemaking.

Comment 8: Two commenters suggested transport vessels suspected of receiving transshipments of fish or fish products from another vessel on a relevant IUU vessel list be equally subject to the proposed regulation.

Response: Applying the provisions of this rule to vessels that are only suspected of receiving transshipments of fish from an IUU vessel, but that have not been included on an IUU vessel list of an RFMO to which we are a party would go beyond the scope of this rulemaking. In addition, denying port entry to such vessels would preclude the United States from inspection and/or follow-up investigation that could lead to confirmation of any suspected IUU activity and, where warranted, further enforcement action. This regulation does make it unlawful for any person subject to U.S. jurisdiction to engage in commercial transactions (including transshipment and transportation of product) with an IUU vessel. A violation of this regulation could lead to prosecution under one or more of the statutes that authorize this rulemaking, namely, the Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971 *et seq.,* the Antarctic Marine Living Resources Convention Act of 1984, 16 U.S.C. 2431 *et seq.,* the Northwest Atlantic Fisheries Convention Act of 1995, 16 U.S.C. 5601 *et seq.,* the Western and Central Pacific Fisheries Convention Implementation Act, 16 U.S.C. 6901 *et seq.,* the Tuna Conventions Act of 1950, 16 U.S.C. 951 *et seq.,* and the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*

Comment 9: Two commenters stated that the rule should apply to vessels on IUU vessel lists compiled by sovereign nations for violations within their EEZs. The commenters suggested the definition of "listed IUU vessel" be expanded to include such lists. Similarly, another commenter would like to see the United States support the creation of national and regional databases and blacklists in IUU fishing affected regions (for example, West Africa) that are then reflected in a list of IUU vessels maintained by NOAA.

Response: Applying the rule to vessels on IUU lists of other nations is beyond the scope of this rulemaking. A vessel on an individual nation's IUU list could get incorporated into RFMO IUU vessel lists in accordance with the procedures of the RFMO. The United States supports and participates in the listing of vessels within the relevant RFMOs, and may support the listing of any vessel that engages in IUU fishing after full consideration of the evidence that supports the listing.

Comment 10: Two commenters noted that the U.S. territories in the South Pacific could provide substantial conduits for product of IUU fishing, particularly tuna, to enter the United States and world market, as the Nicholson Act does not prevent offloading of certain fish products in those areas. They sought clarification that all U.S. territories are subject to the provisions of the rule, and that the regulations would not concern primarily transport vessels included on the IUU vessel lists as it is stated in column 3, page1325 of the proposed rule.

Response: This rule applies in all U.S. territories, including American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, and to all vessels that may be included on an RFMO's IUU vessel list, including fishing, transport, and support vessels.

Comment 11: A commenter suggested that NMFS provide details on the procedure and criteria to be used by the Assistant Administrator in determining which actions to take against an IUU vessel. For example, the commenter sought clarification on how the Assistant Administrator would receive information about an IUU vessel prior to its entry and, if an IUU vessel is on two lists, explain which set of rules would prevail. Another commenter also asked for clarification of the specific steps to be taken during the interagency consultative process to determine whether to deny port entry or access to, or commercial transactions with, a specific vessel, noting that the decisions made by the Assistant Administrator must be transparent. Similarly, two other commenters suggested that the regulations clarify interagency cooperation to ensure that agencies share information effectively.

Response: NMFS agrees that the Assistant Administrator's actions taken pursuant to these regulations should be as transparent as possible. Many of the specific steps to be taken during the process to determine the appropriate course of action are already in place. As described in the preamble to the proposed rule, most foreign-flagged vessels are required to submit a notice of arrival to the U.S. Coast Guard when entering a port or place of the United States in accordance with 33 CFR 160.212(a)(3). The vessels are required to report electronically the vessel name, voyage, cargo, crewmembers, and other information to the U.S. Coast Guard's National Vessel Movement Center (NVMC) at least 96 hours before entering the port or place of destination. When a listed IUU vessel submits a notice of arrival, the Coast Guard would notify NMFS and the Department of State of the impending arrival. Such notification would trigger interagency consultations, among, at a minimum,

the Department of State, U.S. Coast Guard, and NMFS to determine the most appropriate course of action in light of RFMO requirements. The primary factor in determining the course of action is the relevant conservation and management measure.

The actions required by the RFMO conservation and management measures are similar to each other, but where the measures differ, or where an IUU vessel is on more than one IUU vessel list, the Assistant Administrator will determine the appropriate course of action, in consultation with other agencies. Maintaining flexibility, on a case-by-case basis, will be particularly important in these situations.

The interagency consultation will follow the existing Maritime Operational Threat Response (MOTR) process, which was established to address the full spectrum of maritime security and defense threats to, or directed against, the United States and its interests globally. According to May 5, 2009, testimony of the U.S. Coast Guard before Congress, the MOTR Plan includes an integrated network of national-level maritime command centers. The Plan sets forth lead and supporting Federal agency roles and responsibilities for MOTR based on existing law, desired U.S. Government outcome, greatest potential magnitude of the threat, the response capabilities required, asset availability, and authority to act. The MOTR Plan also establishes clear operational coordination requirements and sets forth protocols for interagency coordination, consultation, and assessment. The MOTR Plan has been employed in over 600 maritime cases since 2005. These cases include drug interdiction, migrant interdiction, fisheries violations, violence at sea, bomb threats, radiation/nuclear alarm resolution, piracy, and complex multi-disciplinary events.

Comment 12: Two commenters tentatively agreed that the Assistant Administrator should be allowed some discretion to take action against IUU vessels in accordance with the relevant RFMO measure, but sought transparency in the decisions made on port entry, subject to confidentiality concerns for national security or on-going investigation. They believe a publicly available report detailing the action taken, including the rationale, should be produced. Another commenter suggested that NMFS provide notice and explanations for actions taken pursuant to these regulations, whether access is denied or not.

Response: NMFS agrees that the Assistant Administrator's actions taken pursuant to these regulations should be as transparent as possible. Information on the actions taken against listed IUU vessels will be made public, subject to confidentiality of investigations and enforcement actions. Some enforcement actions carried out by NOAA and the U.S. Coast Guard are already publicized through press releases. NMFS will develop a mechanism for reporting information about the actions taken pursuant to this rule.

Comment 13: A commenter noted that the RFMOs adopted their IUU vessel list measures several years ago. Current law does not bar foreign, IUU vessels from port entry for purposes other than landing, such as maintenance, provisioning, and loading of fish or fish products. The commenter urged NMFS to adopt the final rule as soon as possible.

Response: NMFS agrees with the commenter and has undertaken this rulemaking to implement US obligations with respect to the conservation and management measures relating to RFMO IUU vessel lists.

Comment 14: A commenter encouraged NMFS to undertake a concerted effort to gather information and evidence of IUU fishing activities, and suggested that NMFS may be performing this activity already while implementing the identification and certification procedures under the High Seas Driftnet Fishing Moratorium Protection Act, 16 U.S.C. 1826d *et seq.* (Moratorium Protection Act), as amended by the international provisions of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006. Increased monitoring, information gathering, and enforcement will improve the implementation of the RFMOs' IUU measures domestically and internationally.

Response: NMFS routinely seeks information and evidence of IUU fishing to carry out its domestic and international enforcement obligations. In addition, NMFS has been gathering information and evidence of IUU fishing activities as a part of its implementation of the identification procedures under the Moratorium Protection Act. NMFS also seeks and gathers information, where possible, on changes in vessel names and flags. Such vessel information is critical in implementation of the RFMOs' IUU vessel list measures.

Comment 15: A commenter suggested that NMFS consider not only integrating the measures under the various RFMOs, but also the identification and certification procedures under the Moratorium Protection Act. Although the latter requires identification of nations engaged in IUU fishing occurring only in the preceding two years, and RFMO vessel lists are not necessarily so time constrained, eventually there may be overlap between the vessel lists and the NMFS identification efforts. The proposed rule should clarify the potential overlap of this rule and NMFS actions under domestic law.

Response: The Moratorium Protection Act requires the establishment of procedures to certify whether nations identified in a biennial report to Congress are taking appropriate corrective actions to address IUU fishing or bycatch of protected living marine resources by fishing vessels of that nation. NMFS is developing a rule to establish these procedures, hereinafter referred to as the "identification and certification procedures" rule. Under the Moratorium Protection Act, NMFS is required to identify nations whose fishing vessels are engaged, or that have been engaged at any point during the preceding two calendar years, in IUU fishing. NMFS is also required to identify nations whose fishing vessels are engaged, or that have been engaged during the preceding calendar year, in fishing activities either in waters beyond any national jurisdiction that result in the bycatch of a protected living marine resource, or beyond the U.S. EEZ that result in bycatch of a protected living marine resource shared by the United States. Once nations have been identified, there is a notification and consultation process. Subsequent to these processes, the United States will certify whether the government of an identified nation has provided evidence that corrective action has been taken with respect to the activities identified in the report to Congress. The absence of sufficient steps by an identified nation to address IUU fishing and/or bycatch of protected living marine resources may lead to prohibitions on the importation of certain fisheries products into the United States from that nation, the denial of port privileges for vessels of that nation, and/or other measures. On January 14, 2009, NMFS published a proposed identification and certification procedures rule, and solicited public comment through May 14, 2009 (74 FR 2019).

The rule for identification and certification procedures and this rule complement each other to address IUU fishing. The identification and certification procedures rule, developed pursuant to the Moratorium Protection Act, requires action on a nation-by-

nation basis, while this rule addresses individual vessels. The identification and certification procedures rule encourages changes in a nation's oversight of its IUU vessels, and this rule triggers actions with regard to individual IUU vessels. Finally, the identification and certification procedures operate on a biennial basis, but IUU vessel lists can change annually or more frequently and actions regarding IUU vessels may be needed with greater frequency.

It is possible that the IUU activities of a vessel that is on an IUU vessel list of an RFMO could form the basis of identification of a particular nation. This would occur if the IUU activities occurred within the two years prior to the identification of the nation.

Comment 16: A commenter believes that it is vital that NOAA establish, maintain, and publish through a centrally-located point or Web site a master list of vessels that are prohibited from entering into the United States and other cooperating countries. In this manner companies may check the list and not contract with these vessel owners.

Response: The Web site for NMFS' Office of International Affairs (*http://www.nmfs.noaa.gov/ia*) provides links to each of the RFMOs' IUU vessel lists. Each RFMO updates their lists as necessary. As the United States is just one of the members of the relevant RFMOs that participate in the adoption of the IUU vessel lists, the publication of the lists, and any changes thereto, is the responsibility of the RFMO. The Web page also includes the IUU vessel lists of RFMOs to which the United States not a party. Although this regulation does not apply to vessels on these other lists, U.S. companies should be aware of them.

Comment 17: A commenter believes the use of "may" instead of "shall" removes the mandatory nature of the measures and, as a result, does not adequately comply with the language of the conservation and management measures established by the relevant RFMOs.

Response: As a member of the relevant RFMOs, the United States has an obligation to implement the measures adopted by the RFMOs. The conservation and management measures pertaining to IUU vessel lists differ somewhat from RFMO to RFMO. For example, the ICCAT measure calls for prohibiting vessels on their IUU vessel lists from entering port, except in cases of *force majeure,* whereas IATTC and WCPFC measures do not call for denial of port entry, but obligate their members to ensure that listed vessels that voluntarily enter ports are not authorized to land or transship. Thus, the required action will depend on the vessel and the conservation and management measures that led to its inclusion on an IUU vessel list. The use of the word "may" will not result in no action being taken, but rather provides for implementation of the measure relevant to the vessel in question.

Comment 18: A commenter suggested changing the expression "illegal, unregulated, and unreported fishing" to "illegal, unreported, and unregulated."

Response: NMFS agrees and made the change.

Classification

NMFS Assistant Administrator has determined that this action is consistent with the Atlantic Tunas Convention Act of 1975 (16 U.S.C. 971 *et seq.*), Antarctic Marine Living Resources Convention Act of 1984 (16 U.S.C. 2431 *et seq.*), Northwest Atlantic Fisheries Convention Act of 1995 (16 U.S.C. 5601 *et seq.*), Western and Central Pacific Fisheries Convention Implementation Act (16 U.S.C. 6901–6910), Tuna Conventions Act of 1950 (16 U.S.C. 951–962), the Marine Mammal Protection Act (11 Stat. 1122; 16 U.S.C. 1361 *et seq.*), and other applicable laws.

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

As required under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601, *et seq.*), a final regulatory flexibility analysis (FRFA) was prepared for this final rule implementing international conservation and management measures of ICCAT, CCAMLR, NAFO, WCPFC, IATTC, and AIDCP. The measures relate to foreign vessels that have been identified by these bodies as having engaged in illegal, unreported, and unregulated (IUU) fishing activities and included on their respective IUU vessel lists.

The purpose of the RFA is to establish 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 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 does not contain any decision criteria; instead, the purpose of the RFA is to inform the agency, as well as the public, of the expected economic impacts of regulatory actions (and alternatives) and to ensure that the agency considers alternatives that minimize the expected impacts while meeting the goals and objectives of the action and applicable statutes.

The final rule will allow the NMFS Assistant Administrator to deny a foreign, listed IUU vessel entry into a port or place of the United States or access to port services, in accordance with applicable provisions of RFMO conservation and management measures. The final rule also allows the Assistant Administrator, in accordance with applicable provisions of RFMO conservation and management measures, to prohibit certain transactions, such as transshipping with, processing fish using, or supplying provisions or fuel to such IUU vessels. The rule includes several prohibitions for persons subject to the jurisdiction of the United States that complement the above restrictions for such vessels. The final rule would make it unlawful for any person subject to U.S. jurisdiction to engage in commercial transactions with a listed IUU vessel, including, but not limited to:

- Transshipment with a listed IUU vessel;
- Processing fish harvested or landed by a listed IUU vessel or processing fish using a listed IUU vessel;
- Joint fishing operations with a listed IUU vessel;
- Providing supplies, fuel, crew, or otherwise supporting a listed IUU vessel; or
- Chartering or entering in a chartering arrangement with a listed IUU vessel.

This FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA) published in the **Federal Register** on January 11, 2010 (75 FR 1324). The IRFA is not repeated here in its entirety. The need for and objectives of the rule are explained in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of the proposed rule and this final rule.

A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

NMFS did not receive any public comments on the IRFA and did not receive any comments on the rule generally that would warrant a change in the FRFA analysis.

Description and Estimate of the Number of Small Entities to Which the Final Rule Will Apply

The following is the analysis of the economic impacts on small entities that are anticipated as a result of this final rule. The final rule will apply to U.S. entities that engage or could engage in business transactions with vessels that are on the final IUU vessel lists adopted or approved by ICCAT, CCAMLR, NAFO, WCPFC, IATTC, and AIDCP. In particular, the regulations would apply to U.S. vessels or other entities that could: (1) Engage in transshipment with a listed IUU vessel; (2) process fish harvested or landed by a listed IUU vessel or process fish using a listed IUU vessel; (3) participate in joint fishing operations with a listed IUU vessel; (4) provide supplies, fuel, crew, or otherwise support a listed IUU vessel; or (5) charter or enter in a chartering arrangement with a listed IUU vessel. In addition to vessels, businesses located in or near ports could also be affected. It is not known if, or the extent to which, U.S. entities currently conduct these activities with listed IUU vessels. NMFS has, however, advised the public through NMFS' outreach materials to consult IUU vessel lists when making commercial arrangements, as there are potential negative ramifications of conducting business with a listed IUU vessel because the United States and other countries are obligated to carry out RFMO conservation and management measures targeting IUU vessels, such as port entry restrictions. The warning was first issued in May of 2007, and it has been updated regularly since (*see http://www.nmfs.noaa.gov/ia/challenges/iuu.htm*).

When this final rule goes into effect, U.S. entities will not be able to legally conduct business with vessels that are on IUU vessel lists, subject to certain exceptions. However, only a few of these establishments are expected to lose such opportunities as a result of this final rule. The potential for transactions between these entities and IUU vessels is extremely limited, due to the few arrival attempts made by listed IUU vessels into U.S. ports.

In the aggregate, approximately 90 vessels are listed as IUU vessels by IATTC, ICCAT, CCAMLR, NAFO, WCPFC, and AIDCP. To date, none of these vessels are flagged to the United States. According to information recently compiled by Pew Environment Group, about 87 percent of all the vessels listed by the six RFMOs to which the United States is a party are fishing vessels (*http://www.portstateperformance.org*). Foreign, listed IUU vessels rarely arrive in U.S. ports because foreign fishing vessels are generally prohibited by the Nicholson Act (46 U.S.C. 55114) from landing fish in most U.S. ports. As a result, U.S. entities do not normally conduct business with these vessels.

U.S. Coast Guard and other data show that only two listed IUU vessels have ever come into U.S. ports. The lack of port visits by listed IUU vessels indicates an extremely low likelihood of transactions between U.S. entities and listed IUU vessels. The U.S. Coast Guard holds records of notices of arrivals and departures from commercial vessels. The records include vessels measuring 300 gross tons or more, except for those foreign vessels entering any port or place in the Seventh Coast Guard District (includes South Carolina, most of Georgia and Florida, Puerto Rico, and the U.S. Virgin Islands) where all vessels, irrespective of their capacity, must provide notices. The requirements for notices of arrival are at 33 CFR Part 160, Subpart C. As all of the non-fishing vessels that are currently listed on the RFMO IUU vessel lists are over 300 gross tons (Pew Environment Group, unpublished data), and most arrivals by these vessels would be contained in the U.S. Coast Guard database.

The U.S. Coast Guard database shows that two refrigerated transport (reefer) vessels arrived in U.S. ports, both before being included on an IUU vessel list and afterwards. U.S. Coast Guard's data show that in 2005 one of these reefer vessels submitted three of the 128,033 arrival notices (from 11,493 commercial vessels) received that year. In 2006, the two reefer vessels submitted three of the 138,829 arrival notices (from 12,039 commercial vessels) received. In 2007, both reefer vessels were placed on IUU vessels lists. That year, the two vessels submitted four of the 135,499 arrival notices (from 12,148 commercial vessels). In each of these three years, the notices by these two vessels were a negligible portion of the total submitted to U.S. Coast Guard. No IUU vessels are known to have visited a U.S. port in 2008 or 2009.

With regard to the possible economic impacts of this action on small entities, NMFS anticipates that U.S. entities will not be significantly affected by this action because listed IUU vessels comprise a negligible proportion of the total number of vessel visits to U.S. ports. Therefore, any U.S. entity that might be affected by this rule should be able to offset any lost business opportunities by conducting business with non-listed vessels and thus not be significantly affected by the prohibitions in the final rule.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

There are no new reporting or recordkeeping requirements contained in this action.

Significance of the Economic Impacts on Small Entities

NMFS does not expect a substantial number of small entities to be affected by the final rule, because the number of listed IUU vessels is small and their arrival or arrival attempts into the ports or places of the United States are so few in number. Thus, only a handful of potential transactions would be affected as a result of this final rulemaking. For any entities that could be affected, NMFS expects that the final rule would not have a significant economic impact because the number of legal vessels entering the United States far exceeds the number of listed IUU vessels entering the United States.

Description of Significant Alternatives to the Final Rule and Discussion of How the Alternatives Attempt To Minimize Economic Impacts on Small Entities

NMFS analyzed one alternative to the final rule—a no action alternative where NMFS would not promulgate regulations to implement RFMO conservation and management measures pertaining to listed IUU vessels. This alternative to the final rule may demonstrate the least burden or economic impact to small entities. Under the no-action alternative, U.S. entities could attempt to legally interact with IUU vessels. Because other countries have implemented the restrictions required in the RFMO conservation and management measures, such as port entry restrictions or prohibitions on providing fuel or provisions to IUU vessels, listed IUU vessels may be unable to complete certain transactions. For example, a listed vessel may be prohibited from entering their intended port, or their trip may be hindered because they cannot acquire supplies in a timely manner. Thus, a listed IUU vessel that transports a shipment of fish from the United States may not be able to successfully deliver to countries that implemented the relevant RFMO conservation and management measures. In cases where an IUU vessel travels to a country that is not a member of any of the RFMOs, the vessel could likely deliver a fish shipment. However, the financial risks associated with business transactions with listed IUU vessels likely have already caused U.S. entities to avoid such business transactions with listed

IUU vessels, consistent with what is mandated by the final rule.

NMFS did not consider alternatives other than the no action alternative because as a contracting party to the RFMOs specified in the rule, the United States has an obligation to implement conservation measures passed by those RFMOs. In some cases, the United States has flexibility in crafting regulations to implement RFMO conservation measures. For example, conservation measures that allocate quota of harvest from an international fishery to the United States can be implemented through regulations tailored to minimize economic impacts on small entities by equitably allocating the catch quota to different sectors (*e.g.,* commercial and recreational) of the fishery. The IUU vessel list conservation measures do not lend themselves to that type of flexibility. Either the United States implements these measures through this final rule to restrict access to U.S. ports and access to port services by vessels on RFMO IUU vessel lists or, under the no action alternative, the United States would decline to do so.

Promulgating the regulations in the final rule is the preferred alternative because it will clearly show how the United States is fulfilling its obligations to implement the international conservation and management measures pertaining to listed IUU vessels. Moreover, as discussed above, NMFS does not expect the regulations in the final rule to have significant economic impacts on a substantial number of small entities.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Antarctica, Canada, Exports, Fish, Fisheries, Fishing, Imports, Indians, Labeling, Marine resources, Reporting and recordkeeping requirements, Russian federation, Transportation, Treaties, Wildlife.

Dated: September 22, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set forth in the preamble, 50 CFR part 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

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

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 2431 *et seq.;* 16 U.S.C. 5601 *et seq.;* 16 U.S.C. 6901–6910; 16 U.S.C. 951–962; and 11 Stat. 1122; 16 U.S.C. 1361 *et seq.*

■ 2. Add Subpart P to part 300 to read as follows:

Subpart P—Vessels on IUU Vessel Lists

Sec.
300.300 Purpose and scope.
300.301 Definitions.
300.302 Port entry by foreign, listed IUU vessels.
300.303 Port access by foreign, listed IUU vessels.
300.304 Prohibitions.

Subpart P—Vessels on IUU Vessel Lists

§ 300.300 Purpose and scope.

(a) This subpart implements internationally-adopted measures pertaining to foreign vessels determined to have engaged in illegal, unreported, and unregulated (IUU) fishing and placed on IUU vessel lists of the:

(1) International Commission for the Conservation of Atlantic Tunas (ICCAT),

(2) Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),

(3) Northwest Atlantic Fisheries Organization (NAFO),

(4) Western and Central Pacific Fisheries Commission (WCPFC),

(5) Inter-American Tropical Tuna Commission (IATTC), and

(6) Parties to the Agreement on the International Dolphin Conservation Program (AIDCP).

(b) For purposes of this subpart, the above organizations are referred to as regional fishery management organizations (RFMOs). Each of these RFMOs adopts or approves an IUU vessel list in accordance with their respective rules and procedures. The lists are publicly available at each RFMO's Web site. The regulations in this subpart apply to all persons subject to the jurisdiction of the United States, wherever they are.

§ 300.301 Definitions.

In addition to the terms defined in § 300.2, the terms used in this subpart have the following meanings.

Landing means to begin to offload fish, or to offload fish from any vessel.

Listed IUU Vessel means a vessel that is included on a final IUU vessel list adopted or approved by an RFMO to which the United States is a party.

Processing means the preparation or packaging of fish to render it suitable for human consumption, retail sale, industrial uses or long-term storage, including, but not limited to, cooking, canning, smoking, salting, drying, filleting, freezing, or rendering into meal or oil.

Transshipping means the offloading, unloading, or transferring of fish or fish products from one vessel to another.

§ 300.302 Port entry by foreign, listed IUU vessels.

The Assistant Administrator may, in accordance with applicable provisions of RFMO conservation and management measures, deny a foreign, listed IUU vessel entry to any port or place subject to the jurisdiction of the United States, except in cases of *force majeure.*

§ 300.303 Port access by foreign, listed IUU vessels.

If a foreign, listed IUU vessel is allowed to enter a port or place subject to the jurisdiction of the United States, the Assistant Administrator may, in accordance with applicable provisions of RFMO conservation and management measures, take one or more of the following actions:

(a) Inspect the vessel;

(b) Deny the vessel access to port services, including but not limited to refueling, resupplying, or disembarking or embarking of crew; or

(c) Prohibit the vessel from engaging in commercial transactions including, but not limited to, transshipping or landing product.

§ 300.304 Prohibitions.

(a) It is unlawful for a foreign, listed IUU vessel denied entry under § 300.302 to enter any port or place subject to the jurisdiction of the United States.

(b) It is unlawful for any foreign, listed IUU vessel to obtain port services or engage in commercial transactions, or attempt to obtain such services or engage in such transactions, if such activities have been denied or prohibited under § 300.303(b) and/or § 300.303(c), or if the vessel has been denied entry under § 300.302.

(c) It is unlawful for any person, without prior authorization from the Assistant Administrator, to engage in commercial transactions with listed IUU vessels. Such transactions include, but are not limited to:

(1) Transshipment;

(2) Processing fish harvested or landed by a listed IUU vessel or processing fish using a listed IUU vessel;

(3) Joint fishing operations;

(4) Providing supplies, fuel, crew, or otherwise supporting a listed IUU vessel; or

(5) Chartering or entering in a chartering arrangement with a listed IUU vessel.

(d) The prohibitions listed in § 300.304(c) shall not apply when the Assistant Administrator has authorized a listed IUU vessel to access such port services or engage in such commercial transactions, in accordance with applicable provisions of RFMO

conservation and management measures, including in cases of *force majeure* and where the Assistant Administrator has determined that such services are essential to the safety, health, and welfare of the crew.

[FR Doc. 2010–24196 Filed 9–24–10; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 080102007–0337–03]

RIN 0648–AW18

Magnuson-Stevens Fishery Conservation and Management Act; Regional Fishery Management Councils; Operations

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

ACTION: Final rule.

SUMMARY: NMFS publishes changes to the regulations that address the operations and administration of the Regional Fishery Management Councils (Councils). The regulatory changes implement the 2006 amendments to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) that, among other things, establish the Council Coordinating Committee (CCC), require that the Councils' science and statistical committee (SSC) members disclose their financial interests, and provide for training of Council members and staff. Additionally, this final rule clarifies the Council documents that should be available to the public; the restrictions on lobbying; the procedures for Council member nomination, including timing for submission of nominations; and also requires Councils to provide procedures for deeming regulations necessary and or appropriate for implementing fishery management plans and plan amendments. These regulations also set forth additional financial disclosure requirements for Council members, and revise the security assurance procedures for nominees to and members of the Councils. Finally, this rule makes technical and minor corrections to the regulations unrelated to the most recent Magnuson-Stevens Act amendments.

DATES: Effective October 27, 2010.

ADDRESSES: Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted to Alan Risenhoover, Director, Office of Sustainable Fisheries, National Marine Fisheries Service, 1315 East-West Highway, SSMC3, Silver Spring, MD 20910, Fax: 301–713–1175, and by e-mail to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: William Chappell, at 301–713–2337.

SUPPLEMENTARY INFORMATION: A proposed rule for this action was published on March 27, 2009 (74 FR 13386), with public comment accepted though July 6, 2009. Several Regional Fishery Management Councils requested that the comment period be extended, and NMFS responded by extending the public comment period to November 2, 2009 (74 FR 31224, June 30, 2009). Subsequently, NMFS published a supplementary rule addressing elements of this action on December 7, 2009 (74 FR64042, December 7, 2009), with a comment period ending January 6, 2010. A detailed description of the statutory and regulatory authority and need for this rule is contained in the preamble of the proposed rules and is not repeated here.

This final rule does not finalize regulations on all the elements of the proposed rules. For those elements not finalized in this action, additional public comment will be sought on the proposed rules, or a new proposed rule may be issued for public comment. Specifically, issues regarding stipends for Scientific and Statistical Committees (SSCs) and Advisory Panels need additional public review and comment. Issues addressing the functions of SSCs have been addressed by a recent rulemaking, i.e., the publication of the final rule on National Standard 1 Guidelines, (74 FR 3178, January 16, 2009), or will be addressed in other actions (i.e. pending National Standard 2 Guidelines (proposed rule published at 74 FR 56724, December 11, 2009).

Comments on the Proposed Rule

NMFS received thirteen written responses from organizations and individuals to a call for comments on a proposed rule published on March 27, 2009 (74 FR 13386). Responses included five letters from fishery management councils, one from an attorney for a fishing industry group, three from environmental non-governmental organizations (ENGOs), a letter from the U.S. Small Business Administration (SBA), and three on-line submissions from individuals.

In response to the supplemental proposed rule (74 FR 64042, December 7, 2009), NMFS received a second letter from one of the fishery management councils and two from ENGOs that had previously commented. A fishing industry association and the Marine Mammal Commission (MMC) also responded to the request for comments.

Comment 1: A letter from an ENGO supported the idea of defining the terms "advisory panel" (AP) and "fishing industry advisory committee" (FIAC) and differentiating the groups from one another. Three Councils commented that the definitions should not distinguish between the types of advisory groups for the purposes of authorizing stipends for one, the APs, but not for the other, the FIACs. They noted that the names given advisory groups and the functions of those groups are not consistent with the proposed rule and vary in usage from Council to Council. Also, one respondent noted that Magnuson-Stevens Act Sec. 302(g)(4) refers to the formation of APs, yet it is not referenced in the proposed definition of advisory panels and asks if this is an oversight.

Response: Under the Magnuson-Stevens Act, the Councils are authorized to establish committees and advisory panels at Sec. 302(g)(1) (SSCs), (g)(2) (APs), and (g)(3) (FIACs) as per separate sections of the statute. Sec 301(g)(4) authorized the Secretary to establish APs for Atlantic highly migratory species. Council practice, however, has made little distinction between APs and FIACs. In addition, what would be considered an AP under Sec. 302(g)(2) is often called a committee, and the terms have been used interchangeably and inconsistently from Council to Council. The 2007 reauthorization of the Magnuson-Stevens Act authorized stipends for APs, but not for FIACs. The proposed rule suggested definitions to aid Councils in distinguishing which Council advisory groups' members would be authorized to receive a stipend. In order to determine their eligibility for stipends and whether they are required to meet the meeting notice requirements of 50 CFR 600.135, these definitions are retained and the Councils are now required to declare under which section in the Magnuson-Stevens Act the organization is organized.

Comment 2: A letter from ENGOs suggested the term "fishing industry advisory committee" be replaced by "community advisory panel" to ensure the definition does not preclude membership by individuals who are not representatives of the fishing industry.

Response: The proposed definition of the term "fishing industry advisory committee" is taken from the term's usage in Sec. 302(g)(3)(A) of the Magnuson-Stevens Act. NMFS cannot change the term in the Magnuson-Stevens Act; however, there is nothing in the Magnuson-Stevens Act that would preclude a Council's discretion to establish a community advisory panel or other advisory groups with representation from a broad set of interests.

Comment 3: Several commenters responded to NMFS' request for guidance on the payment of stipends to certain members of the SSCs and APs. One commenter stated that stipends were meant primarily to compensate and enable participation by experts who would not normally be employed and paid directly to do so. The Magnuson-Stevens Act specifies that SSC and AP members who are federal employees and state marine fisheries agency staff are not entitled stipends. Other individuals who are similarly employed (e.g., by state enforcement agencies, marine fisheries commissions, ENGOs, tribal governments, etc.) should also not be entitled to stipend funds. One commenter noted that the amounts paid as stipends to SSC and AP members should be the same for all Councils and should be at the same rate as Council members are paid for their service. Another respondent recommended that stipends should not be paid until the eligibility criteria and business rules for payment are specified in the Council's statements of organization, practices, and procedures. A letter from ENGOs stresses that funding for SSC and AP stipends should be given a high priority.

Response: The final rule reiterates the eligibility for stipends as it was presented in the 2006 reauthorization of the Magnuson-Stevens Act. In addition, the final rule clarifies that employees of State agencies that have management, conservation, or enforcement jurisdiction over marine fisheries in their state are considered employees of State marine fisheries agencies and thus are ineligible for stipends. Similarly, employees of tribal agencies with marine fisheries responsibilities are considered employees of State marine fisheries agencies.

Comment 4: Respondents from industry, Councils, ENGOs, and a government agency expressed support for the proposal requiring Councils to post their statements of organization, practices, and procedures (SOPPs) on the Council website. The SBA suggested that the SOPPs also should be made available by other means (e.g., printed copies upon request) for individuals without Internet access.

Response: NMFS concurs with the comments. Through this final rule, each Council is required to post its SOPP on the Council's Internet site. Copies of SOPPs are currently available for download from most of the Council websites and will remain available in print format upon request to the Council.

Comment 5: Two Councils, noting that SOPPs must be approved by the Assistant Administrator of the NMFS, asked for clarification on the process for making minor edits and technical corrections to the SOPP and asked whether such amendments, so long as they are consistent with the Magnuson-Stevens Act, can be made without NOAA approval.

Response: SOPPs are a means for Councils to describe how their procedures and practices are consistent, not only with the Magnuson-Stevens Act, but also with a body of law associated with federal assistance and grant administration. NMFS understands the need for some flexibility to allow a Council to make minor changes to its SOPP. NMFS has drafted procedures for Secretarial approval of SOPP amendments. The procedures will be posted on the NMFS policy directives system Web site. They will provide guidance on how to effect minor technical changes and when Secretarial approval is needed.

Comment 6: One Council, which has recently made a number of improvements to its SOPP based on recommendations made by the General Accounting Office (GAO), suggested that the GAO's recommended measures be applied to all of the Councils and addressed in a standardized manner in all of the SOPPs.

Response: The recommendations of the GAO report that are applicable to all Councils have been addressed in this final rule. Specifically, Council members will now be required to specify the nature of the financial interest when recusing themselves. Further, Councils are now required to maintain current and archived copies of documents available for public inspection on their Web sites. The availability of documents on the Web sites should reduce the need and volume of material needed in response to Freedom of Information Act requests.

Comment 7: An ENGO asked for NMFS to specify with which regulatory requirements the SOPPs must comply.

Response: The requirements of a SOPP are included in Subchapter B (50 CFR §§ 600.105 to 600.115). The regulatory and administrative requirements that must be addressed in a SOPP may change occasionally as policies and governing statutes are updated. Rather than listing the requirements in regulation, NMFS will provide the Councils with a SOPP template listing the basic requirements of the SOPP as part of the SOPPs amendment procedures.

Comment 8: Two Councils requested that the basis for salary of Council executive directors be put on par with that of NMFS Regional Administrators and the senior executive service pay scale. Also, they suggested that commensurate adjustments should be made to the salaries of Council staffs.

Response: NMFS notes the comment; however, this topic is outside the scope of this rulemaking.

Comment 9: A commenter from an ENGO supported expanding the role of the SSC. A representative of a fishery association noted that the Magnuson-Stevens Act calls for both an SSC and a peer review body, and suggested that the SSC should consist of individuals with technical expertise in various fisheries and a peer review panel should be separate and distinct from it.

Response: This final rule addresses only the organization of the SSC. The role of the SSC with regard to its responsibilities and Magnuson-Stevens Act National Standard 2 is detailed in § 600.315 and is outside the scope of this rulemaking. It is a topic of the separate National Standard 2 rulemaking (proposed rule published at 74 FR 65724, December 11, 2009).

Comment 10: One respondent suggested adjusting the roles of the SSC to ensure the determination of the annual catch limit (ACL) is completely separated from the determination of how to allocate the ACL.

Response: The role of the SSC relative to the determination of ACLs is addressed in regulations implementing Magnuson-Stevens Act National Standard 1 at § 600.310 and is outside the scope of this rulemaking.

Comment 11: With regard to announcing forthcoming Council and committee meetings, one commenter stated that 45 days advanced notice is necessary to allow fishing industry members to plan their attendance. The commenter also suggested that the term "wide publicity" be read to require publication of meeting announcements in local and national trade magazines and distribution via the vessel monitoring system (VMS) in order to reach more industry members. The SBA stated its support for the changes in meeting announcement media, including the condition that

announcement over the Internet alone is not sufficient.

Response: NMFS agrees that meetings of all types should be announced as far ahead as possible, however, the minimum 14-day advance notification requirements are retained. Councils need the flexibility of shorter notification windows in order to ensure the meetings can provide a timely response to emerging and urgent issues. Schedules for most full Council meetings and many major committee meetings are usually established well in advance of the meeting date. Full agendas for the meetings, however, may not be known until just several weeks prior to the meeting. The Councils are encouraged to provide as much advance notice of meetings as is possible and use the media, including industry publications, which will be most effective for meeting announcements. NMFS does not concur that announcing meetings is an appropriate use of the VMS due to low data transmission rates and high costs to the fishermen.

Comment 12: One commenter cited the Magnuson-Stevens Act provision that SSC meetings should be held, to the extent practicable, in conjunction with Council meetings. The commenter noted that some Councils appear to have made little effort to align the meetings and to ease the burden on those people who would like to attend both.

Response: NMFS encourages Councils to adjust their meeting schedules to allow SSC and Council meetings to be held in conjunction with one another. However, scheduling of Council and committee meetings is a function of how each Council operates. Some Councils have successfully aligned the Council meetings with SSC and other committee meetings. Others are supporting processes in which the SSC meeting must precede Council meetings by a certain period in order for the SSC's outcomes to be considered in the Council meeting.

Comment 13: In three letters from ENGOs, respondents expressed concern that the meeting announcement requirements do not seem to apply to Interdisciplinary Planning Teams, consisting of members and NMFS/Council staff and occasionally relying on input from outside experts (also called Plan Development Teams, Fishery Management Action Teams, or Technical Teams). They stated that the meetings of such teams should be fully open to the public and announced in advance, just as Council meetings are; or otherwise, the use of such teams should be discontinued.

Response: Many Councils have ad hoc planning and development teams that are not constituted under MSA Section 302(g), and are not subject to the meeting notice and conduct requirements as for a Council or AP meeting. These groups are organized for the purpose of preparing information for subsequent review of a Council, AP, or other MSA Section 302(g) committee. Presentation of their work products at a Council, AP, or other MSA Section 302(g) committee meeting, followed by public comment provides adequate public input. To the extent practicable, NMFS encourages notice and public attendance meetings of these ad hoc planning and development teams.

Comment 14: Comments from industry representatives, ENGOs, the Councils, and the SBA supported the proposed rule requiring Councils to establish a written procedure for deeming proposed regulations necessary or appropriate for the purposes of the Magnuson-Stevens Act and for submitting proposed regulations to the Secretary. The SBA recommended that NMFS provide guidance to the Councils on the procedures in order to ensure consistency and transparency across Councils.

Response: The NOAA General Counsel for Fisheries has consulted with the Councils, through the Council Coordinating Committee, on the requirements for deeming proposed regulations necessary or appropriate for the Council's purposes. Different Regions and Councils have different agreements concerning who does regulatory drafting. Therefore, each NMFS regional office, the Council, the Council attorney-advisor from the NOAA Office of General Counsel, and NOAA General Counsel for Fisheries will collaborate to ensure the procedures are efficient, responsive to specific regional needs, consistent with the Magnuson-Stevens Act, and transparent from the public's perspective.

Comment 15: Letters from an ENGO, an industry association representative, the MMC, and the SBA supported the proposed requirement for each Council to post on its Internet website a variety of documents, including fishery management plans (FMPs), FMP amendments under consideration, supporting analysis of alternatives, minutes of past meetings of the Council and its committees, and the pre-meeting information packages that are provided to Council members. Both respondents stated that NMFS should require and support the ability of the Councils to maintain the information technology infrastructure capacity necessary to fulfill this requirement and that the posting of a document should never be considered impracticable.

Response: NMFS concurs with the comments and agrees that there should be no technological constraints to Councils posting their current and archived documents on the Internet. This final rule does not retain the "to the extent practicable" clause, but it has been revised to require the Councils to maintain copies of documents too large to maintain on the Web site at the Council office for viewing during regular business hours.

Comment 16: One Council commented that a Council should not be required to record and post on the Internet minutes from the meetings of its committees and advisory bodies. Wide distribution of meeting reports should suffice.

Response: NMFS considers it a responsibility of the each Council to post records of the Council and the Council's committees on the Internet. The intent of the rule is not to require Councils to change their formats for taking down a record of meetings of the Council and its committees, but to require that those records, whatever their format, be made available for viewing via the Council's Internet site. The language in this final rule has been adjusted so as not to imply that verbatim minutes of advisory group meetings are required.

Comment 17: One Council stated its disagreement with the proposed requirement that past Council members take a full year break in service before becoming eligible for reappointment to fill an off-cycle opening.

Response: NMFS acknowledges the comment, but makes no change to the requirement in this final rule. The previous requirement was for a one-year break in service between appointments and this requirement stands. The intent of the change to this section was to remove obsolete language. NMFS interprets the intent of the requirement of the Magnuson-Stevens Act at Section 302(b)(3) as providing the opportunity for a variety of people to serve on Councils. This rule reduces the opportunity to put forth a candidate who will resign shortly after appointment, allowing the member with 3 consecutive terms to apply immediately for that position. This rule does not preclude a Council member from being nominated for a term beginning one year after completing his or her third term.

Comment 18: One Council supported the proposed changes that would allow more time for submission of member nomination packages. A letter from ENGOs stated that existing regulations

concerning Council nominations and appointments provide for a clear and fair process and that simply adhering to the existing requirements would solve many procedural challenges. Further, they suggest that the period between the nomination and paperwork submission deadlines will be used for intense activism by opponents of the nominees to derail the appointments.

Response: NMFS retains the March 15 date for substantially complete nomination packages to be received from the Governors. NMFS drafted the proposed rule to address recurrent problems in the nomination and appointment processes regarding the submission of information for background investigations. This final rule requiring the background investigation to be initiated after the member is conditionally appointed will afford more time in which to receive and prepare extensive background and security assurance documents. Therefore, the deadline for package submission is unchanged in this final rule.

Comment 19: One respondent suggested that NMFS contact state governors earlier in the year and specify qualifications for nominees, and, by January 15, should detail the process in the **Federal Register** and set up a dedicated website with information. Also, after the nomination deadline passes, NMFS should commit to publishing the nominees' names on the website within five days.

Response: NMFS acknowledges the comments as helpful ideas for consideration in the future, but will not specify these details in regulation because current regulations are sufficient to address these concerns. NMFS contacts governors' offices regarding nominations beginning in December. NMFS makes a formal request for nominations from each governor in mid January. An earlier formal request is not practicable in some cases, due to changes in state administration in January following state elections in November. NMFS follows up with a reminder to the Governors in mid February and works closely with the governors' offices and state representatives on the Councils to help in completing the packages. Council members, state representatives and governors' offices are very aware of upcoming Council seat vacancies, and earlier notification is not likely to solve the problem of late nomination package submissions. NMFS does provide a public list of nominees once all nominees have completed an initial vetting.

Comment 20: One letter suggested that NMFS require each nomination package to include a letter from the nominee to the governor requesting to serve on the Council.

Response: NMFS concurs that it would be helpful to have written acknowledgement from nominees acknowledging their nomination and their commitment to serve on the Council if appointed by the Secretary. This suggestion will be added to the requirements of the nomination materials submitted to the governors and/or the nominees rather than in this regulation.

Comment 21: One commenter suggested that NMFS should specify how governors can replace nominees who turn out to be unqualified or unsuitable for appointment.

Response: The current regulations at 50 CFR 600.215(e) state that governors should submit a list of at least three qualified nominees for each open seat. In the event that a preferred nominee is deemed unsuitable or unqualified, an alternate will be selected from the list submitted by the governor. Under section 302(b)(2)(C), if the Secretary determines that any individual is not qualified, the Secretary shall notify the appropriate Governor of that determination. The Governor shall then submit a revised list or resubmit the original list with an additional explanation of the qualifications of the individual in question. An individual is not eligible for appointment by the Secretary until that individual complies with the applicable financial disclosure requirements under section 302(k).

Comment 22: One respondent noted support for including the oath of office for Council members in the rule.

Response: NMFS acknowledges the comment. The oath of office is unchanged in this final rule.

Comment 23: In the supplementary proposed rule, a heading at 50 CFR 600.235(a) lists "advocacy" and "lobbying" as types of reportable financial interest relationships, yet the definitions in the proposed rule text do not include references to advocacy or lobbying. The definition should be updated to indicate the types of income stemming from advocacy and lobbying that must be disclosed by affected individuals.

Response: Both proposed rules referred to the existing rule, so changes proposed in the first proposed rule did not appear in the second proposed rule. In this final rule, the proposed changes from both proposed rules have been adopted and consolidated. NMFS considers any income derived from lobbying or advocacy to be disclosable. Therefore, NMFS did not specify the types of income as it would be too limiting on what is reportable.

Comment 24: Three Councils commented on the proposed new regulations regarding lobbying by Council members, staff, and contractors. Two called for clarification on how the rule bears on interactions between Council members/staff and the executive branch, particularly as regards a Council's obligations under the Magnuson-Stevens Act to advise and direct the Secretary of Commerce and to consult with other agencies on essential fish habitat. A third Council and an ENGO suggested that NMFS specify how the new regulations differ from existing regulations on lobbying and provide greater clarity with regard to specific prohibited activities.

Response: The regulations regarding lobbying make no change from previous law or guidance, but serve to provide some general direction and emphasis on this matter. The rule has no effect on the Council's interactions with NMFS and other agencies pursuant to a Council's obligations under the Magnuson-Stevens Act. Nor does the rule affect Council interaction with NMFS regarding Council administration, budget, and planning. The regulations do highlight the pre-existing limits regarding the Councils' interaction with Congress by specifically prohibiting attempts to influence the introduction and content of legislation.

Comment 25: One ENGO addressed the subject of Council member conflicts of interest and recusal in two separate letters. The commenter suggested that voluntary recusal is insufficient and that NMFS establish mandatory requirements for Council members to recuse themselves from discussion and voting when they have interests likely to be directly affected by the outcome of the vote. The ENGO suggested that non-compliance with the recusal requirement should be penalized and the subject vote should be vacated.

Response: While NMFS acknowledges the commenter's concern, we believe existing regulations and penalties are sufficient. Existing regulations at 50 C.F.R. § 600.235(c)(1) require that an affected individual may not vote on any Council decision that would have a significant and predictable effect on a financial interest disclosed in his/her report. Paragraph (i) of the same section states that it is unlawful for an affected individual to knowingly and willfully fail to disclose, or to falsely disclose, any financial interest as required by this section, or to knowingly vote on a Council decision in violation of this section. In addition to the penalties

applicable under the Magnuson-Stevens Act, a violation of this provision removes that person from the exemption from 18 U.S.C. 208, the general federal conflict of interest statute, and may result in criminal prosecution. This may also result in removal of the affected individual from Council membership.

Comment 26: An ENGO stated its support for the requirement to have Council members identify their affected financial interests when recusing themselves. Further, they called for a requirement to have the recusals and the stated affected financial interests included in the official public record of the meeting.

Response: NMFS agrees that Council minutes must record when member recuse themselves and the reasons for that recusal, however no changes are made to the regulations. Since a Council member must state the reason for a recusal as noted at § 600.235(d), it follows that the Council minutes must reflect that. Further, Statements of financial interest are already a matter of record and available at Council meetings as noted at § 600.235(b)(3).

Comment 27: An ENGO called for all votes made by each Council member to be included in the official public record of the meetings.

Response: NMFS does not agree that all votes by a Council need a roll call vote. Motions and the votes taken on them are already required to be in the minutes under Roberts Rules of Order, as practiced by all Councils. Not all votes taken by a Council require a roll call and a specific record of each member's vote. Voting in accordance with Robert's Rules of Order may take several forms. A Council member may call for a vote by roll call, in which case each member's vote is recorded. This is the usual case for important or contentious votes. Other forms of voting, i.e., a hand vote, may not result in a record of voting by each individual member, but by a count. A voice vote may be taken when the issue is more routine, i.e., motion to adjourn. Some votes, such as those for officers, may be by secret ballot.

Comment 28: A letter from ENGOs expressed concern that the revised guidelines regarding conflict of interest might be construed to preclude an ENGO's representative on a Council from voting. The respondent argues that NMFS should make a distinction between representatives of ENGOs and those from industry as regards the financial stake consequent to a Council vote. Employment in an ENGO alone should not be grounds for determining a conflict of interests exists.

Response: NMFS concurs with this interpretation of the conflict of interest guidelines. The condition of being employed by an ENGO should in itself not be grounds for a Council member's recusal, unless it is reasonable to conclude that the outcome of the vote may have a significant and predictable effect on the financial interests of the member. No changes to the regulations are necessary.

Comment 29: A representative of an industry association commented that SSC members should be subjected to the same recusal guidelines as Council members.

Response: Magnuson-Stevens Act considers SSC members to be "affected individuals" and as such specifies certain provisions under section 302(j), "Disclosure of Financial Interest and Recusal," apply to SSC members. The Magnuson-Stevens Act does not specify that subparagraph (j)(7), which requires recusal from Council votes under certain circumstances, applies to SSC members. NMFS has not set forth financial recusal requirements for SSC members in this final rule; however, Councils may establish local procedures for its committees and advisory groups that would call on members to announce their financial interests in the subject matter of the proceedings.

Comment 30: A Council suggested that the consequence of an SSC member not completing the financial disclosure form should be stated in the rule.

Response: The consequences of an affected individual's falsifying or failing to complete the financial disclosure form are specified in 50 CFR 235(i). It is unlawful for an affected individual to knowingly and willfully fail to disclose, or to falsely disclose, any financial interest as required. Consequences of an SSC member's non-compliance with the requirement to submit a correct, complete, and current financial disclosure form may include removal from the SSC, censure by the Council, and civil prosecution for falsifying information in an official form, subject to penalties under the Magnuson-Stevens Act and 18 U.S.C. 208 conflict of interest guidelines.

Comment 31: Several commenters noted the inadequacy of NOAA's current forms for disclosing one's financial interests. The form is awkward for those who are not employed in the fishing industry, and it does not accommodate reporting on all of the interests addressed under the Magnuson-Stevens Act. One commenter provided very detailed suggestions for revising the form.

Response: NMFS acknowledges the need to update the financial disclosure form. A new form is being drafted and will be submitted for clearance through the procedures of the Paperwork Reduction Act subject to the outcome of this rule. Under these procedures a notice requesting comments on the draft form will be published in the **Federal Register** in the fall of 2010.

Comment 32: An ENGO supports the requirement that Council members update their financial disclosures annually.

Response: NMFS concurs with this current requirement.

Comment 33: Several respondents commented on the types of income and the sources of income that must be disclosed by affected individuals. An industry association representative and the SBA called on NMFS to require disclosure of any grants or other financial interests held by any SSC member, particularly where the issue is of concern to the management process. Further, the term "financial interest" should be broadened and clarified to include any income, grant, or other monetary or in-kind remuneration received by any of the persons or entities from any organization seeking to influence the decisions of any Council for which the SSC provides advice.

Response: NMFS is revising the financial disclosure form and will provide instructions that make clear what sources and types of income are reportable.

Comment 34: Two letters from ENGOs supported the proposed requirement for affected individuals to disclose employment by subsidiaries and associates of entities that may be affected by Council decisions. An industry association noted that such business relationships may not be knowable to the affected individual. The industry association suggested that this provision not be implemented until further deliberation of the implications of the provision and the breadth of its applicability.

Response: NMFS is revising the financial disclosure form and will provide instructions that make clear what sort of business relationships will be reportable. NMFS will specify in this final rule that parent entities and subsidiaries of the entity providing compensation to the affected individual will have to be listed on the form if the entities are involved in regional fisheries under the jurisdiction of the subject Council.

Comment 35:A respondent suggested that NMFS rephrase 50 CFR 600.235(c)(2) to clarify existing regulations that currently can be read as treating IFQ-managed fisheries

differently from others for determining when recusal is required.

Response: NMFS concurs with the comment and has revised the sentence as suggested to clarify that holding any percentage of IFQ is not dispositive of the question of whether a Council decision will have a "significant and predictable effect on a financial interest" requiring recusal. Rather, the percentage IFQ held will be used to assess the relative financial interests of the Council member.

Comment 36: A letter from ENGOs expressed the concern that background investigations would not be conducted for all nominees to a Council seat, but only for those appointed to the Council. The ENGOs called for a requirement for all individuals nominated for a Council seat to disclose any prior felony convictions as part of the nomination packages submitted to the Secretary, and in so doing, helping to avoid removal of an appointed Council member when prior felonies are discovered as the security assurances are completed.

Response: NMFS does not agree that background investigations are needed for all nominees prior to their appointment. Reviews by the governors and enforcement checks by NMFS have been found to be adequate for initial selections. Appointments conditional upon a favorable background investigation will ensure that only suitable appointments are made. The additional work required by the nominee and by the agency investigating the information for background investigations is costly and time consuming, resulting in few or no differences in appointments.

NMFS conducts initial vetting and enforcement checks of nominees in which most issues that would affect a nominee's ability to serve are discovered. It is expected that governors will conduct some level of background and suitability review before nominating individuals to the Council per Magnuson-Stevens Act requirements. A past felony conviction may be disqualifying. Further, the background investigation forms require disclosure of past criminal history. Failure to report such matters truthfully and fully would be grounds for an unfavorable background check.

Comment 37: A respondent stated support for making final Council appointments conditional upon favorable background investigation and noted that NMFS should specify what circumstances would result in an unfavorable background investigation triggering revocation of Council membership.

Response: NMFS agrees that final Council appointments are contingent upon a favorable background check. This requirement is retained in the final rule. While it would be inappropriate, because of national security considerations, to list all criteria that would be cause for disapproval, some of the most obvious reasons for an unfavorable background investigation are noted in the response to Comment 36, above. Background investigations explore a great variety of information about the nominee and a favorable check indicates that the person is acceptable as an employee of the United States. Finally, background investigations are confidential, and reasons for determining a nominee is unsuitable for appointment will not be disclosed to the public.

Comment 38: Two respondents addressed the requirement for new Council members to attend training. One called for NMFS to provide training materials to nominated members before their swearing-in. The other suggested that the training be required of veteran members and Council staffs and that the subject matter should include innovations in fisheries science in addition to legal and procedural matters.

Response: The Magnuson-Stevens Act requires that training be provided to newly appointed members; therefore, they receive top priority for training resources in order to ensure NMFS is compliant with the Magnuson-Stevens Act. NMFS has made training available to veteran members and staff subject to availability of space and funding. NMFS posts all past training materials on the Internet and sent training materials to Council nominees prior to swearing-in in 2010 and will do so in the future.

NMFS also received comments on a number of other topics that are not addressed in the proposed or final rule. Subjects discussed in these comments included the length of NEPA documents, diversity of representation of sectors in Council membership, NMFS's role in overseeing the Council and approving its decisions, the status of overfishing relative to the quality of management provided by the Councils, procedural transparency, and standards for Council websites. NMFS takes notes of all these comments, but will not address these matters further, as they are not relevant to the subjects addressed in this particular rulemaking.

Changes from the Proposed Rule

In § 600.10, the definitions for "advisory panel (AP)" and "fishing industry advisory committee (FIAC)" were retained. As noted in the response to Comment 1, Council practice has made little distinction between the two types of advisory group, therefore, this final rule requires that the section of the Magnuson-Stevens Act under which the panel or committee or other group was formed be identified.

In § 600.10, the definition for "Regional Administrator" has been further revised by removing the reference to the previous title of "Regional Director", as this title is no longer in use.

In § 600.133, paragraph (b) is moved to a new § 600.134. Paragraph (c) reserved for peer review is removed, as peer review will be addressed in the National Standard Guideline 2 final rule, codified at § 600.315. Paragraphs (a)(1)–(a)(4) are redesignated as paragraphs (a)–(d).

A new § 600.134 is added to explain that SCC and AP members may be eligible to receive stipends. State marine fisheries agencies are defined as including any state or tribal agency that has conservation, management, or enforcement responsibility for any marine fishery resources.

In § 600.135, the wording of paragraphs (a), (c), and (d) is revised to clarify that all committees of each Council must follow the procedures of the section. Committees do not include groups that consist of only Council staff and Federal employees.

In § 600.150(b), the regulation has been revised to require pertinent documents to be on each Council's Internet site, with alternative methods of retrieval for specific documents. The words "to the extent practicable" have been removed.

In § 600.215(e), in the introductory language, the wording regarding receipt of the nomination packages is revised to reinstate and clarify the requirement that nomination packages must be received by March 15 each year. The language is carried forward to paragraph (e)(2). This is made possible by a change to § 600.240 that now requires only persons appointed as Council members to get security assurances instead of all nominees, reducing time and administrative burden.

In § 600.235, the definition of "Financial interest in harvesting, processing, lobbying, advocacy, or marketing" is revised to clarify in what entities a Council member must declare a financial interest. The language is revised by changing "any subsidiary of such entities" to the following: "employment with any entity that has any percentage ownership in or by another entity".

In § 600.235(c), the language is clarified to explain that the percentage

of an affected individual's percentage holdings in an IFQ is used to determine the individual's financial interest in a fishery, since this percentage can be directly related to total financial benefits in the fishery.

In § 600.240, the requirement for background investigations to be reinitiated every 5 years for serving members is rescinded. This requirement matches current requirements for Federal employees requiring the same level of background investigation.

Classification

The Acting Director, Office of Sustainable Fisheries, NMFS, determined that this final rule is necessary for the conservation and management of the fisheries and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for is published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none has been prepared.

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under Control Number 0649–0192. Public reporting burden for completing and submitting the Statement of Financial Interests, Form 88–195, is estimated to average 35 minutes 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 NMFS (see **ADDRESSES**) and by e-mail to *OIRA Submission@omb.eop.gov* or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to 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.

List of Subjects in 50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

Dated: September 21, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, NMFS amends 50 CFR part 600 as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

1. The authority citation for part 600 continues to read:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 2. In § 600.10, add definitions for "Advisory panel (AP)," and "Fishing industry advisory committee (FIAC)" in alphabetical order; and revise the definitions for "Region", "Regional Administrator", and "Science and Research Director" to read as follows:

§ 600.10 Definitions.

* * * * *

Advisory panel (AP) means a committee formed, selected, and formally designated as a Magnuson-Stevens Act Section 302(g)(2) advisory panel by the Council's Statement of organization, practices, and procedures (SOPP), or by a formal charge to the committee made by the chair and recorded in the Council's minutes, to assist it in carrying out its functions. An AP may include individuals who are not members of the Council.

* * * * *

Fishing industry advisory committee (FIAC) means an advisory group formed and selected by a regional fishery management council under the authority of the Magnuson-Stevens Act section 302(g)(3)(A) and formally designated in the Council's SOPP or by a formal charge to the FIAC made by the chair and recorded in the Council's minutes. A FIAC is not an "advisory panel" as defined under this section.

* * * * *

Region means one of six NMFS Regional Offices responsible for administering the management and development of marine resources of the United States in their respective geographical regions.

Regional Administrator means the Administrator of one of the six NMFS Regions described in Table 1 to § 600.502, or a designee.

* * * * *

Science and Research Director (also referred to as "Center Director") means the Director of one of the six NMFS Fisheries Science Centers described in Table 1 to § 600.502, or a designee.

* * * * *

■ 3. In § 600.15:

a. Redesignate paragraphs (a)(9) through (a)(15) as paragraphs (a)(11) through (a)(17), respectively.

b. Redesignate paragraphs (a)(5) through (a)(8) as paragraphs (a)(6) through (a)(9), respectively.

c. Add new paragraphs (a)(5) and (a)(10) to read as follows:

§ 600.15 Other acronyms.

(a) * * *

(5) CCC–Council coordination committee

* * * * *

(10) FIAC–Fishing industry advisory committee

* * * * *

■ 4. In § 600.105, revise paragraph (b) to read as follows:

§ 600.105 Intercouncil boundaries.

* * * * *

(b) *Mid-Atlantic and South Atlantic Councils.* The boundary begins at the seaward boundary between the States of Virginia and North Carolina (36°33′01.0″ N. lat), and proceeds due east to the point of intersection with the outward boundary of the EEZ as specified in the Magnuson-Stevens Act.

* * * * *

■ 5. In § 600.115, revise paragraph (b) to read as follows:

§ 600.115 Statement of organization, practices, and procedures (SOPP).

* * * * *

(b) Amendments to current SOPPs must be consistent with the guidelines in this section, subpart C of this part, the terms and conditions of the cooperative agreement (the funding agreement between the Council and NOAA that establishes Council funding and mandates specific requirements regarding the use of those funds), the statutory requirements of the Magnuson-Stevens Act, and other applicable law. Upon approval of a Council's SOPP amendment by the Secretary, a notice of availability must be published in the **Federal Register** that includes an Internet address from which the amended SOPP may be read and downloaded and a mailing address to

which the public may write to request copies.

* * * * *

■ 6. Section 600.117 is added to subpart B to read as follows:

§ 600.117 Council coordination committee (CCC).

(a) The Councils may establish a Council coordination committee (CCC) consisting of the chairs, vice chairs, and executive directors of each of the eight Councils or other Council members or staff, in order to discuss issues of relevance to all Councils.

(b) The CCC is not subject to the requirements of the Federal Advisory Committee Act (5 U.S.C. App. 2). Procedures for announcing and conducting open and closed meetings of the CCC shall be in accordance with § 600.135.

■ 7. In § 600.125, revise paragraph (a) to read as follows:

§ 600.125 Budgeting, funding, and accounting.

(a) Council grant activities are governed by 15 CFR part 14 (Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit and Commercial Organizations), 2 CFR part 230 (Cost Principles for Non-Profit Organizations), 15 CFR part 14 (Audit Requirements for Institutions of Higher Education and Other Non-Profit Organizations), and the terms and conditions of the cooperative agreement.

* * * * *

■ 8. Section 600.133 is added to subpart B to read as follows:

§ 600.133 Scientific and Statistical Committee (SSC).

(a) Each Council shall establish, maintain, and appoint the members of an SSC to assist it in the development, collection, evaluation, and peer review of such statistical, biological, economic, social, and other scientific information as is relevant to such Council's development and amendment of any fishery management plan.

(b) Each SSC shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch, preventing overfishing, maximum sustainable yield, and achieving rebuilding targets, and reports on stock status and health, bycatch, habitat status, social and economic impacts of management measures, and sustainability of fishing practices.

(c) Members appointed by the Councils to the SSCs shall be Federal employees, State employees, academicians, or independent experts and shall have strong scientific or technical credentials and experience.

(d) An SSC shall hold its meetings in conjunction with the meetings of the Council, to the extent practicable.

■ 8a. Section 600.134 is added to read as follows:

§ 600.134 Stipends.

Stipends are available, subject to the availability of appropriations, to members of committees formally designated as SSCs under Sec. 301(g)(1)(a) or APs under Sec. 302(g)(2) of the Magnuson-Stevens Act who are not employed by the Federal Government or a State marine fisheries agency. For the purposes of this section, a state marine fisheries agency includes any state or tribal agency that has conservation, management, or enforcement responsibility for any marine fishery resource.

■ 9. In § 600.135, paragraphs (a), (b), (c), (d), and (e) are revised to read as follows:

§ 600.135 Meeting procedures.

(a) *Regular meetings*. Public notice of a regular meeting, including the meeting agenda, of each Council, CCC, SSC, AP, FIAC, or other committees established under Magnuson-Stevens Act, Sec. 302(g), must be published in the **Federal Register** at least 14 calendar days prior to the meeting date. Appropriate notice by any means that will result in wide publicity in the major fishing ports of the region (and in other major fishing ports having a direct interest in the affected fishery) must be given. E-mail notification and website postings alone are not sufficient. The published agenda of a regular meeting may not be modified to include additional matters for Council action without public notice given at least 14 calendar days prior to the meeting date, unless such modification is necessary to address an emergency under section 305(c) of the Magnuson-Stevens Act, in which case public notice shall be given immediately. Drafts of all regular public meeting notices must be received by NMFS headquarters office at least 23 calendar days before the first day of the regular meeting. Councils must ensure that all public meetings are accessible to persons with disabilities, and that the public can make timely requests for language interpreters or other auxiliary aids at public meetings.

(b) *Emergency meetings*. Drafts of emergency public notices must be transmitted to the NMFS headquarters office at least 5 working days prior to the first day of the emergency meeting. Although notices of and agendas for emergency meetings are not required to be published in the **Federal Register**, notices of emergency meetings must be promptly announced through any means that will result in wide publicity in the major fishing ports of the region. E-mail notification and website postings alone are not sufficient.

(c) *Closed meetings*. After proper notification by any means that will result in wide publicity in the major fishing ports within the region and, having included in the notification the time and place of the meeting and the reason for closing any meeting or portion thereof to the public, a Council, CCC, SSC, AP, FIAC, or other committees:

(1) Must close any meeting, or portion thereof, that concerns information bearing a national security classification.

(2) May close any meeting, or portion thereof, that concerns matters or information pertaining to national security, employment matters, or briefings on litigation in which the Council is interested.

(3) May close any meeting, or portion thereof, that concerns internal administrative matters other than employment. Examples of other internal administrative matters include candidates for appointment to AP, SSC, and other subsidiary bodies and public decorum or medical conditions of members of a Council or its subsidiary bodies. In deciding whether to close a portion of a meeting to discuss internal administrative matters, the Council, CCC, SSC, AP, FIAC, or other committees should consider not only the privacy interests of individuals whose conduct or qualifications may be discussed, but also the interest of the public in being informed of Council operations and actions.

(d) Without the notice required by paragraph (c) of this section, a Council, CCC, SSC, AP, FIAC, or other committees may briefly close a portion of a meeting to discuss employment or other internal administrative matters. The closed portion of a meeting that is closed without notice may not exceed two hours.

(e) Before closing a meeting or portion thereof, the Council, CCC, SSC, AP, FIAC, or other committees should consult with the NOAA Office of General Counsel to ensure that the matters to be discussed fall within the exceptions to the requirement to hold public meetings described in paragraph (c) of this section.

* * * * *

■ 10. Section 600.140 is added to subpart B to read as follows:

§ 600.140 Procedure for proposed regulations.

(a) Each Council must establish a written procedure for proposed regulations consistent with section 303(c) of the Magnuson-Stevens Act. The procedure must describe how the Council deems proposed regulations necessary or appropriate for the purposes of implementing a fishery management plan or a plan amendment, or making modifications to regulations implementing a fishery management plan or plan amendment. In addition, the procedure must describe how the Council submits proposed regulations to the Secretary.

(b) The Councils must include the procedure for proposed regulations in its SOPP, see § 600.115, or other written documentation that is available to the public.

■ 11. In § 600.150, add paragraph (b) to read as follows:

§ 600.150 Disposition of records.

* * * * *

(b) Each Council is required to maintain documents generally available to the public on its Internet site. Documents for posting must include: fishery management plans and their amendments for the fisheries for which the Council is responsible, drafts of fishery management plans and plan amendments under consideration, analysis of actions the Council has under review, minutes or official reports of past meetings of the Council and its committees, materials provided by the Council staff to Council members in preparation for meetings, and other Council documents of interest to the public. For documents too large to maintain on the Web site, not available electronically, or seldom requested, the Council must provide copies of the documents for viewing at the Council office during regular business hours or may provide the documents through the mail.

■ 12. Section 600.207 is added to subpart C to read as follows:

§ 600.207 Pacific Fishery Management Council Tribal Indian representative and alternate.

(a) The tribal Indian representative to the Pacific Fishery Management Council may designate an alternate during the period of the representative's term. The designee must be knowledgeable concerning tribal rights, tribal law, and the fishery resources of the geographical area concerned.

(b) New or revised designations of an alternate by the tribal Indian representative must be delivered in writing to the appropriate NMFS Regional Administrator and the Council chair at least 48 hours before the designee may vote on any issue before the Council. In that written document, the tribal Indian representative must indicate how the designee meets the knowledge requirements under paragraph (a) of this section.

■ 13. In § 600.210 revise paragraph (c) to read as follows:

§ 600.210 Terms of Council members.

* * * * *

(c) A member who has completed three consecutive terms will be eligible for appointment to another term one full year after completion of the third consecutive term.

■ 14. In § 600.215, redesignate paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f), respectively; add paragraph (c); and revise paragraph (b)(5) and the newly redesignated paragraph (e) to read as follows:

§ 600.215 Council nomination and appointment procedures.

* * * * *

(b) * * *

(5) When the terms of both an obligatory member and an at-large member expire concurrently, the Governor of the state holding the expiring obligatory seat may indicate that the nominees who were not selected for appointment to the obligatory seat may be considered for appointment to an at-large seat, provided that the resulting total number of nominees submitted by that governor for the expiring at-large seat is no fewer than three different nominees.

* * * * *

(c) Nominees to the Gulf of Mexico Fishery Management Council. (1) The Governors of States submitting nominees to the Secretary for appointment to the Gulf of Mexico Fishery Management Council shall include:

(i) At least one nominee each from the commercial, recreational, and charter fishing sectors, except that an individual who owns or operates a fish farm outside the United States shall not be considered to be a representative of the commercial or recreational sector; and

(ii) At least one other individual who is knowledgeable regarding the conservation and management of fisheries resources in the jurisdiction of the Council.

(2) Notwithstanding the requirements of paragraphs (a) and (b) of this section, if the Secretary determines that the list of names submitted by the Governor does not meet the requirements of paragraph (c)(1) of this section, the Secretary shall:

(i) Publish a notice in the **Federal Register** asking the residents of that State to submit the names and pertinent biographical data of individuals who would meet the requirements of this section that were not met for appointment to the Council; and

(ii) Add the name of any qualified individual submitted by the public who meets the requirements of this section that were not met to the list of names submitted by the Governor.

(3) The requirements of this paragraph (c) shall expire at the end of fiscal year 2012, meaning through September 30, 2012.

* * * * *

(e) *Nomination deadlines.* Nomination packages (governors' letters and completed nomination kits) must be forwarded by express mail under a single mailing to arrive at the address specified by the Assistant Administrator by March 15. For appointments outside the normal cycle, the Secretary will provide a deadline for receipt of nominations to the affected Council and state governors.

(1) *Obligatory seats.* (i) The Governor of the state for which the term of an obligatory seat is expiring should submit the names of at least three qualified individuals to fill that seat by the March 15 deadline. The Secretary will appoint to the Pacific Fishery Management Council a representative of an Indian tribe from a list of no fewer than three individuals submitted by the tribal Indian governments.

(ii) If the Governor or tribal Indian governments fail to provide a nomination letter and at least three complete nomination kits by March 15, the obligatory seat will remain vacant until all required information has been received and processed and the Secretary has made the appointment.

(2) *At-large seats.* (i) If a Governor chooses to submit nominations for an at-large seat, he/she must submit lists that contain at least three qualified nominees for each vacant seat. A nomination letter and a nomination kit for each qualified nominee must be forwarded by express mail under a single mailing to arrive at the address specified by the Assistant Administrator by March 15.

(ii) Nomination packages that are not substantially complete by March 15 may be returned to the nominating Governor. At-large members will be appointed from among the nominations submitted by the governors who complied with the nomination requirements.

* * * * *

■ 15. Section 600.220 is revised to read as follows:

§ 600.220 Oath of office.

As trustees of the nation's fishery resources, all voting members must take an oath specified by the Secretary as follows: "I, [name of the person taking oath], as a duly appointed member of a Regional Fishery Management Council established under the Magnuson-Stevens Fishery Conservation and Management Act, hereby promise to conserve and manage the living marine resources of the United States of America by carrying out the business of the Council for the greatest overall benefit of the Nation. I recognize my responsibility to serve as a knowledgeable and experienced trustee of the Nation's marine fisheries resources, being careful to balance competing private or regional interests, and always aware and protective of the public interest in those resources. I commit myself to uphold the provisions, standards, and requirements of the Magnuson-Stevens Fishery Conservation and Management Act and other applicable law, and shall conduct myself at all times according to the rules of conduct prescribed by the Secretary of Commerce. This oath is given freely and without mental reservation or purpose of evasion."

■ 16. In § 600.225 redesignate paragraphs (b)(2) through (b)(8) as paragraphs (b)(3) through (b)(9) respectively; and add a new paragraph (b)(2) to read as follows:

§ 600.225 Rules of conduct.

* * * * *

(b) * * *

(2) Council members, employees, and contractors must comply with the Federal Cost Principles Applicable to Regional Fishery Management Council Grants and Cooperative Agreements, especially with regard to lobbying, and other restrictions with regard to lobbying as specified in § 600.227 of this part.

* * * * *

■ 17. Section 600.227 is added to subpart C to read as follows:

§ 600.227 Lobbying.

(a) Council members, employees and contractors must comply with the requirements of 31 U.S.C. 1352 and Department of Commerce implementing regulations published at 15 CFR part 28, "New Restrictions on Lobbying." These provisions generally prohibit the use of Federal funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with the award. Because the Councils receive in excess of $100,000 in Federal funding, the regulations mandate that the Councils must complete Form SF-LLL, "Disclosure of Lobbying Activities," regarding the use of non Federal funds for lobbying. The Form SF-LLL shall be submitted within 30 days following the end of the calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed. The recipient must submit the Forms SF-LLL, including those received from subrecipients, contractors, and subcontractors, to the Grants Officer.

(b) Council members, employees, and contractors must comply with the Federal Cost Principles Applicable to Regional Fishery Management Council Grants and Cooperative Agreements summarized as follows:

(1) Title 2 CFR part 230 - Cost Principles for Nonprofit Organizations (OMB CircularA–122) is applicable to the Federal assistance awards issued to the Councils.

(2) The purpose of the cost principles at 2 CFR part 230 is to define what costs can be paid on Federal awards issued to non-profit organizations. The regulation establishes both general principles and detailed items of costs.

(3) Under 2 CFR part 230, costs for certain lobbying activities are unallowable as charges to Federal awards. These activities would include any attempts to influence:

(i) The introduction of Federal or state legislation;

(ii) The enactment or modification of any pending legislation by preparing, distributing, or using publicity or propaganda, or by urging members of the general public to contribute to or to participate in any demonstration, march, rally, fundraising drive, lobbying campaign, or letter writing or telephone campaign.

(4) Generally, costs associated with providing a technical and factual presentation directly related to the performance of a grant, through hearing testimony, statements, or letters to Congress or a state legislature are allowable if made in response to a documented request.

(5) Costs associated with lobbying to influence state legislation in order to reduce the cost or to avoid material impairment of the organization's authority to perform the grant are also allowable.

■ 18. In § 600.235:

a. In paragraph (a), add paragraph (3) to the definition of "Affected individual", remove the definition of "Financial interest in harvesting, processing, or marketing", and add definitions for "Financial Interest Form" and "Financial interest in harvesting, processing, lobbying, advocacy, or marketing" in alphabetical order.

b. Revise paragraph (b).

c. Revise paragraph (c)(2) and add paragraph (c)(4).'

d. Revise paragraphs (d), (h), and (i).

The revisions and additions read as follows:

§ 600.235 Financial disclosure.

(a) * * *

Affected individual * * *

(3) A member of an SSC shall be treated as an affected individual for the purposes of paragraphs (b)(1), (b)(5) through (b)(7), and (i) of this section.

* * * * *

Financial Interest Form means NOAA Form 88–195, "STATEMENT OF FINANCIAL INTERESTS For Use By Voting Members of, and Nominees to, the Regional Fishery Management Councils, and Members of the Scientific and Statistical Committee (SSC)" or such other form as the Secretary may prescribe.

Financial interest in harvesting, processing, lobbying, advocacy, or marketing (1) includes:

(i) Stock, equity, or other ownership interests in, or employment with, any company, business, fishing vessel, or other entity or employment with any entity that has any percentage ownership in or by another entity engaging in any harvesting, processing, lobbying, advocacy, or marketing activity in any fishery under the jurisdiction of the Council concerned;

(ii) Stock, equity, or other ownership interests in, or employment with, any company or other entity or employment with any entity that has any percentage ownership in or by another entity that provides equipment or other services essential to harvesting, processing, lobbying, advocacy, or marketing activities in any fishery under the jurisdiction of the Council concerned, such as a chandler or a dock operation;

(iii) Employment with, or service as an officer, director, or trustee of, an association whose members include companies, vessels, or other entities engaged in any harvesting, processing, lobbying, advocacy, or marketing activities, or companies or other entities providing services essential to harvesting, processing, lobbying, advocacy, or marketing activities in any fishery under the jurisdiction of the Council concerned; and

(iv) Employment with an entity that has any percentage ownership in or by another entity providing consulting, legal, or representational services to any

entity engaging in, or providing equipment or services essential to harvesting, processing, lobbying, advocacy, or marketing activities in any fishery under the jurisdiction of the Council concerned, or to any association whose members include entities engaged in the activities described in paragraphs (1)(i) and (ii) of this definition;

(2) Does not include stock, equity, or other ownership interests in, or employment with, an entity engaging in scientific fisheries research in any fishery under the jurisdiction of the Council concerned, unless it is covered under paragraph (1) of this definition. A financial interest in such entities is covered by 18 U.S.C. 208, the Federal conflict-of-interest statute.

(b) *Reporting.* (1) The Magnuson-Stevens Act requires the disclosure of any financial interest in harvesting, processing, lobbying, advocacy, or marketing activity that is being, or will be, undertaken within any fishery over which the Council concerned has jurisdiction. An affected individual must disclose such financial interest held by that individual; the affected individual's spouse, minor child, partner; or any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee. The information required to be reported must be disclosed on the Financial Interest Form (as defined in paragraph (a) of this section), or such other form as the Secretary may prescribe.

(2) The Financial Interest Form must be filed by each nominee for Secretarial appointment to the Council with the Assistant Administrator by April 15 or, if nominated after March 15, one month after nomination by the Governor. A seated voting member appointed by the Secretary must file a Financial Interest Form with the Executive Director of the appropriate Council within 45 days of taking office; must file an update of his or her statement with the Executive Director of the appropriate Council within 30 days of the time any such financial interest is acquired or substantially changed by the affected individual or the affected individual's spouse, minor child, partner, or any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee; and must update his or her form annually and file that update with the Executive Director of the appropriate Council by February 1 of each year, regardless of whether any information has changed on that form.

(3) The Executive Director must, in a timely manner, provide copies of and updates to the Financial Interest Forms of appointed Council members to the NMFS Regional Administrator, the Regional Attorney who advises the Council, the Department of Commerce Assistant General Counsel for Administration, and the NMFS Office of Sustainable Fisheries. These completed Financial Interest Forms shall be kept on file in the office of the NMFS Regional Administrator and at the Council offices, and shall be made available for public inspection at such offices during normal office hours. In addition, the forms shall be made available at each Council meeting or hearing and shall be posted for download from the Internet on the Council's website.

(4) Councils must retain the Financial Interest Form for a Council member for at least 5 years after the expiration of that individual's last term.

(5) An individual being considered for appointment to an SSC must file the Financial Interest Form with the Regional Administrator for the geographic area concerned within 45 days prior to appointment. A member of the SSC must file an update of his or her statement with the Regional Administrator for the geographic area concerned within 30 days of the time any such financial interest is acquired or substantially changed by the SSC member or the SSC member's spouse, minor child, partner, or any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee; and must update his or her form annually and file that update with the Regional Administrator by February 1 of each year.

(6) An individual who serves as an SSC member to more than one Council shall file Financial Interest Forms with each Regional Administrator for the geographic areas concerned.

(7) The Regional Administrator shall maintain on file the Financial Interest Forms of all SSC members for at least five years after the expiration of that individual's term on the SSC. Such Forms are not subject to sections 302(j)(5)(B) and (C) of the Magnuson-Stevens Act.

(c) * * *

(2) As used in this section, a Council decision will be considered to have a "significant and predictable effect on a financial interest" if there is a close causal link between the decision and an expected and substantially disproportionate benefit to the financial interest in harvesting, processing, lobbying, advocacy, or marketing of any affected individual or the affected individual's spouse, minor child, partner, or any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee, relative to the financial interests of other participants in the same gear type or sector of the fishery. The relative financial interests of the affected individual and other participants will be determined with reference to the most recent fishing year for which information is available. However, for fisheries in which IFQs are assigned, the percentage of IFQs assigned to the affected individual will be the determining factor.

* * * * *

(4) A member of an SSC is not subject to the restrictions on voting under this section.

(d) *Voluntary recusal.* An affected individual who believes that a Council decision would have a significant and predictable effect on that individual's financial interest disclosed under paragraph (b) of this section may, at any time before a vote is taken, announce to the Council an intent not to vote on the decision and identify the financial interest that would be affected.

* * * * *

(h) The provisions of 18 U.S.C. 208 regarding conflicts of interest do not apply to an affected individual who is a voting member of a Council appointed by the Secretary, as described under section 302(j)(1)(A)(ii) of the Magnuson-Stevens Act, and who is in compliance with the requirements of this section for filing a financial disclosure report. The provisions of 18 U.S.C. 208 do not apply to a member of an SSC, unless that individual is an officer or employee of the United States or is otherwise covered by the requirements of 18 U.S.C. 208.

(i) It is unlawful for an affected individual to knowingly and willfully fail to disclose, or to falsely disclose, any financial interest as required by this section, or to knowingly vote on a Council decision in violation of this section. In addition to the penalties applicable under § 600.735, a violation of this provision may result in removal of the affected individual from Council or SSC membership.

■ 19. In § 600.240, revise paragraph (a) to read as follows:

§ 600.240 Security assurances.

(a) DOC Office of Security will issue security assurances to Council members following completion of favorable background investigations. A Council member's appointment is conditional until such time as the background investigation has been favorably adjudicated. The Secretary will revoke

the member's appointment if that member receives an unfavorable background investigation. In instances in which Council members may need to discuss, at closed meetings, materials classified for national security purposes, the agency or individual (e.g., Department of State, U.S. Coast Guard) providing such classified information will be responsible for ensuring that Council members and other attendees have the appropriate security clearances.

* * * * *

■ 20. Section 600.250 is added to subpart C to read as follows:

§ 600.250 Council member training.

(a) The Secretary shall provide a training course covering a variety of topics relevant to matters before the Councils and shall make the training course available to all Council members and staff and staff from NMFS regional offices and science centers. To the extent resources allow, the Secretary will make the training available to Council committee and advisory panel members.

(b) Council members appointed after January 12, 2007, shall, within one year of appointment, complete the training course developed by the Secretary. Any Council member who completed such a training course within 24 months of January 12, 2007, is considered to have met the training requirement of this section.

[FR Doc. 2010–24222 Filed 9–24–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100120036–0360–02]

RIN 0648–XT99

Fisheries of the Northeastern United States; Black Sea Bass Fishery; 2010 Black Sea Bass Specifications; Emergency Rule Extension; Correction

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

ACTION: Temporary rule; correction.

SUMMARY: On July 7, 2010, NMFS published in the **Federal Register** a temporary rule to extend the emergency action to increase the 2010 black sea bass specifications. The preamble text of that rule incorrectly identified the revised commercial quota and recreational harvest limit (RHL) based on the increased 2010 black sea bass total allowable landings (TAL). This document corrects those values to ensure that they are consistent with the revised 2010 black sea bass specifications.

DATES: Effective August 10, 2010, through December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Sarah Heil, Fishery Management Specialist, (978) 281–9257.

SUPPLEMENTARY INFORMATION: A temporary rule to extend the emergency action to increase the 2010 black sea bass specifications was published in the **Federal Register** on July 7, 2010 (75 FR 38935). On page 38935 of that rule, the commercial quota is incorrectly listed as 1,813,000 lb (822 (mt), and the RHL is listed as 1,887,000 lb (856 mt). The corrected values for these specifications are as follows: The commercial quota is 1,758,610 lb (798 mt) and the RHL is 1,830,390 lb (830 mt).

Classification

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator (AA) for NOAA, Fisheries finds good cause to waive prior notice and opportunity for additional public comment for this action because any delay of this action would be contrary to the public interest. This rule corrects the commercial quota and RHL values published in the **Federal Register** on July 7, 2010 (75 FR 38935), as part of the extension to the emergency rule to increase the 2010 black sea bass specifications. The measures in the extension to the emergency rule, published in the **Federal Register** on July 7, 2010, were intended to be the same as those published in the initial emergency action on February 10, 2010 (75 FR 6586). However, the extension to the emergency rule incorrectly identified the revised commercial quota and RHL values based on the increased 2010 black sea bass TAL. To delay this correction notice would cause confusion over the revised 2010 black sea bass specifications because of the disparity between the revised specifications and the commercial quota and RHL values that were incorrectly identified in the extension to the emergency rule. Immediate publication of the corrected commercial quota and RHL will rectify any confusion on the revised 2010 black sea bass specifications. For the reasons provided above, the AA also finds good cause, pursuant to 5 U.S.C. 553(d)(3), to waive the 30-day delayed effective period for this correction.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

This final rule is exempt from review under Executive Order 12866.

Correction

Accordingly, the final rule FR Doc. 2010–16498, published on July 7, 2010 (75 FR 38935), is corrected as follows:

1. On page 38935, In the second column, in the first full paragraph, in the twentieth line, "1,813,000 lb (822 mt)," is corrected to read "1,758,610 lb (798 mt)," and in the twenty-second line, "1,887,000 lb (856 mt)," is corrected to read "1,830,390 lb (830 mt),".

Dated: September 21, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2010–24219 Filed 9–24–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0910051338–0151–02]

RIN 0648–XZ07

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Trip Limit Reductions and Gear Modifications for the Common Pool Fishery

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

ACTION: Temporary rule; inseason adjustment of landing limits and gear requirements.

SUMMARY: This action decreases the landing limits for Gulf of Maine (GOM) cod to 100 lb (45.4 kg) per days-at-sea (DAS) up to 1000 lb (453.6 kg) per trip, Georges Bank (GB) yellowtail flounder to 100 lb (45.4 kg) per trip, and white hake to 100 lb (45.4 kg) per DAS up to 500 lb (226.8 kg) per trip; expands the trawl gear restriction in the U.S./Canada Management Area to include the entire Western U.S./Canada Area; and authorizes the use of the rope separator trawl in the Western U.S./Canada Area for NE multispecies vessels fishing in the common pool for the remainder of

the 2010 fishing year (FY) (through April 30, 2011). This action is authorized under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and by the regulations implementing Amendment 16 and Framework Adjustment 44 (FW 44) to the NE Multispecies Fishery Management Plan (FMP). It is intended to optimize the harvest of NE regulated multispecies by decreasing the likelihood of harvest exceeding the subcomponent of the annual catch limit (ACL) allocated to the common pool (common pool sub-ACL) for each of these three stocks during FY 2010 (May 1, 2010, through April 30, 2011).

DATES: September 27, 2010, through April 30, 2011.

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

SUPPLEMENTARY INFORMATION: Regulations governing possession and landing limits for vessels fishing under common pool regulations are found at § 648.86. The regulations authorize vessels issued a valid limited access NE multispecies permit and fishing under a NE multispecies day-at-sea (DAS), or fishing under a NE multispecies Small Vessel or Handgear A or B category permit, to fish for and retain NE multispecies under specified conditions. The vessels fishing in the common pool are allocated a sub-ACL equivalent to that portion of the commercial groundfish ACL that is not allocated to the 17 approved NE multispecies sectors for FY 2010. The final rule implementing FW 44 (75 FR 18356, April 9, 2010) established ACLs for FY 2010, which were modified by a subsequent rule (75 FR 29459, May 26, 2010). For FY 2010, the common pool sub-ACLs for these stocks are: 240 mt (529,109 lb) for GOM cod, 20 mt (43,954 lb) for GB yellowtail flounder, and 51 mt (112,436 lb) for white hake.

The regulations at § 648.86(o) authorize the Administrator, Northeast (NE) Region, NMFS (Regional Administrator) to increase or decrease the trip limits for vessels in the common pool to optimize the harvest of NE regulated species by preventing over-harvesting or under-harvesting the common pool sub-ACL. The current relevant FY 2010 trip limits are: 200 lb (90.7 kg)/DAS up to 1,000 lb (453.6 kg)/trip for GOM cod; 1,000 lb (453.6 kg)/trip for GB yellowtail flounder; and 2,000 lb (907.2 kg)/DAS up to 10,000 lb (4,535.9 kg)/trip for white hake. Exceeding the common pool sub-ACL prior to April 30, 2011, would trigger accountability measures (AMs) in FY 2011--specifically, differential DAS counting, to prevent future overages.

An inseason action published in the **Federal Register** on May 27, 2010 (75 FR 29678), reduced the common pool trip limits for five stocks: GOM haddock, GB haddock, GOM winter flounder, GB winter flounder, and GB yellowtail flounder. A subsequent action (75 FR 44924, July 30, 2010) reduced the trip limit for GOM cod and imposed a gear restriction in the U.S./Canada Management Area to reduce catch of GB yellowtail flounder. A third action (75 FR 48613, August 11, 2010) imposed a trip limit for witch flounder and removed the trip limit for pollock. A September 2, 2010, inseason action (75 FR 53872) imposed 2:1 differential DAS counting in the Inshore GOM, Offshore GOM, Inshore GB, and Offshore GB Differential DAS Areas to reduce effort on GOM cod, white hake, and witch flounder.

Initial vessel monitoring system (VMS) and dealer reports indicate that approximately 91.4 percent of the GOM cod, 90.2 percent of the GB yellowtail flounder, and 65.5 percent of the white hake common pool sub-ACLs had been harvested as of September 11, 2010. Although there are relatively few common pool vessels landing groundfish, such vessels have been leasing in additional DAS from other vessels, and a substantial portion of the FY remains. Even minimal future fishing activity will likely increase catch of the stocks of concern. Should the common pool sub-ACLs be exceeded prior to April 30, 2011, AMs would be automatically triggered for the common pool fishery in FY 2011.

Based on this information, the Regional Administrator has determined that despite previous inseason actions, additional measures are needed to help ensure that the common pool sub-ACLs are not exceeded before the end of the FY. To that end the Regional Administrator is implementing the trip limit changes in the following table, effective September 27, 2010 through April 30, 2011, as well as restrictions on the use of trawl gear in the entire Western U.S./Canada Area as more fully described below.

Stock	NewTrip Limit
GOM Cod	100 lb (45.4 kg) per DAS, up to 1000 lb (453.6 kg) per trip
GB Yellowtail Flounder	100 lb (45.4 kg) per trip
White Hake	100 lb (45.4 kg) per DAS, up to 500 lb (226.8 kg) per trip

On July 30, 2010, NMFS implemented a prohibition on the use of trawl gear, except for the haddock separator trawl and the Ruhle trawl, as specified at §§ 648.85(a)(3)(iii) and (b)(6)(iv)(J)(*3*), respectively, by any limited access NE multispecies common pool vessel that harvests, possesses, or lands fish from, or deploys its net during any part of a trip in, the Western U.S./Canada Area south of 41° 40′ N. lat. when fishing under a NE multispecies DAS, to reduce catches and discards of GB yellowtail flounder. This allowed a vessel to continue to fish for other stocks north of 41° 40′ N. lat., where NMFS at-sea observer data indicate catch rates of yellowtail flounder are lower. However, due to the small amount of GB yellowtail flounder remaining for the common pool fishery (approximately 2 mt (4,409 lb)) any catch of GB yellowtail flounder in this area could exceed the remaining sub-ACL. Given this concern, expanding the gear restriction to the entire Western U.S./Canada Area is warranted, and is implemented through this action.

The current Western U.S./Canada Area trawl gear restriction inadvertently omitted rope separator trawl gear as an acceptable type of gear that could be allowed to slow the catch and discard rates of GB yellowtail flounder. This omission, which was inconsistent with gear allowed in the adjacent Western GB Multispecies Restricted Gear Area (RGA) as specified at § 648.81(n) is corrected through this action to ensure flexibility in gears allowed, and to be consistent with gear restrictions in the RGA. This action now allows common pool vessels to use the rope separator trawl, as defined at § 648.81(n)(3)(i)(A), when fishing in the Western U.S./Canada Area. A vessel that fishes in the Eastern U.S./Canada Area is still restricted from using a flounder trawl and may only use either a haddock separator trawl or a Ruhle trawl, as the rope separator trawl is not an authorized gear type in the Eastern U.S./Canada Area.

The regulations at § 648.85(a)(3)(iv)(D) specify that, if the Regional Administrator requires use of a particular gear type in order to reduce catches of stocks of concern, the following gear performance incentives will apply: Possession of flounders (all species combined), monkfish, and skates is limited to 500 lb (226.8 kg) (whole weight) each (i.e., no more than

500 lb (226.8 kg) of all flounders, no more than 500 lb (226.8 kg) of monkfish, and no more than 500 lb (226.8 kg) of skates), and possession of lobsters is prohibited. Therefore, common pool vessels fishing any part of a trip in any part of the U.S./Canada Management Area (Eastern or Western Areas) are restricted to these catch limits for the duration of that trip, and, of the 500 lb (226.8 kg) of flounders, no more than 100 lb (45.4 kg) may be GB yellowtail flounder.

Catch will be closely monitored through dealer-reported landings, VMS catch reports, and other available information. Further inseason adjustments to increase or decrease the trip limits, or to adjust differential DAS measures, may be considered, based on updated catch data and projections. Conversely, if the common pool sub-ACL is projected to be under-harvested by the end of FY 2010, in-season adjustments to increase the trip limit for the remainder of FY2010 will be considered.

Classification

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

Pursuant to 5 U.S.C. 553(b)(3)(B) and (d)(3), there is good cause to waive prior notice and opportunity for public comment, as well as the delayed effectiveness for this action, because notice, comment, and a delayed effectiveness would be impracticable and contrary to the public interest. The regulations under §§ 648.86(o) and 648.85(a)(3)(iv)(D) grant the RA the authority to adjust NE multispecies trip limits and implement gear restrictions in the U.S./Canada Management Area to prevent over-harvesting or under-harvesting the common pool sub-ACLs. This action will implement more restrictive trip limits for GOM cod, GB yellowtail flounder, and white hake in order to ensure that the common pool sub-ACLs are not overharvested, and that the biological and economic objectives of the FMP are met. It is important to take this action immediately because, based on current data and projections, continuation of the status quo trip limits will result in reaching the respective common pool sub-ACLs prior to the end of the FY. Inseason adjustments in FY 2010 have already reduced the landing limits for GOM cod (July 30, 2010) and GB yellowtail flounder (May 27, 2010), implemented a gear restriction in most of the Western U.S./Canada Area (July 30, 2010), and implemented differential DAS counting in the GOM and GB to minimize the chance of exceeding the sub-ACL for GOM cod and white hake, as well as other stocks (September 2, 2010). Attainment of any of the common pool sub-ACLs prior to the end of the FY on April 30, 2011, would result in AMs being put in place for the common pool in FY 2011. These restrictions could result in the loss of yield of other valuable species caught by vessels in the common pool. The information that is the basis for this action includes recent catch data that only recently became available. The time necessary to provide for prior notice and comment, and delayed effectiveness for this action, would prevent NMFS from implementing a reduced trip limit and additional gear restrictions in a timely manner. A resulting delay in the curtailment of the catch rate of these three stocks could result in less revenue for the fishing industry and be counter to the objective of achieving optimum yield from the fishery.

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

Dated: September 21, 2010.

Carrie Selberg,

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

[FR Doc. 2010–24188 Filed 9–22–10; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 0912281446–0111–02]

RIN 0648–XY79

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Closure

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific sardine off the coasts of Washington, Oregon and California. This action is necessary because the directed harvest allocation total for the third seasonal period (September 15 December 31) is projected to be reached by the effective date of this rule. From the effective date of this rule until January 1, 2011, Pacific sardine can only be harvested as part of the live bait fishery or incidental to other fisheries; the incidental harvest of Pacific sardine is limited to 30–percent by weight of all fish per trip. Fishing vessels must be at shore and in the process of offloading at 12:01 am Pacific Daylight Time on date of closure.

DATES: Effective 12:01 am Pacific Daylight Time (PDT) September 24, 2010, through December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Joshua Lindsay, Southwest Region, NMFS, (562) 980–4034.

SUPPLEMENTARY INFORMATION: This document announces that based on the best available information recently obtained from the fishery and information on past effort, the directed fishing harvest allocation for the third allocation period (September 15 December 31) will be reached and therefore directed fishing for Pacific sardine is being closed until January 1, 2011. Fishing vessels must be at shore and in the process of offloading at the time of closure. From 12:01 am on the date of closure through December 31, 2010, Pacific sardine may be harvested only as part of the live bait fishery or incidental to other fisheries, with the incidental harvest of Pacific sardine limited to 30–percent by weight of all fish caught during a trip.

NMFS manages the Pacific sardine fishery in the U.S. exclusive economic zone (EEZ) off the Pacific coast (California, Oregon, and Washington) in accordance with the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). Annual specifications published in the **Federal Register** establish the harvest guideline (HG) and allowable harvest levels for each Pacific sardine fishing season (January 1 - December 31). If during any of the seasonal allocation periods the applicable adjusted directed harvest allocation is projected to be taken, only incidental harvest is allowed and, for the remainder of the period, any incidental Pacific sardine landings will be counted against that period's incidental set aside. In the event that an incidental set-aside is projected to be attained, all fisheries will be closed to the retention of Pacific sardine for the remainder of the period via appropriate rulemaking.

Under 50 CFR 660.509, if the total HG or these apportionment levels for Pacific sardine are reached at any time, NMFS is required to close the Pacific sardine fishery via appropriate rulemaking and it is to remain closed until it re-opens either per the allocation scheme or the beginning of the next fishing season. In accordance with § 660.509 the Regional Administrator shall publish a notice in the **Federal Register** announcing the date of the closure of the directed fishery for Pacific sardine.

The above in-season harvest restrictions are not intended to affect the

prosecution of the live bait portion of the Pacific sardine fishery.

Classification

This action is required by 50 CFR 660.509 and is exempt from Office of Management and Budget review under Executive Order 12866.

NMFS finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) for the closure of the directed harvest of Pacific sardine. For the reasons set forth below, notice and comment procedures are impracticable and contrary to the public interest. For the same reasons, NMFS also finds good cause under 5 U.S.C. 553(d)(3) to waive the 30–day delay in effectiveness for this action. This measure responds to the best available information and is necessary for the conservation and management of the Pacific sardine resource. A delay in effectiveness would cause the fishery to exceed the in-season harvest level. These seasonal harvest levels are important mechanisms in preventing overfishing and managing the fishery at optimum yield. The established directed and incidental harvest allocations are designed to allow fair and equitable opportunity to the resource by all sectors of the Pacific sardine fishery and to allow access to other profitable CPS fisheries, such as squid and Pacific mackerel. Many of the same fishermen who harvest Pacific sardine rely on these other fisheries for a significant portion of their income.

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

Dated: September 22, 2010.

Carrie Selberg,

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

[FR Doc. 2010–24190 Filed 9–22–10; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910131363–0087–02]

RIN 0648–XZ27

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher/Processors Using Pot Gear in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by pot catcher/processors in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2010 Pacific cod total allowable catch (TAC) specified for pot catcher/processors in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 23, 2010, through 2400 hrs, A.l.t., December 31, 2010.

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

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

The 2010 Pacific cod TAC allocated as a directed fishing allowance to pot catcher/processors in the BSAI is 2,248 metric tons as established by the final 2010 and 2011 harvest specifications for groundfish in the BSAI (75 FR 11778, March 12, 2010).

In accordance with § 679.20(d)(1)(iii), the Administrator, Alaska Region, NMFS, has determined that the 2010 Pacific cod TAC allocated as a directed fishing allowance to pot catcher/processors in the BSAI has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by pot catcher/processors in the BSAI.

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

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by pot catcher/processors in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 21, 2010.

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

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

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

Dated: September 22, 2010.

Carrie Selberg,

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

[FR Doc. 2010–24191 Filed 9–22–10; 4:15 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 75, No. 186
Monday, September 27, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 54

[Docket No. PRM–54–6; NRC–2010–0291]

Earth Day Commitment/Friends of the Coast, Beyond Nuclear, Seacoast Anti-Pollution League, C–10 Research and Education Foundation, Pilgrim Watch, and New England Coalition; Notice of Receipt of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; Notice of receipt.

SUMMARY: The Nuclear Regulatory Commission (NRC) has received and requests public comment on a petition for rulemaking dated August 18, 2010, submitted by Raymond Shadis and Mary Lampert on Behalf of Earth Day Commitment/Friends of the Coast, Beyond Nuclear, Seacoast Anti-Pollution League, C–10 Research and Education Foundation, Pilgrim Watch, and New England Coalition, for docketing as a petition for rulemaking under 10 CFR 2.802. In another letter dated August 18, 2010, Robin Read, State Representative for New Hampshire, requested to be included as a petitioner for this petition for rulemaking. The petition was docketed by the NRC and has been assigned PRM–54–6. The petitioners request that the NRC amend its regulations to permit a license renewal application no sooner than 10 years before the expiration of the current license and to apply the rule to all license renewal applications that have not yet been issued an NRC staff Final Safety Evaluation Report (FSER). The petitioners also requested a freeze on all new relicensing activity until the rulemaking is decided.

DATES: Submit comments by December 13, 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.

ADDRESSES: Please include Docket ID NRC–2010–0291 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, *see* "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–2010–0291. Address questions about NRC dockets to Carol Gallagher, telephone 301–492–3668; e-mail *Carol.Gallagher@nrc.gov*.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attn:* Rulemakings and Adjudications Staff.

E-mail comments to: Rulemaking.Comments@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301–415–1966.

Hand Deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852 between 7:30 a.m. and 4:15 p.m. during Federal workdays (Telephone 301–415–1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

FOR FURTHER INFORMATION CONTACT: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone 301–492–3667, toll free 800–368–5642, *Cindy.Bladey@nrc.gov.*

SUPPLEMENTARY INFORMATION:

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.* The ADAMS accession number for the petition is ML1023803790.

Federal Rulemaking Web Site: Public comments and supporting materials related to this action, including the petition for rulemaking, can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2010–0291.

Petitioners

The petitioners all have a residence or interests within 50 miles of the NextEra Seabrook Nuclear Generating Station, which has applied for license renewal (Docket 050–00443) at 10 CFR 54.17(c), 20 years in advance of the end of its current license. The petitioning organizations all have members residing within 50 miles of NextEra Seabrook Nuclear Generating Station. The petitioners who are elected-officials represent constituents who reside within 50 miles of NextEra Seabrook Nuclear Generating Station.

The petitioners are as follows:

Friends of the Coast has been incorporated as a non-profit, for the public good, corporation in the State of Maine since 1995. Friends of the Coast has members who live within fifty miles of the NextEra Seabrook Nuclear Generating Station, which has applied

for license renewal 20 years in advance of the expiration of its current license under 10 CFR 54.17(c).

Beyond Nuclear is incorporated as a not for profit organization based in Takoma Park, MD, which aims to educate and activate the public about the connections between nuclear power and nuclear weapons. Beyond Nuclear has members who live and work within fifty miles of the NextEra Seabrook Nuclear Generating Station which has applied for a license renewal 20 years in advance of the expiration of its current license under 10 CFR 55.17(c).

New England Coalition has been incorporated as a not for profit corporation in the State of Vermont since 1971. It has intervened in NRC licensing and license amendment proceedings at Vermont Yankee, Yankee Rowe, and Seabrook.

Seacoast Anti-Pollution League (SAPL). SAPL has worked since 1969 to protect the health, safety and general well-being of the New Hampshire Seacoast community from nuclear pollution and other threats to the environment. Most of SAPL's members live and work within fifty miles of the NextEra Seabrook Nuclear Generating Station.

New England Coalition has members who live within fifty miles of the NextEra Seabrook Nuclear Generating Station, which has applied for license renewal 20 years in advance of the expiration of its current license under 10 CFR 54.17(c).

Pilgrim Watch is a public interest organization located in Duxbury, MA. Pilgrim Watch is an intervener in the Entergy Pilgrim Nuclear Power Station license renewal application. Pilgrim Watch has members who reside within 50 miles of Seabrook Station.

C–10 Research & Education Foundation is located in Newburyport, MA, and has members who reside within 50 miles of Seabrook Generating Station. C–10 maintains an environmental monitoring system in the vicinity of Seabrook Generating Station and provides public education on environmental and energy matters.

Robin Read is a State Representative for the State of New Hampshire.

Background

Grounds for Action Requested

The petitioners state that the NRC's current regulation (10 CFR 54.17), is unduly non-conservative with respect to its effect on accuracy and completeness of the application, public participation, changing environmental consideration, aging analysis and management, regulatory follow-through, National Environmental Policy Act compliance, changing regulation, and more. The petitioners state that they seek to restore some margin of conservation by halving the lead time on license renewal applications from 20 to 10 years.

The petitioners state that a rulemaking for 10 CFR 54.17(c) was conducted more than 15 years ago. The rulemaking took place before sweeping changes in NRC oversight and before economic and regulatory shifts that enabled unprecedented changes in ownership and an industry-wide shift of focus from anticipated decommissioning to uprate and license renewal. The petitioners state that the rulemaking cannot have contemplated how these changes have affected the dynamics of license renewal aging analysis and aging management planning over a period of 40 years (20 years of current license, plus 20 years of extended period of operation). The petitioners claim that because the rule does not take into consideration its present context, the rule is antiquated and obsolete and must be reconsidered.

The petitioners state that of 32 license renewals granted, none were filed 20 years in advance of license expiration and only among 14 license renewal applications under consideration and filed in the last few years is an exception to be found, Seabrook Station-Unit 1. The petitioners state that NextEra Seabrook has provided no credible justification for its very early filing. The petitioners state that the great majority of licensees have filed applications for license renewal within 10 years of original license expiration without any apparent negative consequences. The petitioners believe that this experience is a clear demonstration that more than 10 years lead time is unnecessary and of little benefit. The petitioners state that filing, reviewing, and granting license renewal applications more than 10 years in advance of the original license expiration can have negative consequences.

The petitioners state that the rulemaking for 10 CFR 54.17(c) proceeded without sufficient consideration of the impact of 20 year advance consideration of license renewal on the hearing rights of affected persons. By renewing the license of a nuclear power station 20 years in advance of the licensed extended period of operation NRC removes to the distance of a full generation, the opportunity for an adjudicatory hearing, a coming generation of affected residents, visitors, and commercial interests as yet unable or unprepared to speak for themselves. The petitioners state that 10 CFR 54.17(c) introduces the question of whether the action proposed is obtaining the license or entering into an extended period of operation 20 years hence. The petitioners believe that the safety and environmental ramifications (the physical impact on affected persons) begin 20 years away. The petitioners state that 10 CFR 54.17(c) allows for effective segmentation of the proposed action rendering the permission so far removed in time from the implementation as to provide an intellectual disconnect or, in effect, void legal notice.

The petitioners state that 10 CFR 54.17(c) allows licensees and NRC reviewing staff to press to untenable lengths the unproven ability to predict the aging and deterioration of systems, structures, and components (SSCs). The petitioners state that 10 CFR 54.17(c) promotes failure of the license renewal application to encompass the potential effects of an environment that is arguably changing at an unprecedented rate. The petitioners state that active proposals for more than 3,000 megawatts of wind power are currently on the books in New England, with potential for 12,000 more. The petitioners state that it cannot be credibly projected over 20 years what wind power will then be available, in part because wind power projects are seldom, if ever, planned 20 years in advance.

The petitioners state that filing for license renewal at mid-term of the current license finds the licensee at a place in SSC service life where in industry experience, few failures are observed and, generally, those that are observed are episodic or anomalous in nature and cannot be readily plotted as a trend for prediction purposes. The petitioners state that the time of an elevated rate of failures due to design, manufacturing, and construction defects has passed and is largely irrelevant to aging management in the proposed extended period of operation. The petitioners state that the anticipated end-of-design life and aging issues have barely, if at all, begun to emerge, so little or no plant-specific information on how a given plant will age is available to be trended, provide lessons, or otherwise illuminate the path forward. It is generally observed that for many SCCs this information flow rates increase rapidly in the fourth quarter and toward the end of a license. The petitioners state that this SSC reliability progression is well-known and often illustrated in the so-called "Bath Tub Curve." Additionally, corrosion risk is a function of time. The petitioners state that the Beaver Valley NPP containment

issue provides a powerful example of operating experience emerging at a late date in a way that affects the license renewal. VT Yankee also provides a series of later life structural failures as additional examples. The petitioners state that it is appropriate, from a regulatory audit standpoint, to wait until applicable failure rate and observed aging phenomena data is in hand, before attempting time-limited aging analysis or aging management planning; less than 10; not less than 20 years in advance of operating license expiration.

The petitioners state that the current rule exacerbates NRC staff and licensee difficulty in following license renewal commitments. The petitioners state that license renewal applications are often approved with the proviso that certain commitments be made and fulfilled; generally before the period of extended operation begins. These commitments often include inspections, tests, analyses, and development of programs vital to safety and environmental protection. The petitioners state that regulatory experience shows NRC staff turnover, changes in oversight, licensee staff changes, and ownership (licensee) changes, greater in a 20-year period than a 10-year period, will at once complicate and place increased emphasis on proper handoff of unfulfilled licensee commitments.

The petitioners state that 20 years from application to onset of extended operation will, based on regulatory history, certainly see an inordinate amount of applicable regulatory change, with lack of compliance likely to be grandfathered in. The petitioners state that current issues under consideration for treatment in the license renewal process include aging management for underground, buried, or inaccessible pipes that carry radionuclides, and aging management for safety-related low voltage cables that are below-grade and not qualified for a wet environment.

The petitioners state that, in its current form, the regulation conflicts with, circumvents, and otherwise frustrates the letter and spirit of the National Environmental Policy Act (NEPA). The petitioners state it further conflicts with, circumvents, and otherwise frustrates the object and goals of NEPA. The petitioners state that the NEPA provides at Section 1500.2, that the Federal agencies, "shall to the fullest extent possible: (e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." The petitioners state that the Act provides at Section 1500.1(b) that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail."

The Petition

The petitioners request that the NRC amend its regulations to change the time before expiration of the operating license or combined license currently in effect in which a licensee may apply for a renewed license from 20 to 10 years. The petitioners request that the NRC amend 10 CFR 54.17(c) to read as follows:

An application for a renewed license may not be submitted to the Commission earlier than 20 years before the expiration of the operating license or combined license currently in effect.

An application for a renewed license may not be submitted to the Commission earlier than 10 years before the expiration of the operating license or combined license currently in effect.

Petitioner's Request To Suspend All License Renewal Review Pending Disposition of the Petition for Rulemaking

The petitioners request that the Commission suspend all license renewal review pending disposition of this petition for rulemaking. The petitioners state that given the lead-in time on the application(s) and the fact that no additional work would be required of the licensee, no significant additional burden would accrue to the applicant. The petitioners state that, inasmuch as several petitioners intend to file requests for a hearing and petitions for leave to intervene in the matter of Seabrook license renewal, this suspension would preserve the order of the application review process and contribute to judicial efficiency and economy. The petitioners state that further suspension of review activities now would avoid duplication of effort should the Commission issue the requested rule change.

The petitioners state that although they are not parties to a proceeding in this matter and no proceeding has yet been convened, the petitioners urge the Commission to find that the present situation is analogous to that described in 10 CFR 2.802(d) and to exercise its discretion for the benefit of the NRC and all parties by suspending review of all license renewal applications submitted more than10 years in advance of current license expiration until resolution of this petition.

The NRC has determined that this request is not part of the rulemaking process. The NRC will address in a separate action the petitioners' request to freeze all new relicensing activity pending disposition of the PRM.

Conclusion

For the reasons stated previously the petitioners request that NRC revise its regulations at 10 CFR 54.17 to permit license renewal application no sooner than 10 years before the expiration of current license and to apply the rule to all license renewal applications that have not yet been issued an NRC staff FSER.

Dated at Rockville, Maryland, this 21st day of September 2010.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2010–24132 Filed 9–24–10; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Chapter I

[NRC–2009–0279]

Radiation Protection Regulations and Guidance; Public Meetings and Request for Comments

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of Public Meeting and Request for Comment.

SUMMARY: The NRC is conducting a series of public meetings, in the format of facilitated roundtable workshops, to solicit early public input on major issues associated with potential updates to NRC's radiation protection regulations and guidance in light of recommendations presented in the International Commission on Radiological Protection (ICRP) Publication 103 (2007). To aid in that process, the NRC is requesting comments on the issues discussed in this notice. The NRC has not initiated rulemaking on this subject, and is seeking early input and views on the benefits and impacts of options to be considered before making any decision on whether to proceed with a rulemaking. Each meeting will include a panel of participants, selected in a convening process to represent the

diversity of stakeholders for these issues, including the various uses of radioactive materials licensed by the NRC. In addition to the panel, the NRC is encouraging observation and participation by all interested individuals. The meeting agenda will specifically include opportunities for viewpoints to be expressed from individuals in attendance who are not members of the panel. The NRC plans to transcribe the meetings.

DATES: Comments on this notice should be submitted by January 31, 2011. 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.

Public Meeting Dates: The NRC will take public comments on the issues raised in this notice at a series of three 2-day public meetings that will be held during the weeks of October 25, 2010 (Washington, DC); November 1, 2010 (Los Angeles, California) and November 8, 2010 (Houston, Texas). The meeting in Washington DC will also include a third day of discussions, focused more specifically on the issues associated with power reactor licensees, as described in Section IV of this notice. Specific locations and dates will be announced on the NRC public Web site at *http://www.nrc.gov/public-involve/public-meetings/index.cfm.* Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information.

ADDRESSES: Members of the public are invited and encouraged to submit comments by any of the following methods:

1. Mail to Cindy Bladey, Chief, Rules, Announcements and Directives Branch, Office of Administration, Mail Stop 5B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; or

2. Electronically at *http://www.regulations.gov.*

Comments will be made available to the public in their entirety. 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 notice using the following methods:

Regulations.gov: Documents related to this notice, including public comments, are accessible at *http://www.regulations.gov.*

NRC's Public Document Room (PDR): The public may examine and have copied for a fee, publicly available documents at the NRC's PDR, Public File Area O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Document Access and Management System (ADAMS): Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, 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 PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Kimyata Morgan Butler, Office of Federal and State Materials and Environmental Management Programs, telephone (301) 415–0733, e-mail *Kimyata.MorganButler@nrc.gov* or Dr. Donald Cool, Office of Federal and State Materials and Environmental Management Programs, telephone (301) 415–6347, e-mail *Donald.Cool@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Regulations issued by the U.S. Nuclear Regulatory Commission (NRC) are found in Chapter I of Title 10, "Energy," of the *Code of Federal Regulations* (10 CFR). Chapter I is divided into Parts 1 through 199, which contain requirements that are binding for all individuals and entities that possess, use, or store nuclear materials or operate nuclear facilities under the NRC's jurisdiction. Of these, the regulations that are most relevant to the subject of this notice are contained in 10 CFR Part 20, "Standards for Protection Against Radiation," and 10 CFR Part 50, "Domestic Licensing of Production, and Utilization Facilities." Through the existing compatibility criteria, the NRC Agreement States have certain requirements that are essentially identical to 10 CFR Part 20 for their licensees. Additional requirements, specific to particular uses or classes of facilities, are found in other portions of the regulations. For example, 10 CFR Part 35, "Medical Use of Byproduct Material," contains requirements related to medical use of radioactive material. Other portions of the regulations also may contain radiation protection criteria, and cross references to 10 CFR Part 20.

ICRP Publication 103 contains the latest in a series of revised international recommendations for radiation protection. Earlier recommendations of the ICRP concerning radiation protection were contained in ICRP Publication 2 (1959), ICRP Publication 26 (1977), and ICRP Publication 60 (1990). On December 18, 2008, the NRC staff provided a Policy Issue Notation Vote Paper (SECY–08–0197) to the Commission which presented the regulatory options of moving, or not moving, towards a greater degree of alignment between NRC's current radiation protection regulatory framework and the recommendations contained in ICRP Publication 103. In a Staff Requirements Memorandum (SRM) dated April 2, 2009, the Commission approved the staff's recommendation to immediately begin engagement with stakeholders and interested parties to ascertain the benefits, burdens, and potential stakeholder impacts if updates are made to NRC's radiation protection regulations and guidance in order to achieve greater alignment with the recommendations in ICRP Publication 103. This notice and series of public meetings are part of the NRC staff's ongoing engagement process.

II. Request for Written and Electronic Comments and Plans for a Public Meeting

The NRC is soliciting comments on the technical issues and options, as presented in Sections III and IV of this notice. Comments may be submitted either in writing or electronically as indicated under the **ADDRESSES** heading. In addition, the NRC is holding a series of three public meetings, in the format of facilitated roundtable workshops, to be held during the weeks of October 25, 2010 (Washington, DC); November 1, 2010 (Los Angeles, California); and November 8, 2010 (Houston, Texas). Specific locations and dates will be announced on the NRC public Web site at *http://www.nrc.gov/public-involve/public-meetings/index.cfm.*

Sections III and IV provide background and topics of discussion on the major issues that will be the subject of the public meetings. During the public meetings, the NRC will conduct roundtable panel discussions, with a panel of participants, selected in a convening process to represent the

diversity of stakeholders for these issues, including the various uses of radioactive materials licensed by the NRC. The meeting agenda will specifically include opportunities for viewpoints to be expressed from individuals in attendance who are not members of the panel. While all roundtable meetings will feature a discussion of technical issues and options for all types of licensed use of radioactive materials, as described in Section III of this notice, each meeting will have some degree of focus on particular types of licensed activity. The Washington, DC roundtable meeting will include a power reactor-focused session on the third day of the workshop, which will focus on issues described in Section IV of this notice. The roundtable meeting to be held in Los Angeles, California is intended to have additional medical use participation and the roundtable meeting held in Houston, Texas is intended to have additional industrial applications-focused (industrial radiography, well logging, etc.) participation. However, all interested stakeholders are encouraged to attend and participate in any of the three workshops, including representatives from the university, research, manufacturer and distributors, and other sectors that use radioactive materials.

In addition to inviting public comments on the issues presented in Sections III and IV of this notice, the NRC is also requesting specific comments from potentially impacted industries. In Section III, the NRC is soliciting comments related to: (1) Information on the projected costs and benefits resulting from consideration of the factors described in Sections III; (2) operational data on radiation exposures from various licensee groups; (3) whether the presented issues are addressed comprehensively; and (4) whether other options should be considered. In Section IV, the NRC is requesting comments from the nuclear power industry, and other stakeholders, specifically on operational considerations and costs and benefits to the industry increasing alignment of 10 CFR Part 50, Appendix I design objectives with the recommendations of ICRP Publication 103. The Commission believes that stakeholder comments will help to identify and quantify the potential impact of these proposed changes and will assist the NRC as potential regulatory action(s) are developed. Based on the comments received, the Commission will then be in a better position to evaluate whether to proceed with the development of a proposed rulemaking. If the Commission decides to proceed with a proposed rulemaking, additional information will be published in the **Federal Register** for public review and comment.

III. NRC Staff-Identified Technical Issues and Options Associated With the Potential Revision of NRC's Radiation Protection Regulations and Guidance

Introduction

Section A of the following discussion presents background information and describes some general considerations concerning potential revisions to NRC's radiation protection regulations, as identified by NRC staff. Section B discusses the various issues and options that need to be assessed before commencing regulatory activities related to initiating rulemaking to change current radiation protection regulations. All public feedback will be used in developing an options paper for Commission consideration in late 2011.

A. Background

The Commission believes that the current NRC regulatory framework continues to provide adequate protection of health and safety of workers, the public, and the environment. From a safety regulation perspective, ICRP Publication 103 proposes measures that may be seen as going beyond what is needed to provide adequate protection. In order to ensure that the NRC is well informed of all the benefits and burdens associated with further alignment of NRC's current radiation protection regulations with ICRP Publication 103, the NRC is actively soliciting stakeholders' input to further clarify the issues, options, benefits, impacts, and/or burdens associated with making changes to the current NRC radiation protection regulations. These efforts include interactions with the public, the nuclear industry, the medical community, the radioactive materials community, States, and other Federal agencies (*i.e.,* EPA, DOE, OSHA, etc.). The staff wishes to continue these interactions with more detailed stakeholder discussions during this series of facilitated roundtable workshops. The agenda for each workshop will feature the list of NRC staff-identified technical options and issues (described below) that are potential areas for revision of 10 CFR Part 20 in light of the recommendations contained in ICRP Publication 103. In addition, stakeholders and interested parties may introduce other options, issues, and information for the NRC's consideration.

The current NRC radiation protection framework, taken as a whole, is a collection based on three different generations of international radiation protection guidelines. 10 CFR Part 20 is based upon the 1977 recommendations contained in ICRP Publication 26, and the scientific information contained in ICRP Publication 30. In addition, 10 CFR Part 20 contains certain requirements based on recommendations and materials provided by the U.S. National Council on Radiation Protection and Measurements. Some other NRC requirements, including those for 10 CFR Part 50 Appendix I, are based on the older recommendations from 1959 contained in ICRP Publication 2. Certain licensees, as provided in specific license conditions, are implementing the more recent recommendations from 1990 in ICRP Publication 60 and subsequent publications updating the scientific information. The situation in other agencies of the Federal Government is similarly diverse, with requirements and guidance values based on all three previous generations of ICRP recommendations.

The recommendations in ICRP Publication 103 continue to be based on the fundamental principles of justification of exposures, optimization of protection, and limitation of dose. ICRP Publication 103 consolidates recommendations from ICRP Publication 60 and subsequent publications using a better integrated approach to radiation protection and in dealing with various types of radiation exposures. Among others things, exposures are divided into three fundamental exposure situations, planned exposure situations, existing exposure situations, and emergency exposure situations. Planned exposure situations include licensed activities where planning and controls are in place before the exposure is permitted. In each exposure situation, ICRP has placed an increased emphasis on the optimization of protection for such types of exposure situations. NRC regulations in 10 CFR Parts 20 and 50 are part of requirements in the United States for planned exposure situations, as described by the ICRP.

B. Issues and Options for Discussion

The following format is used in the presentation of the issues that follow. Each issue is assigned a number, a short title, regulatory options, and a list of questions. These issues, options, and questions are not meant to be a complete or final list, but are intended

to initiate discussion. Interested stakeholders are welcome to recommend additions, deletions, or modifications of the key issues for consideration and propose implementation considerations. These issues and options will serve as the basis for discussion at the public meetings. Meeting participants, and those wishing to make comments, are strongly encouraged to read more about this effort at *http://www.nrc.gov/about-nrc/regulatory/rulemaking/opt-revise.html.*

Issue No. 1: Effective Dose and Numerical Values

Currently, 10 CFR Part 20 expresses the sum of internal and external exposures to an individual as the total effective dose equivalent (TEDE). In particular, the Commission amended the definitions in 10 CFR 20.1003 and 50.2 (72 FR 68058; December 4, 2007) to clarify the definition of TEDE to mean the sum of the effective dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures). This action was made effective on February 15, 2008 (72 FR 72233; December 20, 2007). The revised definition of TEDE allows a licensee to substitute "effective dose equivalent" for "deep dose equivalent" (DDE) for external exposures, when calculated using a method found satisfactory to the Commission. Regulatory Guide 8.40 "Methods for Measuring Effective Dose Equivalent from External Exposure" recently updated and consolidated the guidance available on acceptable methods for calculation of effective dose. A conforming change was made to 10 CFR 20.1201(c) to clarify the determination of occupational radiation dose for adults. The rule change is consistent with the current recommendations of the ICRP.

The staff is considering whether it is appropriate to adopt current ICRP terminology and methodology throughout 10 CFR Part 20 and other portions of the regulations, by using the term TED instead of the term TEDE. ICRP publications no longer use the term TEDE or committed effective dose equivalent. The updated terminology has been associated with changes to various weighting factors within the calculation, but the underlying conceptual approach has remained the same.

Another area of consideration is changing the radiation protection weighting factors and numerical values. The weighting factors for tissues (W_T) and types of radiation (W_R) are currently specified in 10 CFR Part 20 in the definitions section, and are based on the recommendations in ICRP Publication 26. ICRP Publication 103 recommendations provide new values for both quantities. Revising values for Annual Limits on Intake (ALI) and Derived Air Concentrations (DAC) is also an area of consideration. At this time, the ICRP is still in the process of developing a new set of dose coefficients, which will incorporate the revised radiation and tissue weighting factors and account for the latest biophysical models. The ICRP has indicated that the first volume of these new dose coefficients is expected in late 2011, although the publication of the complete set for occupational exposure and public exposure is not expected before 2014.

In considering Issue No. 1, the staff has identified two main issues and options that should be considered and discussed relative to effective dose and numerical values:

Issue No. 1.1: Clarifying Effective Dose Methodology and Assessing Implications for Licensee Compliance With Dose Limits and Changes to Terminology

NRC staff wants to clarify, as stated above, that the revised definition of TEDE allows a licensee to substitute EDE for deep dose equivalent (DDE) for external exposures and that a conforming change was made to 10 CFR 20.1201(c) to clarify the determination of occupational radiation dose for adults. The issue of terminology goes beyond the simple introduction of a new term. Some of the NRC regulations continue to be based on older radiation protection approaches, and if these approaches are changed, then a question would be whether to make a change in the existing terminology of 10 CFR Part 20, or to the current terminology used worldwide. See Section IV for particular considerations in the power reactor community.

In consideration of the potential changes to terminology, the following three options should be considered:

Options: 1.1a: No change in the current terminology (terminology remains TEDE).

1.1b: Change the current regulation to align with the current ICRP Publication.

103: Express as Total Effective Dose.

1c: Allow use of either term.

Questions: Q1.1–1: In terms of implementing the recently changed methodology for applying TEDE, are there any potential impacts on the ability to comply with the options for dose limits (DDE vs. TED)?

Q1.1–2: What are the anticipated impacts on records and reports?

Issue No. 1.2: Numerical Values and Weighting Factors

ICRP Publication 103 provided updated tissue and radiation weighting factors (W_T, W_R). In addition, the ICRP is in the process of revising the dose coefficients based on new values, models, and decay data. The weighting factors currently used in 10 CFR Part 20 date from 1977, and the corresponding ALI and DAC values are presented in 10 CFR Part 20 Appendix B. The NRC staff also notes that the EPA is currently examining the values presented in Federal Guidance Reports 11 and 13, and is considering an update of these values. The difference between the ICRP values and the EPA values stems primarily from the use of a U.S. population cancer incidence and mortality analysis, instead of an average set of cancer incidence and mortality values for a worldwide population. In discussion with stakeholders to date, the majority have been generally in favor of updating the scientific information. However, no specific information related to potential impacts has been presented.

The following are options and questions are related to this issue:

Options: 1.2a: No change.

1.2b: Change the current regulation to align with the current ICRP Publication.

103: Update to new values, models, and radionuclide decay data.

Questions: Q1.2–1: Are there any foreseen impacts of the timing (2014) of making changes to the current numerical values and weighting factors? Should NRC consider moving forward with a more limited set of radionuclides that would be available more quickly, and make subsequent amendments to add additional values as they are published by the ICRP?

Q1.2–2: Should the NRC use the values developed by the EPA, which will be based on a US population, instead of the ICRP values, which are based on a more diverse world population?

Issue No. 2: Occupational Dose Limits

The occupational dose limit of 10 rem (100 mSv) over 5 years, with a maximum of 5 rem (50 mSv) in any one year, recommended by ICRP in 1990, was not incorporated into the last revision of 10 CFR Part 20 because the recommendations were not available during the public comment period for the proposed rule. The ICRP recommendations have now been adopted, in some form, by the International Atomic Energy Agency in their International Basic Safety Standards (BSS), and by most of the other countries in the world. In some countries, the limits are as recommended by the ICRP. In other cases, the national authorities have

chosen to require a single 2 rem (20 mSv) limit for occupational exposure. In the discussions with stakeholders that have already taken place, the occupational dose limits issue has also included discussion of the relationship between the limits, and any proposal related to establishing constraints for occupational exposure (*see* Issue No. 4).

The NRC staff is aware from stakeholder interactions that there are significant global or trans-boundary considerations that are important to some licensees which would argue in favor of changes in the dose limits. The staff is also aware that many other licensees wish to leave the current NRC regulations as they are. Factors identified have included potential impacts to licensees who have occupationally exposed individuals who are currently receiving exposures in excess of 2 rem (20 mSv) in a year.

The NRC staff has identified the following three options for changes to NRC's occupational dose limits:

Options: 2.a: No change. Allow the dose limit to remain at 5 rem (50 mSv) per year.

2.b: Change the current regulation to align with the current ICRP Publication 103: 10 rem (100 mSv) over 5 years, with a maximum of 5 rem (50 mSv) in any one year.

2.c: Change the current regulation to align with the approach adopted by some other countries: yearly dose limit of 2 rem (20 mSv).

Questions: Q2–1: Are there any significant anticipated impacts in assessing and retaining dose histories for each individual in order to comply with a multi-year average?

Q2–2: Are there any anticipated implementation impacts expected if the dose limit is decreased?

Q2–3: Is there any information about the actual dose distributions for industrial and medical licensees? What are the trends for this data? Are the data available to share with the NRC?

Q2–4: For the medical industry, are there any potential impacts on patient care?

Issue No. 3: Doses to Special Populations

Issue No. 3.1: Dose Limits for Embryo/Fetus of a Declared Pregnant Worker

The limits for the embryo/fetus of a declared pregnant worker are specified in 10 CFR 20.1208. Currently, the dose limit to the embryo/fetus of a declared pregnant worker is 0.5 rem (5 mSv) for the gestation period with 0.05 rem (0.5 mSv) additional dose during the gestation period if the dose to the embryo/fetus has already exceeded 0.5 rem (5 mSv) at the time of declaration. The current requirements are based on the recommendations available in ICRP Publication 26. The ICRP recommendations now state that protection should be provided that is generally equivalent to that provided to a member of the public. Thus, the ICRP has now recommended a simplified approach, which is 100 mrem (1 mSv) after the declaration of pregnancy.

In the discussions with stakeholders that have already taken place, many stakeholders have indicated that the ICRP proposal would not cause any issues. However, the NRC staff is also aware of some licensee segments, such as Nuclear Pharmacy licensees, where the change could result in an impact. To date, specific information and supporting data on impacts have not been received.

The NRC staff identified the following three options for the dose limit to an embryo/fetus of a declared pregnant worker:

Options: 3.a: No change. Continue with the dose limit of 0.5 rem (5 mSv) per year.

3.b: Change the current regulation to align with the current ICRP Publication 103: 100 mrem (1 mSv) after the declaration of pregnancy. 3.c: Change the current regulation to another single value after declaration: For example, 0.05 rem (.5 mSv) after declaration, the provision of the current rule if a dose of 0.5 rem (5 mSv) has already been exceeded at the time of declaration of the pregnancy.

Questions: Q3–1: Are there any significant anticipated impacts associated with reducing the dose limit to the embryo/fetus of a declared pregnant woman, including operational impacts?

Q3–2: Are there any anticipated implementation impacts on record keeping?

Q3–3: Is there a reduction in burden in assessment and record keeping if the ICRP recommendation is considered for adoption?

Q3–4: Are there technological implementation issues, such as limits of detection, which would make adoption of the ICRP recommendation difficult in certain circumstances?

Q3–5: Is there data on actual dose distributions to the embryo/fetus of a declared pregnant worker? What are the trends for this data? Is this data available to share with the NRC?

Issue No. 3.2: Dose Limits for Members of the Public, Alternative Provisions for 500 mrem (5 mSv)

In addition to the dose to the embryo/fetus of a declared pregnant female, stakeholders have asked about the implementation of the ICRP recommendations to sensitive populations. In particular, stakeholders have noted that the ICRP recommendations have stated that, although the dose limits for members of the public continue to provide flexibility for doses greater than 100 mrem (1 mSv) in certain limited circumstances, sensitive populations such as young children should not be allowed to receive doses greater than the dose limits. This leads to an issue regarding the public dose limits that the NRC staff has not previously solicited comments.

The current NRC public dose limits in 10 CFR 20.1301 contain a provision that allows for licensees to apply for a limited application of a dose limit up to 500 mrem (5 mSv). In consideration of the ICRP's latest set of recommendations, the following options have been identified:

Options: 3.2–a: No change. Continue to allow a dose limit of 0.5 rem (5 mSv) per year, applicable only upon specific approval of a licensee request.

3.2–b: Change the current regulation to limit the applicability of the provision to situations in which sensitive populations are not receiving the exposure.

3.2–c: Clarify in guidance that the NRC will require licensees to demonstrate that sensitive populations are not included in any proposals for alternative public dose limits.

Questions: Q3.2–1: Are there any significant anticipated impacts associated with limiting the applicability of alternative public dose limits?

Q3.2–2: Are these impacts the same for the options of a rule change, or for changes to guidance?

Q3.2–3: Is there data available about the actual use of the alternative dose criteria? Is this data available to share with the NRC?

Issue No. 4: Incorporation of Dose Constraints

One of the most significant recommendations made in ICRP Publication 103 was the increased emphasis on the use of constraints and reference levels as part of the process of optimization of protection for all exposure situations. Licensees are currently required by 10 CFR 20.1101 to use sound radiation protection principles to achieve occupational doses and doses to members of the public that are 'As Low As Is Reasonably Achievable (ALARA). The term, "constraint," is already included in the definitions of 10 CFR Part 20. A constraint, as currently defined, is a value at which licensee actions are required. Many licensees are generally familiar with the concept of constraints, although the term may be unfamiliar, because the concept is very similar to the use of various types of planning values (such as self-imposed administrative limits) in their programs to ensure that the dose limits are not exceeded. Thus, many established radiation protection programs already incorporate this concept, at least to some degree. The ICRP recommendations indicate that the constraint is the starting point for optimization, serving as an upper bound on the annual dose for members of the public, or an occupationally exposed individual, should receive from the

planned operation of any controlled source of radiation. ICRP has stated that constraints are not to be considered as limits. In the discussions with stakeholders that have already taken place, many stakeholders have asked questions about the concept of constraints, the relationship of constraints to limits, and the relationship between possible changes to the limits and the use of constraints. In the current NRC regulatory structure, a constraint is defined as a level at which a licensee action is required. This provision is applied to airborne effluents from non-reactor facilities, and the actions are to evaluate the situation, develop actions to return effluents levels to less than the constraint, and provide a report to the NRC. Thus, as presently used in the regulations, an effluent release in excess of the numerical value of the constraint is not a violation. A violation only occurs if actions are not implemented in response to the situation. This approach is similar to the description presented by the ICRP, where a dose in excess of the constraint would not be seen as a violation, but as a point when reevaluation of the planning and implementation of the optimization ALARA program is needed.

A number of stakeholders have expressed an interest in exploring the implications of using the mandatory application of constraints as a mechanism to achieve the same level of protection as a change in dose limits, while retaining some flexibility on the part of the licensee to examine and control their own programs. The NRC staff is interested in continuing to explore these proposals and their implications from various groups of licensees.

NRC staff has identified three options for the incorporation of dose constraints to NRC's radiation protection framework:

Options: 4.a: No change. Do not incorporate the use of constraints into NRC's radiation protection framework.

4.b: Change the current regulation to specify that licensees establish and use constraints as part of their radiation protection program and the implementation of the ALARA requirement.

4.c: In addition to requiring the establishment and use of constraints, require that the licensee use a numeric value that does not exceed some specified value. One such value for occupational exposure could be the 2 rem (20 mSv) per year level.

Questions: Q4–1: Are there any significant anticipated benefits and impacts associated with imposing the use of constraints in a licensee's radiation protection program?

Q4–2: Are there any anticipated implementation impacts on inspection, compliance, and reporting anticipated?

Q4–3: What relationship should a constraint have to the dose limit, if any?

Q4–4: Is a requirement to establish and use constraints an appropriate, or inappropriate, insertion of a regulatory requirement?

Q4–5: How familiar are you with the use and implementation of constraints or planning values in a radiation protection program?

Q4–6: Are constraints (planning values) used in your current licensed activities, and if so, can you share insights on the use of these constraints?

IV. NRC Staff-Identified Technical Issues and Options Associated With the Possible Revision of 10 CFR Part 50, Appendix I Regulations and Guidance

Section A of the following discussion presents background information and describes general considerations concerning potential revisions to NRC regulations controlling radioactive liquid and gaseous effluent releases in the environment, as identified by NRC staff. The regulations are contained in Appendix I to 10 CFR Part 50, "Numerical Guides for Design Objectives and Limiting Conditions for Operation to Meet the Criterion 'As Low as is Reasonably Achievable' for Radioactive Material in Light-Water-Cooled Nuclear Power Reactor Effluents." Section B discusses the various issues and options that need to be assessed before initiating any regulatory activities leading to a rulemaking proposing to align the dosimetry basis, current dose terminology, and dose calculation methods of 10 CFR Part 50, Appendix I design objectives with the recommendations of ICRP Publication 103.

A. Background

In 1975, the NRC adopted the ALARA principle in regulating radioactive liquid and gaseous effluent releases from nuclear power plants. Radioactive liquid and gaseous effluents are controlled under 10 CFR Part 20, 10 CFR Parts 50.34a and 50.36a, and Appendix I to 10 CFR Part 50. 10 CFR Part 50, Appendix I contains provisions to ensure that gaseous and liquid radioactive effluents released in unrestricted areas and doses to members of the public are ALARA. These requirements are based on dosimetry concepts issued in 1959 as ICRP Publication 2. This approach was consistent with the version of Part 20 in effect prior to 1991, but is no longer consistent with current 10 CFR Part 20.

The revision under consideration may propose the adoption of the radiation protection framework recommended by ICRP Publication 103. This NRC staff is considering the approach in parallel with the consideration of changes to 10 CFR Part 20 so that the resulting requirements can be consistent.

The Commission believes that the current NRC regulatory framework of 10 CFR Part 50, Appendix I, and reactor oversight program continues to ensure that gaseous and liquid radioactive effluents released in unrestricted areas and doses to members of the public are ALARA. The alignment of 10 CFR Part 50, Appendix I regulations and design objectives with ICRP Publication 103 recommendations would not be intended to change the design objective criteria and regulatory guidance used by the nuclear power industry in demonstrating compliance with these requirements.

B. Issues and Options for Discussion

Issue No. 1: Proposed Revision to the Basis of 10 CFR Part 50, Appendix I Design Objectives

Currently, the design objectives of 10 CFR Part 50, Appendix I, and associated guidance documents, are still based on ICRP Publication 2 dosimetry concepts, which include dose to the whole body and to critical organs. The ICRP Publication 26 and ICRP Publication 103 recommendations moved to a more risk-based approach, and expressed the dose limits as TEDE, a sum of external and internal radiation exposures. Currently, nuclear power plant licensees must apply two different methodologies in calculating doses, one in determining compliance with the requirements of 10 CFR Part 50, Appendix I, and another in calculating doses to members of the public under 10 CFR Part 20. The intent of a possible revision is to align and improve 10 CFR Part 50, Appendix I regulations and guidance by incorporating current developments in radiation protection principles and advances in radiation dosimetry that have occurred since the issuance of ICRP Publication 2, over 50 years ago, and promulgation of 10 CFR Part 50 and Appendix I in 1975.

The staff has identified three main issues and options that should be considered and discussed relative to alignment with more recent recommendation:

Options: 1.a: Leave the basis of 10 CFR Part 50, Appendix I design objectives as is and continue to apply the requirement under existing NRC guidance and industry practices. This approach argues that there is no necessary connection between 10 CFR Part 50, Appendix I design objectives and 10 CFR Part 20 dose limits to the public, given that 10 CFR Part 50, Appendix I is not a

radiation protection standard under 10 CFR Parts 50.34a. The 10 CFR Part 50, Appendix I design objectives are an "ALARA design basis" requirement. If the numerical guides for design objectives and ALARA provisions of 10 CFR Part 50, Appendix I are met, it constitutes a demonstration that effluent releases and associated doses to the public are ALARA and no additional efforts are required to reduce radioactive effluent releases. As a result, it could be argued that there is no need to link the two. This approach would result in minor revisions to supporting NRC guidance. The revision would require that a few regulatory guides, currently as draft, be finalized and re-issued as final.

1.b: Align dose definitions and quantities of 10 CFR Part 50, Appendix I criteria with the ICPR 103 recommendations, in parallel with any changes made to 10 CFR Part 20. This approach argues that there is a benefit in aligning the basis of 10 CFR Part 50, Appendix I design objectives with 10 CFR Part 20, as updated to ICRP Publication 103 recommendations. This approach would ensure a consistent application of regulatory criteria between 10 CFR Part 20 and 10 CFR Part 50. Such a revision could offer the opportunity to standardize the process to a common regulatory basis in calculating doses. This approach would result in significant revisions to supporting NRC guidance, including key regulatory guides, NUREG documents, and computer codes.

1.c: Align dose definitions and quantities of 10 CFR Part 50, Appendix I design objectives with the current framework of 10 CFR Part 20 based on ICRP Publication 26. This approach has the same goal as option 1.2, and is offered as an option if the NRC decides to not update 10 CFR Part 20. As before, this approach would ensure a consistent application of regulatory criteria between 10 CFR Part 20 and 10 CFR Part 50. The revision would result in standardization to a common but still outdated regulatory dosimetry basis and method in calculating doses. This approach would result in significant revisions to supporting NRC guidance, including key regulatory guides, regulatory guides (NUREG) documents, and computer codes.

Questions: Q1–1: What are the benefits and impacts of each option identified above? Is there a preferred ranking of the options?

Q1–2: What is the scope of operational impacts and costs in updating programs and procedures given a revision of 10 CFR Part 50, Appendix I design objectives and NRC guidance? Identify specific types of impacts that the NRC should consider in implementing a revision of 10 CFR Part 50, Appendix I design objectives and NRC guidance to ICRP Publication 103 recommendations.

Q1–3: Are there estimates available for the costs to revise operational programs, implementing procedures, computer codes, and personnel training for a typical pressurized water reactor (PWR) and boiling water reactor (BWR) power plant or for a generic power plant? Is there an estimate of the aggregate cost for the operating fleet of nuclear power reactors?

Q1–4: Should the NRC combine both 10 CFR Part 20 and 10 CFR Part 50, Appendix I updates into one rulemaking effort, *or* consider two parallel rulemaking efforts with the implementation of the revised rules synchronized to a common implementation date when all regulatory conforming changes and revisions of implementing guidance are completed for 10 CFR Part 20 and 10 CFR Part 50, Appendix I?

Issue No. 2: Voluntary or Required Implementation of Revised 10 CFR Part 50, Appendix I Regulations

This issue examines the different possibilities for implementation of a possible revision for existing licensee facilities. Voluntary implementation should not pose any backfitting considerations under the Backfit Rule (10 CFR 50.109). However, the staff would need to address the potential impacts on the reactor inspection program for those plants and new applicants that would voluntarily implement the revised regulations.

Options: 2.a: No change. Leave the current requirements and guidance intact for all currently licensed and operating plants under Parts 50 and 52.

2.b. Make the implementation of new requirements voluntary for all currently licensed and operating plants under Parts 50 and 52 using a separate set of revised 10 CFR Part 50, Appendix I regulations and guidance.

2.c. Require the implementation of revised 10 CFR Part 50, Appendix I regulations and guidance for all operating plants and applicants over time with a mandated common implementation date.

Questions: Q2–1: If 10 CFR Part 50, Appendix I was revised, should the NRC make the implementation of the revised requirements voluntary or mandatory on all nuclear power plant licensees?

Q2–2: If 10 CFR Part 50, Appendix I were revised and became mandatory, what should be the duration of the implementation phase for power plant licensees, *e.g.,* 2, 4, or 6 years?

Issue No. 3: Approaches and Considerations in Revising 10 CFR Part 50, Appendix Regulations

In addition to the possible update of dosimetric concepts and methods, there are a number of additional areas within 10 CFR Part 50 Appendix I which could be considered for possible revision and update. The staff is examining a tiered set of options, reflecting increasing levels of complexity of the update, with the scope of the revision ultimately depending on the chosen option on how to proceed with the revisions, whether the implementation is mandated or voluntary, and taking full considerations of impacts on regulations and guidance.

Options: 3.a: Limited Scope Revision—Besides specific revisions to the regulations, target only those elements of the guidance dealing with dose conversion factors and, if necessary, directly supporting radiological parameters, such as specific adjustments to the basis of dose conversion factors, based on ICRP Publication 103 or ICRP Publications 26 and 30. The balance of the technical guidance and default values of other parameters would remain as stated in current regulatory guides. The revision would identify changes to computer codes using new dose conversion factors based on ICRP Publication 103 or ICRP Publications 26 and 30 recommendations.

3.b: Expanded Scope Revision—In addition to the above, the basis of specific parameters used in dose calculations would be evaluated, and an assessment would identify the need to update or retain specific default values. Such parameters, for example, would include human food or animal consumption rates, bio-accumulation factors, shore-line width factors, agricultural productivity rates, usage and time factors for exposed individuals, etc. The revision would also identify changes to computer codes using new dose conversion factors based on ICRP Publication 103 or ICRP Publications 26 and 30 recommendations.

3.c: Full Scope Revision—This approach would consider a full review of the guidance, including a complete update of models addressing liquid and gaseous treatment options and development of radiological effluent source terms, atmospheric and aquatic dispersion, and environmental transport using the current literature and industry standards. The review would assess model assumptions, parameters (as partly described above), and their default values. The revision would identify changes to computer codes, modeling assumptions and parameters, and apply new dose conversion factors based on ICRP Publication 103 or ICRP Publications 26 and 30 recommendations.

Questions: Q3–1: Which option should the NRC apply in aligning 10 CFR Part 50, Appendix I regulations with ICRP Publication 103 if 10 CFR Part 20 were revised, or with ICRP Publications 26 and 30 if 10 CFR Part 20 were *not* revised?

Q3–2: What are the impacts and benefits in the implementation of revised 10 CFR Part 50, Appendix I regulations that the NRC should consider?

Q3–3: If significant impacts in the implementation of revised 10 CFR Part 50, Appendix I regulations are envisioned, what types of issues should the NRC evaluate and consider in revising 10 CFR Part 50, Appendix I regulations?

Issue No. 4: Scope of Revisions to 10 CFR Part 50, Appendix I Regulations

At this time, the NRC assumes that any proposed revision to 10 CFR Part 50, Appendix I will be multi-fold. One aspect involves conforming changes in ensuring that the nomenclature used in defining doses and dosimetric quantities, as described in Issue 1 above. The implementation of conforming changes in regulations and guidance is expected to be a relatively simple process, once all nomenclatures and definitions have been finalized and

integrated in a revised 10 CFR Part 20. However, some challenges are expected in modifying some of the regulatory provisions of Appendix I to 10 CFR Part 50. The following identifies specific provisions of Appendix I to 10 CFR Part 50 and 10 CFR Part 20 regulations that may need to be reviewed and updated, as warranted:

Provisions: 4.1: Numerical design objectives of 10 CFR Part 50, Appendix I for liquid and gaseous effluents—The revision would retain the current numerical dose criteria, but would redefine doses as effective dose (ED) or TED for consistency with ICRP Publication 103 dosimetry concepts in a revised 10 CFR Part 20, or as TEDE with the current 10 CFR Part 20 (ICRP Publications 26 and 30) if 10 CFR Part 20 were *not* realigned with ICRP Publication 103. The update would necessitate a revision of dose calculation methods described in Regulatory Guide 1.109 and associated computer codes.

4.2: Organ numerical design objectives of 10 CFR Part 50, Appendix I for liquid and gaseous effluents—The revision would assess whether there is still a need to report doses separately for organs since this would not be necessary if ICRP Publication 103 or ICRP Publications 26 and 30 were adopted. The assessment would consider the provisions of Sections II and III of Appendix I to 10 CFR Part 50 on doses associated with radioiodine in situations where releases might be dominated by the presence of noble gases and radioiodine, resulting in potentially significant skin and thyroid doses. The assessment would also consider the need to revise the scope of thyroid dose contributors to include radionuclides present as vapor (tritium) and gases (*e.g.,* 14C in inorganic and organic forms) in addition to radioiodine and particulates.

4.3: Annual gamma and beta air dose for gaseous effluents—The gamma and beta dose criteria characterize an absorbed dose rate in air, expressed in mrad/year, while the balance of the design objectives are expressed in mrem/year for the total body and organs. The revision would assess the need to still report gamma and beta absorbed air dose results based on a review of historical gaseous effluent releases and doses from operating PWR and BWR plants. The revision might consider dropping that requirement altogether, or alternatively, converting the design objective to an ED or TED dose for a receptor assumed to be located at the site boundary.

4.4: Light-Water-Cooled Reactor Provisions of Appendix I to 10 CFR Part 50—The revision would consider whether there is a need to expand current regulatory provisions for design certifications and new reactor applications involving other types of reactor technologies. Such new technologies might include new types of reactor fuels and modular reactor technologies, *e.g.,* high temperature gas-cooled reactors, molten-salt or lead-cooled reactors, and breeder reactors.

4.5: Compliance with Requirements for "Licensed Operation" under 10 CFR Part 20—The revision would consider the need to expand provisions describing compliance requirements for "licensed operation" for sites with two or more licensed entities contributing to and radiation exposures to a single offsite dose receptor under Parts 20.1301(a)(1) and 20.1302(a) and (b). The expanded provisions would identify acceptable methods in the regulation or guidance for apportioning radioactive effluent releases and doses between two or more licensed entities. The discussion would also consider compliance with EPA regulations of 40 CFR Part 190 as implemented under 10 CFR Part 20.1301(e).

Questions: Q4–1: Given the above summary descriptions of the provisions of 10 CFR Part 50, Appendix I that might be considered for possible revision, should the NRC evaluate all provisions described above, or focus instead only on those necessary to align 10 CFR Part 50, Appendix I regulations with ICRP Publication 103 if 10 CFR Part 20 were revised, or with ICRP Publication 26 and 30 if 10 CFR Part 20 were *not* revised?

Q4–2: Given the above, are there any significant impacts in the implementation of revised 10 CFR Part 50, Appendix I regulations that the NRC should consider if it were to proceed with a rulemaking?

Q4–3: If significant impacts in the implementation of revised 10 CFR Part 50, Appendix I regulations are envisioned, what types of issues should the NRC evaluate and consider in revising 10 CFR Part 50, Appendix I regulations?

Dated at Rockville, Maryland, this 20th day of September, 2010.

For the Nuclear Regulatory Commission.

Mark Thaggard,

Deputy Director, Division of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental Management Program.

[FR Doc. 2010–24137 Filed 9–24–10; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0858; Directorate Identifier 2010–NM–183–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This proposed AD would require modifying the thrust reverser inner walls, inspecting for damage of the upper and lower inner wall insulation blankets, measuring the electrical conductivity on the aluminum upper compression pads 2 and 3 as applicable, inspecting for discrepancies of the inner wall of the thrust reverser, and corrective actions if necessary. This proposed AD would also require, for certain airplanes, doing various concurrent actions (including replacing the inner wall blanket insulation, installing updated full-authority digital electronic control software, and modifying the thrust reverser inner wall and insulation blankets). This proposed AD results from reports of heat damage to the inner wall of the thrust reversers. We are proposing this AD to detect and correct such heat damage, which could result in separation of adjacent components and consequent structural damage to the airplane, damage to other airplanes, and injury to people on the ground.

DATES: We must receive comments on this proposed AD by November 12, 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 W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* 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 Management Facility 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 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: Chris Parker, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone 425–917–6496; fax 425–917–6590.

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–2010–0858; Directorate Identifier 2010–NM–183–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 because of those comments.

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

Discussion

We have received reports of heat-related damage to the inner wall of the thrust reverser. During an inspection of a thrust reverser, one operator found heat damage at different locations of the inner wall: At the top, in the area of the number 2 and number 3 upper compression pads, and at the lower aft edge. A flight test at Boeing showed that the temperatures applied to the inner walls of the thrust reversers are too high. Higher temperatures are due to hot precooler air leakage between the inner wall of the thrust reverser and the insulation blankets and heat transfer through the upper compression pad area and the fireseal bracket support flange. Heat damage to the thrust reverser inner wall, if not corrected, could result in separation of adjacent components and consequent structural damage to the airplane, damage to other airplanes, and injury to people on the ground.

Relevant Service Information

We have reviewed the service bulletins identified in the following table.

SERVICE INFORMATION

Service Bulletin	Revision level	Date
Boeing Service Bulletin 737-78-1082	Original	March 25, 2010.
Boeing Service Bulletin 737-78-1088	Original	May 12, 2010.
Boeing Service Bulletin 737-78-1079	2	June 7, 2010.
Boeing Service Bulletin 737-78-1069	4	June 16, 2005.
Boeing Service Bulletin 737-78-1063	2	October 7, 1999.
CFM CFM56–7B Service Bulletin 73-0135	Original	March 30, 2007.

Boeing Service Bulletin 737–78–1082 describes procedures for modifying the thrust reverser inner wall by drilling a hole through the inner wall behind the number 3 upper compression pad, and installing a bushing, applying sealant to areas of the insulation blankets, and installing flange insulation assemblies at the top aft edge of the upper insulation blanket.

Boeing Service Bulletin 737–78–1088 describes procedures for the following:

- Detailed inspection for damage of the engine side and inner wall side of the upper and lower insulation blankets.
- Measurement of the electrical conductivity on the aluminum upper compression pads 2 and 3, as applicable.
- Inspections for discrepancies of the inner wall of the thrust reverser, including an ultrasonic inspection of the thrust reverser inner wall for interplay delamination and skin-to-core disbond.
- Detailed inspection, for certain airplanes, of the thrust reverser inner wall for signs of heat damage.
- Detailed inspection of the thrust reverser inner wall for indications of loose fasteners where the inner wall attaches to the hinge beam and at the fasteners for the compression pads.
- Corrective actions, including repairing or replacing damaged insulation blankets and repairing the thrust reverser inner wall (including replacing loose fasteners and contacting Boeing for a repair procedure), and replacing any unserviceable compression pad with a new one.

Boeing Service Bulletin 737–78–1079 describes procedures for essentially the same actions (including inspections and modification) specified in Boeing Service Bulletins 737–78–1082 and 737–78–1088.

Boeing Service Bulletin 737–78–1082 also specifies the concurrent accomplishment of the actions specified in Boeing Service Bulletin 737–78–1063: replacement of the inner wall blanket insulation.

Boeing Service Bulletin 737–78–1082 also specifies the concurrent accomplishment of the actions specified in CFM CFM56–7B Service Bulletin 73–0135: installation of updated full-authority digital electronic control (FADEC) software.

Boeing Service Bulletin 737–78–1088 specifies the concurrent accomplishment of the actions specified in Boeing Service Bulletin 737–78–1069: modification of the thrust reverser inner walls and insulation blankets. The modification involves installing additional supports on the inner wall of the thrust reverser for the attachment of the insulation blankets, installing new brackets to attach the forward edge of the upper and lower insulation blankets, installing additional attachment grommets to the blankets, and sealing the blankets at the forward edge of the fan duct inner walls.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed below.

Differences Between the Proposed AD and Service Information

Although Boeing Service Bulletin 737–78–1088 specifies that operators may contact the manufacturer for disposition of certain repair conditions, this proposed AD would require operators to repair those conditions using a method approved by the FAA.

Clarification of Certain Terminology

Where Boeing Service Bulletin 737–78–1088 refers to "unsatisfactory" findings, this proposed AD assumes those parts or locations are "unserviceable."

Costs of Compliance

We estimate that this proposed AD would affect 710 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD, at an average labor rate of $85 per hour.

ESTIMATED COSTS

Actions (Service Bulletin)	Work hours	Parts	Cost per product	Number of U.S.-registered airplanes	Fleet cost
Modification (Boeing Service Bulletin 737-78-1082).	14 per engine	$2,065 or 3,702	$4,445 or 6,082	710	Up to $4,318,220.
Insulation replacement (Boeing Service Bulletin 737-78-1063).	18 per engine	0	3,060	15	45,900
Software update (CFM CFM56–7B Service Bulletin 73-0135).	1	0	85	Up to 710	Up to 60,350.
Inspections (Boeing Service Bulletin 737–78–1088).	35	0	2,975	710	2,112,250
Modifications (Boeing Service Bulletin 737–78–1069).	110	0	9,350	306	2,861,100
Inspections and modification (Boeing Service Bulletin 737–78–1079) (if done as an option to Boeing Service Bulletin 737–78–1088 and Boeing Service Bulletin 737–78–1082).	37 per engine	2,070 or 3,391	8,360 or 9,681	Optional action	Optional action.

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.

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2010–0858; Directorate Identifier 2010–NM–183–AD.

Comments Due Date

(a) We must receive comments by November 12, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes; certificated in any category; as identified in Boeing Service Bulletin 737–78–1082, dated March 25, 2010.

Subject

(d) Air Transport Association (ATA) of America Code 78: Engine exhaust.

Unsafe Condition

(e) This AD results from reports of heat damage to the inner wall of the thrust reversers. The Federal Aviation Administration is issuing this AD to detect and correct such heat damage, which could result in separation of adjacent components and consequent structural damage to the airplane, damage to other airplanes, and injury to people on the ground.

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.

Modification of Thrust Reverser Inner Wall

(g) Except as required by paragraph (m) of this AD: Within 24 months after the effective date of this AD, modify the thrust reverser inner wall, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 737–78–1082, dated March 25, 2010.

Actions Concurrent With Paragraph (g)

(h) Before or concurrently with accomplishment of the requirements of paragraph (g) of this AD, do the actions

specified in paragraphs (h)(1) and (h)(2) of this AD, as applicable.

(1) For Model 737–600, -700, and -800 series airplanes identified in Boeing Service Bulletin 737–78–1063, Revision 2, dated October 7, 1999: Replace the inner wall blanket insulation, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 737–78–1063, Revision 2, dated October 7, 1999.

(2) For airplanes equipped with engines identified in CFM CFM56–7B Service Bulletin 73–0135, dated March 30, 2007: Install updated full-authority digital electronic control (FADEC) software, in accordance with the Accomplishment Instructions of CFM CFM56–7B Service Bulletin 73–0135, dated March 30, 2007.

Inspection/Measurement

(i) At the applicable time specified in paragraph (j) of this AD: Do the actions specified in paragraphs (i)(1), (i)(2), and (i)(3) of this AD, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 737–78–1088, dated May 12, 2010. If any damage or discrepancy is found, before further flight, do all applicable corrective actions, in accordance with Accomplishment Instructions of Boeing Service Bulletin 737–78–1088, dated May 12, 2010; except as required by paragraph (k) of this AD; and except where the service bulletin refers to "unsatisfactory" findings, this AD assumes those parts or locations are "unserviceable."

(1) Do a detailed inspection for damage of the engine side and inner wall side of the upper and lower insulation blankets.

(2) Measure the electrical conductivity on the aluminum upper compression pads 2 and 3, as applicable.

(3) Inspect for discrepancies of the thrust reverser inner wall (including an ultrasonic inspection for interplay delamination and skin-to-core disbond, a detailed inspection for signs of heat damage as applicable, and a detailed inspection for loose fasteners where the inner wall attaches to the hinge beam and at the fasteners for the compression pads).

Compliance Times for Paragraph (i)

(j) Do the actions specified in paragraph (i) of this AD at the applicable time specified in paragraph (j)(1), (j)(2), (j)(3), (j)(4), or (j)(5) of this AD.

(1) For airplanes with thrust reverser part number (P/N) 315A2295–003 through 315A2295–154 inclusive: Do the actions within 30 months after the effective date of this AD.

(2) For airplanes with thrust reverser P/N 315A2295–155 through 315A2295–174 inclusive: Do the actions within 60 months after the effective date of this AD.

(3) For airplanes with thrust reverser P/N 315A2295–175 through 315A2295–190 inclusive: Do the actions within 72 months after the effective date of this AD.

(4) For airplanes with thrust reverser P/N 315A2295–191 through 315A2295–198 inclusive: Do the actions within 84 months after the effective date of this AD.

(5) For airplanes with thrust reverser P/N 315A2295–199 through 315A2295–202 inclusive: Do the actions within 96 months after the effective date of this AD.

Exception to Boeing Service Bulletin 737–78–1088 Procedures

(k) Where Boeing Service Bulletin 737–78–1088, dated May 12, 2010, specifies to contact Boeing for appropriate action, repair before further flight in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Actions Concurrent With Paragraph (i)

(l) For airplanes identified in Boeing Service Bulletin 737–78–1069, Revision 4, dated June 16, 2005: Before or concurrently with the accomplishment of the requirements of paragraph (i) of this AD, modify the thrust reverser inner wall and insulation blankets, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 737–78–1069, Revision 4, dated June 16, 2005. A modification done before the effective date of this AD is also acceptable if done in accordance with Boeing Service Bulletin 737–78–1069, Revision 1, dated June 13, 2002; Revision 2, dated February 6, 2003; or Revision 3, dated August 5, 2004.

(m) If the actions required by paragraph (i) of this AD are done before the compliance time specified in paragraph (g) of this AD: Before or concurrently with the accomplishment of the actions required by paragraph (i) of this AD, the modification required by paragraph (g) of this AD must be done.

Option to Requirements of Paragraphs (g) and (i)

(n) Accomplishment of all of the actions (including inspections and modification) specified in Boeing Service Bulletin 737–78–1079, Revision 2, dated June 7, 2010, within 24 months after the effective date of this AD, is acceptable for compliance with the requirements of paragraphs (g) and (i) of this AD and is acceptable for compliance with the requirements of this AD, provided applicable repairs are done before further flight, and provided the applicable actions specified in paragraphs (h)(1), (h)(2), and (l) of this AD have been done. Actions done before the effective date of this AD in accordance with Boeing Service Bulletin 737–78–1079, dated August 6, 2007; or Revision 1, dated December 17, 2007; are also acceptable for compliance with the corresponding actions specified in this paragraph.

Alternative Methods of Compliance (AMOCs)

(o)(1) The Manager, Seattle Aircraft Certification Office (ACO), 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: Chris Parker, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone 425–917–6496; fax 425–917–6590. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

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

Issued in Renton, Washington on September 15, 2010.

Robert D. Breneman,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–24175 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0942; Directorate Identifier 2010–CE–049–AD]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Regional Aircraft Models Jetstream Series 3101 and Jetstream Model 3201 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) 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:

As a result of the fatigue-testing programme on the Jetstream fatigue test specimen, it has been identified that failure of the undercarriage jack mounting shaft assembly can occur.

This condition, if not corrected, could lead to a Main Landing Gear (MLG) collapse on the ground or during landing and consequently damage to the aeroplane or injury to the occupants.

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 November 12, 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 W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Taylor Martin, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4138; *fax:* (816) 329–4090; *e-mail: taylor.martin@faa.gov.*

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–2010–0942; Directorate Identifier 2010–CE–049–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 because of those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No.: 2010–0162, dated August 4, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> As a result of the fatigue-testing programme on the Jetstream fatigue test specimen, it has been identified that failure of the undercarriage jack mounting shaft assembly can occur.
>
> This condition, if not corrected, could lead to a Main Landing Gear (MLG) collapse on the ground or during landing and consequently damage to the aeroplane or injury to the occupants.
>
> BAE SYSTEMS have now defined safe life limits for these components.
>
> For the reasons described above, this AD requires the application of safe life limits to these components.

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

Relevant Service Information

BAE Systems has issued British Aerospace Jetstream Series 3100 & 3200 Service Bulletin 05–JA090143, dated April 30, 2009; and British Aerospace Regional Aircraft has issued British Aerospace Jetstream Series 3100 & 3200 Service Bulletin 32–JA990142, dated March 26,1999. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the 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 this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed 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

We estimate that this proposed AD will affect 80 products of U.S. registry. We also estimate that it would take about 15 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $10,000 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $902,000, or $11,275 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with

this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

British Aerospace Regional Aircraft: Docket No. FAA–2010–0942; Directorate Identifier 2010–CE–049–AD.

Comments Due Date

(a) We must receive comments by November 12, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to British Aerospace Regional Aircraft Models Jetstream Series 3101 and Jetstream Model 3201 airplanes, all serial numbers, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 32: Landing Gear.

Reason

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

As a result of the fatigue-testing programme on the Jetstream fatigue test specimen, it has been identified that failure of the undercarriage jack mounting shaft assembly can occur.

This condition, if not corrected, could lead to a Main Landing Gear (MLG) collapse on the ground or during landing and consequently damage to the aeroplane or injury to the occupants.

BAE SYSTEMS have now defined safe life limits for these components.

For the reasons described above, this AD requires the application of safe life limits to these components.

Actions and Compliance

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

(1) Within 30 days after the effective date of this AD, establish the number of landings accumulated since installation of each left and right main landing gear radius rod mounting shaft assemblies following paragraph 2.(A) of BAE Systems British Aerospace Jetstream Series 3100 & 3200 Service Bulletin 05–JA090143, dated April 30, 2009.

(2) Replace the left and right main landing gear radius rod mounting shaft assembly with an airworthy assembly following British Aerospace Jetstream Series 3100 & 3200 Service Bulletin 32–JA990142, dated March 26, 1999, within the following:

(i) *For Model Jetstream Series 3101:* Within 38,220 total landings accumulated on each main landing gear radius rod mounting shaft assembly or within 1,000 landings after the effective date of this AD, whichever occurs later; and

(ii) *For Model Jetstream Model 3201:* Within 31,038 total landings accumulated on each main landing gear radius rod mounting shaft assembly or within 1,000 landings after the effective date of this AD, whichever occurs later.

(3) After replacing each main landing gear radius rod mounting shaft assembly as required by paragraph (f)(2) of this AD, repetitively thereafter replace each assembly with an airworthy assembly at intervals not to exceed the following life limits:

(i) *For Model Jetstream Series 3101:* Within 38,220 total landings; and

(ii) *For Model Jetstream Model 3201:* Within 31,038 total landings.

(4) For operators that do not have landing records, determine the number of landings by multiplying the number of hours time-in-service (TIS) accumulated on each main landing gear radius rod mounting shaft assembly by 0.75. For the purpose of this AD:

(i) 1,000 landings equals 1,333 hours TIS;

(ii) 31,038 landings equals 41,384 hours TIS; and

(ii) 38,220 landings equals 50,960 hours TIS.

(5) Compliance with the life limits set in paragraph (f)(3) of this AD may be done by incorporating these limits into the limitations section of the aircraft maintenance manual. You may do this by inserting a copy of this AD into the limitations section of aircraft maintenance manual.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* Taylor Martin, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4138; *fax:* (816) 329–4090; *e-mail: taylor.martin@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(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

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2010–0162, dated August 4, 2010; BAE Systems British Aerospace Jetstream Series 3100 & 3200 Service Bulletin 05–JA090143, dated April 30, 2009; and British Aerospace Regional Aircraft British Aerospace Jetstream Series 3100 & 3200 Service Bulletin 32–JA990142, dated March 26, 1999, for related information.

Issued in Kansas City, Missouri, on September 21, 2010.

Patrick R. Mullen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–24180 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 31, 40, and 301

[REG–153340–09]

RIN 1545–BJ13

Electronic Funds Transfer of Depository Taxes; Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document cancels a public hearing on proposed regulation relating to Federal tax deposits (FTDs) by Electronic Funds Transfer (EFT). The proposed regulations affect all taxpayers that currently use FTD coupons.

DATES: The public hearing, originally scheduled for September 27, 2010 at 10 a.m. is cancelled.

FOR FURTHER INFORMATION CONTACT: Regina Johnson of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration) at (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and notice of public hearing that appeared in the **Federal Register** on Thursday, August

26, 2010, (75 FR 52485) announced that a public hearing was scheduled for September 27, 2010 at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is under section 7430 of the Internal Revenue Code.

The public comment period for these regulations expired on September 22, 2010. Outlines of topics to be discussed at the hearing were due on September 20, 2010. The notice of proposed rulemaking and notice of public hearing instructed those interested in testifying at the public hearing to submit a request to speak, and an outline of the topics to be addressed. As of Wednesday, September 22, 2010, no one has requested to speak. Therefore, the public hearing scheduled for September 27, 2010, is cancelled.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel.

[FR Doc. 2010–24155 Filed 9–24–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DOD–2009–HA–0175]

RIN 0720–AB38

TRICARE: Elimination of Copayments for Authorized Preventive Services for Certain TRICARE Standard Beneficiaries

AGENCY: Office of the Secretary, Department of Defense.

ACTION: Proposed rule.

SUMMARY: This proposed rule implements Section 711 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (FY 2009). Section 711 eliminates copayments for authorized preventive services for TRICARE Standard beneficiaries other than Medicare-eligible beneficiaries. This proposed rule also realigns the covered preventive services listed in the Exclusions section of the TRICARE regulation to the Special Benefits section in the regulation.

DATES: Written comments received at the address indicated below by November 26, 2010 will be accepted.

ADDRESSES: You may submit comments, identified by docket number or Regulatory Information Number (RIN) 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, District of Columbia 20301–1160.

Instructions: All submissions received must include the agency name and docket number or RIN 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: Ms. Joy Saly, Medical Benefits and Reimbursement Branch, TRICARE Management Activity, telephone (303) 676–3742.

SUPPLEMENTARY INFORMATION:

I. Background

TRICARE currently covers those preventive services authorized by statute for all TRICARE Standard beneficiaries. The NDAA for FY 1996 (Pub. L. 104–106) and NDAA FY 1997 (Pub. L. 104–201) provided authority for such care. Although beneficiaries enrolled in TRICARE Prime receive preventive services with no copayment requirement, prior to enactment of Section 711 of the Duncan Hunter NDAA FY 2009 (Pub. L. 110–417), TRICARE Standard beneficiaries who received preventive care were required to pay a cost-share. For further information on TRICARE, to include preventive services covered under TRICARE Prime and TRICARE Standard, and cost-shares, please visit *http://www.tricare.mil.*

II. Section 711 of the Duncan Hunter NDAA for FY 2009

This proposed rule implements section 711 of the Duncan Hunter NDAA for FY 2009. The language in Section 711 reads as follows:

SEC. 711. WAIVER OF CO-PAYMENTS FOR PREVENTIVE SERVICES FOR CERTAIN TRICARE BENEFICIARIES.

(a) Waiver of Certain Co-payments—Subject to subsection (b) and under regulations prescribed by the Secretary of Defense, the Secretary shall—

(1) Waive all co-payments under sections 1079(b) and 1086(b) of title 10, United States Code, for preventive services for all beneficiaries who would otherwise pay copayments; and

(2) Ensure that a beneficiary pays nothing for preventive services during a year even if the beneficiary has not paid the amount necessary to cover the beneficiary's deductible for the year.

(b) Exclusion for Medicare-Eligible Beneficiaries—Subsection (a) shall not apply to a medicare-eligible beneficiary.

(c) Refund of Co-payments—

(1) Authority—Under regulations prescribed by the Secretary of Defense, the Secretary may pay a refund to a medicare-eligible beneficiary excluded by subsection (b), subject to the availability of appropriations specifically for such refunds, consisting of an amount up to the difference between—

(A) The amount the beneficiary pays for copayments for preventive services during Fiscal Year 2009; and

(B) The amount the beneficiary would have paid during such fiscal year if the copayments for preventive services had been waived pursuant to subsection (a) during that year.

(2) Co-payments Covered—The refunds under paragraph (1) are available only for copayments paid by medicare-eligible beneficiaries during Fiscal Year 2009.

(d) Definitions—In this section:

(1) Preventive Services—The term "preventive services" includes, taking into consideration the age and gender of the beneficiary:

(A) Colorectal screening.

(B) Breast screening.

(C) Cervical screening.

(D) Prostate screening.

(E) Annual physical exam.

(F) Vaccinations.

(G) Other services as determined by the Secretary of Defense.

(2) Medicare-Eligible—The term "medicare-eligible" has the meaning provided by section 1111(b) of Title 10, United States Code.

III. General

This language requires all co-payments to be eliminated for authorized preventive services for certain TRICARE Standard beneficiaries who would otherwise pay co-payments and that certain TRICARE Standard beneficiaries pay nothing for the preventive services during a year, even if the beneficiary has not paid the amount necessary to cover the beneficiary's deductible for the year. The language does not expand coverage of preventive services not otherwise authorized by law under the TRICARE preventive care benefit.

IV. Medicare-Eligible Beneficiaries

Section 711 specifically states that elimination of the co-payment shall not

apply to any TRICARE beneficiary who is Medicare-eligible. For the purposes of this section, the term "Medicare-eligible" is defined in 10 U.S.C., Section 1111(b) and means a person entitled to benefits under Medicare Part A.

Section 711 also states that the Secretary of Defense may prescribe regulations to refund co-payments paid by Medicare-eligible beneficiaries during fiscal year 2009 when the following conditions are met: (1) When appropriations specifically for such refunds are appropriated; and (2) the amount of the refund is the difference between the amount of co-payments the beneficiary paid during fiscal year 2009 and the amount the beneficiary would have paid if the co-payments for preventive services had been waived during that year. However, no funds have been appropriated specifically for this purpose; as a result, subsection (c), Refund of Co-Payments, of Section 711 will not be implemented.

V. Clarification of Preventive Service Benefit for Purposes of Elimination of Co-Payments

Although beneficiaries enrolled in TRICARE Prime receive preventive services with no co-payment requirement, prior to enactment of Section 711 of the Duncan Hunter NDAA FY09 (Pub. L.110–417), TRICARE Standard beneficiaries, including TRICARE Standard beneficiaries who elected to utilize the TRICARE Extra plan, were required to pay the appropriate cost-share for preventive care.

It is important to note the proposed rule does not expand the preventive care benefit for TRICARE Standard beneficiaries, but rather eliminates the co-payment requirements for those specific preventive services otherwise authorized in title 10, Chapter 55, United States Code. Therefore, although the language in Section 711 defines preventive services for which a cost share is not applicable as including an "annual physical exam," routine annual examinations are not authorized preventive services under TRICARE Standard. By law, however, physical examinations conducted as part of health promotion and disease prevention visits are covered when provided in connection with otherwise authorized immunizations and well-child visits or cancer screenings, resulting in elimination of cost-shares for these specific physical examinations for TRICARE Standard beneficiaries. *See* Title 10, U.S.C. Section 1079(a)(2).

VI. Realignment of Preventive Services Listed in the TRICARE Regulation

Finally, this proposed rule clarifies and realigns the preventive services currently listed in the Exclusions section of the TRICARE regulation to the Special Benefits section in the regulation. This realignment does not remove from coverage any preventive services currently covered under the program. We are performing this realignment because Title 32 Code of Federal Regulations (CFR) 199.4(g), "Exclusions and limitations," states in subparagraph (37) that preventive care is excluded, and then lists those services that are not excluded. We believe including covered preventive services in the Exclusions section creates confusion for those seeking information about preventive services under the TRICARE program. A person seeking information about what preventive services are covered would most likely not look for that information in a section labeled "Exclusions." We intend to remedy this confusion by removing the list of covered preventive services from this section, and placing the list in the "Special Benefit Information" Section of 32 CFR 199.4(e). We also intend to realign those services currently in the "Exclusions" section that are not truly preventive but are more evaluative in nature in the "Special Benefit Information" Section of 32 CFR 199.4(e) and add a definition of "evaluative" services in 32 CFR 199.2.

VII. Summary of Regulatory Revisions

Section 199.2 addresses definitions used in the program.

Section 199.2(b) is revised to add a definition for evaluative services. The purpose of this is to make a distinction between an evaluative service and a preventive service.

Section 199.4 provides Basic Program benefits.

Section 199.4(e)(28) is added as special benefit information pertaining to covered preventive services under TRICARE Standard for which co-payments will be eliminated.

Section 199.4(e)(29) is added as special benefit information pertaining to evaluative services under TRICARE Standard for which co-payments and deductibles apply.

These two sections are necessary to distinguish those services TRICARE has determined eligible for a elimination of co-payment from those services that are not truly preventive, and therefore continue to require a beneficiary copayment.

Section 199.4(f)(12) is added to eliminate cost sharing for certain preventive services authorized by paragraph (e)(28) of this section.

Section 199.4(g)(37) is revised to delete the list of preventive and other evaluative services benefits not excluded from coverage. Again, while such services are deleted from paragraph (g)(37), the intent is to move them to the special benefits section of the regulation to be clear that such services are covered by TRICARE.

Section 199.17 contains information about the TRICARE program.

Section 199.17(m)(1) and (2) are revised to eliminate cost sharing for certain preventive services provided by network and non-network providers, and by application to preventive services provided by non-military providers under external resource sharing agreements under § 199.17(m)(4).

VIII. Regulatory Procedures

Executive Order 12866, "Regulatory Planning and Review"

Section 801 of Title 5, United States Code, and Executive Order 12866 require certain regulatory assessments and procedures for any major rule or significant regulatory action, defined as one that would result in an annual effect of $100 million or more on the national economy or which would have other substantial impacts. It has been certified that this rule is not economically significant, and has been reviewed by the Office of Management and Budget as required under the provisions of E. O. 12866.

Public Law 96–354, "Regulatory Flexibility Act" (RFA) (5 U.S.C. 601)

Public Law 96–354, "Regulatory Flexibility Act" (RFA) (5 U.S.C. 601), requires that each Federal agency prepare a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This proposed rule is not an economically significant regulatory action, and it has been certified that it will not have a significant impact on a substantial number of small entities. Therefore, this proposed rule is not subject to the requirements of the RFA.

Public Law 96–511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

This rule does not contain a "collection of information" requirement, and will not impose additional information collection requirements on the public under Public Law 96–511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35).

Public Law 104–4, Section 202, "Unfunded Mandates Reform Act"

Section 202 of Public Law 104–4, "Unfunded Mandates Reform Act," requires that an analysis be performed to determine whether any federal mandate may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector of $100 million in any 1 year. It has been certified that this proposed rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year, and thus this proposed rule is not subject to this requirement.

Executive Order 13132, "Federalism"

Executive Order 13132, "Federalism," requires that an impact analysis be performed to determine whether the rule has federalism implications that would have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. It has been certified that this proposed rule does not have federalism implications, as set forth in Executive Order 13132.

List of Subjects in 32 CFR Part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR part 199 is proposed to be amended as follows:

PART 199—[AMENDED]

1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. Chapter 55.

2. Section 199.2(b) is amended by adding the definition of "evaluative services" in its appropriate alphabetical order to read as follows:

§ 199.2 Definitions.

* * * * *

(b) * * *

Evaluative services. Diagnostic and other medical procedures that may not be related directly to a specific illness, injury or definitive set of symptoms, but are performed as health promotion or disease detection services.

* * * * *

3. Section 199.4 is amended by adding paragraphs (e)(28), (e)(29) and (f)(12), and revising (g)(37) to read as follows.

§ 199.4 Basic program benefits.

* * * * *

(e) * * *

(28) *Preventive care.* Coverage is provided for the following preventive services:

(i) Cervical, breast, colon and prostate cancer screenings in accordance with standards issued by the Director, TRICARE Management Activity, based on guidelines from the U.S. Department of Health and Human Services. Such standards may establish a specific schedule, including frequency, age specifications, and gender of the beneficiary, as appropriate.

(ii) Immunizations as recommended by the Centers for Disease Control and Prevention (CDC).

(iii) Well-child visits for children under six (6) years of age as set forth in paragraph (c)(3)(xi) of this section.

(iv) Health promotion and disease prevention visits may be provided in connection with immunizations and cancer screening examinations authorized by this section.

(29) *Evaluative services.* Coverage is provided for the following evaluative health promotion and disease detection services:

(i) Well-child care, except for well-child visits and immunizations which are covered under preventive services as described in paragraph (e)(28) of this section.

(ii) Rabies shots.

(iii) Tetanus shot following an accidental injury.

(iv) Rh immune globulin.

(v) Genetic tests as specified in paragraph (e)(3)(ii) of this section.

(vi) Physical examinations provided when required in the case of dependents of active duty military personnel who are traveling outside the United States as a result of an active duty member's assignment and such travel is being performed under orders issued by a Uniformed Service. Any immunizations required for a dependent of an active duty member to travel outside of the United States is not considered an evaluative health promotion and disease detection service, but is covered as a preventive service under paragraph (e)(28) of this section.

(vii) Health promotion and disease detection visits may be provided in connection with the evaluative services authorized by this section.

(viii) Physical examinations for beneficiaries ages 5 through 11 that are required in connection with school enrollment, and that are provided on or after October 30, 2000.

(f) * * *

(12) *Cost-sharing for preventive services.* (i) Effective for dates of service on or after October 14, 2008, beneficiaries, other than Medicare-eligible beneficiaries, shall not pay any cost-share for preventive services listed in paragraph (e)(28) of this section. Such beneficiary shall not be required to pay any portion of the cost of these preventive services even if the beneficiary has not satisfied the deductible for that year.

(ii) This elimination of cost-sharing for preventive services does not apply to any beneficiary who is a Medicare-eligible beneficiary. For purposes of this section, the term "Medicare-eligible" beneficiary is defined in Title 10 United States Code Section 1111(b) and refers to a person eligible for Medicare Part A.

(iii) Requests for reimbursement of copayments paid by beneficiaries for preventive services on or after October 14, 2008, may be made up to [DATE ONE YEAR FROM EFFECTIVE DATE IN FINAL RULE PUBLICATION] in accordance with procedures established by the Director, TRICARE Management Activity.

(iv) Appropriate copayments and deductibles will apply for all other preventive services not listed in paragraph (e)(28) of this section and all evaluative services.

(g) * * *

(37) Preventive care. Except as specified in paragraphs (e)(28) and (29) of this section, preventive care or other evaluative services, such as routine, annual, or employment-requested physical examinations; routine screening procedures.

* * * * *

4. Section 199.17 is amended by adding paragraphs (m)(1)(ii)(D) and (m)(2)(iii) to read as follows:

§ 199.17 TRICARE program.

* * * * *

(m) * * *

(1) * * *

(ii) * * *

(D) In accordance with § 199.4(f)(12), TRICARE Standard beneficiaries, other than Medicare-eligible beneficiaries, shall have no cost sharing requirements for preventive care listed under § 199.4 (e)(28).

* * * * *

(2) * * *

(iii) In accordance with § 199.4(f)(12), TRICARE Standard beneficiaries, other than Medicare-eligible beneficiaries, shall have no cost sharing requirements for preventive care listed under § 199.4 (e)(28).

* * * * *

Dated: September 21, 2010.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–24093 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 222

[DoD–2010–OS–0043; RIN 0790–AI62]

DoD Mandatory Declassification Review (MDR) Program

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: This part implements policy established in DoD Instruction 5200.01. It assigns responsibilities and provides procedures for members of the public to request a declassification review of information classified under the provisions of Executive Order 13526, or predecessor orders.

DATES: Comments must be received by November 26, 2010.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) 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, Room 3C843, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number and/or RIN 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: Robert Storer, 703–696–2197.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 222 does not:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribunal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order 12866, as amended by Executive Order 13422.

Sec. 202, Public Law 104–4, "Unfunded Mandates Reform Act"

It has been certified that 32 CFR part 222 does not contain a Federal mandate that may result in the expenditure by State, local and tribunal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96–354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been certified that 32 CFR part 222 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. The rule implements the procedures for the effective administration of the DoD MDR Program.

Public Law 96–511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 222 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, "Federalism"

It has been certified that 32 CFR part 222 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 222

Declassification; security information.

Accordingly, 32 CFR part 222 is proposed to be added to read as follows:

PART 222—DOD MANDATORY DECLASSIFICATION REVIEW (MDR) PROGRAM

Sec.
222.1 Purpose.
222.2 Applicability.
222.3 Definitions.
222.4 Policy.
222.5 Responsibilities.
222.6 MDR processing procedures.
Appendix A to Part 222—Addressing MDR requests.

Authority: 5 U.S.C. 552

§ 222.1 Purpose.

This part implements policy established in DoD Instruction 5200.01.[1] It assigns responsibilities and provides procedures for members of the public to request a declassification review of information classified under the provisions of Executive Order 13526, or predecessor orders.

§ 222.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the "DoD Components").

§ 222.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Foreign government information. (1) Information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) Information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) Information received and treated as "Foreign Government Information" under the terms of a predecessor order to E.O. 13526.

Formal tracking system. A system designed to ensure DoD Component accountability and compliance. For each MDR request, the system shall contain as a minimum a unique tracking number, requester's name and organizational affiliation, information requested, date of receipt, and date of closure.

[1] Available at *http://www.dtic.mil/whs/directives/corres/pdf/520001p.pdf.*

Formerly Restricted Data. Information removed from the Restricted Data category upon a joint determination by the Department of Energy (or antecedent Agencies) and the Department of Defense that such information relates primarily to the military utilization of atomic weapons and that such information can be safeguarded adequately as classified defense information. For purposes of foreign dissemination, this information is treated in the same manner as Restricted Data.

MDR. Review classified information for declassification in response to a declassification request that meets the requirements under section 3.5 of Executive Order 13526.

Restricted Data. All data concerning the following:

(1) Design, manufacture or utilization of atomic weapons;

(2) Production of special nuclear material; or

(3) Use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category under Section 142 of the Atomic Energy Act of 1954, as amended.

Transclassification of Foreign Nuclear Information (TFNI). Classified information moved from the Restricted Data category to National Security Information (NSI) after the Department of Energy and the Director, National Intelligence jointly determine that it:

(1) Concerns the atomic energy programs of other nations, and

(2) It can be adequately safeguarded in a manner similar to NSI, and

(3) It shall not be automatically declassified.

§ 222.4 Responsibilities.

(a) The Director, Washington Headquarters Services, shall process MDR requests for OSD, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, and DoD components not listed in the Appendix A to this part.

(b) The Heads of the DoD Components listed in the Appendix A to this part shall:

(1) Establish procedures for the processing of MDR requests and appeals for information originating within the Component.

(2) Appoint an appellate authority to adjudicate MDR appeals for the Component.

§ 222.5 MDR processing procedures.

(a) *General.* (1) The DoD Components shall process MDR requests from the public for classified information originating within the DoD Component in accordance with title 32, Code of Federal Regulations (CFR), part 2001.

(2) Information not subject to review for public release under the MDR includes:

(i) Unclassified documents or previously classified documents that are declassified prior to the receipt of the MDR request. These documents must be requested under the provisions of the Freedom of Information Act (FOIA), section 552(b) of title 5, United States Code (U.S.C.) and 32 CFR part 286.

(ii) Information reviewed for declassification within 2 years preceding the date of receipt of the MDR request. If this is the case, the requester shall be provided the documents as previously released and advised of the right to appeal to the DoD Component within 60 days unless the documents are already under appeal to the Interagency Security Classification Appeals Panel (ISCAP).

(iii) Information exempted from search and review by sections 431 and 432 of title 50, U.S.C.

(iv) Documents originated by the incumbent President; the incumbent President's White House Staff; committees, commissions, or boards appointed by the incumbent President; or other entities within the Executive Office of the President that solely advise and assist the incumbent President.

(v) Information marked as Restricted Data, Formerly Restricted Data, or Transclassification of Foreign Nuclear Information.

(vi) Information that is the subject of pending litigation.

(vii) This section shall not apply to any request for a review made to an element of the Intelligence Community that is made by a person other than an individual as that term is defined by 5 U.S.C. 552a(a)(2), or by a foreign government entity or any representative thereof.

(b) *MDR Requester Guidelines.* Members of the public seeking the declassification of DoD documents under the provisions of section 3.5 of Executive Order 13526 shall:

(1) Address the written request to the appropriate DoD Component listed in the Appendix A to this part.

(2) Identify the requested document or information with sufficient specificity to enable the DoD Component to locate it with a reasonable amount of effort. Information that would provide the sufficient specificity would include a document identifier such as originator, date, title, and/or subject, the National Archives and Records Administration accession number, or other applicable unique document identifying number. Broad or topical MDR requests for records on a particular subject, such as "any and all documents concerning" a subject do not meet this standard.

(3) Include a correct return mailing address with the request.

(4) Include a statement that the requester understands that the request may incur processing charges in accordance with paragraph (j) of this section.

(c) *Receipt and Control.* Upon receipt of an MDR request, the DoD Component shall send the requester an acknowledgement and open a file in a formal control system. The acknowledgement shall include the tracking number and date of receipt of the request.

(d) *Simultaneous MDR and FOIA Requests.* DoD Components should be aware of possible requests under both the MDR and the FOIA. In accordance with section 2001.33(f) of 32 CFR part 2001, if a requester asks for the same information under the FOIA and the MDR, the DoD Component shall ask the requester to select only one process. If the requester does not select a process, then the DoD Component shall process the requested information under the FOIA.

(e) *MDR Document Review Process.* (1) Requests normally will be processed on a first in first out basis by date of receipt.

(2) Every effort shall be made to ensure that a response to an MDR request is provided to the requester within 1 year from the date of receipt.

(3) The DoD Components shall conduct line-by-line reviews of documents responsive to an MDR request to determine if the information contained within the documents continues to adhere to the standards for classification according to Executive Order 13526. This line-by-line review must take into account the unique sensitivity of foreign government information (FGI) as outlined in paragraph (g) of this section. In accordance with section 3.6 (b) of Executive Order 13526, classified information originating with another U.S. Government agency contained in records of the DoD Components will be referred to the originating agency for a declassification and release determination. Likewise, classified information in a DoD Component's records originating with another DoD Component will be referred to the originating Component. It is the responsibility of the DoD Component originally receiving the MDR request to manage these referrals and to incorporate the other agency's or DoD Component's determinations when preparing the final decision on the

request. The review of each document will determine if the document:

(i) No longer meets the standards for classification as established by Executive Order 13526 and current statutes, and is therefore declassified in full.

(ii) Contains portions still meeting the standards for classification and is therefore declassified in part and denied in part.

(iii) Still meets the standards for classification in its entirety and is therefore denied in full.

(4) For documents meeting the criteria of paragraphs (e)(3)(i) and (ii) of this section, the DoD Components shall not release any unclassified information exempt from public release pursuant to Exemptions 2 through 9 of the FOIA. 32 CFR part 286 provides a more detailed explanation of the FOIA exemptions.

(5) When this process is complete, the DoD Components shall redact all information determined exempt from release as warranted under applicable law and authority. All of the remaining information within the documents, which is determined to be publicly releasable information, shall be provided promptly to the requester.

(f) *Public Access.* In the interest of transparency, the DoD Components should take efforts to post documents released under the MDR program on DoD Component Web sites.

(g) *FGI* If a requested document originated with a foreign government or organization and was classified by that government or organization, the DoD Component shall:

(1) Conduct an MDR review of the document in accordance with DoD 5200.1–R.[2]

(2) Process mandatory declassification review requests for classified records containing foreign government information in accordance with this section. The declassifying agency is the agency that initially received or classified the information. When foreign government information is being considered for declassification, the declassifying agency shall determine whether the information is subject to a treaty or international agreement that does not permit automatic or unilateral declassification. The declassifying agency or the Department of State may consult with the foreign government(s) prior to declassification.

(h) *Denial of Information.* (1) When classified information is denied, the DoD Component shall advise the requester, in writing:

(i) That information currently and properly classified has been denied (whether a document in its entirety or partially) in accordance with the appropriate sections of Executive Order 13526.

(ii) Of the right to appeal the denial to the DoD Component within 60 days of receipt of the denial.

(iii) Of the mailing address for the appellate authority.

(2) When unclassified information is withheld because it is determined exempt from release pursuant to Exemptions 2 through 9 of the FOIA (whether or not classified information was also withheld within the same document), the DoD Component shall advise the requester that:

(i) Section 3.5(c) of Executive Order 13526 allows for the denial of information when withholding it is authorized and warranted under applicable law.

(ii) Unclassified information exempt from public release pursuant to one or more exemptions of the FOIA has been withheld.

(3) For the denial of unclassified information, the requester shall not be given MDR appeal rights because the MDR applies only to the denial of classified information and because the request was not processed under the FOIA.

(4) The DoD Component is not required to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified pursuant to Executive Order 13526.

(i) *MDR Appeals.* MDR appeals are for the denial of classified information only. DoD Components shall make an appellate decision within 60 working days of receipt of an MDR appeal. If additional time is required to make a determination, the appellate authority shall notify the requester of the additional time needed and provide the requester with the reason for the extension. When the appellate review is complete, the appellate authority shall notify the requester in writing of the final determination and of the reasons for any denial. If the appellate authority determines that some information remains classified under the provision of Executive Order 13526, the requester will be advised of the right to appeal the final decision to the ISCAP within 60 days of the final component decision, in accordance with Appendix A of 32 CFR part 2001.

Appendix A to Part 222—Addressing MDR Requests

(a) *General.* The Department of Defense does not have a central repository for DoD records. MDR requests therefore should be addressed to the DoD Component that has custody of the requested record. If a requester is not sure which DoD Component has custody or if the DoD Component is not listed paragraph (b) of this Appendix, the MDR request should be directed to the Washington Headquarters Services address in paragraph (b)(1) of this Appendix.

(b) *DoD Component MDR Addresses.* (1) *OSD and the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff.* Department of Defense, Washington Headquarters Services, Records And Declassification Division, 1155 Defense Pentagon, Washington, DC 20301–1155. EXCEPTION: *DoD Inspector General.* DoD Office of Inspector General, 400 Army Navy Drive, Arlington, VA 22202–4704.

(2) *Department of the Army.* U.S. Army Declassification Activity, Attention: AHRC–RDD, 8850 Richmond Highway, Suite 300, Alexandria, VA 22309.

(3) *Department of the Navy.* Department of the Navy, Chief of Naval Operations, DNS–34, 2000 Navy Pentagon, Washington, DC 20350–2000.

(4) *Department of the Air Force.* Department of the Air Force, HAF/IMIO (MDR), 1000 Air Force Pentagon, Washington, DC 20330–1000.

(5) *United States Marine Corps.* Commandant of the Marine Corps, HQMC Code ARS, 2 Navy Annex, Room 1006, Washington, DC 20830–1775.

(6) *Defense Advanced Research Projects Agency.* Defense Advanced Research Projects Agency, 3701 N. Fairfax Drive, Arlington, VA 22203–1714.

(7) *Defense Contract Audit Agency.* Director, Defense Contract Audit Agency, Attention: CPS, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060–6219.

(8) *Defense Information Systems Agency.* Defense Information Systems Agency, Attention: Security Division, MPS 6, 5111 Leesburg Pike, Suite 100, Falls Church, VA 22041.

(9) *Defense Intelligence Agency.* Defense Intelligence Agency, Attention: DAN–1A (FOIA), Washington, DC 20340–5100.

(10) *Defense Logistics Agency.* Defense Logistics Agency, Attention: DLA/DSS–S, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060–6221.

(11) *Defense Security Service.* Defense Security Service, Office of FOIA & Privacy, 1340 Braddock Place, Alexandria, VA 22314–1651.

(12) *Defense Threat Reduction Agency.* Defense Threat Reduction Agency, Attention: SCR, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

(13) *Missile Defense Agency.* Missile Defense Agency, Attention: MDA/DS, 7100 Defense Pentagon, Washington, DC 20301–7100.

(14) *National Geospatial-Intelligence Agency.* National Geospatial-Intelligence Agency, Mail Stop D–10, 4600 Sangamore Road, Bethesda, MD 20816–5003.

(15) *National Reconnaissance Office.* National Reconnaissance Office, NRO–DDA–MSO–ASG–IMSC–IART, 14675 Lee Road, Chantilly, VA 20151–1715.

(16) *National Security Agency/Central Security Service.* National Security Agency,

[2] *Available at http://www.dtic.mil/whs/directives/corres/pdf/520001r.pdf.*

Declassification Office, DJP5, 9800 Savage Road, Suite 6884, Fort George G. Meade, MD 20755–6884.

(17) *U.S. Africa Command.* U.S. Africa Command, Unit 29951, APO AE 09751–9951.

(18) *U.S. Central Command.* U.S. Central Command, Attention: CCJ6–RDD, 7115 South Boundary Blvd., MacDill AFB, FL 33621–5101.

(19) *U.S. European Command.* U.S. European Command, Attention: ECJ1–AX, Unit 30400, APO AE 09131.

(20) *U.S. Joint Forces Command.* U.S. Joint Forces Command, Code J024, 1562 Mitscher Ave., Suite 200, Norfolk, VA 23511–2488.

(21) *U.S. Northern Command.* U.S. Northern Command, HQ USNORTHCOM/CSM, 250 Vandenberg Street, Suite B016, Peterson AFB, CO 80914–3804.

(22) *U.S. Pacific Command.* U.S. Pacific Command, Attention: J151 FOIA, Box 64017, Camp Smith, HI 96861–4017.

(23) *U.S. Southern Command.* U.S. Southern Command, Attention: SCJ1–A (FOIA), 3511 NW 91st Avenue, Miami, FL 33172–1217.

(24) *U.S. Special Operations Command.* U.S. Special Operations Command, Attention: SOCS–SJS–SI (FOIA), 7701 Tampa Point Blvd., MacDill AFB, FL 33621–5323.

(25) *U.S. Strategic Command.* U.S. Strategic Command, Attention: CS50, 901 SAC Blvd., STE 1C17, Offutt AFB, NE 68113–6000.

(26) *U.S. Transportation Command.* U.S. Transportation Command, Chief, Resources Information, Communications, and Records Management, Attention: TCJ6–RII, 508 Scott Drive, Bldg. 1961, Scott AFB, IL 62225–5357.

Dated: September 20, 2010.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–24094 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–06–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0657; FRL–9205–7]

Approval and Promulgation of Air Quality Implementation Plans; Michigan; PSD Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve revisions to the Michigan State Implementation Plan (SIP) under the Federal Clean Air Act (CAA). The revisions serve to meet specific requirements of the prevention of significant deterioration (PSD) construction permit program in Michigan. Michigan has submitted two SIP revisions pertaining to the "net emission increase" definition and the "reasonable possibility" recordkeeping and reporting requirements, and EPA has found the revisions acceptable.

DATES: Comments must be received on or before October 27, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0657, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: blakley.pamela@epa.gov.*
3. *Fax:* (312) 692–2450.
4. *Mail:* Pamela Blakley, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Pamela Blakley, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The regional office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Pamela Blakley, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–4447, *blakley.pamela@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, EPA will withdraw the final rule and will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, *see* the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: September 11, 2010.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2010–23983 Filed 9–24–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0484; FRL–9206–1]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Adoption of Control Techniques Guidelines for Flexible Packaging Printing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Maryland. This SIP revision includes amendments to Maryland's regulation for Volatile Organic Compounds from Specific Processes, and meets the requirement to adopt Reasonably Available Control Technology (RACT) for sources covered by EPA's Control Techniques Guidelines (CTG) for flexible packaging printing. These amendments will reduce emissions of volatile organic compound (VOC) emissions from flexible packaging printing. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by October 27, 2010.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–

R03–OAR–2010–0484 by one of the following methods:

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

B. *E-mail: pino.maria@epa.gov.*

C. *Mail:* EPA–R03–OAR–2010–0484, Maria A. Pino, Acting Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2010–0484. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Irene Shandruk, (215) 814–2166, or by e-mail at *shandruk.irene@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, "Approval and Promulgation of Air Quality Implementation Plans; Maryland; Adoption of Control Techniques Guidelines for Flexible Packaging Printing," that is located in the "Rules and Regulations" section of this **Federal Register** publication.

Dated: *September 7, 2010.*

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2010–24003 Filed 9–24–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0525; FRL–9206–5]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Control Technique Guidelines for Paper, Film, and Foil Coatings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Maryland. This SIP revision includes amendments to Maryland's regulation for Volatile Organic Compounds from Specific Processes. Specifically, Maryland is amending its regulations by adopting the requirements of EPA's Control Technique Guidelines (CTG) for paper, film, and foil coatings. These amendments will reduce volatile organic compound (VOC) emissions from this source category. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A more detailed description of the state submittal and EPA's evaluation are included in a Technical Support Document (TSD) prepared in support of this rulemaking action. A copy of the TSD is available, upon request, from the EPA Regional Office listed in the **ADDRESSES** section of this document. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by October 27, 2010.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2010–0525 by one of the following methods:

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

B. *E-mail: pino.maria@epa.gov.*

C. *Mail:* EPA–R03–OAR–2010–0525, Maria A. Pino, Acting Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2010–0525. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly

to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Ellen Wentworth, (215) 814–2034, or by e-mail at *wentworth.ellen@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, "Approval and Promulgation of Air Quality Implementation Plans; Maryland; Control Technique Guidelines for Paper, Film, and Foil Coatings," that is located in the "Rules and Regulations" section of this **Federal Register** publication.

Dated: September 7, 2010.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2010–23981 Filed 9–24–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–000; Internal Agency Docket No. FEMA–B–1137]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before December 27, 2010.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1137, to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3461, or (e-mail) *roy.e.wright@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3461, or (e-mail) *roy.e.wright@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

State	City/town/county	Source of flooding	Location **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)	
				Existing	Modified
City of Poquoson, Virginia					
Virginia	City of Poquoson	Chesapeake Bay	At the intersection of Hunt Wood Drive and Oscars Court.	None	+7
	City of Poquoson	Chesapeake Bay/Cedar Creek.	At the intersection of Villa Drive and Huntlandia Way.	None	+7
			Approximately 400 feet north of the intersection of State Route 171 and City Hall Avenue.	None	+7

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Poquoson

Maps are available for inspection at the Building Official's Office, 500 City Hall Avenue, Poquoson, VA 23662.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Stearns County, Minnesota, and Incorporated Areas				
Sauk Lake	Entire shoreline within Stearns County	None	+1232	Unincorporated Areas of Stearns County.
Sauk River	Approximately 7,260 feet downstream of County Road 17.	None	+1226	City of Sauk Centre, Unincorporated Areas of Stearns County.
	Approximately 1,450 feet downstream of Main Street	None	+1227	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Sauk Centre

Maps are available for inspection at 320 Oak Street South, Sauk Centre, MN 56378.

Unincorporated Areas of Stearns County

Maps are available for inspection at the Stearns County Administration Center, 705 Courthouse Square, St. Cloud, MN 56303.

Barrett Pond	At the confluence with Clove Creek	+356	+361	Town of Philipstown.
	Approximately 2,741 feet upstream of Fishkill Road	None	+378	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Clove Creek	Approximately 50 feet downstream of U.S. Route 9	+258	+259	Town of Philipstown.
	Approximately 1.6 mile upstream of Briars Road	None	+517	
Croton Falls Diverting Reservoir.	Entire shoreline within the Town of Southeast	None	+310	Town of Southeast.
Croton Falls Reservoir	Entire shoreline	None	+311	Town of Carmel, Town of Southeast.
East Branch Croton River	At the confluence with the Croton Falls Diverting Reservoir.	+311	+310	Town of Southeast, Village of Brewster.
Reach 1	Approximately 777 feet upstream of State Route 22	+418	+359	
Foundry Brook	Approximately 1,320 feet downstream of State Route 9D.	+7	+8	Town of Philipstown, Village of Cold Spring, Village of Nelsonville.
	Approximately 852 feet upstream of Fishkill Road	None	+369	
Holly Stream	Approximately 1,099 feet downstream of State Route 22.	+272	+273	Town of Southeast.
	Approximately 854 feet upstream of I–684	None	+312	
Lake Mahopac	Entire shoreline within the Town of Carmel	None	+660	Town of Carmel.
Lost Lake	Entire shoreline	None	+466	Town of Patterson.
Michael Brook	At the confluence with the Croton Falls Reservoir	+305	+311	Town of Carmel, Town of Kent.
	Approximately 0.9 mile upstream of Fair Street	None	+593	
Middle Branch Croton River	At confluence with the Middle Branch Reservoir	+374	+371	Town of Carmel, Town of Kent, Town of Southeast.
	Approximately 101 feet upstream of Lakeshore Drive	+622	+620	
Middle Branch Reservoir	Entire shoreline within the Town of Southeast	None	+371	Town of Southeast.
Muscoot River	At the county boundary	+512	+509	Town of Carmel.
	Approximately 1,009 feet upstream of Stillwater Road	+513	+511	
Oscawana Brook	At the county boundary	+116	+115	Town of Putnam Valley.
	Approximately 1,550 feet upstream of Oscawana Lake Road.	None	+516	
Putnam Lake	Entire shoreline	None	+494	Town of Patterson.
Secor Brook	At the confluence with the Muscoot River	+513	+511	Town of Carmel.
	Approximately 1,396 feet upstream of Secor Road	None	+566	
Shrub Oak Brook	Approximately 500 feet upstream of the confluence with Peekskill Hollow Creek.	+218	+219	Town of Putnam Valley.
	At the county boundary	+391	+393	
Stephens Brook	Approximately 250 feet upstream of the confluence with East Branch Croton River Reach 2.	+432	+433	Town of Patterson.
	Approximately 31 feet upstream of Thunder Ridge Road.	+475	+473	
Tonetta Brook	At the confluence with East Branch Croton River Reach 1.	+314	+313	Town of Southeast, Village of Brewster.
	Approximately 351 feet upstream of Pumphouse Road.	+446	+444	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Town of Carmel
Maps are available for inspection at the Carmel Town Hall, 60 McAlpin Avenue, Mahopac, NY 10541.

Town of Kent
Maps are available for inspection at the Town of Kent Administration Office, 25 Sybils Crossing, Kent Lakes, NY 10512.

Town of Patterson
Maps are available for inspection at the Town Hall, 1142 Route 311, Patterson, NY 12563.

Town of Philipstown
Maps are available for inspection at the Philipstown Town Hall, 238 Main Street, Cold Spring, NY 10516.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Town of Putnam Valley Maps are available for inspection at the Town Hall, 265 Oscawana Lake Road, Putnam Valley, NY 10579.				
Town of Southeast Maps are available for inspection at the Southeast Town Building Department, 1 Main Street, Brewster, NY 10509.				
Village of Brewster Maps are available for inspection at the Village Hall, Larry T. Jewell Municipal Building, 50 Main Street, Brewster, NY 10509.				
Village of Cold Spring Maps are available for inspection at the Village Hall, 85 Main Street, Cold Spring, NY 10516.				
Village of Nelsonville Maps are available for inspection at the Village Hall, 258 Main Street, Nelsonville, NY 10516.				
East Branch Tunungwant Creek.	Approximately 0.59 mile upstream of Browntown Road.	None	+1532	Borough of Lewis Run.
	Approximately 0.70 mile upstream of Browntown Road.	None	+1535	
Marvin Creek	Approximately 0.46 mile upstream of U.S. Route 6 (Marvin Street).	None	+1484	Township of Keating.
	Approximately 0.59 mile upstream of U.S. Route 6 (Marvin Street).	None	+1485	
Potato Creek	Approximately 0.62 mile downstream of Champlin Hill Road.	None	+1448	Township of Keating.
	Approximately 1,050 feet downstream of Champlin Hill Road.	None	+1448	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Borough of Lewis Run
Maps are available for inspection at the Borough Hall, 60 Main Street, Lewis Run, PA 16738.

Township of Keating
Maps are available for inspection at the Keating Township Building, 7160 State Route 46, Smethport, PA 16749.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: September 13, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–24144 Filed 9–24–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1131]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before December 27, 2010.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1131, to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3461, or (e-mail) *roy.e.wright@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3461, or (e-mail) *roy.e.wright@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Boulder County, Colorado, and Incorporated Areas				
55th Street Split Flow	Approximately 350 feet upstream of Burlington Northern and Sante Fe Railroad.	None	+5222	City of Boulder, Unincorporated Areas of Boulder County.
	Just downstream of South Boulder Road	None	+5345	
Dry Creek Ditch No. 2	Approximately 800 feet upstream of the confluence with South Boulder Creek.	None	+5192	City of Boulder, Unincorporated Areas of Boulder County.
	At Arapahoe Avenue	None	+5234	
South Boulder Creek	At the confluence with Boulder Creek	+5178	+5175	City of Boulder, Unincorporated Areas of Boulder County.
	Approximately 770 feet upstream of Eldorado Springs Road.	None	+5820	
West Valley Split Flow	Approximately 200 feet upstream of Burlington Northern and Santa Fe Railroad.	None	+5226	City of Boulder, Unincorporated Areas of Boulder County.
	Just downstream of Apache Road	None	+5345	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Boulder

Maps are available for inspection at 1739 Broadway Street, Boulder, CO 80306.

Unincorporated Areas of Boulder County

Maps are available for inspection at 1739 Broadway Street, Boulder, CO 80306,

Volusia County, Florida, and Incorporated Areas

Angela Lake	Entire shoreline	None	*28	City of Deltona.
Dupont Lake	Entire shoreline	None	*28	City of Deltona.
Lake Butler	Entire shoreline	None	*28	City of Deltona, Unincorporated Areas of Volusia County.
Louise Lake	Entire shoreline	None	*28	City of Deltona.
Outlook Lake	Entire shoreline	None	*57	City of Deltona.
Ponding Area 5	Ponding area bounded by I–4 to the north and west, North Firwood Drive to the south, and North Normandy Boulevard to the east.	None	*44	City of Deltona.
Ponding Area 6	Ponding area bounded by Graves Avenue to the north, North Normandy Boulevard to the west, North Firwood Drive to the south, and West Seagate Drive to the east.	None	*74	City of Deltona.
Ponding Area 7	Ponding area bounded by Graves Avenue to the north, North Normandy Boulevard to the west, North Firwood Drive to the south, and West Seagate Drive to the east.	None	*74	City of Deltona.
Ponding Area 8	Ponding area bounded by I–4 to the north and west, North Gloria Drive to the south, and East Annapolis Drive to the east.	None	*36	City of Deltona.
Ponding Area 9	Ponding area bounded by Graves Avenue to the north, North Normandy Boulevard to the west, Vicksburg Street to the south, and Utility Driveway to the east.	None	*79	City of Deltona.
Ponding Area 10	Ponding area bounded by North Firwood Drive to the north, North Normandy Boulevard to the west, Arlene Drive to the south, and East Firwood Drive to the east.	None	*79	City of Deltona.
Ponding Area 11	Ponding area bounded by Graves Avenue to the north, North Normandy Boulevard to the west, Vicksburg Street to the south, and Utility Driveway to the east.	None	*79	City of Deltona.
Ponding Area 12	Ponding area bounded by Flagler Street to the north, I–4 to the west, South Annapolis Drive to the south, and East Annapolis Drive to the east.	None	*36	City of Deltona.
Ponding Area 13	Ponding area bounded by Arlene Drive to the north, North Normandy Boulevard to the west and south, and Fitzpatrick Terrace to the east.	None	*65	City of Deltona.
Ponding Area 14	Ponding area bounded by North Fairbanks Drive to the north, East Firwood Drive to the west, Arlene Drive to the south, and Banbury Avenue to the east.	None	*88	City of Deltona.
Ponding Area 15	Ponding area bounded by I–4 to the north and west, Sullivan Street to the south, and Galveston Avenue to the east.	None	*32	City of Deltona.
Ponding Area 16	Ponding area bounded by North Gloria Drive to the north, Galveston Avenue to the west, Antelope Drive to the south, and East Gloria Drive to the east.	None	*38	City of Deltona.
Ponding Area 17	Ponding area bounded by Applegate Terrace to the north, East Gloria Drive to the west and south, and North Normandy Boulevard to the east.	None	*51	City of Deltona.
Ponding Area 18	Ponding area bounded by I–4 to the north and west, Sullivan Street to the south, and Galveston Avenue to the east.	None	*40	City of Deltona.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Ponding Area 19	Ponding area bounded by Geraldine Drive to the north and east, Apricot Drive to the west, and Gondolier Terrace to the south.	None	*38	City of Deltona.
Ponding Area 20	Ponding area bounded by Gallagher Avenue to the north and west, Sullivan Street to the south, and East Gloria Drive to the east.	None	*51	City of Deltona.
Ponding Area 21	Ponding area bounded by I–4 to the north and west, Rockford Street to the south, and West Parkton Drive to the east.	None	*34	City of Deltona.
Ponding Area 22	Ponding area bounded by I–4 to the north and west, Sullivan Street to the south, and Galveston Avenue to the east.	None	*40	City of Deltona.
Ponding Area 23	Ponding area bounded by Gallagher Avenue to the north and west, Sullivan Street to the south, and East Gloria Drive to the east.	None	*43	City of Deltona.
Ponding Area 24	Ponding area bounded by Sullivan Street to the north, East Parkton Drive to the west, South Anchor Drive to the south, and East Anchor Drive to the east.	None	*43	City of Deltona.
Ponding Area 25	Ponding area bounded by Gainsboro Street to the north, East Anchor Drive to the west, Elwood Street to the south, and Dupont Court to the east.	None	*53	City of Deltona.
Ponding Area 26	Ponding area bounded by North Goodrich Drive to the north, Escobar Avenue to the west, South Glancy Drive to the south, and East Glancy Drive to the east.	None	*37	City of Deltona.
Ponding Area 27	Ponding area bounded by Leland Drive to the north and west, Fisher Drive to the south, and Providence Boulevard to the east.	None	*31	City of Deltona.
Ponding Area 28	Ponding area bounded by Providence Boulevard to the north and west, Grapewood Street to the south, and Chestnut Court to the east.	None	*39	City of Deltona.
Ponding Area 29	Ponding area bounded by Leland Drive to the north, Coventry Estates Boulevard to the west, Debary Avenue to the south, and Monarco Avenue to the east.	None	*34	City of Deltona, Unincorporated Areas of Volusia County.
Ponding Area 30	Ponding area bounded by Beckwith Street to the north, Coachman Drive to the west, Bentley Court to the south, and Courtland Boulevard to the east.	None	*47	City of Deltona.
Ponding Area 31	Ponding area bounded by Captain Drive to the north, Parma Drive to the west, Lake Helen Osteen Road to the south, and Snow Drive to the east.	None	*28	City of Deltona.
Ponding Area 32	Ponding area bounded by Yorkshire Drive to the north and west, Catalina Boulevard to the south, and Lake Helen Osteen Road to the east.	None	*36	City of Deltona.
Ponding Area 33	Ponding area bounded by Coventry Street to the north, Courtland Boulevard to the west, Riverhead Drive to the south, and Jewel Avenue to the east.	None	*51	City of Deltona.
Ponding Area 34	Ponding area bounded by Riverhead Drive to the north, Courtland Boulevard to the west, Laredo Drive to the south, and East Dorchester Drive to the east.	None	*51	City of Deltona, Unincorporated Areas of Volusia County.
Ponding Area 35	Ponding area bounded by Elkcam Boulevard to the north, East Cooper Drive to the west, Beechdale Drive to the south, and Eden Drive to the east.	None	*28	City of Deltona.
Ponding Area 36	Ponding area bounded by Tivoli Drive to the north, Lydia Drive to the west, Fergason Avenue to the south, and Providence Boulevard to the east.	None	*49	City of Deltona.
Ponding Area 37	Ponding area bounded by Lake Helen Osteen Road to the north, Center Road to the west, Howland Boulevard to the south, and Austin Avenue to the east.	None	*28	City of Deltona.
Ponding Area 38	Ponding area bounded by Newmark Drive to the north, Cofield Drive to the west, Conyers Court to the south, and Amboy Drive to the east.	None	*28	City of Deltona.
Ponding Area 39	Ponding area bounded by Clewiston Street to the north, Etta Circle to the west, Hallow Drive to the south, and Courtland Boulevard to the east.	None	*23	City of Deltona.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Ponding Area 40	Ponding area bounded by Montcalm Street to the north, Gage Avenue to the west, Goldenhills Street to the south, and Clarion Circle to the east.	None	*26	City of Deltona.
Ponding Area 41	Ponding area bounded by Alexander Avenue to the north and east, Providence Boulevard to the west, and Grapewood Street to the south.	None	*69	City of Deltona.
Ponding Area 42	Ponding area bounded by Doyle Road to the north, Braddock Road to the west and south, and West Harbor Drive to the east.	None	*42	City of Deltona, Unincorporated Areas of Volusia County.
Ponding Area 43	Ponding area bounded by Lake Helen Osteen Road to the north and east, Sixma Road to the west, and Yorkshire Drive to the south.	None	*34	City of Deltona, Unincorporated Areas of Volusia County.
Ponding in the vicinity of Angela Lake, Dupont Lake, Lake Butler, Louise Lake, and Theresa Lake.	Ponding area bounded by Howland Boulevard to the north and east, Providence Boulevard to the west, and Doyle Road to the south.	None	*28	City of Deltona, Unincorporated Areas of Volusia County.
Theresa Lake	Entire shoreline	None	*28	City of Deltona.
Three Island Lakes	Entire shoreline	None	*28	City of Deltona, Unincorporated Areas of Volusia County.
Trout Lake	Entire shoreline	None	*26	City of Deltona.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Deltona

Maps are available for inspection at the Department of Developmental Services, 777 Deltona Boulevard, Deltona, FL 32725.

Unincorporated Areas of Volusia County

Maps are available for inspection at the Volusia County Office of Growth Management, 123 West Indiana Avenue, DeLand, FL 32720.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: September 13, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–24146 Filed 9–24–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1133]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before December 27, 2010.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1133, to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3461, or (e-mail) *roy.e.wright@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3461, or (e-mail) *roy.e.wright@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Tuscola County, Michigan (All Jurisdictions)				
Cass River	Approximately 180 feet downstream of the CSX Railroad crossing.	+635	+634	City of Vassar, Township of Tuscola,
	At Kirk Road, extended	+639	+638	Township of Vassar.
Cat Lake/South Drain	Approximately 110 feet downstream of Harmon Lake Road.	None	+747	Township of Dayton.
	At Cat Lake, approximately 280 feet upstream of Lakeview Drive.	None	+749	
Gibson Drain	Approximately 2,680 feet north of Don Road	None	+585	Township of Gilford.
	Approximately 1,160 feet south of M–138	None	+585	
McPherson Drain	At Akron Road	None	+585	Township of Gilford.
	Approximately 260 feet north of Dutcher Road	None	+585	
Northwest Drain Outlet No. 1	At the confluence with VCCM and S Drain	None	+585	Township of Gilford.
	Approximately 500 feet downstream of North Quanicassee Road.	None	+585	
Reese Drain	Upstream of Reese Road, approximately 310 feet south of Dixon Road.	None	+603	Township of Denmark, Village of Reese.
	Downstream of Reese Road, approximately 2,600 feet south of M–81.	None	+625	
Saginaw Bay	Entire shoreline in the Township of Akron	None	+585	Township of Akron, Township of Wisner.
	Entire shoreline in the Township of Wisner	+584	+585	
VCCM and S Drain	Approximately 300 feet north of M–138	None	+585	Township of Gilford.
	At Akron Road	None	+585	
Wiscoggin Drain	At Loomis Road	None	+585	Township of Columbia.
	Approximately 380 feet upstream of Loomis Road	None	+585	

* National Geodetic Vertical Datum.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Vassar
Maps are available for inspection at City Hall, 287 East Huron Street, Vassar, MI 48768.

Township of Akron
Maps are available for inspection at 6800 North Vassar Road, Unionville, MI 48767.

Township of Columbia
Maps are available for inspection at 6822 Unionville Road, Unionville, MI 48767.

Township of Dayton
Maps are available for inspection at P.O. Box 305, Mayville, MI 48744.

Township of Denmark
Maps are available for inspection at P.O. Box 44, Reese, MI 48757.

Township of Gilford
Maps are available for inspection at 171 Garner Road, Fairgrove, MI 4873.

Township of Tuscola
Maps are available for inspection at 6697 Buell Road, Vassar, MI 48768.

Township of Vassar
Maps are available for inspection at 4505 West Saginaw Road, Vassar, MI 48768.

Township of Wisner
Maps are available for inspection at 8207 M–25, Akron, MI 48701.

Village of Reese
Maps are available for inspection at 2073 Gates Street, Reese, MI 48757.

Dakota County, Nebraska, and Incorporated Areas

Crystal Cove	Just upstream of I–129 along U.S. Route 77	None	+1086	City of South Sioux City.
Crystal Lake	From just upstream of 152nd Street to just downstream of U.S. Route 77.	None	+1086	City of South Sioux City, Unincorporated Areas of Dakota County.
Crystal Lake Northwest	From just downstream of Golf Road to just upstream of 142nd Street.	None	+1093	City of South Sioux City.
Crystal Lake-Sump Area	From the intersection of Old Sawmill Road and unnamed road to approximately 780 feet south, extending approximately 1,050 feet west along Old Sawmill Road.	None	+1098	City of South Sioux City.
Missouri River	Approximately 1 mile downstream of the confluence with Omaha Creek Ditch.	+1070	+1069	City of Dakota City, City of South Sioux City, Unincorporated Areas of Dakota County.
	Approximately 0.9 mile upstream from the confluence with Aowa Creek.	+1100	+1102	
Old Silver Lake Creek	At the confluence with the Missouri River	None	+1090	City of South Sioux City.
	Approximately 200 feet downstream of West 29th Street.	None	+1092	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Dakota City

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

Maps are available for inspection at 1511 Broadway Street, Dakota City, NE 68731.

City of South Sioux City

Maps are available for inspection at 1615 1st Avenue, South Sioux City, NE 68776.

Unincorporated Areas of Dakota County

Maps are available for inspection at 1601 Broadway Street, Dakota City, NE 68731.

Sussex County, New Jersey (All Jurisdictions)

Delaware River	At the Warren County boundary	None	+352	Township of Walpack.
	At the Township of Sandyston boundary	None	+376	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Township of Walpack

Maps are available for inspection at the Walpack Township Municipal Building, 9 Main Street, Walpack Center, NJ 07881.

Clark County, Nevada, and Incorporated Areas

Las Vegas Wash	At the mouth of the Las Vegas Wash (Lake Las Vegas Parkway).	+1425	+1431	City of Henderson, City of Las Vegas, City of North Las Vegas, Unincorporated Areas of Clark County.
	Approximately 375 feet upstream of North Las Vegas Boulevard.	+1854	+1852	
Unnamed Tributary to Las Vegas Wash A Channel.	Approximately 1,000 feet upstream of the intersection of Las Vegas Wash and Las Vegas Boulevard.	+1857	+1857	City of North Las Vegas.
	Approximately 400 feet downstream of I-15	+1890	+1886	
Unnamed Wash Along Gowan Road.	Approximately 180 feet upstream of the intersection of North Rancho Drive and West Gowan Road.	None	+2256	City of Las Vegas, Unincorporated Areas of Clark County.
	At the intersection of West Gowan Road and U.S. Route 95.	None	+2311	
Unnamed Wash Along Maverick Street and Duncan Drive.	Approximately 300 feet upstream of the intersection of Duncan Drive and North Rancho Drive.	None	+2258	City of Las Vegas, Unincorporated Areas of Clark County.
	Approximately 150 feet downstream of the intersection of West Gowan Road and Maverick Street.	None	+2280	
Unnamed Wash Along North Rancho Drive.	Approximately 300 feet upstream of the intersection of North Rancho Drive and North Decatur Boulevard.	None	+2209	City of Las Vegas, City of North Las Vegas.
	Approximately 250 feet upstream of the intersection of North Rancho Drive and West Craig Road.	+2300	+2298	
Unnamed Wash along U.S. Route 95.	At the intersection of West Gowan Street and U.S. Route 95.	+2318	+2317	City of Las Vegas.
	Approximately 950 feet upstream of the intersection of U.S. Route 95 and West Craig Road.	+2326	+2325	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

ADDRESSES

City of Henderson
Maps are available for inspection at the Public Works Department, 240 Water Street, Henderson, NV 89015.

City of Las Vegas
Maps are available for inspection at the Public Works Department, 400 Stewart Avenue, Las Vegas, NV 89101.

City of North Las Vegas
Maps are available for inspection at the Public Works Department, 2200 Civic Center Drive, North Las Vegas, NV 89030.

Unincorporated Areas of Clark County
Maps are available for inspection at the Public Works Department, 500 South Grand Central Parkway, Las Vegas, NV 89155.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: September 13, 2010

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–24141 Filed 9–24–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1138]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before December 27, 2010.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1138, to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3461, or (e-mail) *roy.e.wright@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3461, or (e-mail) *roy.e.wright@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Clinton County, Indiana, and Incorporated Areas				
Prairie Creek	Approximately 100 feet downstream of County Road 100 North.	None	+822	City of Frankfort, Unincorporated Areas of Clinton County.
	Approximately 450 feet upstream of Kelly Street	None	+853	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Frankfort

Maps are available for inspection at City Hall, 301 East Clinton Street, Frankfort, IN 46041.

Unincorporated Areas of Clinton County

Maps are available for inspection at the Clinton County Courthouse, 180 Courthouse Square, Frankfort, IN 46041.

Cerro Gordo County, Iowa, and Incorporated Areas				
Chelsea Creek	At the confluence with Willow Creek	+1116	+1118	City of Mason City.
	Just downstream of Chicago, Milwaukee, St. Paul and Pacific Railroad.	+1131	+1134	
Clear Creek	At the confluence with Willow Creek	None	+1180	City of Clear Lake.
	Just downstream of 40th Street	+1195	+1192	
Clear Lake	Entire shoreline	None	+1228	City of Clear Lake, City of Ventura, Unincorporated Areas of Cerro Gordo County.
Willow Creek	Just upstream of State Road 122	+1157	+1158	City of Clear Lake, City of Mason City, Unincorporated Areas of Cerro Gordo County.
	Approximately 850 feet upstream of I–35	None	+1195	
Winnebago River	Approximately 0.4 mile upstream of Chicago, Milwaukee, St. Paul and Pacific Railroad.	None	+1061	City of Mason City, Unincorporated Areas of Cerro Gordo County.
	Approximately 1.6 mile upstream of 13th Street	+1093	+1092	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Clear Lake

Maps are available for inspection at 15 North 6th Street, Clear Lake, IA 50428.

City of Mason City

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

Maps are available for inspection at 10 1st Street Northwest, Mason City, IA 50401.

City of Ventura

Maps are available for inspection at 101 Sena Street, Ventura, IA 50482.

Unincorporated Areas of Cerro Gordo County

Maps are available for inspection at 220 North Washington Avenue, Mason City, IA 50401.

Lafayette Parish, Louisiana, and Incorporated Areas

Anselm Coulee	Just upstream of the confluence with the Vermillion River.	None	+14	Unincorporated Areas of Lafayette Parish.
	Just downstream of the confluence with Isaac Verot Coulee.	None	+24	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Lafayette Parish

Maps are available for inspection at 101 East Cypress Street, Lafayette, LA 70501.

Steele County, Minnesota, and Incorporated Areas

Crane Creek	Approximately 400 feet upstream of the confluence with the Straight River.	+1091	+1092	Unincorporated Areas of Steele County.
	At Frontage Road	+1091	+1092	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Steele County

Maps are available for inspection at the Steele County Administration Center, 630 Florence Avenue, Owatonna, MN 55060.

Clarion County, Pennsylvania (All Jurisdictions)

Allegheny River	Approximately 1.16 mile upstream of the confluence with Redbank Creek.	None	+837	Township of Brady.
	Approximately 2.12 miles upstream of the confluence with Redbank Creek.	None	+838	
Allegheny River	Approximately 1.38 mile downstream of the confluence with Black Fox Run.	None	+853	Township of Perry, Township of Toby.
	Approximately 480 feet upstream of State Route 368	None	+868	
Allegheny River	Approximately 1,660 feet downstream of State Route 58.	None	+873	Township of Richland.
	Approximately 1,245 feet downstream of State Route 58.	None	+873	
	Approximately 860 feet downstream of I–80	None	+880	
	Approximately 920 feet upstream of I–80	None	+880	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Township of Brady

Maps are available for inspection at the Brady Township Building, 141 West Liberty Road, Slipery Rock, PA 16057.

Township of Perry

Maps are available for inspection at the Perry Township Building, 5687 Doc Walker Road, Parker, PA 16049.

Township of Richland

Maps are available for inspection at the Richland Township Building, 511 Dittman Road, Emlenton, PA 16373.

Township of Toby

Maps are available for inspection at the Toby Township Building, 37 Simmons Road, Rimersburg, PA 16248.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: September 13, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–24148 Filed 9–24–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 8, 12, and 16

[FAR Case 2009–043; Docket 2010–0100; Sequence 1]

RIN: 9000–AL74

Federal Acquisition Regulation; Time-and-Materials (T&M) and Labor-Hour (LH) Contracts for Commercial Items

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement recommendations of the Government Accountability Office (GAO) Report 09–579 dated June 2009 to Congressional Committees on "Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program."

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before November 26, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR Case 2009–043 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2009–043" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "FAR Case 2009–043". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2009–043" on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), *Attn:* Hada Flowers, 1800 F Street, NW., Room 4041, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2009–043, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Warren Blankenship, Procurement Analyst, at (202) 501–1900, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAR case 2009–043.

SUPPLEMENTARY INFORMATION:

A. Background

This rule proposes to amend the FAR to implement the recommendations of GAO's Report to Congressional Committees 09–579 dated June 2009 on "Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to the GSA Schedules Program." GAO was directed by the National Defense Authorization Act of Fiscal Year 2004 conference report to review the use of the new authority being authorized in section 1432 of the Act, the extent to which it had been used, the types of contracts for which the authority had been used, and the degree to which such use was in compliance with the safeguards included in section 1432 (including the requirement that time-and-material and labor-hour contracts be used only where no other contract type was suitable).

GAO reviewed contract files, interviewed contracting and procurement policy officials, and utilized legal interpretations of the applicability of the determination and findings (D&F) requirement to the GSA Schedules program. GAO believes that the evidence and findings obtained during its audit substantiates the conclusions and associated recommendations in the report. The

GAO audit revealed that, Governmentwide, contracting officers had the mistaken impression that the fixed labor rates in the time-and-material/labor-hour contracts make them fixed price type contracts. The audit further revealed that there was a general lack of awareness of the FAR part 12 determinations and findings requirement among contracting officers across all Government agencies in their review of contract actions more than two (2) years after the determinations and findings requirement was implemented in the FAR. There was a failure of management to detect the lack of compliance with these safeguards. GAO recommended that further action was required for the use of time-and-material contracts to acquire commercial services in order to help ensure that this contract type is used only when no other contract type is suitable and instill discipline in the determination of contract type with a view toward managing the risk to the Government. Therefore, GAO recommended that the following steps be taken:

- Amend FAR Subpart 16.6 (Time-and-Materials, Labor-Hour, and Letter Contracts) and FAR Subpart 16.2 (Fixed-Price Contracts) to make it clear that contracts with a fixed hourly labor rate and an estimated ceiling price are time-and-materials or labor-hour contracts, not fixed-price type contracts;
- Amend FAR Subpart 8.4 (pertaining to the Schedules program) to explicitly require the same safeguards for commercial time-and-materials services, *i.e.,* the FAR part 12 determination and findings and the justification for changes to the ceiling price, that are required in FAR 12.207; and
- Provide guidance to contracting officials on the requirements in FAR 12.207 for the detailed determination and findings for time-and-materials or labor-hour contracts for commercial services and encourage agencies to provide training regarding the determination and findings requirement.

The requirement for executing a determination and findings when acquiring commercial services on a time-and-material or labor-hour basis is not new. The FAR used to prohibit the use of any other contract type except fixed price for the acquisition of commercial items. However, in 2003, the Services Acquisition Reform Act (SARA), amended Section 8002(d) of Federal Acquisition Streamlining Act of 1994 (FASA) to explicitly provide that the FAR shall include the authority for the use of time-and-materials and labor-hour contracts for the procurement of certain commercial services (the commercial services in such a category are "of a type" of commercial services that are commonly sold to the general public through the use of time-and-materials and labor-hour contracts). FAR Case 2003–027 was published in the **Federal Register** at 71 FR 74667 on December 12, 2006, modified FAR 12.207, FAR 16.601, and FAR 52.212–4 to include an Alternate I, to permit the use of time-and-materials and labor-hour contracts for commercial services when no other contract type is suitable. When using a time-and-materials or labor-hour contract, a ceiling price must be included in time-and-material and labor-hour contracts, it must incorporate Alternate I to payment clause FAR 52.212–4 to safeguard records and audit rights, provide insight into contractor costs, and ensure that costs are monitored by the Government due to the inherent risks associated with time-and-materials and labor-hour types of contracts. This FAR case proposes to modify FAR 8.405–2 and 12.207 to require the contracting officer, when acquiring commercial services using a time-and-materials or labor-hour order, to execute a determination and findings explaining why no other contract type is suitable for the acquisition; and FAR 16.201 and 16.600 to state explicitly that time-and-materials/labor-hour contracts are not fixed price contracts. The determination and findings is required to contain several elements, including a description of the market research performed for the acquisition and a description of the actions planned to maximize the use of fixed-price contracts on future or follow-on acquisitions. This is similar to the requirements in FAR 12.207 for a time-and-materials/labor-hour contract for commercial services. Currently, neither FAR 12.207 nor FAR subpart 8.4 explicitly mentions the requirement for the contracting officer to execute a determination and findings when placing orders against Schedules under FAR subpart 8.4. GSA establishes contracts for commercial supplies and services against which Government agencies can issue orders.

This proposed rule therefore builds on the existing Services Acquisition Reform Act (SARA) Panel recommendation to permit the use of time-and-materials and labor-hour contracts or orders when acquiring commercial services as long as a determination and findings is executed by the contracting officer consistent with FAR 12.207 and FAR 16.601 when ordering services under Schedules. Therefore, the determination and findings requirement is proposed to be added to FAR subpart 8.4 for Schedule orders to make it clear that contracting officers must execute, prior to placing the order, a determination and findings that a fixed-price order is not suitable. The FAR is proposed to be further revised as follows:

(1) At FAR 8.405–2, Ordering procedures for services requiring a statement of work, paragraph (e), Use of time-and-materials and labor-hour orders for services, is added to incorporate the requirement for a determination and findings consistent with FAR 12.207 and 16.601(d).

(2) Section 12.207(b)(4) is added as a cross-reference to 8.405–2(e) for determination and findings when using Federal Supply Schedules.

(3) Section 16.201, which sets forth the general description of a fixed-price contract, has been modified to clarify that time-and-materials and labor-hour contracts are not fixed-price contracts.

(4) Section 16.600, which sets forth the scope of time-and-materials and labor-hour contracts, is added to clarify that time-and-materials and labor-hour contracts are not fixed price contracts. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule does not impose any additional requirements on small businesses. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 8, 12, and 16 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2009–043), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 8, 12, and 16

Government procurement.

Dated: September 20, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 8, 12, and 16 as set forth below:

1. The authority citation for 48 CFR parts 8, 12, and 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. Amend section 8.405–2 by redesignating paragraph (e) as paragraph (f); and adding a new paragraph (e) to read as follows:

8.405–2 Ordering procedures for services requiring a statement of work.

* * * * *

(e) *Use of time-and-materials and labor-hour orders for services.* (1) Except as provided in paragraph (e)(2) of this section, agencies shall use fixed-price orders for the acquisition of commercial services to the maximum extent practicable.

(2) A time-and-materials or labor-hour order may be used for the acquisition of commercial services only when—

(i) It is not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence; and

(ii) The agency acquires the services through a competitive procedure under paragraph (c).

(3) Prior to the issuance of a time-and-materials or labor-hour order, the contracting officer shall—

(i) Execute a determination and findings (D&F) for the order, in accordance with paragraph (e)(4) of this section that a fixed price order is not suitable;

(ii) Include a ceiling price in the order that the contractor exceeds at its own risk; and

(iii) Authorize any subsequent change in the order ceiling price only upon a determination, documented in the order file, that it is in the best interest of the procuring agency to change the ceiling price, and the change does not affect the scope of the task order as awarded (see 12.207(b)(1)(ii)).

(4) The D&F required by paragraph (e)(3) of this section shall contain sufficient facts and rationale to justify that a fixed-price order is not suitable. At a minimum, the D&F shall—

(i) Include a description of the market research conducted (*see* 8.404(c), Acquisition planning, and 10.002(e));

(ii) Establish that it is not possible at the time of placing the order to accurately estimate the extent or duration of the work or anticipate costs with any reasonable degree of certainty;

(iii) Establish that the current requirement has been structured to maximize the use of fixed-price orders (*e.g.,* by limiting the value or length of the time-and-materials/labor-hour order; establishing fixed prices for portions of the requirement) on future acquisitions for the same or similar requirements; and

(iv) Describe actions to maximize the use of fixed-price orders on future acquisitions for the same requirements (*see* 12.207(b)(2)).

(5) Additional approval is required for orders with a total performance period, including options, of more than three years:

(i) The D&F prepared in accordance with paragraph (e)(3) of this section shall be signed by the contracting officer and approved by the head of the contracting activity prior to the execution of the base period; and

(ii) The order shall include a ceiling price that the contractor exceeds at its own risk. The contracting officer shall document the order file to justify the reasons for and amount of any subsequent change in the ceiling price.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 12.207 by adding paragraph (b)(4) to read as follows:

12.207 Contract type.

* * * * *

(b) * * *

(4) *See* 8.405–2(e) for requirement for determination and findings when using Federal Supply Schedules.

* * * * *

PART 16—TYPES OF CONTRACTS

4. Revise section 16.201 to read as follows:

16.201 General.

(a) Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts providing for an adjustable price may include a ceiling price, a target price (including target cost), or both. Unless otherwise specified in the contract, the ceiling price or target price is subject to adjustment only by operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances. The contracting officer shall use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring commercial items.

(b) Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

5. Add section 16.600 to read as follows:

16.600 Scope.

Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

[FR Doc. 2010–24104 Filed 9–24–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 177

[Docket No. PHMSA–2010–0221 (HM–256)]

RIN 2137–AE63

Hazardous Materials: Limiting the Use of Electronic Devices by Highway

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Pipeline and Hazardous Materials Safety Administration (PHMSA) proposes to prohibit texting on electronic devices by drivers during the operation of a motor vehicle containing a quantity of hazardous materials requiring placarding under part 172 of the 49 CFR or any quantity of a select agent or toxin listed in 42 CFR part 73. Additionally, in accordance with requirements published today by the Federal Motor Carrier Safety Administration (FMCSA), motor carriers are prohibited from requiring or allowing drivers of covered motor vehicles to engage in texting while driving. This rulemaking would improve health and safety on the Nation's highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of commercial motor vehicles.

DATES: Comments must be received by October 27, 2010.

ADDRESSES: You may submit comments identified by the docket number PHMSA–2010–0221 by any of the following methods:

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

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

Docket: For access to the docket to read background documents and comments received, go to *http://www.regulations.gov* at any time or to Room W12–140, Ground Level, Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ben Supko, Office of Hazardous Materials Standards, (202) 366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590 0001.

SUPPLEMENTARY INFORMATION:

I. Background

A. US DOT Strategy

The United States Department of Transportation (US DOT) is leading the effort to end the dangerous practice of distracted driving on our nation's roadways and in other modes of transportation. Driver distraction can be defined as the voluntary or involuntary diversion of attention from the primary driving tasks due to an object, event, or person that shifts the attention away from the fundamental driving task. The US DOT has identified three main types of distraction that occur while operating a motor vehicle:

1. Visual—taking your eyes off of the road;
2. Manual—taking your hands off of the wheel; and
3. Cognitive—taking your mind off of driving.

The US DOT is working across the spectrum with private and public entities to tackle distracted driving, and will lead by example. The individual agencies of the US DOT are working together to share knowledge, promote a greater understanding of the issue, and identify additional strategies to end distracted driving. Additionally, the majority of the 50 states have forbidden texting while driving any motor vehicle. *See* US DOT Distracted Driving Web site, *http://www.distraction.gov*; see also Insurance Institute for Highway Safety Web site, *http://www.iihs.org/*.

B. PHMSA Distracted Driving Safety Advisory Notice

In support of the US DOT strategy to end distracted driving, PHMSA issued "Safety Advisory Notice: Personal Electronic Device Related Distractions (Safety Advisory Notice No.10–5)" on August 3, 2010 (75 FR 45697) to alert the hazardous materials community to the dangers associated with the use of mobile phones and electronic devices while operating a commercial motor vehicle (CMV; 49 CFR 383.5). In the notice, PHMSA stresses the heightened risk of transportation incidents involving hazardous materials when CMV drivers are distracted by electronic devices. Accordingly, the notice urges motor carriers that transport hazardous materials to institute policies and provide awareness training to discourage the use of mobile telephones and electronic devices by motor vehicle drivers.

C. FMCSA Rulemaking and Definitions

1. FMCSA Rulemakings

In a final rule published in the Federal Register today entitled, "Limiting the Use of Wireless Communication Devices" the Federal Motor Carrier Safety Administration adopted requirements prohibiting texting on electronic devices by CMV drivers. FMCSA's final rule adopts a prohibition consistent with requirements originally proposed and considers comments submitted in response to the original NPRM issued on April 1, 2010 under Docket FMCSA–2009–0370 (75 FR 16391). The final rule prohibits texting by CMV drivers operating in interstate commerce and imposes sanctions for drivers that fail to comply. In both the final rule and NPRM FMCSA cites numerous studies evaluating the dangers of various forms of distracted driving.

2. Definitions

In existing Federal Motor Carrier Safety Regulations (FMCSRs; 49 CFR Parts 350–399) FMCSA defines a "CMV" in § 383.5 of the 49 CFR as follows:

Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

(a) Has a gross combination weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit(s) with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds);

(b) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 pounds or more);

(c) Is designed to transport 16 or more passengers, including the driver; or

(d) Is of any size and is used in the transportation of hazardous materials as defined in this section.

In a final rule published today addressing the use of wireless communication devices by CMV drivers FMCSA defines the terms "electronic device" and "texting" in § 383.5 (75 FR 16403) as follows:

Electronic device includes, but is not limited to, a cellular telephone; personal digital assistant; pager; computer; or any other device used to input, write, send, receive, or read text.

Texting means manually entering alphanumeric text into, or reading text from, an electronic device.

(1) This action includes, but is not limited to, short message service, e-mailing, instant messaging, a command or request to access a World Wide Web page, or engaging in any other form of electronic text retrieval or entry, for present or future communication.

(2) Texting does not include:

(i) Reading, selecting, or entering a telephone number, an extension number, or voicemail retrieval codes and commands into an electronic device for the purpose of initiating or receiving a phone call or using voice commands to initiate or receive a telephone call;

(ii) Inputting, selecting, or reading information on a global positioning system or navigation system; or

(iii) Using a device capable of performing multiple functions (e.g., fleet management systems, dispatching devices, smart phones, citizen band radios, music players, etc.) for a purpose that is not otherwise prohibited in this part.

In addition, in today's final rule FMCSA defines the term "driving" in § 392.80(c) as follows:

Driving means operating a commercial motor vehicle, with the motor running, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle with or without the motor running when the

driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary.

D. Studies, Data, and Analysis on Driver Distractions

Distracted driving reduces a driver's situational awareness, decisionmaking, or performance, possibly resulting in a crash, near-crash, or unintended lane departure by the driver. In an effort to understand and mitigate crashes associated with driver distraction, the US DOT has been studying the distracted driving issue with respect to both behavioral and vehicle safety countermeasures. Researchers and writers classify distraction into various categories, depending on the nature of their work. Texting while driving applies to these three types of driver distraction (visual, physical, and cognitive), and thus may pose a considerably higher safety risk than other sources of driver distraction. Below we summarize recommendations, studies, data, and analysis that provide the foundation for this NPRM.

1. NTSB Safety Recommendation H–06–27

On November 14, 2004, a motorcoach crashed into a bridge overpass on the George Washington Memorial Parkway in Alexandria, Virginia. This crash was the impetus for a National Transportation Safety Board (NTSB) investigation and subsequent recommendation (Safety Recommendation H–06–27) to FMCSA regarding cell phone use by passenger-carrying CMVs. The NTSB determined that one probable cause of the crash was the use of a hands-free cell phone, resulting in cognitive distraction; therefore, the driver did not "see" the low bridge warning signs.

In a letter to NTSB dated March 5, 2007, FMCSA agreed to initiate a study to assess:

- The potential safety benefits of restricting cell phone use by drivers of passenger-carrying CMVs;
- The applicability of an NTSB recommendation to property-carrying CMV drivers;
- Whether adequate data existed to warrant a rulemaking; and
- The availability of statistically meaningful data regarding cell phone distraction.

Subsequently, the report "Driver Distraction in Commercial Vehicle Operations" was published on October 1, 2009.

2. Driver Distraction in Commercial Vehicle Operations ("the VTTI Study")—Olson et al., 2009 [1]

Under contract with FMCSA, the Virginia Tech Transportation Institute (VTTI) completed its "Driver Distraction in Commercial Vehicle Operations" study [2] and released the final report on October 1, 2009. The purpose of the study was to investigate the prevalence of driver distraction in CMV safety-critical events (i.e., crashes, near-crashes, lane departures, as explained in the VTTI study) recorded in a naturalistic data set that included over 200 truck drivers and 3 million miles of data. The dataset was obtained by placing monitoring instruments on vehicles and recording the behavior of drivers conducting real-world revenue-producing operations. The study found that drivers were engaged in non-driving related tasks in 71 percent of crashes, 46 percent of near-crashes, and 60 percent of all safety-critical events. Tasks that significantly increased risk included texting, looking at a map, writing on a notepad, or reading.

Odds ratios (OR) were calculated to identify tasks that were high risk. For a given task, an odds ratio of "1.0" indicated the task or activity was equally likely to result in a safety-critical event as it was a non-event or baseline driving scenario. An odds ratio greater than "1.0" indicated a safety-critical event was more likely to occur, and odds ratios of less than "1.0" indicated a safety-critical event was less likely to occur. The most risky behavior identified by the research was "text message on cell phone," [3] with an odds ratio of 23.2. This means that the odds of being involved in a safety-critical event are 23.2 times greater for drivers who text message while driving than for those who do not. Texting drivers took their eyes off the forward roadway for an average of 4.6 seconds during the 6-second interval surrounding a safety-critical event. At 55 mph (or 80.7 feet per second), this equates to a driver traveling 371 feet, the approximate length of a football field, including the end zones, without looking at the roadway. At 65 mph (or 95.3 feet per second), the driver would have traveled approximately 439 feet without looking at the roadway. This clearly creates a significant risk to the safe operation of the CMV.

Other tasks that drew drivers' eyes away from the forward roadway in the study involved the driver interacting with technology: Calculator (4.4 seconds), dispatching device (4.1 seconds), and cell phone dialing (3.8 seconds). Technology-related tasks were not the only ones with high visual demands. Non-technology tasks with high visual demands, including some common activities, were: Reading (4.3 seconds), writing (4.2 seconds), looking at a map (3.9 seconds), and reaching for an object (2.9 seconds).

The study further analyzed population attributable risk (PAR), which incorporates the frequency of engaging in a task. If a task is done more frequently by a driver or a group of drivers, it will have a greater PAR percentage. Safety could be improved the most if a driver or group of drivers were to stop performing a task with a high PAR. The PAR percentage for texting is 0.7 percent, which means that 0.7 percent of the incidence of safety-critical events is attributable to texting, and thus, could be avoided by not texting.

TABLE 1—ODDS RATIO AND POPULATION ATTRIBUTABLE RISK PERCENTAGE BY SELECTED TASK

Task	Odds ratio	Population attributable risk percentage *
Complex Tertiary** Task:		

[1] Olson, R.L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009) Driver distraction in commercial vehicle operations. (Document No. FMCSA–RRR–09–042) Washington, DC: Federal Motor Carrier Safety Administration, August 2010, from *http://www.fmcsa.dot.gov/facts-research/art-public-reports.aspx?.*

[2] The formal peer review of the "Driver Distraction in Commercial Vehicle Operations Draft Final Report" was completed by a team of three technically qualified peer reviewers who are qualified (via their experience and educational background) to critically review driver distraction-related research.

[3] Although the final report does not elaborate on texting, the drivers were engaged in the review, preparation, and transmission of typed messages via wireless phones.

TABLE 1—ODDS RATIO AND POPULATION ATTRIBUTABLE RISK PERCENTAGE BY SELECTED TASK—Continued

Task	Odds ratio	Population attributable risk percentage *
Text message on cell phone	23.2	0.7
Other—Complex (e.g., clean side mirror)	10.1	0.2
Interact with/look at dispatching device	9.9	3.1
Write on pad, notebook, etc	9.0	0.6
Use calculator	8.2	0.2
Look at map	7.0	1.1
Dial cell phone	5.9	2.5
Read book, newspaper, paperwork, etc	4.0	1.7
Moderate Tertiary ** Task:		
Use/reach for other electronic device	6.7	0.2
Other—Moderate (e.g., open medicine bottle)	5.9	0.3
Personal grooming	4.5	0.2
Reach for object in vehicle	3.1	7.6
Look back in sleeper berth	2.3	0.2
Talk or listen to hand-held phone	1.0	0.2
Eating	1.0	0
Talk or listen to CB radio	0.6	(*)
Talk or listen to hands-free phone	0.4	(*)

* Calculated for tasks where the odds ratio is greater than one.
** Non-driving related tasks.

A complete copy of the final report for this study is included in PHMSA Docket PHMSA–2010–0221, available at *http://www.regulations.gov.*

3. Text Messaging During Simulated Driving—Drews, et al., 2009 [4]

This research was designed to identify the impact of text messaging on simulated driving performance. Using a high-fidelity driving simulator, researchers measured the performance of 20 pairs of participants while: (1) Only driving, and (2) driving and text messaging. Participants followed a pace car in the right lane, which braked 42 times, intermittently. Participants were 0.2 seconds slower in responding to the brake onset when driving and text messaging, compared to driving-only. When drivers are concentrating on texting, either reading or entering, their reaction times to braking events are significantly longer.

4. Driver Workload Effects of Cell Phone, Music Player, and Text Messaging Tasks With the Ford SYNC Voice Interface Versus Handheld Visual-Manual Interfaces ("The Ford Study")—Shutko, et al., 2009 [5]

A recent study by Ford Motor Company,[6] involving 25 participants, compared using a hands-free voice interface to complete a task while driving with using personal handheld devices (cell phone and music player) to complete the same task while driving. Of particular interest were the results of this study with regard to total eyes-off-road time when texting while driving. The study found that texting, both sending and reviewing a text, was extremely risky. The median total eyes-off-road time when reviewing a text message on a handheld cell phone while driving was 11 seconds. The median total eyes-off-road time when sending a text message using a handheld cell phone while driving was 20 seconds.

5. The Effects of Text Messaging on Young Novice Driver Performance—Hosking, et al., 2006 [7]

Hosking studied a very different driver population, but obtained similar results. This study used an advanced driving simulator to evaluate the effects of text messaging on 20 young, novice Australian drivers. The participants were between 18 and 21 years old, and they had been driving 6 months or less. Legislation in Australia prohibits hand-held phones, but a large proportion of the participants said that they use them anyway.

The young drivers took their eyes off the road while texting, and they had a harder time detecting hazards and safety signs, as well as maintaining the simulated vehicle's position on the road than they did when not texting. While the participants did not reduce their speed, they did try to compensate for the distraction of texting by increasing their following distance. Nonetheless, retrieving and particularly sending text messages had the following effects on driving:

- Difficulty maintaining the vehicle's lateral position on the road;
- Harder time detecting hazards;
- Harder time detecting and responding to safety signs;
- Up to 400 percent more time with drivers' eyes off the road than when not texting.

[4] Drews, F.A., Yazdani, H., Godfrey, C.N., Cooper, J.M., & Strayer, D.L. (Dec. 16, 2009). Text messaging during simulated driving. Salt Lake City, Utah: *The Journal of Human Factors and Ergonomics Society Online.* First published as doi:10.1177/0018720809353319. Retrieved December 22, 2009, from *http://hfs.sagepub.com/cgi/rapidpdf/0018720809353319?ijkey=gRQOLrGlYnBfc&keytype=ref&siteid=sphfs.*

[5] Shutko, J., Mayer, J., Laansoo, E., & Tijerina, L. (2009). Driver workload effects of cell phone, music player, and text messaging tasks with the Ford SYNC voice interface versus handheld visual-manual interfaces (paper presented at SAE World Congress & Exhibition, April 2009, Detroit, MI). Warrendale, PA: Society of Automotive Engineers International. Available from SAE International at: *http://www.sae.org/technical/papers/2009–01–0786.*

[6] The Engineering Meetings Board has approved this paper for publication. It has successfully completed SAE's peer review process under the supervision of the session organizer. This process requires a minimum of three (3) reviews by industry experts.

[7] Hosking, S., Young, K., & Regan, M. (February 2006). The effects of text messaging on young novice driver performance. Victoria, Australia: Monash University Accident Research Centre, from: *http://www.monash.edu.au/muarc/reports/muarc246.pdf.*

6. The Effect of Text Messaging on Driver Behavior: A Simulator Study—Reed and Robbins, 2008 [8]

The RAC Foundation commissioned this report [9] to assess the impact of text messaging on driver performance and the attitudes surrounding that activity in the 17- to 24-year old driver category. There were 17 participants in the study. The results demonstrated that driving was impaired by texting. Researchers reported that "failure to detect hazards, increased response times to hazards, and exposure time to that risk have clear implications for safety." They reported an increased stopping distance of 12.5 meters, or three car lengths, and increased variability of lane position.

7. Cell Phone Distraction in Commercial Trucks and Buses: Assessing Prevalence in Conjunction With Crashes and Near-Crashes—Hickman [10]

The purpose of this research was to conduct an analysis of naturalistic data collected by DriveCam®. The introduction of naturalistic driving studies that record drivers (through video and kinematic vehicle sensors) in actual driving situations created a scientific method to study driver behavior under the daily pressures of real-world driving conditions. The research documented the prevalence of distractions while driving a CMV, including both trucks and buses, using an existing naturalistic data set. This data set came from 183 truck and bus fleets comprising a total of 13,306 vehicles captured during a 90-day period. There were 8,509 buses and 4,797 trucks. The data sets in the current study did not include continuous data; it only included recorded events that met or exceeded a kinematic threshold (a minimum g-force setting that triggers the event recorder). These recorded events included safety-critical events (e.g., hard braking in response to another vehicle) and baseline events (*i.e.,* an event that was not related to a safety-critical event, such as a vehicle that traveled over train tracks and exceeded the kinematic threshold). A total of 1,085 crashes, 8,375 near-crashes, 30,661 crash-relevant conflicts, and 211,171 baselines were captured in the dataset.

Odds ratios were calculated to show a measure of association between involvement in a safety-critical event and performing non-driving related tasks, such as dialing or texting. The odds ratios show the odds of being involved in a safety-critical event when a non-driving related task is present compared to situations when there is no non-driving related task. The odds ratios for text/email/accessing the Internet tasks were very high, indicating a strong relationship between text/e-mail/accessing the Internet while driving and involvement in a safety-critical event. Very few instances of this behavior were observed during safety-critical events in the current study and even fewer during control events. Although truck and bus drivers do not text frequently, the data suggest that truck and bus drivers who use their cell phone to text, e-mail, or access the Internet are very likely to be involved in a safety-critical event.

E. Existing Texting Prohibitions and Restrictions by Federal, State, and Local Governments

1. Executive Order 13513

The President immediately used the feedback from the DOT Summit on Distracted Driving and issued Executive Order 13513, which ordered that:

> Federal employees shall not engage in text messaging (a) when driving a Government Owned Vehicle, or when driving a Privately Owned Vehicle while on official Government business, or (b) when using electronic equipment supplied by the Government while driving.

The Executive Order is applicable to the operation of CMVs by Federal government employees carrying out their duties and responsibilities, or using electronic equipment supplied by the government. This order also encourages contractors to comply while operating CMVs on behalf of the Federal government.

2. Regulatory Guidance

On January 27, 2010, FMCSA published regulatory guidance concerning the applicability of 49 CFR 390.17, Additional equipment and accessories, to any CMV operator engaged in "texting" on an electronic device while driving a CMV in interstate commerce (75 FR 4305). The guidance interpreted § 390.17 as prohibiting texting on electronic devices while driving because it decreases the safety of operations.

3. Federal Railroad Administration

On October 7, 2008, FRA published Emergency Order 26 (73 FR 58702). Pursuant to FRA's authority under 49 U.S.C. 20102 and 20103, the order, which took effect on October 1, 2008, restricts railroad operating employees from using distracting electronic and electrical devices while on duty. Among other things, the order prohibits both the use of cell phones and texting. FRA cited numerous examples of the adverse impact that electronic devices can have on safe operations. These examples included fatal accidents that involved operators who were distracted while texting or talking on a cell phone. In light of these incidents, FRA is imposing restrictions on the use of such electronic devices, both through its order and a rulemaking that seeks to codify the order. In a NPRM published May 18, 2010, FRA proposed to amend its railroad communications regulations by restricting the use of mobile telephones and other distracting electronic devices by railroad operating employees (75 FR 27672).

4. State Restrictions

Texting while driving is prohibited in 30 States and the District of Columbia. A list of states and territories that have taken such actions can be found at the following DOT Web site: *http://www.distraction.gov/state-laws.* Generally, the state requirements are applicable to all drivers operating motor vehicles within those jurisdictions, including CMV operators. Because some states do not currently prohibit texting while driving, there is a need for a Federal regulation to address the safety risks associated with texting by CMV drivers. Generally, state laws and regulations remain in effect and could continue to be enforced with regard to CMV drivers, provided those laws and regulations are compatible with the Federal requirements. This proposed rule does not affect the ability of states to institute new prohibitions on texting while driving. For more information see the Federalism section later in this document.

II. Applicability of This NPRM

PHMSA's Office of Hazardous Materials Safety is the Federal safety authority for the transportation of hazardous materials by air, rail, highway, and water. Under the Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*), the Secretary of Transportation is charged with protecting the nation against the risks to life, property, and the environment that are inherent in the

[8] Reed, N. & Robbins, R. (2008). The effect of text messaging on driver behavior: A simulator study. Report prepared for the RAC Foundation by Transport Research Laboratory. From: *http://www.racfoundation.org/files/textingwhiledrivingreport.pdf.*

[9] The work described in this report was carried out in the Human Factors and Simulation group of the Transport Research Laboratory. The authors are grateful to Andrew Parks who carried out the technical review and auditing of this report.

[10] Hickman, J., Hanowski, R., & Bocanegra, J. (2010). Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction With Crashes and Near-Crashes. Washington, DC: Federal Motor Carrier Safety Administration.

commercial transportation of hazardous materials. The Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) are promulgated under the mandate in Section 5103(b) of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) that the Secretary of Transportation "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." Section 5103(b)(1)(B) provides that the HMR "shall govern safety aspects, including security, of the transportation of hazardous material the Secretary considers appropriate." As such, PHMSA strives to reduce the risks inherent to the transportation of hazardous materials in both intrastate and interstate commerce.[11]

The final rule published in the **Federal Register** today by FMCSA under Docket FMCSA–2009–0370 incorporates texting restrictions into § 392.80 of the FMCSRs that apply to CMV motor carriers and drivers in interstate commerce. During the coordination process for PHMSA's August 3, 2010 safety advisory notice on distracted driving, PHMSA and FMCSA representatives expressed concern that changes to the FMCSRs regarding distracted driving would only apply to motor carriers and drivers of CMVs that operate in interstate commerce.[12] As such, the final rule published by FMCSA today regarding distracted driving does not apply to motor carriers and drivers that transport a quantity of hazardous materials requiring placarding under part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR part 73 in intrastate commerce.

PHMSA developed this NPRM to expand the population of drivers who are prohibited from texting by FMCSA's final rule to include drivers who transport a quantity of hazardous materials requiring placarding under part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR part 73 in intrastate commerce. The safety benefits associated with limiting the distractions caused by electronic devices are equally applicable to drivers transporting a quantity of hazardous materials requiring placarding under part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR part 73 in intrastate commerce as they are to interstate commerce. The use of an electronic device while driving constitutes a safety risk to the motor vehicle driver, other motorists, and bystanders. As adopted in the FMCSA final rule, the consequences of texting while driving a CMV can include state and local sanctions, fines, and possible revocation of commercial driver's licenses.

III. Summary of Changes

In accordance with the comments received and public meeting discussion this NPRM proposes the following changes by section:

Section 177.804. We propose to add a new paragraph (b) to prohibit texting by any person transporting a quantity of hazardous materials requiring placarding under part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR part 73. As such, motor carriers and drivers who engage in the transportation of covered materials must comply with the distracted driving requirements in § 392.80 of the FMCSRs.

IV. Regulatory Analysis and Notices

A. Statutory/Legal Authority for This Rulemaking

This rulemaking is issued under authority of the Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*), which authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in interstate, intrastate, and foreign commerce.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

PHMSA has determined that this rulemaking action is a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, and significant under DOT regulatory policies and procedures because of the substantial Congressional and public interest concerning the crash risks associated with distracted driving, even though the economic costs of the rule do not exceed the $100 million annual threshold.

Executive Order 12866 requires agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." As discussed throughout this rulemaking, the intent of this NPRM is to expand the applicability of FMCSA's final rule and prohibit texting by drivers of motor vehicles that contain a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR Part 73. As a result, the population of motor carriers covered by this proposed rule is comprised of a very small portion of motor carriers operating in intrastate commerce.

PHMSA's calculated its affected population by assessing hazmat registration data from the 2010–2011 registration year. This data is collected on DOT form F 5800.2 in accordance with § 107.608(a) of the 49 CFR. Generally, the registration requirements apply to any person who offers for transportation or transports a quantity of hazardous materials requiring placarding under part 172 of the 49 CFR. Additional data collected on form F 5800.2 verify that the person is indeed a carrier, the mode of transportation used, and the US DOT Number.[13] Using this key data from the registration form submissions we can make some assumptions to estimate the number of persons registered that we consider motor carriers subject to this NPRM. Based on our analysis of form F 5800.2–18,841 persons have registered as motor carriers of hazardous materials. Of those 18,841 persons 17,599 included a US DOT Number. Therefore, based on PHMSA's registration data, the difference between persons registered as motor carriers and persons that have obtained a US DOT Number is 1,242 (18,841–17,599 = 1,242). PHMSA considers these persons to be intrastate motor carriers. We compared these

[11] The term "intrastate commerce" is trade, traffic, or transportation within a single state. The term "interstate commerce" is trade, traffic, or transportation involving the crossing of a state boundary. Additionally, "interstate commerce" includes transportation originating or terminating outside the state of United States.

[12] In accordance with § 390.3(a) the rules in Subchapter B, including Parts 350–399, of the 49 CFR are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce. The only FMCSA regulations that are applicable to intrastate operations are: The commercial driver's license (CDL) requirement, for drivers operating commercial motor vehicles as defined in 49 CFR 383.5; controlled substances and alcohol testing for all persons required to possess a CDL; and minimum levels of financial responsibility for the intrastate transportation of certain quantities of hazardous materials and substances.

[13] The FMCSRs require certain commercial carriers to obtain a US DOT number by filling out DOT form MC–150 (OMB Control Number 2126–0013). Companies that operate commercial vehicles transporting passengers or hauling cargo in interstate commerce must be registered with the FMCSA and must have a US DOT Number. The US DOT Number serves as a unique identifier when collecting and monitoring a company's safety information acquired during audits, compliance reviews, crash investigations, and inspections. FMCSA provides two services for people who need to obtain a U.S. DOT number. The MC–150 form can be downloaded from the FMCSA web site in PDF form and mailed in; or, they may file electronically via the Web site. Both options are found at the following URL: *http://www.fmcsa.dot.gov/factsfigs/formspubs.htm.*

numbers with the FMCSA Motor Carrier Management Information System (MCMIS).[14] Based on MCMIS data we verified that the 1,242 carriers identified through registration data have not been issued a US DOT Number by FMCSA.

To better define the population of intrastate motor carriers subject to this rulemaking we assessed the data further. Generally, registration data is limited to persons that offer or transport placarded quantities of hazardous materials. Registration data does not include persons that transport a material listed as a select agent or toxin in 42 CFR part 73. In addition, the data includes those intrastate motor carriers that are required to obtain a US DOT Number through their state even if they operate solely in intrastate commerce. FMCSA indicates that 28 states currently require motor carriers to obtain a US DOT Number, regardless if they operate in interstate or intrastate commerce.[15] Based on these assumptions, the number of intrastate carriers identified through hazmat registration data may be underestimated by up to 60% to 70%.

Another assumption that must be considered is that 30 states and the District of Columbia have adopted a broad based ban on texting while driving. As a result, it is likely that 60% of the carriers identified as intrastate carriers are already subject to a ban on texting while driving. Accordingly, this would indicate that the number of intrastate carriers identified as uncovered by a texting ban by evaluating hazardous materials registration data could be over estimated by as much as 60%.

Based on the assumptions outlined above, and PHMSA's desire to take a conservative approach to the affected population, we multiply the number of intrastate carriers identified through registration data by a 20% underreporting factor. This will result in a total population affected by this rulemaking of 1,490 intrastate motor carriers ($1,242 \times 1.20 = 1,490$). In addition to the number of interstate motor carriers, PHMSA estimates that each interstate motor carrier employs approximately 8 drivers. Therefore, the estimated population of intrastate motor carrier drivers affected by this proposed rule is 11,920 ($1,490 \times 8 = 11,920$). This conservative estimate ensures that PHMSA is fully considering the impacts of expanding applicability of the FMCSA final rule to prohibit texting by drivers of motor vehicles that contain a quantity of hazardous materials requiring placarding under part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR part 73.

The regulatory evaluation prepared in support of this rulemaking considers the following potential costs: (a) Loss in carrier productivity due to time spent while parking or pulling over to the side of the roadway to perform texting activities; (b) increased fuel usage due to idling as well as exiting and entering the travel lanes of the roadway; and (c) increased crash risk due to covered CMVs that are parked on the side of the roadway and exiting and entering the travel lanes of the roadway. The regulatory evaluation also considers potential costs to the states. However, since the analysis does not yield appreciable costs to the states, further analysis pursuant to the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) was deemed unnecessary.

PHMSA estimates that this proposed rule will cost $5,227 annually. Additionally, PHMSA has not identified a significant increase in crash risk associated with drivers' strategies for complying with this proposed rule. As indicated in the regulatory evaluation, a crash resulting in property damage only (PDO) averages approximately $17,000 in damages. Consequently, the texting prohibition would have to eliminate just one PDO crash every 3.25 years for the benefits of this proposed rule to exceed the costs. A summary of the costs and threshold analysis is provided in the following table:

SUMMARY OF COSTS AND THRESHOLD ANALYSIS

Cost of Lost Carrier Productivity.	$438
Cost of Increased Fuel Consumption.	$3,411
Cost of Parking, Entering and Exiting Roadway Crashes.	$1,378
Total Costs (annual)	$5,227
Benefit of Eliminating One Fatality.	$6 million.
Break-even Number of Lives Saved.	< 1

The productivity losses, as well as other costs, were estimated for only one year, as the entire threshold analysis was performed as an undiscounted annual estimation. The loss of productivity is expected to diminish (but not necessarily vanish within one year), as the motor carrier industry adjusts to the texting restriction and as new (permissible) technologies arise that compensate for the loss of the texting functionality. PHMSA is unaware of the specific future technologies that might arise, but we continue to research and monitor technological changes in the market.

C. Executive Order 13132

Executive Order 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may 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. A rule has implications for Federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on state or local governments and would either preempt state law or impose a substantial direct cost of compliance on them. We invite state and local governments to comment on the effect that the adoption of this rule may have on state or local safety or environmental protection programs.

D. Executive Order 13175

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this proposed rule does not significantly or uniquely affect the communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term "small entities" comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses.

PHMSA has conducted an economic analysis of the impact of this proposed

[14] MCMIS contains information on the safety fitness of commercial motor carriers (truck & bus) and hazardous material shippers subject to both the FMCSRs and the HMR. This information is available to the general public through the MCMIS Data Dissemination Program.

[15] "What is a USDOT Number?" See: *http://www.fmcsa.dot.gov/registration-licensing/registration-USDOT.htm.*

rule on small entities and certifies that a Regulatory Flexibility Analysis is not necessary because the rule will not have a significant economic impact on a substantial number of small entities subject to the requirements of this proposed rule. We assume that all of the 1,490 motor carriers identified by this proposed rule are small entities. However, the direct costs of this rule that small entities may incur are only expected to be minimal. They consist of the costs of lost productivity from foregoing texting while on-duty and fuel usage costs for pulling to the side of the road to idle the truck or passenger-carrying vehicle and send or receive a text message. The majority of motor carriers are small entities. Therefore, PHMSA will use the total cost of this proposed rule ($5,227) applied to the number of small entities (1,490) as a worse case evaluation which would average $3.51 annually per carrier.

F. Executive Order 13272 and DOT Regulatory Policies and Procedures

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

G. Paperwork Reduction Act

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

H. Regulation Identifier Number (RIN)

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

I. Unfunded Mandates Reform Act of 1995

This proposed rule does not impose unfunded mandates, under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $140.8 million or more to either state, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

J. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477 through 19478) or you may visit *http://www.dot.gov.* This rule is not a privacy-sensitive rulemaking because the rule will not require any collection, maintenance, or dissemination of Personally Identifiable Information (PII) from or about members of the public.

K. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) requires Federal agencies to consider the consequences of major Federal actions and that they prepare a detailed statement on actions significantly affecting the quality of the human environment. PHMSA assessment did not reveal any significant positive or negative impacts on the environment expected to result from the rulemaking action. There could be minor impacts on emissions, hazardous materials spills, solid waste, socioeconomics, and public health and safety. Interested parties are invited to address the potential environmental impacts of regulations applicable to texting while driving.

List of Subjects in 49 CFR Part 177

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR Chapter I is proposed to be amended as follows:

PART 177—CARRIAGE BY PUBLIC HIGHWAY

1. The authority citation for part 177 continues to read as follows:

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

2. Section 177.804 is amended by:

a. Designating the extisting text as paragraph (a);

b. Adding a heading to the newly designated paragraph (a); and

c. Adding a new paragraph (b) to read as follows:

§ 177.804 Compliance with Federal Motor Carrier Safety Regulations.

(a) *General.* * * *

(b) *Prohibition against texting.* Drivers of commercial motor vehicles, as defined in 49 CFR 383.5, transporting a quantity of hazardous materials requiring placarding under 49 CFR part 172 or any quantity of a material listed as a select agent or toxin in 42 CFR part 73 are prohibited from texting while driving in accordance with § 392.80 of the FMCSRs.

Issued in Washington, DC, on September 21, 2010, under authority delegated in 49 CFR part 106.

R. Ryan Posten,

Senior Director for Hazardous Materials Safety.

[FR Doc. 2010–24114 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100818375–0379–02]

RIN 0648–XX84

Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Reopening of a Proposed Rule Comment Period Through October 1, 2010

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

ACTION: Proposed rule, reopening and extension of comment period.

SUMMARY: NMFS is reopening the comment period for the proposed rule to Implement Addenda to 17 Fishing Year (FY) 2010 Northeast Multispecies Sector Operations Plans and Contracts. The comment period is being reopened and extended to provide additional opportunity for public comment.

DATES: Written comments must be received by 5 p.m., local time on October 1, 2010.

ADDRESSES: You may submit comments, identified by 0648–XX84, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Fax:* (978) 281–9135, *Attn:* Melissa Vasquez.
- *Mail:* Paper, disk, or CD–ROM comments should be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: "Comments on 2010 Sector Exemption Rule."

• *Instructions:* All comments received are part of the public record and will generally be posted to *http://www.regulations.gov* without change. No comments will be posted for public viewing until after the comment period has closed. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only. Copies of requests for addenda to the FY 2010 sector operations plans and contracts, and the supplemental environmental assessment (EA), are available from the NMFS NE Regional Office at the mailing address specified above.

FOR FURTHER INFORMATION CONTACT: Melissa Vasquez, Fishery Policy Analyst, phone (978) 281–9166, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION: A final rule published April 9, 2010 (75 FR 18113), approved FY 2010 sector operations plans and contracts and allocations of annual catch entitlement (ACE) for 17 NE multispecies sectors. Through this final rule, the Regional Administrator also approved exemptions for sector vessels from certain Federal fishing regulations for those sectors that requested them, in addition to the universal exemptions already approved for all sectors through Amendment 16 to the NE Multispecies Fishery Management Plan (FMP).

A proposed rule published on September 2, 2010 (75 FR 53939), proposes to implement addenda to FY 2010 NE multispecies sector operations plans and contracts that would add certain exemptions from Federal fishing regulations for FY 2010 sectors. The proposed rule considers expanding exemptions already approved for some sectors to all those that request them to maximize flexibility and improve profitability for sector vessels. It also proposes approving two new exemption requests: The Gulf of Maine (GOM) Sink Gillnet exemption and the discarding exemption for unmarketable fish. The GOM Sink Gillnet exemption is based on a program originally considered and disapproved for the common pool fishery in Amendment 16 to the NE Multispecies FMP, and would allow sector vessels to use 6-inch (15.24-cm) mesh gillnets in the GOM Regulated Mesh Area January through April 2011, to target haddock. This action also proposes a partial exemption from the prohibition on discarding of legal-size allocated stocks to allow sector vessels to discard unmarketable fish at sea, to improve safety conditions and operational flexibility for sector vessels.

The proposed rule published in the **Federal Register** with a 15-day comment period that closed on September 17, 2010. The New England Fishery Management Council (Council) will be discussing a number of important sector exemption requests from the proposed rule at their September 28–30, 2010, meeting. Reopening and extending the comment period to overlap with the Council meeting is necessary to provide additional time for the Council and any other interested parties to provide comment, after this proposed action is discussed at the Council meeting. Thus, NMFS is reopening and extending the comment period on the proposed rule through October 1, 2010.

Dated: September 22, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–24185 Filed 9–22–10; 4:15 pm]

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Notices

Federal Register

Vol. 75, No. 186

Monday, September 27, 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

Forest Service

Ketchikan-Misty Fiords Ranger District; Tongass National Forest; Alaska; Ketchikan-Misty Fiords Ranger District Outfitter/Guide Management Plan

AGENCY: Forest Service, USDA.

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

SUMMARY: The USDA, Forest Service will prepare an environmental impact statement (EIS) on a proposed action to allocate about 54,000 visitor days (of the estimated recreation carrying capacity of approximately 148,000 days) annually for outfitter and guide use on the Ketchikan-Misty Fiords Ranger District. The decision on the EIS will allocate recreation carrying capacity on the District to outfitters and guides through special use permits that serve the public need for guide services. The allocation will set limits for outfitter and guide use levels, but will not limit or regulate use by unguided visitors. The alternatives will include the proposed action, no action, and additional alternatives that respond to issues identified during scoping. The agency will give notice of the full environmental analysis and decision-making process so interested and affected people may participate and contribute to the final decision.

DATES: Comments concerning the scope of the analysis must be received by November 1, 2010. The draft environmental impact statement is expected to be completed in March 2011 and the final environmental impact statement is expected in August 2011.

ADDRESSES: Send written comments to Sue Jennings, Interdisciplinary Team Leader, Ketchikan-Misty Fiords Ranger District, 3031 Tongass Ave., Ketchikan, AK 99901, *Fax:* (907) 225–8738 or on-line at *comments-alaska-tongass-ketchikan-mistyfiord@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Sue Jennings, Interdisciplinary Team Leader, (907) 772–5864, *by email: sjennings@fs.fed.us,* or Ketchikan-Misty Fiords Ranger District, 3031 Tongass Ave., Ketchikan, AK 99901.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Acton

In 2007, the Forest Supervisor determined a need existed for outfitter and guide services within Wilderness Areas on the Tongass. In 2008, a Determination of Need for Commercial Uses on the Ketchikan-Misty Fiords Ranger District was completed that demonstrated the need for commercially guided opportunities on the wilderness and non-wilderness portions of the District.

This action responds to the goals and objectives outlined in the Forest Plan, which provides standards and guidelines for authorizing the services of qualified outfitters and guides to the public in areas with an identified need for the services and the use is compatible with the objectives and management direction of the affected Land Use Designation.

A district-wide outfitter/guide plan is needed because the current permitting process:

- Does not satisfy Forest Service direction for issuing long-term (5–10 year) priority use permits,
- Does not provide managers with a district-wide strategy for reducing conflicts between guided and unguided visitors and ensuring a range of recreational opportunities are offered across the District,
- Does not allow the Forest Service to respond to special use permit applications in a timely manner because each application involves a separate analysis and scoping process consistent with the National Environmental Policy Act (NEPA), and
- Does not fully address cumulative impacts of outfitter/guide use on forest resources, including wilderness character.

The purpose of this plan is to:

- Determine visitor capacity estimates and outfitter and guided use allocations for 28 recreation use areas on the Ketchikan-Misty Fiords Ranger District,
- Provide opportunities for guided use while minimizing resource impacts and conflicts between guided and unguided visitors,
- Satisfy Forest Service requirements for issuance of long-term, priority use permits,
- Provide standards and indicators for monitoring social conditions across the District,
- Develop an adaptive management strategy for adjusting guided use allocations based on monitoring information collected during the life of this plan, and
- Improve the Forest Service's ability to process permits in a timely manner.

If there is a demonstrated need for commercial service(s) and these services are deemed appropriate, the Forest Service may issue Special Use Authorizations (SUAs) to individual(s) or organization(s) (USDA 2008a, p.3–20) to provide the services. This action also responds to Forest Service policy (FSM 2720 and FSH2709.11), which allows for issuance of priority use permits, after a needs assessment and resource capacity analysis have been completed to identify the public or agency need for outfitting and guiding activities and to assess the amount of use that may be conducted without detrimental social and environmental impacts. Multi-year priority use permits allow outfitters and guides to make financial commitments necessary to continue providing service to the public.

The overall goal of the project is to work with the public to provide opportunities for guided and unguided use, while minimizing conflicts and protecting forest resources.

Proposed Action

The action proposed by the Forest Service to meet the purpose and need is to authorize outfitter and guide operations through the issuance of special use permits based on the Determination of Need for Commercial Uses on the Ketchikan-Misty Fiords Ranger District (2008), visitor capacity estimates, and guided use allocations for the District's 28 recreation use areas.

This proposed action would authorize the issuance of commercial outfitter/guide permits for KMRD. The proposed action allocates zero to 75 percent of the visitor capacity in the 28 use areas to outfitters and guides during the summer season and zero to 40 percent during the spring and fall seasons. Overall, the proposal would allocate approximately 54,000 visitor days annually for outfitter and guide use on the KMRD (5,124

visitor days in the spring, 44,420 visitor days in the summer, and 4,456 visitor days in the fall). Some of the areas with a proposed allocation of 75 percent are in wilderness areas that are little used by unguided visitors. Due to very low outfitter and guide use in the winter, there are no winter allocations proposed with this project; winter permitting will follow the current process.

The Proposed Action includes the ability to use adaptive management to maintain a range of quality recreation experiences across the District and a balance between guided and unguided use. Adaptive management may result in increased or decreased allocations for specific recreation use areas based on standards and the level of effects.

All outfitter and guide operations will be subject to area-wide and site-specific mitigation measures to protect natural and historic resources and minimize crowding and conflicts between guided and unguided visitors.

For those operators who have demonstrated satisfactory performance, the District Ranger may issue priority use permits based on the guided use allocations, for a period of up to 10 years, in accordance with FSH 2709.11, Chapter 40. Authorized use may also be temporary in nature (authorized for less than one year).

Possible Alternatives

A full range of alternatives will be considered including a "No Action" alternative in which no change from the current management of the outfitter and guide special uses program would occur; outfitter and guide special use permits would continue to be issued on a temporary basis. Based on preliminary issues gathered through collaborative meetings prior to scoping, two additional alternatives are under consideration. One alternative may allocate one-half of the estimated carrying capacity to outfitters and guides across the 28 recreation use areas. Another alternative may propose minimal (15 percent) allocations in some wilderness-recreation-use-areas, no allocations in some sensitive areas and areas heavily used by unguided visitors, 25 percent use in the Margaret Bay Use Area, and 50 percent allocation in other areas during the summer season. These alternatives could be adjusted and/or additional alternatives proposed based on comments received during scoping.

Responsible Official

The Ketchikan-Misty Fiords District Ranger is the responsible official for this proposal: Ketchikan-Misty Fiords District Ranger, 3031 Tongass Ave., Ketchikan, AK 99901.

Nature of Decision To Be Made

The District Ranger will decide how to manage the outfitter and guide special use program by allocating a portion of the total estimated recreation carrying capacity for commercial use, while protecting forest resources and taking into account the needs of unguided visitors.

Given the purpose and need, the District Ranger will review the proposed action and the other alternatives in order to make the following decisions:

- The locations, limitations, management, and allocations for outfitter and guide permits and opportunities on the Ketchikan-Misty Fiords Ranger District, for the next five to ten years;
- The extent, type, amount, and location of outfitter and guide use to allocate within the Misty Fiords Wilderness Area;
- How best to manage outfitter and guide use on the KMRD to minimize potential impacts to all resources; and
- What, if any, mitigation measures and monitoring are needed.

The District Ranger will also decide whether and how to use adaptive management to potentially increase or decrease allocations for specific recreation use areas in order to maintain a range of quality recreation experiences across the District and a balance between guided and unguided use.

Scoping Process

The public will have an opportunity to participate at several points during the analysis, including the scoping period after publication of the Notice of Intent and the draft EIS in the **Federal Register**. Notification of these opportunities will also appear in subsequent issues of the Tongass National Forest's Schedule of Proposed Activities; letters to agencies, organizations, and individuals who have previously indicated their interest in such activities; and in the Ketchikan Daily News. A public meeting is planned in Ketchikan on October 26, 2010 at the Ketchikan-Misty Fiords Ranger District Office, 3031 Tongass Ave., Ketchikan, AK 99901, from 6 p.m. to 8 p.m. Public meetings and subsistence hearings are expected in Ketchikan, Saxman, Hyder, and Metlakatla during the spring of 2011, after the DEIS is published in the **Federal Register**. The scoping process will include identifying major issues to be analyzed in depth, eliminating non-significant issues, considering alternatives based on issues recognized during scoping activities, and identifying potential environmental effects of the proposed action and alternatives (i.e. direct, indirect, and cumulative effects).

Preliminary Issues

Preliminary issues were identified during collaborative meetings held before scoping began on this project. Preliminary issues include the potential effects of the proposed action on businesses, wilderness, heritage resources, and visitors' experience (through crowding and noise disturbance).

Permits or Licenses Required

The Forest Service is not required to obtain permits or licenses to implement this project. However, outfitter and guide permit holders are responsible for obtaining necessary permits from federal and state agencies prior to commencing outfitting and guiding.

Comment Requested

This Notice of Intent initiates the scoping process, which guides the development of the environmental impact statement. Public comments about this proposal are requested in order to assist in properly scoping issues, to determine how best to manage the resources, and to fully analyze environmental effects. Please identify issues of concern to you and the Ketchikan-Misty Fiords Ranger District communities about recreational use.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register.** It is important that reviewers provide their comments at such times and in such a way that they are useful to the Agency's preparation of the EIS. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative review or judicial review. Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the

respondent with standing to participate in subsequent administrative review or judicial review.

Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21.

Dated: *September 20, 2010.*

Jeffrey DeFreest,

District Ranger.

[FR Doc. 2010–24179 Filed 9–24–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Modoc County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Modoc County Resource Advisory Committee will meet in Alturas, CA. 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 to review Resource Advisory Committee Project Applications.

DATES: The meeting will be held October 4, 2010, 4 p.m.

ADDRESSES: The meeting will be held at Modoc National Forest Office, Conference Room, 800 West 12th St., Alturas.

FOR FURTHER INFORMATION CONTACT: Kimberly H. Anderson, Forest Supervisor and Designated Federal Officer, at (530) 233–8700; or Resource Advisory Coordinator, Stephen Riley at (530) 233–8771.

SUPPLEMENTARY INFORMATION: The business meeting on October 4, 2010 will begin at 4 p.m., at the Modoc National Forest Office, Conference Room, 800 West 12th St., Alturas, California 96101. Agenda topics will include recruiting new project proposals that meet the intent of Public Law 110–343. Time will also be set aside for public comments at the beginning of the meeting.

Dated: September 20, 2010.

Kimberly H. Anderson,

Forest Supervisor.

[FR Doc. 2010–24177 Filed 9–24–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Results of Administrative Review

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

DATES: Effective Date: September 27, 2010.

SUMMARY: On September 17, 2010, the United States Court of International Trade ("Court" or "CIT") sustained the U.S. Department of Commerce's ("Department") final results of redetermination pursuant to the Court's remand.[1] Consistent with the decision of the United States Court of Appeals for the Federal Circuit ("CAFC") in *Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) ("*Timken*"), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's final results of the administrative review ("AR") of the antidumping duty order on wooden bedroom furniture ("WBF") from the People's Republic of China ("PRC") covering the period of review ("POR") of January 1, 2007, through December 31, 2007.[2]

FOR FURTHER INFORMATION CONTACT: Frances Veith, Antidumping and Countervailing Duty Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street, and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4295.

SUPPLEMENTARY INFORMATION: On August 17, 2009, the Department published its *Final Results.* In response to Bon Ten's arguments in its administrative case brief, the Department determined not to rescind the AR with respect to Bon Ten because Bon Ten had not demonstrated that it had no shipments during the 2007 AR POR outside of the single shipment reviewed during a new shipper review ("NSR")[3] that overlapped, in part, with the 2007 AR POR.[4] Additionally, because Bon Ten had not demonstrated its eligibility for a separate rate in the 2007 AR, the Department maintained its determination to treat Bon Ten as part of the PRC-wide entity.[5]

On August 14, 2009, Bon Ten submitted comments alleging that the Department made a ministerial error with respect to the *Final Results.* Bon Ten's ministerial error allegation focused on the Department's finding in the *Final Results* that Bon Ten had not provided any assertion prior to the submission of its case brief that it had no shipments during the 2007 AR POR outside of the shipment reviewed in the context of the NSR. Bon Ten argued that the Department did not consider its February 5, 2009, submission concerning its shipments during the 2007 AR POR in that finding.

In the *Amended Final Results,* the Department determined that, although it had inadvertently overlooked Bon Ten's February 5, 2009, submission for purposes of the *Final Results,* Bon Ten's allegation did not reflect a ministerial error. The Department reasoned that Bon Ten's allegation required reconsideration of a methodological issue, namely whether the review should be rescinded with respect to Bon Ten based upon its February 5, 2009, submission. Accordingly, the Department continued to treat Bon Ten as part of the PRC-wide entity for the AR in the *Amended Final Results.* However, the Department clarified that Bon Ten lost the separate rate status it was granted during the NSR starting on August 1, 2007, which is the first day of the administrative review that did not overlap with Bon Ten's NSR POR (*i.e.,* January 1, 2007, through July 31, 2007).[6]

On October 16, 2009, Bon Ten filed a complaint with the Court challenging the Department's determination not to rescind the AR with respect to Bon Ten

[1] *See Dongguan Bon Ten Furniture Co., Ltd.* v. *United States, Court No. 09–00396: Final Results of Redetermination Pursuant To Remand,* dated August 9, 2010 ("*Bon Ten* v. *United States*").

[2] *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 41374 (August 17, 2009)* ("*Final Results*"), and accompanying Issues and Decision Memorandum, as amended by *Wooden Bedroom Furniture From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 55810 (October 29, 2009)* ("*Amended Final Results*").

[3] *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Fourth New Shipper Reviews,* 73 FR 64916 (October 31, 2008) ("*NSR Final Results*").

[4] *See Final Results* at Comment 29.

[5] *See id.*

[6] *See Amended Final Results* and the Department's memorandum entitled, "Ministerial Error Memorandum for the Final Results of the 2007 Administrative and New Shipper Reviews of Wooden Bedroom Furniture from the People's Republic of China," dated October 7, 2009, at Issue 4.

and its determination that it could not address its failure to consider the February 5, 2009, submission as a ministerial error. On June 7, 2010, the Department filed an unopposed motion for voluntary remand with the Court so that the Department could fully consider and evaluate the overlooked record evidence, prepare draft remand results, issue a draft to the parties for comment, analyze those comments, and take such action as may be appropriate pertaining to Bon Ten. On June 8, 2010, the Court granted the Department's voluntary remand motion.

On June 11, 2010, we issued a supplemental questionnaire to Bon Ten, in which we provided Bon Ten the opportunity to submit a no-shipment certification. On June 15, 2010, Bon Ten submitted a certification that it had no shipments of WBF during the period August 1, 2007, through December 31, 2007, the portion of the 2007 AR POR that was not covered by the preceding NSR POR. On July 16, 2010, we released to all interested parties for comment: (1) Our draft redetermination pursuant to the remand finding that Bon Ten had properly submitted its no-shipment certification and stating our intent to rescind the AR with respect to Bon Ten; (2) a U.S. Customs and Border Protection ("CBP") data listing of all type 3 entries (*i.e.,* entries subject to antidumping and countervailing duty tariffs) classified under subheadings 7009.92.5000, 9403.50.9080, and 9403.50.9040 of the Harmonized Tariff Schedule of the United States that entered the United States during the 2007 AR POR and were exported/manufactured by Bon Ten; and (3) a draft version of Bon Ten's amended final cash deposit instructions reflecting the draft redetermination results, which the Department intends to send to CBP, pending the expiration of the period of appeal or, if appealed, pending a final and conclusive court decision.[7] We received no comments from interested parties on the Department's draft redetermination results, CBP data, or the draft version of the cash deposit instructions for Bon Ten.

On August 9, 2010, the Department issued its final results of redetermination pursuant to *Bon Ten* v. *United States.* The remand redetermination explained that, in accordance with the CIT's instructions, we have reconsidered the record information with regard to Bon Ten's no-shipment certification and separate-rate status for the 2007 AR. Based on this reconsideration, we have determined to rescind the 2007 AR with respect to Bon Ten pursuant to 19 CFR 351.214(j) and 19 CFR 351.213(d)(3).

Timken Notice

In its decision in *Timken,* the CAFC held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended ("the Act"), the Department must publish a notice of a court decision that is not "in harmony" with a Department determination and must suspend liquidation of entries pending a "conclusive" court decision.[8] The CIT's decision in *Bon Ten* v. *United States,* issued on September 17, 2010, constitutes a final decision of that Court that is not in harmony with the Department's *Final Results* and *Amended Final Results.* This notice is published in fulfillment of the publication requirements of *Timken.* Accordingly, pending the expiration of the period of appeal or, if appealed, pending a final and conclusive court decision, the Department will instruct CBP to collect a cash-deposit rate for Bon Ten, effective October 31, 2008, based on the rate established in the final results of Bon Ten's NSR (*i.e.,* 0.00 percent) until completion of any subsequent administrative review of Bon Ten.[9]

This notice is issued and published in accordance with section 516A(c)(1) of the Act.

Dated: September 23, 2010.

Paul Piquado,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–24321 Filed 9–24–10; 8:45 am]

BILLING CODE 3510–DS–P

[7] *See* the Department's memorandum entitled, "2007 Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China: Due Date for Interested Parties to Submit Comments on Draft Results of Redetermination Pursuant to Remand," dated July 16, 2010.

[8] *See* Timken, 893 F.2d at 341.

[9] *See* NSR Final Results.

DEPARTMENT Of COMMERCE

International Trade Administration

[C–560–824]

Certain Coated Paper Suitable for High–Quality Print Graphics Using Sheet–Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination

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

SUMMARY: The Department of Commerce (the Department) has determined that countervailable subsidies are being provided to producers and exporters of certain coated paper suitable for high–quality print graphics using sheet–fed presses (coated paper) from Indonesia. For information on the estimated countervailing duty rates, please see the "Suspension of Liquidation" section, below.

EFFECTIVE DATE: September 27, 2010.

FOR FURTHER INFORMATION CONTACT: Gene Calvert or Nicholas Czajkowski, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3586 and (202) 482–1395, respectively.

SUPPLEMENTARY INFORMATION:

Case History

The following events have occurred since the announcement of the preliminary determination, which was published in the **Federal Register** on March 9, 2010. *See Certain Coated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 75 FR 10761 (March 9, 2010) (*Preliminary Determination*).

The Department issued additional supplemental questionnaires to the Government of Indonesia (GOI), and to cross–owned company respondents PT Pabrik Kertas Tjiwi Kimia Tbk., PT Indah Kiat Pulp and Paper Tbk., and PT Pindo Deli Pulp and Paper Mills (collectively, APP/SMG) regarding the programs under investigation. Parties submitted timely responses to these supplemental questionnaires on May 11 and May 26 (the GOI and APP/SMG) and June 25 (the GOI only). On April 7 and April 8, APP/SMG and Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a Sappi Fine Paper North America, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, Petitioners), respectively, submitted timely requests for a hearing pursuant to 19 CFR 351.310(c), which they both subsequently withdrew on August 6, 2010.

The Department conducted verification of the questionnaire responses submitted by the GOI and APP/SMG from June 28, 2010 through July 8, 2010. The Department issued the final business–proprietary version of the verification reports on August 6, 2010. We received case briefs from the GOI and APP/SMG, jointly, and from Petitioners on August 16. We received

rebuttal briefs from these parties on August 23.

Scope of the Investigation

The merchandise under investigation includes certain coated paper and paperboard[1] in sheets suitable for high quality print graphics using sheet–fed presses; coated on one or both sides with kaolin (China or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher;[2] weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface–colored, surface–decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions (Certain Coated Paper).

Certain Coated Paper includes (a) coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi–thermo-mechanical pulp (BCTMP) that meets this scope definition; and (c) any other coated paper and paperboard that meets this scope definition.

Certain Coated Paper is typically (but not exclusively) used for printing multi–colored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics.

Specifically excluded from the scope are imports of paper and paperboard printed with final content printed text or graphics.

As of 2009, imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States (HTSUS): 4810.14.11, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.70, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090, 4810.22.1000, 4810.22.50, 4810.22.6000, 4810.22.70, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.70, 4810.32, 4810.39 and 4810.92. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Scope Comments

Following the *Preliminary Determination*, on August 3, 2010, the Department issued a decision memorandum addressing three scope issues in this and the concurrent antidumping and countervailing duty investigations on certain coated paper from Indonesia and the People's Republic of China: (1) whether to clarify the scope of these investigations to exclude multi–ply coated paper and paperboard; (2) whether to modify the scope language by striking the phrase "suitable for high–quality print graphics;" and (3) whether to add three HTSUS numbers which may include in–scope merchandise (*i.e.*, HTSUS 4810.32, 4810.39 and 4810.92). *See* August 3, 2010, Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, from Susan Kuhbach, Director, Office 1, entitled "Scope" (August 3, 2010 Scope Memorandum). For the reasons explained in the August 3, 2010, Scope Memorandum, the Department determined that: (1) multi–ply products that otherwise meet the description of the scope of the investigations are not excluded from the scope; (2) the "suitable for high–quality print graphics" language should not be deleted from the scope; and (3) the three HTSUS numbers at issue should be added to the scope.

The Department subsequently provided the interested parties an opportunity to comment on its post–preliminary scope determination. In response, the respondents in these investigations filed a case brief on August 20, 2010, and the petitioners filed a rebuttal brief on August 24, 2010. Based on the Department's analysis of these comments and the factual records of these investigations, the Department continues to find that multi–ply coated paper and paperboard are not excluded from the scope of the investigations, that the "suitable for high–quality print graphics" language should be maintained, and that the three HTSUS numbers listed above should be added to the scope. For a complete discussion of the parties' comments and the Department's position, *see* "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Coated Paper Suitable for High–Quality Print Graphics Using Sheet–Fed Presses from the People's Republic of China," dated concurrently with this notice and incorporated herein by reference.

Injury Test

Because Indonesia is a "Subsidies Agreement Country" within the meaning of section 701(b) of the Tariff Act of 1930, as amended (the Act), the International Trade Commission (ITC) is required to determine pursuant to section 701(a)(2) of the Act whether imports of the subject merchandise from Indonesia materially injure, or threaten material injury to, a United States industry. On November 23, 2009, the ITC published its preliminary determination that there is a reasonable indication that an industry in the United States is materially injured by reason of allegedly subsidized imports from Indonesia of subject merchandise. *See Certain Coated Paper Suitable for High–Quality Print Graphics Using Sheet–Fed Presses from China and Indonesia*, 74 FR 61174 (November 23, 2009); and *Certain Coated Paper Suitable for High–Quality Print Graphics Using Sheet–Fed Presses from China and Indonesia (Preliminary)*, USITC Pub. 4108, Inv. Nos. 701–TA–470–471 and 731–TA–1169–1170 (November 2009).

Period of Investigation

The period for which we are measuring subsidies, *i.e.*, the period of investigation (POI), is January 1, 2008 through December 31, 2008.

Analysis of Comments Received

All non–scope issues raised in the case and rebuttal briefs submitted by the GOI, APP/SMG, and Petitioners are addressed in the Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, "Issues and Decision Memorandum for Certain Coated Paper Suitable for High–Quality Print Graphics Using Sheet–Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination" (September 20, 2010) (hereafter referred to as the "Decision Memorandum"), which is hereby adopted by this notice. Attached to this notice as an Appendix is a list of the issues that parties have raised and to which we have responded in the Decision Memorandum. Parties can find this public memorandum in the Department's Central Records Unit, located in Room 7046 in the main Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at http://ia.ita.doc.gov/ia–highlights-and–news.html or http://ia.ita.doc.gov/frn/. The paper copy and

[1] " 'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.'"

[2] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which measures the reflection of light off of a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade.

electronic version of the Decision Memorandum are identical in content.

Application of Adverse Facts Available

For purposes of this final determination, we relied, in part, on adverse facts available (AFA), as provided for in sections 776(a) and (b) of the Act, to determine the countervailable subsidy rate for one program under investigation. A full discussion of our decision to apply AFA is presented in the Decision Memorandum in the section "Application of Facts Otherwise Available."

Suspension of Liquidation

In accordance with section 705(c)(1)(B)(i)(I) of the Act, we have calculated an individual rate for APP/SMG. Section 705(c)(5)(A)(i) of the Act states that for companies not investigated, we will determine an all others rate equal to the weighted average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and *de minimis* countervailable subsidy rates, and any rates based entirely on AFA under section 776 of the Act.

Producer/Exporter	Net Subsidy Rate
PT Pabrik Kertas Tjiwi Kimia, Tbk..	
PT Pindo Deli Pulp and Paper Mills.	
PT Indah Kiat Pulp and Paper, Tbk..	
(*i.e.*, APP/SMG)	17.94%
All Others	17.94%

Although suspension of liquidation was required on the date of publication of the *Preliminary Determination*, we subsequently instructed U.S. Customs and Border Protection, pursuant to section 703(d) of the Act, to discontinue the suspension of liquidation for countervailing duty purposes for subject merchandise entered on or after July 7, 2010, but to continue the suspension of liquidation of entries made on or after March 9, 2010 (the publication date of the *Preliminary Determination*) through July 6, 2010.

If the ITC issues a final affirmative injury determination, we will issue a countervailing duty order and continue with the suspension of liquidation under section 706(a) of the Act. We will then require a cash deposit of estimated countervailing duties for entries of subject merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non–privileged and non–proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an Administrative Protective Order (APO), without the written consent of the Assistant Secretary for Import Administration.

Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to an APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or

conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This determination is issued and published pursuant to sections 705(d) and 777(i) of the Act.

Dated: Septmber 20, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

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[FR Doc. 2010–24182 Filed 9–24–10; 8:45 am]
BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–959]

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Affirmative Countervailing Duty Determination

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

SUMMARY: The Department of Commerce (the "Department") has determined that countervailable subsidies are being provided to producers and exporters of certain coated paper suitable for high-quality print graphics using sheet-fed presses from the People's Republic of China ("PRC"). For information on the estimated countervailing duty rates, please see the "Suspension of Liquidation" section, below.

DATES: *Effective Date:* September 27, 2010.

FOR FURTHER INFORMATION CONTACT: David Neubacher, Jennifer Meek, and Mary Kolberg, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–5823, (202) 482–2778, and (202) 482–1785, respectively.

SUPPLEMENTARY INFORMATION:

Period of Investigation

The period for which we are measuring subsidies, or the period of investigation ("POI"), is January 1, 2008, through December 31, 2008.

Case History

The following events have occurred since the publication of the preliminary determination in the **Federal Register** on March 9, 2010. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination,* 75 FR 10774 (March 9, 2010) ("*Preliminary Determination*").

On March 4, 2010, the Department initiated investigations into new subsidy allegations on several grant programs to Shandong Sun Paper Industry Co., Ltd. and Yanzhou Tianzhang Paper Industry Co., Ltd. (collectively, "Sun companies"). *See* Memorandum from David Neubacher, International Trade Compliance Analyst, Office 1, to Susan Kuhbach, Director, Office 1, Import Administration, regarding "New Subsidy Allegations," (March 4, 2010), available in the Department's Central Records Unit in Room 7046 of the main Department building ("CRU").

On March 5, 2010, the Department issued a questionnaire regarding the new subsidy allegations to the Government of the People's Republic of China ("GOC"), and received a response on April 2, 2010.

On March 17, 2010, the Department received a submission from Appleton Coated LLC, NewPage Corporation, S.D.Warren Company d/b/a Sappi Fine Paper North America, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, "Petitioners") regarding additional information to be collected from Gold East (Jiangsu) Co., Ltd., Gold Huasheng Paper Co., Ltd., and their reporting cross-owned companies (collectively, "Gold companies") in connection with the entered value adjustment.

The Department issued supplemental questionnaires to the GOC on April 14, May 12, and May 21, 2010, and received responses on April 29, May 19, and May 26, 2010, respectively. The Department issued supplemental questionnaires to the Gold companies on April 22, May 12, and May 21, 2010, and received responses on May 14, May 20 (a portion of the response was timely filed on May 27), and May 26, 2010, respectively. Finally, the Department issued supplemental questionnaires to the Sun companies on April 1, and May 14, 2010, and received responses on April 27, and May 28, 2010, respectively.

On March 31, 2010, the Department determined to investigate Petitioners' uncreditworthiness allegation for the Gold companies for the years 2006–2008. *See* Memorandum from Nancy Decker, Program Manager, Office 1, to Susan Kuhbach, Director, Office 1, Import Administration, regarding "Uncreditworthiness Allegation for Gold East (Jiangsu) Co., Ltd., ("Gold East"), Gold Huasheng Paper Co., Ltd. ("GH"), Ningbo Zhonghua Paper Co., Ltd. ("NZ"), Ningbo Asia Pulp & Paper Co. Ltd., and Hainan Jinhai Pulp and Paper Co., Ltd. (collectively, the "APP companies")," (March 31, 2010), available in the CRU.

On June 1, 2010, the Department published an amended affirmative preliminary determination to correct a significant ministerial error in the *Preliminary Determination. See Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Amended Affirmative Preliminary Countervailing Duty Determination,* 75 FR 30370 (June 1, 2010) ("*Amended Preliminary Determination*").

From June 7, 2010, to June 18, 2010, the Department conducted verification of the questionnaire responses submitted by the GOC, Gold companies, and Sun companies. *See* Memorandum from David Neubacher and Jennifer Meek, International Trade Compliance Analysts, Office 1, to Susan H. Kuhbach,

Director, AD/CVD Operations, Office 1, regarding "Verification Report of the Government of the People's Republic of China" (July 28, 2010); Memorandum from David Neubacher, David Layton, and Jennifer Meek, International Trade Compliance Analysts, Office 1, to Susan H. Kuhbach, Director, AD/CVD Operations, Office 1, regarding "Verification Report of Shandong Sun Paper Industry Joint Stock Co., Ltd., and Yanzhou Tianzhang Paper Industry Co., Ltd." (August 4, 2010); and Memorandum from David Neubacher, Scott Holland, David Layton, and Jennifer Meek, International Trade Compliance Analysts, Office 1, to Susan H. Kuhbach, Director, AD/CVD Operations, Office 1, regarding "Verification Report of Gold East Paper (Jiangsu) Co., Ltd. and its reported cross-owned affiliates" (August 24, 2010).

On August 26, 2010, we issued a preliminary determination regarding the creditworthiness of the Gold companies for the years 2006–2008. *See* Memorandum from Mary Kolberg, International Trade Compliance Analyst, Office 1, to Susan H. Kuhbach, Director, AD/CVD Operations, Office 1, regarding "Preliminary Creditworthiness Determination for Gold East Paper (Jiangsu) Co., Ltd. and its Cross-Owned Affiliates," (August 26, 2010).

On August 27, 2010, the Department issued its Post-Preliminary Analysis for the Gold and Sun companies. *See* Memorandum from The Team, Office 1, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, regarding "Countervailing Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Post-Preliminary Analysis Memorandum for Gold East Paper (Jiangsu) Co., Ltd. ("GE"), Gold Huasheng Paper Co., Ltd. ("GHS"), and their reported cross-owned affiliates (collectively, "APP companies")," (August 27, 2010) and Memorandum from The Team, Office 1, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, regarding "Countervailing Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Post-Preliminary Analysis Memorandum for Shandong Sun Paper Industry Joint Stock Co., Ltd. ("Sun Paper") and Yanzhou Tianzhang Paper Industry Co. Ltd. ("Yanzhou Tianzhang") (collectively, "Sun companies")," (August 27, 2010), available in the CRU. (These analyses are referred to herein as "Post-Preliminary Analyses".)

On August 30, 2010, the Department determined not to investigate a new subsidy allegation regarding currency undervaluation. *See* Memorandum form The Team to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, regarding "New Subsidy Allegation—Currency," (August 30, 2010), available in the CRU.

We received case briefs from the GOC, the Gold companies, the Sun companies, and Petitioners on September 7, 2010. The same parties submitted rebuttal briefs on September 10, 2010.

The GOC, Gold companies, and Petitioners requested a hearing. The same parties later withdrew their requests. Therefore, no hearing was held.

Scope of the Investigation

The merchandise covered by this investigation includes certain coated paper and paperboard [1] in sheets suitable for high quality print graphics using sheet-fed presses; coated on one or both sides with kaolin (China or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher; [2] weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface-colored, surface-decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions ("Certain Coated Paper").

Certain Coated Paper includes: (a) Coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi-thermo-mechanical pulp ("BCTMP") that meets this scope definition; and (c) any other coated paper and paperboard that meets this scope definition.

Certain Coated Paper is typically (but not exclusively) used for printing multi-colored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics.

Specifically excluded from the scope are imports of paper and paperboard printed with final content printed text or graphics.

As of 2009, imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States ("HTSUS"): 4810.14.11, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.70, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090, 4810.22.1000, 4810.22.50, 4810.22.6000, 4810.22.70, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.70, 4810.32, 4810.39 and 4810.92. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Scope Comments

Following the *Preliminary Determination,* on August 3, 2010, the Department issued a decision memorandum addressing three scope issues in this and the concurrent antidumping and countervailing duty investigations on certain coated paper from Indonesia and the People's Republic of China: (1) Whether to clarify the scope of these investigations to exclude multi-ply coated paper and paperboard; (2) whether to modify the scope language by striking the phrase "suitable for high-quality print graphics;" and (3) whether to add three HTSUS numbers which may include in-scope merchandise (*i.e.,* HTSUS 4810.32, 4810.39 and 4810.92). *See* August 3, 2010, Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, from Susan Kuhbach, Director, Office 1, entitled "Scope" (August 3, 2010 Scope Memorandum). For the reasons explained in the August 3, 2010, Scope Memorandum, the Department determined that: (1) Multi-ply products that otherwise meet the description of the scope of the investigations are not excluded from the scope; (2) the "suitable for high-quality print graphics" language should not be deleted from the scope; and (3) the three HTSUS numbers at issue should be added to the scope.

The Department subsequently provided the interested parties an opportunity to comment on its post-preliminary scope determination. In response, the respondents in these investigations filed a case brief on August 20, 2010, and Petitioners filed a rebuttal brief on August 24, 2010. Based on the Department's analysis of these

[1] 'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.'

[2] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which measures the reflection of light off of a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade.

comments and the factual records of these investigations, the Department continues to find that multi-ply coated paper and paperboard are not excluded from the scope of the investigations, that the "suitable for high-quality print graphics" language should be maintained, and that the three HTSUS numbers listed above should be added to the scope. For a complete discussion of the parties' comments and the Department's position, *see* Memorandum from Susan Kuhbach, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, entitled "*Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*" (September 20, 2010) (hereafter "Decision Memorandum"), which is hereby adopted by this notice.

Injury Test

Because the PRC is a "Subsidies Agreement Country" within the meaning of section 701(b) of the Tariff Act of 1930, as amended ("the Act"), the International Trade Commission (the "ITC") is required to determine whether imports of the subject merchandise from the PRC materially injure, or threaten material injury to, a U.S. industry. On November 9, 2009, the U.S. International Trade Commission ("ITC") issued its affirmative preliminary determination that there is a reasonable indication that an industry in the United States is materially injured by reason of allegedly subsidized imports of coated paper from the PRC. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From China and Indonesia; Determinations,* Investigation Nos. 701–TA–470–471 and 731–TA–1169–1170, 74 FR 61174 (November 23, 2009).

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this investigation are addressed in the above-referenced Decision Memorandum. Attached to this notice as an Appendix is a list of the issues that parties have raised and to which we have responded in the Decision Memorandum. Parties can find a complete discussion of all issues raised in this investigation and the corresponding recommendations in this public memorandum, which is on file in the CRU. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at *http://ia.ita.doc.gov/frn/.* The paper copy and electronic version of the Decision Memorandum are identical in content.

Use of Adverse Facts Available

Consistent with the *Preliminary Determination,* we have continued to rely on facts available and to draw an adverse inference, in accordance with sections 776(a) and (b) of the Act, for certain of our findings. With respect to the GOC's provision of papermaking chemicals, we determine that kaolin clay, caustic soda and titanium dioxide are being provided by governmental authorities for the reasons explained in the *Preliminary Determination* and we determine that the subsidy conferred through the GOC's provision of caustic soda is specific for the reasons explained in the Post-Preliminary Analysis. With respect to the GOC's provision of land use rights in the Yangpu Economic Development Zone, we determine that the subsidy is specific for the reason explained in Post-Preliminary Analyses. Finally, with respect to the GOC's provision of electricity, we determine that the GOC has made a financial contribution that is specific, and we have applied an adverse inference is determining the benefit for the reasons explained in the *Preliminary Determination.*

Sun Companies

In a departure from the *Preliminary Determination,* the Department now finds that the use of "facts otherwise available" pursuant to section 776(a) of the Act is warranted with regard to the Sun companies. At verification, we learned that numerous companies that meet the Department's criteria for being "cross-owned," as that term is defined in 19 CFR 351.525(b)(6)(vi), and that produced certain coated paper or inputs for paper products were not included in the Sun companies' responses. Therefore, information that the Department needs to calculate the Sun companies' subsidy rate has not been provided and the Department is unable to accurately determine the appropriate level of subsidization provided to the Sun companies. By not providing this information despite being in a position to do so, the Sun companies failed to act to the best of their ability. Accordingly, we find that an adverse inference is warranted, pursuant to section 776(b) of the Act.

For the final determination and consistent with the Department's recent practice, we are computing a total AFA rate for the Sun companies, generally using program-specific rates determined for the cooperating respondent or in past cases. Specifically, for programs other than those involving income tax exemptions and rate reductions, we will apply the highest calculated rate for the identical program in this investigation if a responding company used the identical program. If there is no identical program match within the investigation, we will use the highest non-*de minimis* rate calculated for the same or similar program in another PRC CVD investigation. Absent an above-*de minimis* subsidy rate calculated for the same or similar program, we will apply the highest calculated subsidy rate for any program otherwise listed that could conceivably be used by the Sun companies. *See, e.g., Certain Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 74 FR 37012 (July 27, 2009) and the accompanying Issues and Decision Memorandum at "Use of Facts Otherwise Available and Adverse Facts Available" at 4–5. The Department has further amended its methodology to exclude any calculated rate for a program by a voluntary respondent. *See Aluminum Extrusions From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination,* 75 FR 54302, 54305 (September 7, 2010).

Also, as explained in *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Initiation of Countervailing Duty Investigation,* 73 FR 42324 (July 21, 2008) and accompanying Initiation Checklist, where the GOC can demonstrate through complete, verifiable, positive evidence that non-cooperative companies (including all their facilities and cross-owned affiliates) are not located in particular provinces whose subsidies are being investigated, the Department does not intend to include those provincial programs in determining the countervailable subsidy rate for the non-cooperative companies.

The GOC failed to provide verifiable information demonstrating that the Sun companies are located in particular provinces or that they have no facilities or cross-owned affiliates in any other province in the PRC, as requested. Therefore, the Department makes the adverse inference that the Sun companies have facilities and/or cross-owned affiliates that received subsidies under all of the sub-national programs alleged prior to the selection of mandatory respondents.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the

Department to rely on information derived from: (1) The petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any other information placed on the record. The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* Uruguay Round Agreements Act Statement of Administrative Action ("SAA"), attached to H.R. Rep. No. 103–316, Vol. I, at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N 3773, 4163.

Consistent with this, we have calculated the Sun companies' countervailable subsidy rate as follows:

Loans

For the "Preferential Lending to the Coated Paper Industry" and "Fast Growth High-Yield Forestry Program Loans" programs, we have applied the loan rate calculated for the Gold companies in this investigation, 8.89 percent, to each program.

Grants

The Department included in its investigation numerous grant programs: "Funds for Forestry Plantation Construction and Management," "State Key Technologies Renovation Project Fund," "Loan Interest Subsidies for Major Industrial Technology Reform Projects in Wuhan," "Funds for Water Treatment Improvement Projects in the Songhuajiang Basin," "Special Fund for Energy Saving Technology Reform in Wuhan and Shougang Municipality," "Clean Production Technology Fund," "Famous Brands Awards," "Grants to Enterprises Achieving RMB 10 Million in Sales Revenue and Implementing 'Three Significant Projects,'" "Grants to Large Enterprises in Jining City," "Funds for Water Treatment and Pollution Control Projects for Three Rivers and Three Lakes," "Grants for Programs Under the 2007 Science and Technology Development Plan in Shandong Province," "Special Funds for Economic and Trade Development," and "Interest Subsidies for Forestry Loans." The Gold companies did not use any of these programs and the Department has not calculated above *de minimis* rates for any of these programs in prior investigations. Moreover, all previously calculated rates for grant programs from prior PRC CVD investigations have been *de minimis.* Therefore, for each of these programs, we have determined to use the highest calculated subsidy rate by a non-voluntary respondent for any program otherwise listed, which could conceivably have been used by the Sun companies. This rate was 8.89 percent for the "Government Policy Lending Program" calculated for the Gold companies in this investigation.

Income Tax Rate Reduction and Exemption Programs

For "The 'Two Free, Three Half' Program," "Income Tax Subsidies for Foreign Invested Enterprises ('FIEs') Based on Geographic Location," "Income Tax Reduction for FIEs Purchasing Domestically Produced Equipment," "Local Income Tax Exemption and Reduction Program for 'Productive FIEs,'" "Preferential Tax Policies for Technology or Knowledge-Intensive FIEs," "Preferential Tax Programs for FIEs that are New or High Technology Enterprises," "Income Tax Reductions for High-Technology Industries in Guandong Province," "Income Tax Exemption Program for Export-Oriented FIEs," we have applied an adverse inference that the Sun companies paid no income tax during the POI (*i.e.,* calendar year 2008). The standard income tax rate for corporations in the PRC was 30 percent, plus a three percent provincial income tax rate. *See* GOC's Response to the Department's Initial Questionnaire, dated January 8, 2010. Therefore, the highest possible benefit for these income tax programs is 33 percent. We are applying the 33 percent AFA rate on a combined basis (*i.e.,* the eight programs combined provided a 33 percent benefit). This 33 percent AFA rate does not apply to tax credit and refund programs.

Other Tax Benefits and VAT/Tariff Reductions and Exemptions

We are using the rates calculated for the Gold companies in this investigation for the following programs: "Preferential Tax Policies for Research and Development at FIEs" (0.01 percent); "Exemption from Maintenance and Construction Taxes and Education Surcharges for FIEs" (0.34 percent); "Value Added-Tax and Tariff Exemptions on Imported Equipment" (3.46 percent); "Domestic VAT Refunds for Companies Located in the Hainan Economic Development Zone" (0.37 percent); and "VAT Rebates on Domestically Produced Equipment" (0.20 percent). For the programs the Gold companies did not use, "Corporate Income Tax Refund Program for Reinvestment of FIE Profits in Export Orientated Enterprises," and "Income Tax Credits for Domestically Owned Companies Purchasing Domestically Produced Equipment," we have used the highest non-*de minimis* rate for any indirect tax program from a PRC CVD investigation. The rate we selected is 1.51 percent, which was the rate calculated for respondent Gold East Paper (Jiangsu) Co., Ltd. ("GE") for the "Value-added Tax and Tariff Exemptions on Imported Equipment," program. *See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 72 FR 60645 (October 25, 2007) and accompanying Issues and Decision Memorandum at 14.

Provision of Goods and Services for Less Than Adequate Remuneration ("LTAR")

For "Provision of Electricity for LTAR," "Provision of Papermaking Chemicals for LTAR," and "Land in the Yangpu Economic Development Zone," we have used the rates calculated for the Gold companies in this investigation, 0.08 percent, 0.80 percent and 0.85 percent, respectively.

Economic Development Zones ("EDZs")

For the "Subsidies in the Nanchang Economic Development Zone," Petitioners alleged that land, water and electricity were provided to producers of coated paper for LTAR in the Nanchang EDZ. For land, we have applied the rate calculated for the Gold companies in this investigation, 0.85 percent. For water, the Department has not calculated an above *de minimis* rate for this program in prior investigations. Therefore, we have applied the land for LTAR rate calculated for the Gold companies in this investigation, 0.85 percent because this program is similar to other EDZ LTAR programs in this investigation. We are not applying a sub-national rate for electricity, as we are already applying a national-level rate to the Sun companies as AFA.

For "Subsidies in the Wuhan Economic Development Zone," Petitioners alleged that land was provided to producers of coated paper at LTAR in the Wuhan EDZ. Therefore, we have applied the rate calculated for the Gold companies in this investigation, 0.85 percent. For "Subsidies in the Yangpu Economic Development Zone," Petitioners alleged that land and electricity were provided to producers of coated paper at LTAR in the Yangpu

EDZ. For land, we are applying the rate calculated for the Gold companies in this investigation, 0.85 percent. For electricity, as previously discussed we are not applying a sub-national rate. Finally, for "Subsidies in the Zhenjiang Economic Development Zone," Petitioners alleged that electricity was provided to producers of coated paper at LTAR in the Zhenjiang EDZ. As discussed above, we are not applying a sub-national rate for electricity.

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." *See e.g.,* SAA, at 870. The Department considers information to be corroborated if it has probative value. *See id.* To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information. *See* SAA at 869.

With regard to the reliability aspect of corroboration, we note that these rates were calculated in recent final CVD determinations. Further, the calculated rates were based upon verified information about the same or similar programs. Moreover, no information has been presented in this investigation that calls into question the reliability of these calculated rates that we are applying as AFA. Finally, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.

With respect to the relevance aspect of corroborating the rates selected, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as AFA, the Department will not use it. *See Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review,* 61 FR 6812 (February 22, 1996).

In the absence of record evidence concerning these programs due to Sun companies' decision to impede the investigation, the Department has reviewed the information concerning PRC subsidy programs in this and other cases. For those programs for which the Department has found a program-type match, we find that, because these are the same or similar programs, they are relevant to the programs of this case. For the programs for which there is no program-type match, the Department has selected the highest calculated subsidy rate for any PRC program from a non-voluntary respondent from which the Sun companies could receive a benefit to use as AFA. The relevance of this rate is that it is an actual calculated CVD rate for a PRC program from which the Sun companies could conceivably receive a benefit. Further, this rate was calculated for a period close to the POI in the instant case. Moreover, the Sun companies' failure to respond to requests for information has "resulted in an egregious lack of evidence on the record to suggest an alternative rate." *See Shanghai Taoen Int'l Trading Co., Ltd.* v. *United States,* 360 F. Supp. 2d 1339, 1348 (Ct. Int'l Trade 2005). Due to the lack of participation by the Sun companies and the resulting lack of record information concerning these programs, the Department has corroborated the rates it selected to the extent practicable.

On this basis, we determine that the AFA countervailable subsidy rate for the Sun companies is 178.03 percent *ad valorem.*

Suspension of Liquidation

In accordance with section 705(c)(1)(B)(i)(I) of the Act, we have calculated individual rates for each producer/exporter of the subject merchandise individually investigated. Section 705(c)(5)(A)(i) of the Act states that for companies not investigated, we will determine an "all others" rate equal to the weighted-average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and *de minimis* countervailable subsidy rates, and any rates determined entirely under section 776 of the Act. As the Sun companies' subsidy rate was determined entirely under section 776 of the Act, the Gold companies' calculated rate was used as the All Others rate.

Exporter/manufacturer	Net subsidy rate
Gold East Paper (Jiangsu) Co., Ltd, Gold Huasheng Paper Co., Ltd., Gold East Trading (Hong Kong) Company Ltd., Ningbo Zhonghua Paper Co., Ltd., and Ningbo Asia Pulp & Paper Co., Ltd	17.64
Shandong Sun Paper Industry Joint Stock Co., Ltd. and Yanzhou Tianzhang Paper Industry Co., Ltd	178.03
All Others	17.64

Also, in accordance with section 703(d) of the Act, we instructed U.S. Customs and Border Protection to discontinue the suspension of liquidation for countervailing duty purposes for subject merchandise entered on or after July 7, 2010, but to continue the suspension of liquidation of entries made from March 9, 2010, through July 6, 2010.

We will issue a countervailing duty order if the ITC issues a final affirmative injury determination, and we will require a cash deposit of estimated countervailing duties for such entries of merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated deposits or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an APO, without the written consent of the Assistant Secretary for Import Administration.

Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder

to parties subject to an administrative protective order ("APO") of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This determination is published pursuant to sections 705(d) and 777(i) of the Act.

Dated: September 20, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix

List of Comments and Issues in the Decision Memorandum

General Issues

Comment 1 Application of CVD Law to the PRC
Comment 2 Application of the CVD Law to NMEs and the Administrative Protection Act
Comment 3 Double Counting/Overlapping Remedies
Comment 4 Cutoff Date for Identifying Subsidies

Currency

Comment 5 Opportunity to Comment and the Initiation Standard
Comment 6 The Determination Not To Investigate the Alleged Currency Subsidy
Comment 7 The Department's Analysis of a Unified Rate of Exchange

Scope

Comment 8 Burden Imposed on Respondents
Comment 9 Whether Multi-ply Paperboard Was Intended To Be in the Scope
Comment 10 Physical Characteristics and End-use Applications Distinguish Multi-ply Paper From the Covered Merchandise
Comment 11 Whether the Department Should Retain the "Suitability" Language in the Scope Description
Comment 12 Whether Inclusion of Multi-ply Paper in the Scope Affects Respondent Selection
Comment 13 Scope Expansion Violates Standing and Injury Requirements

Chemicals for LTAR

Comment 14 Benchmarks—Papermaking Chemicals
Comment 15 Provision of Papermaking Chemicals for LTAR—Specificity
Comment 16 Government Ownership and Determining Whether a Financial Contribution Has Occurred

Preferential Lending to the Coated Paper Industry

Comment 17 Whether Chinese Banks Are Authorities
Comment 18 Whether the Policy Loan Program Is Specific

Lending Benchmarks

Comment 19 Whether Negative Real Interest Rates Should Be Excluded From the Regression
Comment 20 Whether the Regression Is Statistically Valid
Comment 21 Should the Department Use an In-Country Benchmark
Comment 22 Terms of Loan Rates in the IMF Data
Comment 23 Whether the Long-Term and Discount Rates Are Flawed

Provision of Land for LTAR

Comment 24 Whether HYDC Is an Authority
Comment 25 Financial Contribution
Comment 26 Whether To Use an In-country Benchmark
Comment 27 Whether There Are Flaws in the Thai Benchmark
Comment 28 Specificity of Land for LTAR Based on AFA

Issues Related to Sun Companies

Comment 29 Whether To Use Revised Sales Values for the Sun Companies
Comment 30 Whether To Apply Adverse Facts Available to Sun Companies' Unreported Loans
Comment 31 Whether To Apply Facts Available to Sun Companies' Unreported Cross-Owned Companies

Issues Related to Gold Companies

Comment 32 Whether To Grant the Gold Companies an EV Adjustment
Comment 33 Creditworthiness
Comment 34 Whether To Adjust the Uncreditworthiness Benchmark
Comment 35 GE Sales Denominator
Comment 36 Whether To Attribute Subsidies Received by Input Suppliers Whose Inputs Are Not Used for Merchandise Exported to the United States
Comment 37 Whether the Department Should Attribute Subsidies From Pulp Producers Based on the Percentage of Total Pulp Sales to the Paper Producers Covered
Comment 38 Whether To Countervail Additional Financing Reported by the Gold Companies
Comment 39 Whether To Adjust the Gold Companies' Interest Calculation
Comment 40 Whether To Adjust JHP's Reported VAT and Duty Exemptions on Imported Equipment
Comment 41 Whether To Use an Alternative Electricity Benchmark
Comment 42 Whether To Apply AFA to JAP and JHP Caustic Soda Purchases

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–958]

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value

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

DATES: *Effective Date:* September 27, 2010.

SUMMARY: On May 6, 2010, the Department of Commerce ("Department") published its preliminary determination of sales at less than fair value ("LTFV") in the antidumping investigation of certain coated paper suitable for high-quality print graphics using sheet-fed presses ("coated paper") from the People's Republic of China ("PRC"). We invited interested parties to comment on our preliminary determination of sales at LTFV. Based on our analysis of the comments we received, we have made changes to our margin calculations for the mandatory respondents. The final dumping margins for this investigation are listed in the "Final Determination Margins" section below.

FOR FURTHER INFORMATION CONTACT: Lindsey Novom and Demitri Kalogeropoulos, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–5256 or (202) 482–2623, respectively.

SUPPLEMENTARY INFORMATION:

Case History

The Department published its preliminary determination of sales at LTFV on May 6, 2010. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 FR 24892, (May 6, 2010) ("Preliminary Determination").*

On May 19, 2010, Shandong Sun Paper Industry Joint Stock Co., Ltd., Yanzhou Tianzhang Paper Industry Co., Ltd., Shandong International Paper and Sun Coated Paperboard Co., Ltd., International Paper and Sun Cartonboard Co., Ltd. (collectively "Sun Paper Companies") ceased participating

in the investigation.[1] On May 10, 2010, Gold East Paper (Jiangsu) Co., Ltd. ("GE"), Gold Huasheng Paper Co., Ltd. ("GHS"), Gold East (Hong Kong) Trading Co., Ltd. ("GEHK"), Ningbo Zhonghua Paper Co., Ltd. ("NBZH"), Ningbo Asia Pulp and Paper Co., Ltd. ("NAPP"), collectively referred to as the "GE Group," or "APP-China," alleged that the Department made ministerial errors in its *Preliminary Determination.* On May 13, 2010, APP-China and Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a Sappi Fine Paper North America, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, "Petitioners") submitted comments on APP-China's allegations. On June 9, 2010, the Department released a memo detailing the errors it found to be "clerical" in nature, but determined not to amend the *Preliminary Determination* as the ministerial errors were not significant under 19 CFR 351.224(g).

In a Memo to the File, on May 19, 2010, regarding "Phone Call Regarding Factual Information Submission and Tackifier Input," the Department requested information with respect to APP-China's "tackifier" input. On May 21, 2010, APP-China submitted the input data. APP-China and Shandong Chenming Paper Holding Ltd. ("Chenming") also submitted a market-oriented industry ("MOI") submission, on May 19, 2010.

Between May 26, 2010, and June 25, 2010, the Department conducted verifications of several of the APP-China entities and their affiliated U.S. reseller Global Paper Solutions Inc. ("GPS"). The Department released both verification reports for these companies on July 21, 2010. *See* the "Verification" section below for additional information. Petitioners submitted a request for a public hearing on May 28, 2010, and June 3, 2010, respectively. On August 6, 2010, APP-China and Petitioners filed timely requests for a withdrawal of request for a public hearing.

APP-China and Petitioners submitted surrogate value comments on June 29, 2010. On July 6, 2010, Petitioners submitted rebuttal comments on this information. On July 27, 2010, the Department requested a revised factors of production ("FOP") and sales database from APP-China, and on July 30, 2010, APP-China submitted the requested databases to the Department. On August 5, 2010, case briefs were filed by Petitioners, APP-China, and the Government of China ("GOC"), APP-China, and Chenming, collectively, submitted a separate case brief on August 5, 2010. On August 10, 2010, Petitioners filed their rebuttal brief, and on August 11, 2010, APP-China filed its rebuttal brief. The Department released labor wage rate data on July 16, 2010.[2] Petitioners and APP-China submitted comments on the labor wage rate data on July 23, 2010. The Department released additional (Honduran) labor wage rate data on August 5, 2010, and Petitioners submitted comments on this information on August 9, 2010. On August 12, 2010, APP-China requested that the Department reject parts of Petitioners' August 10, 2010 rebuttal brief because it contains certain new information. On August 16, 2010, Petitioners submitted a response to APP-China's request. On August 17, 2010, the Department rejected APP-China's request and continued to accept the Petitioners' rebuttal brief as filed because the information at issue already existed on the record of this investigation. On August 19, 2010, APP-China submitted a request for reconsideration, and Petitioners submitted a request to remove APP-China's request for reconsideration from the record on August 23, 2010. On September 1, 2010, the Department rejected APP-China's August 19, 2010, request for reconsideration and Petitioners' August 23, 2010 submission because they contained untimely filed written arguments within the meaning of 19 CFR 351.309 of the Department's regulations. In accordance with 19 CFR 351.302(d), the Department removed the submissions from the record of the proceeding and has not considered them for purposes of the final determination. On September 3, 2010 APP-China resubmitted its request for reconsideration, and Petitioners resubmitted their request to remove APP-China's request for reconsideration. On September 16, 2010, the Department issued its final response not to reject Petitioners' rebuttal brief.

Scope Comments

Following the *Preliminary Determination,* on August 3, 2010, the Department issued a decision memorandum addressing three scope issues in this and the concurrent antidumping and countervailing duty investigations on certain coated paper from Indonesia and the People's Republic of China: (1) Whether to clarify the scope of these investigations to exclude multi-ply coated paper and paperboard; (2) whether to modify the scope language by striking the phrase "suitable for high-quality print graphics;" and (3) whether to add three Harmonized Tariff Schedule of the United States ("HTSUS") numbers which may include in-scope merchandise (i.e., HTSUS 4810.32, 4810.39 and 4810.92). *See* August 3, 2010, Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, from Susan Kuhbach, Director, Office 1, entitled "Scope" (August 3, 2010 Scope Memorandum). For the reasons explained in the August 3, 2010, Scope Memorandum, the Department determined that: (1) Multiply products that otherwise meet the description of the scope of the investigations are not excluded from the scope; (2) the "suitable for high-quality print graphics" language should not be deleted from the scope; and (3) the three HTSUS numbers at issue should be added to the scope.

The Department subsequently provided the interested parties an opportunity to comment on its post-preliminary scope determination. In response, the respondents in these investigations filed a case brief on August 20, 2010, and the petitioners filed a rebuttal brief on August 24, 2010. Based on the Department's analysis of these comments and the factual records of these investigations, the Department continues to find that multi-ply coated paper and paperboard are not excluded from the scope of the investigations, that the "suitable for high-quality print graphics" language should be maintained, and that the three HTSUS numbers listed above should be added to the scope. For a complete discussion of the parties' comments and the Department's position, see "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China," dated concurrently with this notice and incorporated herein by reference.

Period of Investigation

The period of investigation ("POI") is January 1, 2009, through June 30, 2009. This period corresponds to the two most recent fiscal quarters prior to the month of the filing of the petition, which was September 2009. *See* 19 CFR 351.204(b)(1).

[1] *See* letter from Sun Paper Companies, regarding "Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China; Withdrawal from Antidumping Case," dated May 19, 2010.

[2] *See* Memorandum to the file, "Wage Rate Data," dated July 16, 2010.

Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended ("Act"), we verified the information submitted by APP-China for use in our final determination. *See* the Department's verification reports on the record of this investigation in the Central Records Unit ("CRU"), Room 7046 of the main Department building, with respect to these entities. For all verified companies, we used standard verification procedures, including the examination of relevant accounting and production records, as well as original source documents provided by respondents.

Analysis of Comments Received

All non-scope issues raised in the case and rebuttal briefs by parties to this investigation are addressed in the "Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Issues and Decision Memorandum," dated concurrently with this notice and hereby adopted in this notice ("Issues and Decision Memorandum"). A list of the issues which parties have raised and to which we have responded in the Issues and Decision Memorandum is attached to this notice as Appendix I. The Issues and Decision Memorandum is a public document on file in the CRU and is accessible on the Web at *ia.ita.doc.gov/frn.* The paper copy and electronic version of the memorandum are identical in content.

Changes Since the Preliminary Determination

• Sun Paper Companies did not submit a complete database of all reportable U.S. sales, refused to undergo verification, and withdrew from participating in the investigation. We have also found that Sun Paper Companies did not demonstrate that they are entitled to a separate rate, and are therefore part of the PRC entity. Thus, we have applied total adverse facts available ("AFA") to the PRC entity, which includes Sun Paper Companies. *See* "Use of Facts Available" and "PRC-Wide Rate" sections below. *See also* Comment 6 of the Issues and Decision Memorandum.

• For APP-China, we made the following changes since the *Preliminary Determination:*

○ We revised the targeted dumping analysis to include another customer alleged by Petitioners. *See* Comment 4 of the Issues and Decision Memorandum.

○ The Department has revised APP-China's margin calculation to incorporate minor corrections submitted at verification, as well as other minor discrepancies noted in the verification report. *See* Comments 10 and 11 of the Issues and Decision Memorandum. *See also* the public version of the APP-China Verification report on file in the CRU.

○ The Department is no longer deducting certain commissions from those sales classified as "Channel 1" sales, based on APP-China's minor correction from verification. *See* Comment 12 of the Issues and Decision Memorandum.

○ The Department has made corrections to the *Preliminary Determination* that we found to be "clerical" in nature in our Ministerial Error Memo. *See* Comment 13 of the Issues and Decision Memorandum.

○ The Department has revised the calculation of foreign truck freight to include the weight of the packing. *See* Comment 15 of the Issues and Decision Memorandum.

○ The Department has revised the calculation of domestic inland insurance and brokerage and handling to include the weight of the packing. *See* Final Analysis Memo.

○ The Department has revised the surrogate value ("SV") for tapioca starch ("TSTARCH"). For the final determination, the Department is valuing TSTARCH using the Indonesian HTS category 110814, labeled "Manioc (cassava) starch." *See* Comment 22 of the Issues and Decision Memorandum.

○ The Department is using HTS category 3906.90.90, labeled "other acrylic polymers in other forms," to value the non-market economy ("NME") portion of APP-China's tackifier input. *See* Comment 25 of the Issues and Decision Memorandum.

○ The Department has revised the SV for surface sizing starch ("SSS"). For the final determination, the Department is valuing SSS using the Indian HTS category 3505.10.00, labeled "dextrins and other modified starches (for example, pregelantinized or esterified starches)." *See* Comment 29 of the Issues and Decision Memorandum.

○ We have revised the calculation of the wage rate. *See* Comment 30 of the Issues and Decision Memorandum.

○ We have revised the brokerage and handling surrogate value. *See* Comment 31 of the Issues and Decision Memorandum.

Scope of Investigation

The merchandise covered by this investigation includes certain coated paper and paperboard [3] in sheets suitable for high quality print graphics using sheet-fed presses; coated on one or both sides with kaolin (china or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher;[4] weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface-colored, surface-decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions ("Certain Coated Paper").

Certain Coated Paper includes (a) coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi-thermo-mechanical pulp ("BCTMP") that meets this scope definition; and (c) any other coated paper and paperboard that meets this scope definition.

Certain Coated Paper is typically (but not exclusively) used for printing multi-colored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics.

Specifically excluded from the scope are imports of paper and paperboard printed with final content printed text or graphics.

As of 2009, imports of the subject merchandise are provided for under the following categories of the HTSUS: 4810.14.11, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.70, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090, 4810.22.1000, 4810.22.50, 4810.22.6000, 4810.22.70, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.70, 4810.32, 4810.39 and 4810.92. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigations is dispositive.

Surrogate Country

In the *Preliminary Determination,* we stated that we had selected India as the appropriate surrogate country to use in this investigation for the following

[3] "'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.'"

[4] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which measures the reflection of light off of a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade.

reasons: (1) It is a significant producer of comparable merchandise; (2) it is at a level of economic development comparable to that of the PRC, pursuant to section 773(c)(4) of the Act; and (3) we have reliable data from India that we can use to value the FOPs. *See Preliminary Determination,* 75 FR at 24898. For the final determination, we received no comments on surrogate country selection and made no changes to our findings with respect to the selection of a surrogate country.

Separate Rates

In proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991) ("*Sparklers*"), as amplified by *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2, 1994) ("*Silicon Carbide*"), and 19 CFR 351.107(d).

In the *Preliminary Determination,* we found that the four mandatory respondents (*i.e.,* GE, GHS (and their affiliates, NAPP and NBZH), Tianzhang, and IP Paperboard/IP Cartonboard), and the separate-rate respondent Chenming, demonstrated their eligibility for separate-rate status. For the final determination, we continue to find that the evidence placed on the record of this investigation by GE, GHS (their affiliates, NAPP and NBZH), and Chenming demonstrates both a *de jure* and *de facto* absence of government control, with respect to their respective exports of the merchandise under investigation, and, thus are eligible for separate-rate status. *See Preliminary Determination,* 75 FR at 24899–24900. However, we are no longer finding that Tianzhang, and IP Paperboard/IP Cartonboard are eligible for separate rate status, as they withdrew from participating in the investigation.

Margin for the Separate Rate Company

As discussed above, the Department continues to find that Chenming has demonstrated its eligibility for a separate rate. Consistent with the Department's practice, as the separate rate, we have established a margin for Chenming based on the rate we calculated for the cooperating mandatory respondent, APP-China.[5]

Use of Facts Available ("FA")

Sections 776(a)(1) and (2) of the Act provide that the Department shall apply "facts otherwise available" if, *inter alia,* necessary information is not on the record, or an interested party: (A) Withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, as provided by section 782(i) of the Act.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain its deficiency. If the party fails to remedy the deficiency within the applicable time limits, subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate. Pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) if: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Furthermore, section 776(b) of the Act states that if the administering authority finds that an interested party has not acted to the best of its ability to comply with a request for information, the administering authority may, in reaching its determination, use an inference that is adverse to that party. The adverse inference may be based upon: (1) The petition, (2) a final determination in the investigation under this title, (3) any previous review under section 751 of the Act or determination under section 753 of the Act, or (4) any other information placed on the record.

Because Sun Paper Companies ceased participating in the instant investigation, the Department was not able to conduct verification of Sun Paper Companies' responses. Verification is integral to the Department's analysis because it allows the Department to satisfy itself that it is relying upon accurate information and calculating dumping margins as accurately as possible. By failing to participate in verification, Sun Paper Companies prevented the Department from verifying its reported information, including separate rates information, and significantly impeded the proceeding. In addition, by not permitting verification, Sun Paper Companies failed to demonstrate that they operate free of government control and are entitled to a separate rate. Accordingly, Sun Paper Companies is considered part of the PRC-wide entity for purposes of this final determination. Thus, we find that, in accordance with sections 776(a)(2)(A), (C) and (D) of the Act, the use of FA for the PRC-wide entity (which includes Sun Paper Companies) is appropriate for this final determination.

First, the PRC-wide entity, which includes Sun Paper Companies, failed to submit a full and proper database of all sales to unaffiliated U.S. customers during the POI. Accordingly, we find that the PRC wide entity withheld information requested by the Department pursuant to section 776(a)(2)(A) of the Act.[6] Second, we find that the PRC-wide entity, which includes the Sun Paper Companies, significantly impeded the Department's proceeding pursuant to sections 776(a)(2)(C) of the Act, by failing to provide the requested information and by refusing to allow verification of their data. Based on the above, we have

[5] *See, e.g., Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China, 71 FR 77373, 77377 (December 26, 2006), unchanged in Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China, 72* FR 19690 (April 19, 2007).

[6] For the *Preliminary Determination,* the Department applied partial AFA to Sun Paper Companies for failing to report all reportable U.S. sales made during the POI. *See Preliminary Determination,* 75 FR at 24901–24902.

determined that the PRC-wide entity, which includes the Sun Paper Companies, failed to act to the best of its ability by not providing the requested information and by ceasing their participation in the proceeding. Therefore, we have determined that when selecting from among FA, an adverse inference is warranted for the PRC-wide entity, including the Sun Paper Companies, pursuant to section 776(b) of the Act.

The PRC-Wide Rate

Because we begin with the presumption that all companies within a NME country are subject to government control, and because only the companies listed under the "Final Determination Margins" section, below, have overcome that presumption, we are applying a single antidumping rate (*i.e.,* the PRC-wide rate) to all other exporters of subject merchandise from the PRC. These other companies did not demonstrate entitlement to a separate rate. *See, e.g., Synthetic Indigo From the People's Republic of China; Notice of Final Determination of Sales at Less Than Fair Value,* 65 FR 25706, 25707 (May 3, 2000). The PRC-wide rate applies to all entries of subject merchandise except for entries from the companies eligible for separate rate status.

In the *Preliminary Determination,* the Department preliminarily determined that there were exporters/producers of the subject merchandise during the POI from the PRC that did not respond to the Department's request for information. Further, we treated these PRC producers/exporters as part of the PRC-wide entity because they did not apply for a separate rate. As a result, we found that the use of FA was appropriate to determine the PRC-wide rate pursuant to section 776(a)(2)(A) of the Act. *See Preliminary Determination,* 75 FR at 24900–02.

Thus, in the *Preliminary Determination,* the Department determined that, in selecting from among the FA, an adverse inference is appropriate because the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with requests for information. *See Id.* As AFA, we preliminarily assigned to the PRC-wide entity a rate of 135.8 percent, the highest calculated rate from the petition. *See id; see also Statement of Administrative Action accompanying the URAA,* H.R. Rep. No. 103–316, vol. 1, at 870 (1994) ("SAA").

Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Because the PRC-wide entity (including Sun Paper Companies) did not respond to our requests for information, withheld information requested by the Department, and did not allow their information to be verified, pursuant to sections 776(a)(2)(A), (C), and (D) of the Act, we determine, as in the *Preliminary Determination,* that the use of facts otherwise available is appropriate to determine the PRC-wide rate.

Selection of the Adverse Facts Available Rate

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) provide that the Department may rely on information derived from (1) The petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. In selecting a rate for AFA, the Department selects a rate that is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." [7] It is also the Department's practice to select a rate that ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." [8]

Generally, the Department finds selecting the highest rate in any segment of the proceeding as AFA to be appropriate.[9] It is the Department's practice to select, as AFA, the higher of the (a) highest margin alleged in the petition, or (b) the highest calculated rate of any respondent in the investigation.[10] In the instant investigation, as AFA, we have assigned to the PRC-wide entity the highest petition rate, recalculated using the revised wage rate, on the record of this proceeding that can be corroborated. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia and the People's Republic of China: Initiation of Antidumping Duty Investigations,* 74 FR 53710 (October 20, 2009) ("Initiation Notice"), and Memorandum to the File, regarding "Recalculation of Petition Margins," dated concurrently with this notice. The Department determines that this information is the most appropriate from the available sources to effectuate the purposes of AFA.

Corroboration

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation as FA, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. Secondary information is described as "information derived from the petition that gave rise to the investigation or review, the final determination concerning merchandise subject to this investigation, or any previous review under section 751 concerning the merchandise subject to this investigation." [11] To "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. Independent sources used to corroborate may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.[12]

[7] *See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8932 (February 23, 1998).

[8] *See Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review, 70 FR 69937, 69939* (November 18, 2005); *See also,* SAA at 870.

[9] *See, e.g., Certain Cased Pencils from the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part, 70 FR 76755, 76761 (December 28, 2005) unchanged in final, Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 71 FR 38366 (July 6, 2006), and accompanying Issues and Decision Memorandum at Comment 10.

[10] *See Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Quality Steel Products from the People's Republic of China,* 65 FR 34660 (May 21, 2000), and accompanying Issues and Decision Memorandum at "Facts Available."

[11] *See Final Determination of Sales at Less Than Fair Value: Sodium Hexametaphosphate From the People's Republic of China,* 73 FR 6479, 6481 (February 4, 2008), quoting SAA at 870.

[12] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 61 FR 57391, 57392 (November 6, 1996), unchanged in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative*

Continued

The AFA rate that the Department used is from the Petition; however, we have updated the labor wage rate used to calculate the Petition rates. The Department's practice is not to recalculate dumping margins provided in petitions, but rather to corroborate the applicable petition rate when applying that rate as AFA. In the instant case, however, the surrogate wage rate used in the Petition was based upon the Department's methodology that the Federal Circuit invalidated in *Dorbest II.*[13] In light of the Federal Circuit decision to invalidate the wage rate methodology, the Department has adjusted the petition rate using the surrogate value for labor used in this final determination.[14]

The AFA rate that the Department used is from the Petition. To corroborate the AFA margin that we have selected, we compared this margin to the transaction-specific margins we found for the cooperating mandatory respondents. We found that the margin of 135.83 percent has probative value because it is in the range of the transaction-specific margins that we found for APP-China during the period of investigation. *See* APP-China's Final Analysis Memo. Accordingly, we find this rate is reliable and relevant, considering the record information, and thus, has probative value. *See* Memorandum to the File, regarding "Corroboration of the PRC-Wide Entity Rate and for the Final Determination in the Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China," dated concurrently with this notice. Given that numerous PRC-wide entities did not respond to the Department's requests for information and that Sun Paper Companies, which is part of the PRC-wide entity, ceased participating in the investigation, the Department concludes that the updated petition rate of 135.83 percent, as total AFA for the PRC-wide entity, is sufficiently adverse to prevent these respondents from benefitting from their lack of cooperation. *See* SAA at 870. Accordingly, we found that the rate of 135.83 percent is corroborated to the extent practicable within the meaning of section 776(c) of the Act.

The PRC-wide rate applies to all entries of the merchandise under investigation except for entries from APP-China and Chenming, as they have demonstrated eligibility for a separate rate. These companies and their corresponding antidumping duty cash deposit rates are listed below in the "Final Determination" section of this notice.

Combination Rates

In the *Preliminary Determination,* the Department stated that it would calculate combination rates for respondents that are eligible for a separate rate in this investigation.[15] This practice is described in the *Separate Rate Policy Bulletin.*[16]

Final Determination

The weighted-average dumping margin percentages are as follows:

Exporter	Producer	Percent margin
Gold East Paper (Jiangsu) Co., Ltd.;	Gold East Paper (Jiangsu) Co., Ltd.;	7.60
Gold Huasheng Paper Co., Ltd.;	Gold Huasheng Paper Co., Ltd.;	
Ningbo Zhonghua Paper Co., Ltd.;	Ningbo Zhonghua Paper Co., Ltd.;	
Ningbo Asia Pulp and Paper Co., Ltd.;	Ningbo Asia Pulp and Paper Co., Ltd	
Gold East (Hong Kong) Trading Co., Ltd		
Shandong Chenming Paper Holdings Ltd	Shandong Chenming Paper Holdings Ltd	7.60
PRC-Wide Entity*		135.83

* The PRC-Wide Entity includes the Sun Paper Companies.

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing U.S. Customs and Border Protection ("CBP") to continue to suspend liquidation of all imports of subject merchandise entered or withdrawn from warehouse, for consumption on or after the date of publication of the *Preliminary Determination* in the **Federal Register.** We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the normal value exceeds U.S. price, as follows: (1) The rate for the exporter/producer combinations listed in the chart above will be the rate we have determined in this final determination; (2) for all PRC exporters of subject merchandise which have not received their own rate, the cash-deposit rate will be the PRC-wide rate; and (3) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash-deposit rate will be the rate applicable to the PRC exporter/producer combination that supplied that non-PRC exporter. These suspension-of-liquidation instructions will remain in effect until further notice.

ITC Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission ("ITC") of our final determination of sales at LTFV. As our final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will, within 45 days, determine whether the domestic industry in the United States is materially injured or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of the subject merchandise. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess antidumping duties on all imports of the subject merchandise entered or withdrawn from warehouse

Reviews and Termination in Part, 62 FR 11825 (March 13, 1997).

[13] *See* Comment 30 of Issues and Decision Memorandum.

[14] *See Id. See also* Memorandum to the File, regarding "Recalculation of Petition Margins," dated concurrently with this notice.

[15] *See Preliminary Determination,* 75 FR at 24905.

[16] *See* Memorandum entitled "Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries" dated April 5, 2005, available at *http://ia.ita.doc.gov/policy/index.html.*

for consumption on or after the effective date of the suspension of liquidation.

Notification Regarding APO

This notice also serves as a reminder to the 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. Timely 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.

This determination and notice are issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: September 20, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix I—List of Issues

Case Issues:

Comment 1: Whether to Grant Market-Oriented Industry ("MOI") Status to the Coated Paper Industry
Comment 2A: Whether Simultaneous Application of Countervailing Duties ("CVDs") and Antidumping Duties Calculated Using the NME Methodology is Contrary to Law
Comment 2B: Whether Simultaneous Application of Countervailing Duties and Antidumping Duties Calculated Using the NME Methodology to Imports of the Same Products Results in the Imposition of Double Remedies
Comment 3: Whether Targeted Dumping Test Violates the Administrative Procedures Act ("APA") and is Flawed
Comment 4: Whether to Revise the Targeted Dumping Analysis in Light of APP-China's Minor Corrections Filed at Verification
Comment 5: Whether the Department Should Apply Zeroing
Comment 6: Application of Adverse Facts Available ("AFA") to Sun Paper Companies
Comment 7: Whether to Apply Market-Oriented Economy ("MOE") Treatment to APP-China
Comment 8: Whether to Apply AFA to All Sales and Expense Information of GPS
Comment 9: Whether to Reclassify Certain APP-China Sales from Export Price ("EP")- to "Constructed Export Price ("CEP")
Comment 10: Whether the Department Should Reject APP-China's Minor Correction
Comment 11: Whether the Department Should Deduct Certain Rebates for APP-China
Comment 12: Whether the Department Should Deduct Certain Commission Expenses
Comment 13: Whether the Department Should Correct Certain Ministerial Errors
Comment 14: Whether to Deduct Domestic Inland Insurance from U.S. Price
Comment 15: Application of Foreign Truck Freight
Comment 16: Whether to Treat All of APP-China's Market Economy ("ME") Pulp Purchases as Market Economy Purchases ("MEPs")
Comment 17: Whether to Accept APP-China's ME Purchases from Thailand and Korea
Comment 18: Whether to Employ the 33 Percent Threshold for GE Group's ME Purchases
Comment 19: Valuation of Calcium Carbonate Ore ("CCORE")
Comment 20: Valuation of Optical Brightener ("OBA/OBAS/OBAL")
Comment 21: Valuation of Masculine Starch Transforming Agent ("MSTA")
Comment 22: Valuation of Tapioca Starch ("TSTARCH")
Comment 23: Valuation of Wet End Starch ("WESTARCH")
Comment 24: Valuation of Dispersing Agent A ("DISPERSANTA")
Comment 25: Valuation of Tackifier
Comment 26: Valuation of Hypochlorous Natrium/Sodium Hypochlorite ("BACLO/NACLO")
Comment 27: Valuation of Coating Binding Agent ("CBA")
Comment 28: Valuation of Coating Starch ("CSTARCH")
Comment 29: Valuation of Surface Sizing Starch ("SSS")
Comment 30: Selection of Labor Rate
Comment 31: Valuation of Brokerage & Handling
Comment 32: Whether the Department Should Include Certain Direct Selling Expenses in the Calculation of SG&A

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–560–823]

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Final Determination of Sales at Less Than Fair Value

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

SUMMARY: The Department of Commerce determines that certain coated paper suitable for high-quality print graphics using sheet-fed presses (certain coated paper) from Indonesia is being, or is likely to be, sold in the United States at less-than-fair-value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The estimated margins of sales at LTFV are shown in the "Final Determination Margins" section of this notice.

DATES: *Effective Date:* September 27, 2010.

FOR FURTHER INFORMATION CONTACT: Gemal Brangman or Brian Smith, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–3773 and (202) 482–1766, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 6, 2010, the Department of Commerce (Department) published in the **Federal Register** the preliminary determination of sales at LTFV in the antidumping duty investigation of certain coated paper from Indonesia. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 24885 (May 6, 2010) (*Preliminary Determination*).

On May 10, 2010, the respondents[1] in this investigation alleged a ministerial error in the Department's preliminary margin calculation.

On May 14, 2010, the Department issued a post-preliminary analysis for PD/TK/IK evaluating whether the use of quarterly cost averaging periods was warranted in this investigation. *See* Memorandum to Neal Halper, Director, Office of Accounting, entitled "Alternative Cost Averaging Period Analysis Memorandum—PT Pabrik Kertas Tjiwi Kimia Tbk., PT Pindo Deli Pulp and Paper Mills, and PT Indah Kiat Pulp Tbk," dated May 14, 2010. Based on the data and methodology described in this memorandum, we found that the change in the total cost of manufacturing recognized by PD/TK/IK during the period of investigation (POI) for its highest-volume products sold in the U.S. and home markets did not meet the Department's standard for significance (*i.e.,* greater than 25 percent

[1] The respondents are: PT. Pindo Deli Pulp & Paper Mills (PD), PT. Pabrik Kertas Tjiwi Kimia, Tbk (TK), PT Indah Kiat Pulp & Paper Tbk (IK) (collectively PD/TK/IK). In the preliminary determination, we determined it appropriate to treat PD, TK, and IK as one entity for margin calculation purposes because they met the regulatory criteria for collapsing. *See* Memorandum to John M. Andersen, Acting Deputy Assistant Secretary for Import Administration, from the Team entitled, "Whether To Treat Respondents as a Single Entity for Margin Calculation Purposes in the Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia," dated April 21, 2010. No party commented on this preliminary determination and we found nothing at verification that would otherwise compel us to reverse this determination. Therefore, we have continued to treat these affiliated companies as one entity in the final determination.

change from the high to the low quarter). *See Certain Welded Stainless Steel Pipes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review,* 74 FR 31242 (June 30, 2009) and accompanying Issues and Decision Memorandum at Comment 1. Therefore, we determined that no change to our normal POI-average cost methodology was warranted in this case.[2]

On May 11, 2010, we issued the cost verification agenda to PD/TK/IK.

On May 19, 2010, we determined that the error alleged by PD/TK/IK in its May 10, 2010, submission was a ministerial error, but not a significant ministerial error as defined by 19 CFR 351.224(g), and stated that we would correct this error for purposes of the final determination. *See* Memorandum from The Team to James Maeder, Director, AD/CVD Operations Office 2, entitled "Respondent's Allegation of Ministerial Error in the Preliminary Determination," dated May 19, 2010.

On June 1, 2010, we issued a sales supplemental questionnaire to PD/TK/IK and received PD/TK/IK's response to this questionnaire on June 16, 2010.

On June 4, 2010, we issued the sales verification agenda to PD/TK/IK.

During May and June 2010, we verified the sales and cost of production (COP) questionnaire responses of PD/TK/IK. During June and July 2010, we issued the COP and sales verification reports. *See* Memorandum to The File entitled "Verification of the Cost Response of PT Pabrik Kertas Tjiwi Kimia Tbk., PT Pindo Deli Pulp and Paper Mills, and PT Indah Kiat Pulp and Paper Tbk. in the Antidumping Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia," dated June 29, 2010; Memorandum to The File entitled "Verification of the Sales Response of (Affiliated Company) in the Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (Coated Paper) From Indonesia," dated July 26, 2010; Memorandum to The File entitled "Verification of the Sales Response of PT Pindo Deli Pulp & Paper Mills and PT Pabrik Kertas Tjiwi Kimia, Tbk in the Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (Coated Paper) From Indonesia," dated July 26, 2010; Memorandum to The File entitled "Verification of the Sales Response of PT Indah Kiat Pulp & Paper Tbk. and (Affiliated Company) in the Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (Coated Paper) From Indonesia," dated July 30, 2010; and Memorandum to The File entitled "Verification of the Sales Response of (Affiliated Company) in the Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (Coated Paper) From Indonesia," dated July 30, 2010.

On August 3, 2010, we issued a memorandum addressing certain scope issues in this investigation. *See* Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, from Susan Kuhbach, Director, Office 1, entitled "Scope" (August 3, 2010 Scope Memorandum).

On August 10 and 16, 2010, respectively, the petitioners[3] in this investigation and PD/TK/IK each submitted case and rebuttal briefs on all issues excluding scope. On August 18 and 25, 2010, the Department met with the petitioners' and PD/TK/IK's counsels, respectively, to discuss the issues raised in these case and rebuttal briefs. *See* the Department's memoranda to the file entitled, "Meeting With Petitioner's Counsel," dated August 18, 2010, and "Meeting With the Respondent Counsel," dated August 25, 2010.

On August 20, 2010, PD/TK/TK filed its case brief on scope issues, and on August 24, 2010, the petitioners filed their rebuttal brief on scope issues.

Period of Investigation

The POI is July 1, 2008, to June 30, 2009. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition. *See* 19 CFR 351.204(b)(1).

Scope of Investigation

The merchandise under investigation includes certain coated paper and paperboard[4] in sheets suitable for high quality print graphics using sheet-fed presses; coated on one or both sides with kaolin (China or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher;[5] weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface-colored, surface-decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions ("Certain Coated Paper").

Certain Coated Paper includes (a) Coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi-thermo-mechanical pulp ("BCTMP") that meets this scope definition; and (c) any other coated paper and paperboard that meets this scope definition.

Certain Coated Paper is typically (but not exclusively) used for printing multi-colored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics.

Specifically excluded from the scope are imports of paper and paperboard printed with final content printed text or graphics.

As of 2009, imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States ("HTSUS"): 4810.14.11, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.70, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090, 4810.22.1000, 4810.22.50, 4810.22.6000, 4810.22.70, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.70, 4810.32, 4810.39 and 4810.92. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Scope Comments

Following the *Preliminary Determination,* on August 3, 2010, the Department issued a decision memorandum addressing three scope issues in this and the concurrent antidumping and countervailing duty investigations on certain coated paper

[2] No party commented on the Department's post-preliminary quarterly cost analysis and we found nothing at verification that warrants the reversal of this determination. Therefore, we have continued to apply our normal POI-average cost methodology in the final determination.

[3] The petitioners include the following companies: Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a/Sappi Fine Paper North America, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

[4] " 'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.' "

[5] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which measures the reflection of light off of a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade.

from Indonesia and the People's Republic of China: (1) Whether to clarify the scope of these investigations to exclude multi-ply coated paper and paperboard; (2) whether to modify the scope language by striking the phrase "suitable for high-quality print graphics;" and (3) whether to add three HTSUS numbers which may include in-scope merchandise (*i.e.,* HTSUS 4810.32, 4810.39 and 4810.92). *See* August 3, 2010 Scope Memorandum. For the reasons explained in the August 3, 2010, Scope Memorandum, the Department determined that: (1) Multi-ply products that otherwise meet the description of the scope of the investigations are not excluded from the scope; (2) the "suitable for high-quality print graphics" language should not be deleted from the scope; and (3) the three HTSUS numbers at issue should be added to the scope.

The Department subsequently provided the interested parties an opportunity to comment on its post-preliminary scope determination. In response, the respondents in these investigations filed a case brief on August 20, 2010, and the petitioners filed a rebuttal brief on August 24, 2010. Based on the Department's analysis of these comments and the factual records of these investigations, the Department continues to find that multi-ply coated paper and paperboard are not excluded from the scope of the investigations, that the "suitable for high-quality print graphics" language should be maintained, and that the three HTSUS numbers listed above should be added to the scope. For a complete discussion of the parties' comments and the Department's position, *see* "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China," dated concurrently with this notice and incorporated herein by reference.

Analysis of Comments Received

All issues (except scope issues) raised in the case and rebuttal briefs submitted by the parties to this investigation are addressed in the "Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia" from Susan H. Kuhbach, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration (Decision Memo), dated concurrently with this notice, which is hereby adopted by this notice. A list of the issues that parties have raised and to which we have responded, all of which are in the Decision Memo, is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised in this investigation and the corresponding recommendations in the Decision Memo, which is on file in the Central Records Unit, Room 1117 of the Commerce Department. In addition, a complete version of the Decision Memo can be accessed directly on the Web at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the Decision Memo are identical in content.

Verification

As provided in section 782(i) of the Act, we verified the sales and COP information submitted by PD/TK/IK for use in our final determination. We used standard verification procedures including an examination of relevant accounting and production records, and original source documents provided by the respondent. Our sales and cost verification results are outlined in separate verification reports. *See* "Background" section above for a list of verification reports the Department has issued in this investigation. The verification reports are on file and available in the Central Records Unit, Room 1117 of the Commerce Department.

Changes Since the Preliminary Determination

Based on our analysis of the comments received and our findings at verification, we have made certain changes to the margin calculations for PD/TK/IK. For a discussion of these changes, *see* the "Margin Calculations" section of the Decision Memo.

Targeted Dumping

The statute allows the Department to employ the average-to-transaction margin calculation methodology under the following circumstances: (1) There is a pattern of export prices that differ significantly among purchasers, regions or periods of time; and (2) the Department explains why such differences cannot be taken into account using the average-to-average or transaction-to-transaction methodology. *See* section 777A(d)(1)(B) of the Act.

In the *Preliminary Determination,* we conducted customer, regional, and time-period targeted dumping analyses based on timely allegations of targeted dumping filed by the petitioners, using the methodology adopted in *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value,* 73 FR 33985 (June 16, 2008), and *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 33977 (June 16, 2008), and applied in more recent investigations.[6] As a result, we preliminarily determined that, with respect to sales by PD/TK/IK for certain customers, regions and time periods, there was a pattern of prices that differed significantly. However, we also found that these differences could be taken into account using the average-to-average methodology because the average-to-average methodology did not conceal differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. We stated further that the standard average-to-average methodology took into account the price difference because the alternative average-to-transaction methodology yielded no difference in the margin or yielded a difference in the margin that was so insignificant relative to the size of the resulting margin as to be immaterial. Therefore, for the preliminary determination, we applied the standard average-to-average methodology to all of PD/TK/IK's U.S. sales. *See Preliminary Determination* at 75 FR 24887–24888.

For the final determination, we performed our targeted-dumping analysis following the methodology employed in the *Preliminary Determination,* after making certain revisions to PD/TK/IK's reported data based on verification findings and the comments submitted by the parties, as enumerated in the "Margin Calculations" section of the Decision Memo. Because the results of our final targeted-dumping analysis were consistent with those of our preliminary targeted-dumping analysis, we have continued to apply the standard average-to-average methodology to all of PD/TK/IK's U.S. sales in the final

[6] These investigations include *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Taiwan,* 75 FR 14569 (March 26, 2010), *Polyethylene Retail Carrier Bags from Indonesia: Final Determination of Sales at Less Than Fair Value,* 75 FR 16431 (April 1, 2010), and accompanying Issues and Decision Memorandum at Comment 1; and *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping,* 75 FR 20335 (April 19, 2010) and accompanying Issues and Decision Memorandum at Comment 2.

determination. For further discussion, see the Decision Memo at Comment 1.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all imports of subject merchandise that are entered or withdrawn from warehouse, for consumption on or after May 6, 2010, the date of publication of the preliminary determination in the **Federal Register**. We will instruct CBP to continue to require a cash deposit or the posting of a bond for all companies based on the estimated weighted-average dumping margins shown below. The suspension of liquidation instructions will remain in effect until further notice.

Final Determination Margins

We determine that the weighted-average dumping margins are as follows:

Manufacturer/Exporter	Weighted-Average margin (percent)
PT. Pabrik Kertas Tjiwi Kimia Tbk./PT. Pindo Deli Pulp and Paper/PT. Indah Kiat Pulp and Paper Tbk	20.13
All Others	20.13

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated "All Others" rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. PD/TK/IK is the only respondent in this investigation for which the Department calculated a company-specific rate. Therefore, for purposes of determining the all-others rate and pursuant to section 735(c)(5)(A) of the Act, we are using the weighted-average dumping margin calculated for PD/TK/IK, as referenced above. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy,* 64 FR 30750, 30755 (June 8, 1999); *Coated Free Sheet Paper from Indonesia: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 72 FR 30753, 30757 (June 4, 2007), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from Indonesia,* 72 FR 60636 (October 25, 2007); and *Certain Magnesia Carbon Bricks from Mexico: Notice of Final Determination of Sales at Less Than Fair Value,* 75 FR 45097 (August 2, 2010).

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

International Trade Commission Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our final determination. As our final determination is affirmative, the ITC will determine within 45 days whether imports of the subject merchandise are causing material injury, or threat of material injury, to an industry in the United States. If the ITC determines that material injury or threat of injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

Return or Destruction of Proprietary Information

This notice will serve as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing this determination and notice in accordance with sections 735(d) and 777(i) of the Act.

Dated: September 20, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix—Issues in Decision Memo

Comments

Comment 1: Targeted Dumping
Comment 2: Capitalization of Foreign Exchange Losses in Log Costs
Comment 3: Market Price for Certain Logs
Comment 4: Inclusion of Sawmill Logs in Log Costs
Comment 5: Transfer Price for Logs
Comment 6: IK's Pulp Costs
Comment 7: General and Administrative (G&A) Expenses
Comment 8: Financial Expenses
Comment 9: Unreported Sales to Puerto Rico
Comment 10: Treatment of Bank Charges, Loading Fees, Administrative (ADM) Fees, and Automatic Manifest System (AMS) Fees
Comment 11: Billing Adjustments
Comment 12: Rebates
Comment 13: Freight Revenue
Comment 14: International Freight
Comment 15: Foreign Inland Freight
Comment 16: Treatment of Certain U.S. Sales

[FR Doc. 2010–24160 Filed 9–24–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XZ25

Fisheries of the South Atlantic, Gulf of Mexico, and Caribbean; Southeastern Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR Steering Committee Meeting.

SUMMARY: The SEDAR Steering Committee will meet to discuss the SEDAR assessment schedule, budget, and the SEDAR process. See **SUPPLEMENTARY INFORMATION.**

DATES: The SEDAR Steering Committee will meet on Tuesday, October 5 through Thursday, October 7, 2010. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the Embassy Suites Historic Charleston, 337 Meeting Street, Charleston, SC 29403. telephone: (843) 723–6900.

FOR FURTHER INFORMATION CONTACT: John Carmichael, SEDAR Program Manager, SEDAR/SAFMC, 4055 Faber Place, Suite

201, North Charleston, SC 29405; telephone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520.

SUPPLEMENTARY INFORMATION: The South Atlantic, Gulf of Mexico, and Caribbean Fishery Management Councils; in conjunction with NOAA Fisheries, the Atlantic States Marine Fisheries Commission, and the Gulf States Marine Fisheries Commission; implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks. The SEDAR Steering Committee meets regularly to provide oversight of the SEDAR process, establish assessment priorities, and provide coordination between assessment efforts and management activities.

During this meeting the Steering Committee will receive reports on recent SEDAR activities, consider benchmark and update assessment scheduling for 2011–15, and discuss the SEDAR budget and process.

Meeting Schedule:

October 5, 2010: 1 p.m. - 5 p.m.

October 6, 2010: 9 a.m. - 5 p.m.

October 7, 2010: 9 a.m. - 3 p.m.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the South Atlantic Fishery Management Council office (see **FOR FURTHER INFORMATION CONTACT**) at least 7 business days prior to the meeting.

Dated: September 21, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–24051 Filed 9–24–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

U.S. Travel and Tourism Advisory Board

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an Opportunity To Apply for Membership on the U.S. Travel and Tourism Advisory Board.

SUMMARY: The Department of Commerce is currently seeking applications to fill three vacant positions on the U.S. Travel and Tourism Advisory Board (Board). The purpose of the Board is to advise the Secretary of Commerce on matters relating to the travel and tourism industry.

ADDRESSES: Please submit application information via e-mail to *jennifer.pilat@trade.gov* or by mail to Jennifer Pilat, Office of Advisory Committees, U.S. Travel and Tourism Advisory Board Executive Secretariat, U.S. Department of Commerce, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230.

DATES: All applications must be received by the Office of Advisory Committees by close of business on October 8, 2010.

FOR FURTHER INFORMATION CONTACT: Jennifer Pilat, U.S. Travel and Tourism Advisory Board, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230, *telephone:* 202–482–5896, *e-mail: jennifer.pilat@trade.gov.*

SUPPLEMENTARY INFORMATION: The Office of Advisory Committees is accepting applications for three vacant positions on the Board for the current two-year charter term that began September 2009. Members shall serve until the Board's charter expires on September 20, 2011. Members will be selected, in accordance with applicable Department of Commerce guidelines, based on their ability to advise the Secretary of Commerce on matters relating to the U.S. travel and tourism industries, to act as a liaison among the stakeholders represented by the membership and to provide a forum for those stakeholders on current and emerging issues in the travel and tourism industry. Members of the Board shall be selected in a manner that ensures that the Board is balanced in terms of points of view, industry sector or subsector, range of products and services, demographics, geographic locations, and company size. Additional factors which may be considered in the selection of Board members include candidates' proven experience in promoting, developing, and implementing advertising and marketing programs for travel-related or tourism-related industries; or the candidates' proven abilities to manage tourism-related or other service-related organizations.

Each Board member shall serve as the representative of a U.S. entity or U.S. organization in the travel and tourism sector. For the purposes of eligibility, a U.S. entity shall be defined as a firm incorporated in the United States (or an unincorporated firm with its principal place of business in the United States) that is controlled by U.S. citizens or by another U.S. entity. An entity is not a U.S. entity if 50 percent plus one share of its stock (if a corporation, or a similar ownership interest of an unincorporated entity) is controlled, directly or indirectly, by non-U.S. citizens or non-U.S. entities. For the purposes of eligibility, a U.S. organization shall be defined as an organization, including a trade association or government unit or body, established under the laws of the United States that is controlled by U.S. citizens or by another U.S. organization or entity, as determined based on board of directors (or comparable governing body), membership, and revenue sources.

Priority may be given to a Chief Executive Officer or President (or comparable level of responsibility) of a U.S. organization or U.S. entity in the travel and tourism sector. Priority may also be given to individuals with international tourism marketing experience.

Officers or employees of state and regional tourism marketing entities are eligible for consideration for Board membership as representatives of U.S. organizations. A state and regional tourism marketing entity may include, but is not limited to, state government tourism offices, state and/or local government supported tourism marketing entities, or multi-state tourism marketing entities. Again, priority may be given to a Chief Executive Officer or President (or comparable level of responsibility) of a state and regional tourism marketing entity.

Members will serve at the discretion of the Secretary of Commerce. Board members shall serve in a representative capacity, representing the views and interests of their particular business sector or subsector. Board members are not special government employees and will receive no compensation for their participation in Board activities. Members participating in Board meetings and events will be responsible for their travel, living and other personal expenses. Meetings will be held regularly and not less than twice annually, usually in Washington, DC. Members are required to attend a majority of the Board's meetings. The current Board met initially on April 12, 2010 in Washington DC and again on July 26, 2010 in New Orleans. The next meeting is scheduled to take place in Las Vegas on October 26, 2010.

To be considered for membership, please provide the following:

1. Name and title of the individual requesting consideration.

2. A sponsor letter from the applicant on his or her organization/entity letterhead or, if the applicant is to represent an entity other than his or her employer, a letter from the entity to be

represented, containing a brief statement of why the applicant should be considered for membership on the Board. This sponsor letter should also address the applicant's travel and tourism-related experience.

3. The applicant's personal resume.

4. An affirmative statement that the applicant is not required to register as a foreign agent under the Foreign Agents Registration Act of 1938, as amended.

5. An affirmative statement by the applicant that he or she is not a federally registered lobbyist, and that the applicant understands that he or she, if appointed, will not be allowed to continue to serve as a Board member if the applicant becomes a federally registered lobbyist.

6. If the applicant represents a state or regional tourism marketing entity, the functions and responsibilities of the entity.

7. If the applicant represents an organization, information regarding the control of the organization, including the governing structure, members, and revenue sources as appropriate signifying compliance with the criteria set forth above.

8. If the applicant represents a company, information regarding the control of the company, including the governing structure and stock holdings as appropriate signifying compliance with the criteria set forth above.

9. The entity's or organization's size and ownership, product or service line and major markets in which the entity or organization operates.

Appointments of members to the Board will be made by the Secretary of Commerce.

Dated: September 21, 2010.

Jennifer Pilat,

Executive Secretary, U.S. Travel and Tourism Advisory Board.

[FR Doc. 2010–24049 Filed 9–24–10; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

Minority Business Development Agency

[Docket No.: 100914450–0452–02]

Solicitation of Applications for the MBDA Business Center (MBC) Program

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) is soliciting competitive applications from organizations to operate a MBDA Business Center (MBC). This notice specifies the thirty (30) MBC projects and their respective locations are being individually competed. The MBC program delivers strategic business consulting services to eligible minority business enterprise (MBE) clients through the use of business consultants and the leveraging of strategic partnerships. Responsibility for ensuring that applications in response to this competitive solicitation are complete and received by MBDA on time is the sole responsibility of the applicant. Applications submitted must be for the operation of a MBC and to provide business consulting services to eligible MBEs. Applications that do not meet these requirements will be rejected. This is not a grant program to help start or to further an individual business.

A link to the full text of the Announcement of Federal Funding Opportunity (FFO) for this solicitation may be accessed at: *http://www.Grants.gov*, or at *http://www.mbda.gov*. The FFO contains a full and complete description of the application and programmatic requirements under the MBC Program. In order to receive proper consideration, applicants must comply with the requirements contained in the FFO.

DATES: The closing date for receipt of applications is November 10, 2010 at 5 p.m. Eastern Standard Time (EST). Complete applications must be submitted electronically through *http://www.Grants.gov*. The date that applications will be deemed to have been submitted electronically shall be the date and time received by www.Grants.gov. Applicants should save and print the proof of submission they receive from Grants.gov. Applications received after the closing date and time will not be considered. Anticipated time for processing is approximately one hundred-forty (140) days from the closing date for receipt of applications. MBDA anticipates that awards made pursuant to this notice will be made with a start date of April 1, 2011.

Pre-Application Conference: In connection with this solicitation, two pre-application conferences are scheduled for October 20 and 25, 2010. The time and location of the pre-application conference have yet to be determined. Participants must register at least 24 hours in advance of the conference and may participate in person or by telephone. Please visit the MBDA Internet Portal at *http://www.mbda.gov* (MBDA Portal) or contact an MBDA representative listed below for the specific time and location of the pre-application conference and for registration instructions.

ADDRESSES: Applicants are required to submit their proposal electronically through *http://www.Grants.gov*. MBDA will not accept hard-copy, facsimile or email transmissions of applications.

Electronic submissions should be made in accordance with the instructions available at Grants.gov (*see http://www.grants.gov/applicants/resources.jsp* for detailed information). Applicants should register as organizations, not as individuals. As part of the registration process the person submitting the application must be registered as an Authorized Organizational Representative (AOR) of the organization. AORs registered at *http://www.Grants.gov* are the only officials with the authority to submit applications at *http://www.Grants.gov*. If the application is submitted by anyone other than the organization's AOR it will be rejected and cannot be considered for the competition. Note that a given organization may designate multiple individuals as AORs for purposes of *http://www.Grants.gov* purposes. MBDA strongly recommends that applicants not wait until the application deadline date to begin the application process through Grants.gov as, in some cases, the process for completing an online application may require 3–5 working days. Before beginning to apply through *http://www.Grants.gov*, please review fully the application instructions posted at *http://www.Grants.gov* and in Section IV. of the FFO.

FOR FURTHER INFORMATION CONTACT: For further information, please visit MBDA's Minority Business Internet Portal at *http://www.mbda.gov*.

Agency Contacts: MBDA Office of Business Development, 1401 Constitution Avenue, NW., Room 5085, Washington, DC 20230. *Contact:* Ms. Rita Gonzales, Program Manager, 202–482–1940.

SUPPLEMENTARY INFORMATION:

Authority: 15 U.S.C. Section 1512 and Executive Order 11625.

Catalog of Federal Domestic Assistance (CFDA): 11.805, MBDA Business Center.

Program Description: The MBC program is a key component of MBDA's overall portfolio of minority business development services, focusing on securing large public and/or private contracts and financing transactions, stimulating job creation and facilitating entry to global markets for "eligible minority-owned businesses." For this

purpose, business concerns that are owned or controlled by the following persons or groups of persons are eligible to receive business assistance services under the MBC Program: African Americans, Hispanic Americans, Asian and Pacific Islander Americans, Native Americans (including Alaska Natives, Alaska Native Corporations and Tribal entities), Asian Indian Americans and Hasidic Jewish Americans. *See* 15 CFR 1400.1–.2 and Executive Order 11625.

The primary drivers of the MBDA MBC program are job creation and retention and the award of procurement/contract and financial transactions to MBEs. The MBCs provide services including, but not limited to, the development of a pool of contract and finance opportunities; direct matching of opportunities with qualified/vetted MBEs; execution of relationship management and deal sourcing initiatives (such as but not limited to industry clusters); assisting MBEs in accessing global market opportunities and financing; identification and securing of alternative sources of capital for MBEs; promotion of the advantages of achieving size and scale; educating MBEs on the benefits of strategic growth alternatives (i.e. mergers, acquisitions and/or joint ventures); and provision of service referrals to MBEs of all sizes.

Through the cooperative agreements expected to be awarded under this funding opportunity, MBDA seeks to establish a national network of public-private partnerships that will provide services aimed at increasing the probability of significant growth for minority-owned firms. MBC and MBDA staff will work collaboratively to improve access to market and financial opportunities (domestic and global), foster key industry relationships, and leverage business expertise. Operators of MBC projects will work with the Agency and its network of funded centers to support and enhance the Agency's initiatives, performance, brand, reach, customer service and establishment of strategic partners.

MBC services are targeted towards assisting MBE clients achieve higher levels of growth and competitiveness. Start-up and/or micro firms will be served by the MBC program via strategic partnership referrals or electronic service delivery mechanisms (*e.g.,* MBDA Business Portal). While the MBC program serves all MBEs, target clients include eligible MBEs with one or both of the following characteristics: (1) Annual revenues of over $1,000,000 or (2) participant in a high-growth industry (*e.g.,* green technology, clean energy, health care, infrastructure and broadband technology, among others). Promoting the success of MBEs is anticipated to have a significant impact on employment and the tax base in their communities.

The MBC program generally requires project staff to: (1) Directly provide high-level business development services to eligible MBEs; (2) develop and maintain a network of strategic partnerships; (3) provide collaborative consulting services with MBDA, other MBDA funded programs and strategic partners; and (4) provide referral services to clients. The MBCs will assist eligible MBEs in accessing federal and non-federal contracting and financing opportunities (domestically and globally) that result in demonstrable client outcomes and job creation/retention.

Successful applicants will possess experience in assisting minority-owned firms in obtaining large scale procurements/contracts and financing awards; accessing established supply chains; educating and assisting minority firms in joint ventures, teaming arrangements, mergers and acquisitions; and facilitating entry and large scale transactions in global markets. It is also anticipated that the mission of successful applicant organizations will align with both the mission of MBDA and the MBC program objectives.

Please refer to the FFO pertaining to this competitive solicitation for a full and complete description of the application and programmatic requirements under the MBC Program.

Funding Availability: MBDA anticipates a total of $8.7 million in FY 2011 funds will be available to fund the financial assistance awards for the MBC projects identified in this FFO. The Agency also anticipates that $8.7 million will be available in FY 2012 through FY 2015 to support continuation funding for this program. The total award period for awards made under this competitive solicitation is anticipated to be five years and all awards are expected to be made with a start date of April 1, 2011.

FY 2011 funding for this program has not yet been appropriated and the funding periods and funding amounts referenced in this solicitation are subject to the availability of funds, as well as to Department of Commerce and MBDA priorities at the time of award. In no event will the Department of Commerce or MBDA be responsible for proposal preparation costs. Publication of this notice does not obligate the Department of Commerce or MBDA to award any specific cooperative agreement or to obligate all or any part of available funds.

Pursuant to this notice, and as set forth more fully in the corresponding FFO, competitive applications for new awards are being solicited for the thirty (30) MBC projects in the respective locations identified in the below table. The anticipated amount of the financial assistance award for each MBC project is also set forth below, although actual award amounts may vary depending on the availability of funds:

MBDA National Enterprise Center (NEC or Regional Office)	MBC location (state, city)	Federal funding years 1–5
Atlanta NEC		
	Alabama—Mobile	$230,000
	Florida—Orlando	230,000
	Florida—Miami	332,112
	Mississippi—Biloxi	250,000
	Georgia—Atlanta	250,000
	North Carolina—Raleigh	250,000
	South Carolina—Columbia	250,000
Chicago NEC		
	Illinois—Chicago	590,400
	Indiana—Indianapolis	225,000
	Michigan—Detroit	290,000
	Ohio—Cleveland	225,000
	Wisconsin—Milwaukee	225,000
Dallas NEC		
	Colorado—Denver	243,359

MBDA National Enterprise Center (NEC or Regional Office)	MBC location (state, city)	Federal funding years 1–5
	New Mexico—Albuquerque	237,957
	Texas—Dallas	295,238
	Texas—El Paso	228,378
	Texas—San Antonio	242,490
New York NEC		
	New York—Manhattan	500,000
	New York—Queens	275,000
	New York—Williamsburg	291,000
	Pennsylvania—Philadelphia	275,000
	Puerto Rico*	241,000
	Maryland, Washington, DC, Virginia*	301,000
San Francisco NEC		
	Arizona*	290,000
	California—Inland Empire	355,000
	California—Los Angeles	365,000
	California—Northern*	365,000
	Hawaii*	295,500
	Nevada*	270,000
	Washington*	270,000

* Applicants are required to identify the city where the MBC project would be physically located along with a justification for the proposed placement.

The award period for projects funded under the solicitation is anticipated to be five (5) years, with five consecutive annual funding periods. Applicants must submit project plans and budgets for each of the five (5) funding periods under this award (April 1, 2011–March 31, 2012, April 1, 2012–March 31, 2013, April 1, 2013–March 31, 2014, April 1, 2014–March 31, 2015 and April 1, 2015–March 31, 2016). Projects will initially be funded for the first year of the award. A project operator will not compete for funding in years two through five, as long as the center is operating at a "Commendable" or "Outstanding" performance level at the time during the current program year that MBDA determines its recommendations to the Grants Officer for continuation funding for the next program year. A project that achieves a performance rating of "Good" or lower will not qualify for automatic renewal, but rather will be eligible for negotiation of award terms and conditions for the next funding period at the discretion of MBDA, subject to the approval of the Grants Officer.

In this respect, recommendations for continuation funding are generally evaluated by MBDA based on the mid-year performance rating and/or a combination of the mid-year and cumulative third quarter performance ratings for the current program year. In making such continued funding determinations, MBDA and the Department of Commerce will consider all the facts and circumstances of each case, such as, but not limited to, market conditions, most recent performance of the project and other mitigating circumstances.

Electronic Access: Applicants will be able to access, download and submit electronic grant applications for the MBC Program through *http://www.Grants.gov*. MBDA strongly recommends that applicants not wait until the application deadline date to begin the application process through Grants.gov as in some cases the process for completing an online application may require additional time (*e.g.,* 3–5 working days). The date that applications will be deemed to have been submitted electronically shall be the date and time received at Grants.gov. Applicants must save and print the proof of submission they receive from Grants.gov. Applications received after the closing date and time will not be considered.

Program Priorities: Preference may be given during the selection process to applications that effectively address one or more of the following MBDA program priorities:

(a) Applicants who demonstrate experience in assisting MBEs in obtaining large scale contracts and financing awards and accessing established supply chains;

(b) Applicants who demonstrate a record of facilitating large scale transactions for MBEs in global markets, or facilitating entry into global markets;

(c) Applicants who demonstrate a record of assisting MBEs in joint ventures, teaming arrangements, mergers and acquisitions;

(d) Applicants who demonstrate a track record of successfully partnering and collaborating with third-party entities for the benefit of MBEs;

(e) Applicants who demonstrate experience working with MBEs in high-growth industries;

(f) Applicants who demonstrate the capacity and willingness to assist MBEs in identifying and accessing federal procurement opportunities, either directly or via partnerships;

(g) Proposals that direct 80% or more of the federal funding for the project towards direct business consulting staff costs (i.e., direct consulting staff salaries and fringe benefits, travel costs and training costs); and

(h) Applicants who propose innovative additions to the MBC program that significantly enhance their opportunity to be successful (*See* Appendix F of the FFO for samples of possible additions that can be developed, enhanced and proposed by applicants).

Eligibility Criteria: For-profit entities (including but not limited to sole-proprietorships, partnerships, and corporations), non-profit organizations, state and local government entities, American Indian Tribes, and educational institutions are eligible to operate MBCs.

Match Requirements: There is no predefined minimum or maximum amount of required non-federal cost sharing under the MBC program. However, as discussed below, non-federal cost sharing through the generation of "program income" is mandatory. Non-federal cost share is the portion of the total project costs not borne by the Federal Government.

The MBC program is a fee-for-service program and MBC operators are required to generate "program income" through the collection of client fees,

membership fees, success fees and/or other fee structures proposed by the applicant. All proposed fee structures must be acceptable to MBDA and approved by the Grants Officer. Program income generated by the MBC project must be applied directly to the award's non-federal cost share and must be used in furtherance of program objectives. *See* the "Program Income" discussion in Section III.B, Non-Federal Cost Share Requirement, of the FFO as well as the Proposed Budget and Narrative portion of Section IV.B. of the FFO for additional information on this requirement.

Beyond the required generation of program income, applicants may contribute additional non-federal cost share to the award by one or more of the following methods: (1) Applicant cash contributions; (2) applicant in-kind (*i.e.,* non-cash) contributions; or, (3) third-party cash or in-kind contributions (including a state or local grant or other form of support for the project).

Evaluation Criteria: Applications will be evaluated and applicants will be selected based on the below evaluation criterion. The maximum total number of points that an applicant may receive is 110, including: (1) 90 points under the Program Narrative component; (2) 10 points under Budget and Budget narrative component; and (3) 10 bonus points under the optional Service Innovation component. The number of points assigned to each evaluation criterion will be determined on a competitive basis by the MBDA review panel based on the quality of the application with respect to each evaluation criterion.

Program Narrative:

1. Applicant Capability (30 points total).

• Organizational Background and Knowledge of Community (5 points maximum): Applicant's organizational background, emphasizing knowledge of the minority business sector and strategies for enhancing its growth and expansion. Consideration will be given as to whether the applicant has a physical presence in the applicable location and past experience providing related services.

• Mission Alignment (5 points maximum): The extent to which the mission of the applicant organization aligns with the mission of MBDA and the objectives of the MBC program.

• Access to Markets (5 points maximum): Applicant's knowledge of and experience in public and private sector contracting opportunities for MBEs, as well as demonstrated experience in assisting clients into supply chains. The applicant's professional working relationships and networks with potential sources of contracts for MBEs will also be considered. Additionally, the applicant's experience with facilitating large procurement/contract deals on behalf of MBEs, conducting business matchmaking forums, and assisting MBEs with the establishment of joint ventures and teaming arrangements will be considered.

• Access to Capital (5 points maximum): Applicant experience in successfully preparing and matching MBEs with traditional sources of capital, alternative sources of financing (*i.e.,* equity and venture capital), loan and bonding packages, and mergers and acquisitions. The applicant's professional working relationships and networks with financial institutions (corporate, banking and investment communities) will also be considered.

• Business Consulting to Clients (5 points maximum): The applicant's experience with and strategies for enhancing minority business growth and delivery of business consulting services and related successful client outcomes.

• Key Staff (5 points maximum): Qualifications and experience of proposed key staff, including but not limited to the Project Director and business consultants. The Applicant's plan for recruiting staff will also be considered.

2. Resources (30 points total).

• Partners (10 points maximum): The applicant's plan for establishing and maintaining a network of strategic partners and the extent to which each partner will support the MBC in implementing the program and meeting program performance goals will be a consideration. Whether the partnerships will be leveraged towards assisting clients with securing contracts, securing financing, job creation, penetrating global markets, achieving size and scale, or providing referrals for services will also be considered. Additionally, how the applicant will interact and coordinate with its strategic partners towards effecting successful client outcomes will be considered.

• Resources (10 points maximum): Resources that will be used in implementing the program in each of the five program years will be considered. Resources include, but are not limited to, existing prior and/or current data lists that will serve in fostering immediate success for the MBC.

• Location/Equipment (10 points maximum): The applicant's strategic rationale for the proposed MBC office (the center location must be close to private and public sector resources and potential clients, and be professional in appearance). The applicant's plan for satisfying the MBC information technology requirements, including computer hardware, software requirements, creation and support of an MBC website and network map (*see* Appendix C, Information Technology and Computer Requirements, of the FFO) will also be considered.

3. Techniques and Methodologies (30 points total)

• Performance Measures (10 points maximum): For each of the five (5) funding periods, the applicant's techniques and methodology to be used in implementing the program will be considered, including the quarterly breakdown of the performance goals. Additionally, the applicant's recognition of and strategy for addressing existing market conditions in achieving its proposed performance goals will also be considered. Additionally, how the applicant proposes to establish a system that corresponds to, or may compliment, MBDA's tracking and validation of contracts and financings will be considered. (*See* Suggested Performance Goals for each MBC location are listed in Appendix B, Suggested Performance Goals by Center Location, of the FFO.) Please note that deviations, either above or below, from the Suggested Performance Goals require justification.

• Start-up Phase (10 points maximum): The applicant's strategic plan for commencement of the MBC operations within the initial 60-day period (the MBC shall have sixty (60) days to become fully operational after an award is made—*see* Section I.A.4., Operational and Performance Requirements, of the FFO) will be considered. Please note that the applicant must submit a schedule with significant implementation milestones, such as the hiring of key staff and the opening of the MBC facility.

• Work Requirements Execution Plan (10 points maximum): The applicant's description for how staff time will be used effectively and efficiently to achieve the work requirements of the overall program including the start-up phase will be considered. Please note that the applicant must include a specific five-year plan-of-action detailing how the MBC work requirements will be met for each of the five (5) funding periods. (*See* "Program Details and Work Requirements" in Section I.A.4 of the FFO.) A staff allocation chart for each of the five (5) years must also be included as part of the work requirements execution plan.

Budget and Budget Narrative:

1. Reasonableness, Allowability and Allocability of Proposed Program Costs (5 points maximum).

All of the proposed program costs expenditures should be broken down into their individual units and discussed. The budget narrative must match the proposed line item budget. Fringe benefits and other percentage item calculations should match the proposed budget line-item and narrative. Line item amounts in the detailed budget and budget narrative must match the budget numbers reflected in Standard Form (SF) 424 (one for all five years) and 424A (one for each of the five years).

All costs included in the proposed budget must be allowable, allocable and reasonable. Each item of cost *must* be accompanied by a sufficiently detailed description and cost breakdown to enable reviewers to make a determination regarding its allowability, allocability and reasonableness. One word descriptions and lump sum amounts *are not adequate* for justifying costs. Each budget item should be broken out and described fully so that there is no ambiguity as to its relevance to MBC program objectives and its reasonableness. The following Office of Management and Budget (OMB) Circulars and Federal Acquisition Regulations (depending on the type of recipient) will be used to determine allowable costs, and will apply to the entire amount of the MBC award, including both the federal and non-federal program costs:

- 2 CFR part 220 (OMB Circular A–21, "Cost Principles for Educational Organizations");
- 2 CFR part 225 (OMB Circular A–87, "Cost Principles for State, Local and Indian Tribal Governments");
- 2 CFR part 230 (OMB Circular A–122, "Cost Principles for Nonprofit Organizations"); and
- 48 CFR part 31 for commercial organizations and for those organizations listed in Appendix C to 2 CFR part 230.

2. Performance-Based Budgeting (5 points maximum).

The extent to which the line-item budget and budget narrative relate to the accomplishment of the MBC work requirements and performance measures (i.e., performance-based budgeting) will be considered. The budget will be compared to the program narrative to determine whether the budget is realistic from a programmatic perspective and whether costs are necessary to complete the work requirements. Costs included in the budget that are determined to be unrealistic will be considered as an indication of an applicant's lack of understanding of the requirements of the MBC program and/or the methods that must be utilized to deliver services. Program Income (i.e., client fees, membership fees, success fees, and/or other acceptable fee structures proposed) must be adequately addressed and properly documented, including but not limited to how the proceeds will be billed, collected, waived and used by the applicant in furthering the program objectives.

Service Innovation (Optional)—Bonus Points (10 points maximum):

Bonus points may be awarded to an applicant proposing innovative MBE services that enhance the required MBC program scope. This component is optional and any service(s) proposed under the "Service Innovation" is in addition to the core MBC services (*see* "Program Details and Work Requirements" in Section I.A.4, of the FFO). Proposed innovations cannot be used as a substitute or otherwise in lieu of the defined MBC program and service requirements.

An applicant proposing a "Service Innovation" must fully describe the aspects of any innovative addition(s) to the work requirements that the applicant will implement. Some examples have been provided in Appendix F—Sample Innovation Concepts, of the FFO. Applicants are not required to utilize these examples. MBDA encourages any innovative solutions; however, proposed ideas (including the stated examples) must be fully developed and articulated, including their processes and anticipated results.

Review and Selection Process

1. Initial Screening

Prior to the formal paneling process, each application will receive an initial screening to ensure that all required forms, signatures and documentation are present. An application will be considered non-responsive and will not be evaluated by the review panel if it is received after the closing date for receipt of applications, the applicant authorized organizational representative (AOR) fails to submit Standard Form 424 by the application closing date, or the application does not provide for the operation of a MBC. Note, AOR substitutions require approximately ten (10) working days to be processed by www.Grants.gov. Other application deficiencies will be accounted for during panel review and may result in point deductions.

2. MBDA Merit Review Panel

Each responsive application will receive an independent, merit review by a panel qualified to evaluate the applications submitted. The review panel will consist of at least three (3) individuals, all of whom are full-time federal employees and at least one of whom will be an MBDA employee, who will review the applications for a specified project based on the published evaluation criterion. Each reviewer shall evaluate and provide a score for each proposal. Each project review panel (through the panel Chairperson) shall provide the MBDA Selecting Official with a ranking of the applications based on the average of the reviewers' scores.

3. MBDA Regional Director Review

The MBDA Regional Director will review panel recommendations and submitted applications for MBC projects located within the geographical area served by his/her National Enterprise Center (NEC) (sometimes referred to as an MBDA Regional Office). Responsibility for the NEC review will reside with the Regional Director.

The applicable MBDA Regional Director will review the panel recommendation and submitted applications and provide a written memorandum to the MBDA Selecting Official either indicating his/her concurrence with the recommendation of the panel or making an alternate recommendation for selection out of rank order. Any recommendation by the Regional Director for selection out of rank order must be justified based on one or more of the MBDA Program Priorities outlined in the FFO.

The panel recommendation, together with Regional Director's recommendation, will be provided to the MBDA Selecting Official for consideration in making the final award recommendation to the Grants Officer.

4. Final Selection and Recommendation for Funding

The MBDA National Director is the Selecting Official and makes the final recommendation to the Grants Officer regarding the funding of applications under this competitive solicitation. MBDA expects to recommend funding of the highest ranked applicant for each of the MBC projects being competed (only one award will be made for each project), as evaluated and recommended by the review panel and taking into account results of the respective MBDA Regional Director's review. However, the MBDA National Director may decide not to select any of the recommended applications, or may select an applicant

out of rank order, for either of the following reasons:

(a) A determination that a lower ranked applicant better addresses one or more of the program priorities set forth in the FFO. The National Director (or his/her designee) reserves the right to conduct one or more site visits, in order to make a better assessment of an applicant's capability to achieve the program priorities; or

(b) The availability of MBDA funding. Prior to making a final recommendation for funding to the Grants Officer, MBDA may conduct negotiations with an applicant that Selecting Official anticipates recommending and/or request that the applicant provide written clarifications regarding its application.

Intergovernmental Review: Applications under this program are not subject to Executive Order 12372, "Intergovernmental Review of Federal Programs."

Limitation of Liability: In no event will MBDA or the Department of Commerce be responsible for proposal preparation. All funding periods under the award are subject to the availability of funds to support the continuation of the project. Publication of this notice does not obligate MBDA or the Department of Commerce to award any specific project or to obligate any available funds. FY 2011 funds have not yet been appropriated for the MBC program.

Universal Identifier: All applicants will be required to provide a Dun and Bradstreet Data Universal Numbering system (DUNS) number during the application process. *See* the June 27, 2003 **Federal Register** notice (68 FR 38402) for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free DUNS Number request line at 1–866–705–5711 or by accessing the Grants.gov Web site at *http://www.Grants.gov.*

Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements: The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of February 11, 2008 (73 FR 7696) are applicable to this solicitation.

Paperwork Reduction Act: This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of the MBDA Performance Online Database and of Standard Forms 424, 424A, 424B, SF–LLL, and CD–346 have been approved by the Office of Management and Budget (OMB) under the respective control numbers 0640–0002, 4040–0004, 4040–0006, 4040–0007, 0348–0046 and 0605–0001. Notwithstanding any other provisions of the law, no person is required to respond to, nor shall any person be subject to 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.

Executive Order 12866: This notice has been determined to be not significant for purposes of E.O. 12866.

Administrative Procedure Act/ Regulatory Flexibility Act: Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act for rules concerning public property, loans, grants, benefits, or contracts (5 U.S.C. 533(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 533 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

Dated: September 22, 2010.

Alejandra Y. Castillo,

Deputy National Director, Minority Business Development Agency.

[FR Doc. 2010–24164 Filed 9–24–10; 8:45 am]

BILLING CODE 3510–21–P

CONSUMER PRODUCT SAFETY COMMISSION

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Requirements for Non-Full-Size Baby Cribs

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission ("CPSC" or "Commission") is announcing that a proposed collection of information has been submitted to the Office of Management and Budget ("OMB") for review and clearance under the Paperwork Reduction Act of 1995 ("PRA").

DATES: Fax written comments on the collection of information by October 27, 2010.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, *Attn:* CPSC Desk Officer, *FAX:* 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 3041–0012. In addition, written comments also should be submitted by e-mail to *cpsc-os@cpsc.gov,* or by mail/hand delivery/courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

FOR FURTHER INFORMATION CONTACT: Linda Glatz, Division of Policy and Planning, Office of Information Technology, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, 301–504–7671, *lglatz@cpsc.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, the CPSC has submitted the following proposed collection of information to OMB for review and clearance: Requirements for Non-Full-Size Baby Cribs—(OMB Control Number 3041–0012—Extension).

The safety regulations for non-full-size baby cribs (also referred to as "non-full-size cribs") are codified at 16 CFR Part 1509 and 16 CFR 1500.18(a)(14). These regulations were issued to reduce hazards of strangulation, suffocation, pinching, bruising, laceration, and other injuries associated with non-full-size cribs. (A non-full-size crib is a crib having an interior length greater than 55 inches or smaller than 49¾; inches; or an interior width greater than 30⅝; inches or smaller than 25⅜; inches; or both.) The regulations prescribe performance, design, and labeling requirements for non-full-size cribs. They also require manufacturers and importers of those products to maintain sales records for a period of three years after the manufacture or importation of non-full-size cribs. If any non-full-size cribs subject to provisions of 16 CFR 1500.18(a)(14) and part 1509 fail to comply in a manner to warrant a recall, the required records can be used by the manufacturer or importer and by the Commission to identify those persons and firms who should be notified of the recall.

In the **Federal Register** of June 28, 2010 (75 FR 36637), the CPSC published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows. Approximately 16 firms manufacture or import non-full-size baby cribs and are subject to the record keeping requirements. The Commission staff

estimates that the record keeping will take five hours per firm for obtaining the information from existing sales and distribution data. The annualized cost to respondents for the burden for collection of information is approximately $2,222. This estimated cost to respondents is based on 80 hours (16 firms × 5 hours each) multiplied by a cost of $27.78 per hour (Bureau of Labor Statistics, Total Compensation, All workers, goods-producing industries, Sales and office, September 2009, Table 9) or $2,222.40, which we have rounded down to $2,222.

The cost to the government (wages and benefits) for 8 hours staff time to review the information (½ hour per firm) is approximately $655. Assuming that the employee reviewing the records will be a GS–14 level employee, the average hourly wage rate for a mid-level GS–14 employee in the Washington, DC metropolitan area, effective as of January 2010, is $57.33. This represents 70 percent of total compensation (Bureau of Labor Statistics, March 2010, percentage wages and salaries for all civilian management, professional, and related employees, Table 1). Adding an additional 30 percent for benefits brings average hourly compensation for a mid-range GS–14 employee to $81.89. Thus, 8 hours multiplied against an hourly compensation figure of $81.89 results in an estimated cost to the government of $655.12, which we have rounded down to $655.

Dated: September 21, 2010.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2010–24130 Filed 9–24–10; 8:45 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Requirements for Full-Size Baby Cribs

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission ("CPSC" or "Commission") is announcing that a proposed collection of information has been submitted to the Office of Management and Budget ("OMB") for review and clearance under the Paperwork Reduction Act of 1995 ("PRA").

DATES: Fax written comments on the collection of information by October 27, 2010.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, *Attn:* CPSC Desk Officer, *FAX:* 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 3041–0013. In addition, written comments also should be submitted by e-mail to *cpsc-os@cpsc.gov,* or by mail/hand delivery/courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

FOR FURTHER INFORMATION CONTACT: Linda Glatz, Division of Policy and Planning, Office of Information Technology, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, 301–504–7671, *lglatz@cpsc.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, the CPSC has submitted the following proposed collection of information to OMB for review and clearance: Requirements for Full-Size Baby Cribs—(OMB Control Number 3041–0013—Extension).

The safety regulations for full-size baby cribs (also referred to as "full-size cribs") are codified at 16 CFR part 1508 and 16 CFR 1500.18(a)(13). These regulations were issued to reduce hazards of strangulation, suffocation, pinching, bruising, laceration, and other injuries associated with full-size cribs. (Full-size cribs have specific interior dimensions, 28 ± ⅝ inches (71 ± 1.6 centimeters) wide by 52 ⅜ ± ⅝ inches (133 ± 1.6 centimeters) long). The regulations prescribe performance, design, and labeling requirements for full-size cribs. They also require manufacturers and importers of those products to maintain sales records for a period of three years after the manufacture or importation of full-size cribs. If any full-size cribs subject to provisions of 16 CFR 1500.18(a)(13) and Part 1508 fail to comply in a manner to warrant a recall, the required records can be used by the manufacturer or importer and by the Commission to identify those persons and firms who should be notified of the recall. The Commission will consider all comments received in response to this notice before requesting approval of this collection of information from OMB.

In the **Federal Register** of June 28, 2010 (75 FR 36638), the CPSC published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows. Approximately 75 firms manufacture or import full-size baby cribs and are subject to the recordkeeping requirements. The Commission staff estimates that the recordkeeping will take five hours per firm for obtaining the information from existing sales and distribution data. The annualized cost to respondents for the burden for collection of information is $10,417.50 based on 375 hours (75 firms × 5 hours each) multiplied by a cost of $27.78 per hour (Bureau of Labor Statistics, Total Compensation, All workers, goods-producing industries, Sales and office, September 2009, Table 9).

The cost to the government (wages and benefits) for 37.5 hours staff time to review the information (½ hour per firm) is approximately $3,071. Assuming that the employee reviewing the records will be a GS–14 level employee, the average hourly wage rate for a mid-level GS–14 employee in the Washington, DC metropolitan area, effective as of January 2010, is $57.33. This represents 70 percent of total compensation (Bureau of Labor Statistics, March 2010, percentage wages and salaries for all civilian management, professional, and related employees, Table 1). Adding an additional 30 percent for benefits brings average hourly compensation for a mid-range GS–14 employee to $81.89. Thus, 37.5 hours multiplied against an hourly compensation figure of $81.89 results in an estimated cost to the government of $3,070.87, which we have rounded up to $3,071.

Dated: September 21, 2010.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2010–24131 Filed 9–24–10; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket No. DoD–2010–OS–0013]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the

following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by October 27, 2010.

Title and OMB Number: Post-Election Surveys; OMB Control Number 0704–0125.

Type of Request: Revision.

Title of Survey: The 2010 Post-Election Voting Survey of Overseas Citizens.

Number of Respondents: 250,000.

Responses per Respondent: 1.

Average Burden per Response: 30 minutes.

Annual Burden Hours: 125,000.

Affected Public: Individuals or Households.

Frequency: One Time.

Title of Survey: The 2010 Post-Election Voting Survey of Local Election Officials.

Number of Respondents: 7,900.

Responses per Respondent: 1.

Average Burden per Response: 30 minutes.

Annual Burden Hours: 3,950 hours.

Affected Public: State, Local or Tribal Government.

Frequency: One time.

Needs and Uses: The information collection requirement is necessary to meet a requirement of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA of 1986 [42 U.S.C. 1973ff]). UOCAVA requires a report to the President and Congress on the effectiveness of assistance under the Act, a statistical analysis of voter participation, and a description of State-Federal cooperation.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title 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.

DoD Clearance Officer: Ms. Patricia Toppings/Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: September 23, 2010.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–24091 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Army National Cemeteries Advisory Commission

AGENCY: Department of Defense (DoD).

ACTION: Establishment of Federal advisory committee.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and 41 CFR 102–3.50, the Department of Defense gives notice that it is establishing the charter for the Army National Cemeteries Advisory Commission (hereafter referred to as "the Commission").

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703–601–6128.

SUPPLEMENTARY INFORMATION: The Commission is a discretionary Federal advisory committee established to provide the Secretary of Defense, through the Under Secretary of the Army, independent advice and recommendations on the Army National Cemeteries Program, including, but not limited to:

a. Management and operational issues, including bereavement practices;

b. Plans and strategies for addressing long-term governance challenges;

c. Resource planning and allocation; and

d. Any other matters relating to Army National Cemeteries that the Commission's co-chairs, in consultation with the Secretary of the Army, may decide to consider.

The Commission shall be comprised of no more than nine members, who are preeminent authorities in their respective fields of interest or expertise, including:

a. One member nominated by the Secretary of Veterans Affairs;

b. One member nominated by the Secretary of the American Battle Monuments Commission; and

c. No more than 7 members nominated by the Secretary of the Army.

The commission members shall be appointed by the Secretary of Defense, and those members, who are not full-time or permanent part-time Federal officers or employees, shall be appointed as experts and consultants under the authority of 5 U.S.C. 3109 and shall serve as special government employees.

Members may serve two-year terms of service on the Commission; however Members who are appointed under the authority of 5 U.S.C. 3109 are subject to renewal on an annual basis by the Secretary of Defense. Unless otherwise authorized by the Secretary of Defense, no member shall serve more than 6 years on the Commission.

With the exception of travel and per diem for official travel, Commission members appointed as special government employees shall serve without compensation.

With DoD approval, the Commission is authorized to establish subcommittees, as necessary and consistent with its mission. These subcommittees or working groups shall operate under the provisions of the Federal Advisory Committee Act of 1972, the Government in the Sunshine Act of 1978 (5 U.S.C. 552b), and other appropriate Federal regulations.

Such subcommittees or workgroups shall not work independently of the chartered Commission, and shall report all their recommendation and advice to the Commission for full deliberation and discussion. Subcommittees or workgroups have no authority to make decisions on behalf of the chartered Commission; nor can they report directly to the Department of Defense or any Federal officers or employees who are no Commission members.

The Commission shall meet at the call of the Designated Federal Officer, in consultation with the co-chairs. The estimated number of Commission meetings is four per year.

The Designated Federal Officer, pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with established DoD policies and procedures.

In addition, the Designated Federal Officer is required to be in attendance at all meetings, however, in the absence of the Designated Federal Officer, the Alternate Designated Federal Officer shall attend the meeting.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the Army National Cemeteries Advisory Commission membership about the Commission's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Army National Cemeteries Advisory Commission.

All written statements shall be submitted to the Designated Federal Officer for the Army National Cemeteries Advisory Commission, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Army National Cemeteries Advisory Commission Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Army National Cemeteries Advisory Commission. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: September 22, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–24166 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2010–OS–0126]

Privacy Act of 1974; System of Records

AGENCY: Department of Defense (DoD).

ACTION: Notice to add a system of records.

SUMMARY: The Office of the Secretary of Defense proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on October 27, 2010, unless comments are received which 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, Room 3C843 Pentagon, 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: Ms. Cindy Allard at (703) 588–6830.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records 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 Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on September 13, 2010, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996; 61 FR 6427).

Dated: September 22, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DPR 40 DoD

SYSTEM NAME:

Wounded Warrior Care and Recovery Transition Coordination Program System Solution

SYSTEM LOCATION:

Manpower Information Systems Technology Branch, Manpower Information Systems Division, Manpower and Reserve Affairs Headquarters, U.S. Marine Corps, 3280 Russell Road, Quantico, VA 22134–5103.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Department of Defense military members, including Active, Reserve, and National Guard, and Coast Guard personnel undergoing medical treatment, recuperation or therapy who incurred or aggravated a serious illness or injury in the line of duty; and may be assigned to a temporary disability retired or permanent disability retired list due to the Military Department's disability evaluation system proceedings.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, rank/grade, Military Occupational Specialty (MOS), Social Security Number (SSN), date of birth, current address, home telephone number, service separation information including Permanent Duty Retirement List (PDRL), Temporary Duty Retirement List (TDRL), and medical separation, limited injury and illness-specific medical information, and other personnel management data specifically awards, time in service, end active obligated service date, demobilization date, separation date, retirement date, temporary disability retirement list date, permanent disability retirement, and spouse and/or primary caregiver name, address, and telephone number (home, cell and/or work).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 113, Secretary of Defense; DoD Directive 5124.02, Under Secretary of Defense for Personnel and Readiness (USD(P&R)); DoD Instruction 1300.24, Recovery Coordination Program (RCP); and E.O. 9397, (SSN) as amended.

PURPOSE(S):

To improve the care, management, and transition of recovering Service Members. Contact information is used by Recovery Care Coordinators to facilitate the uniformity and effectiveness of care and transition from active duty to temporary or permanent retirement for eligible individuals. These records are also used as a management tool for statistical analysis, tracking, reporting, evaluating program effectiveness and conducting research.

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 may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows."

The DoD 'Blanket Routine Uses' set forth at the beginning of the Office of

the Secretary of Defense compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper file folders and electronic storage media.

RETRIEVABILITY:

Name, Social Security Number (SSN), rank/grade.

SAFEGUARDS:

The data will be housed at computer facilities and terminals located in restricted areas accessible only to authorized persons that are properly screened, cleared and trained. All users are required to provide a valid common access card (CAC) and access is specifically granted by a system administrator. Records will be maintained in a secure, password protected electronic system that will utilize security hardware and software to include: Multiple firewalls, active intruder detection, and role-based access controls.

RETENTION AND DISPOSAL:

Disposition Pending. Until the National Archives and Records Administration has approved the retention and disposal of these records, treat them as permanent.

SYSTEM MANAGER(S) ADDRESS:

Principal Deputy for Care Coordination, Office of Wounded Warrior Care and Transition Policy, Office of the Secretary of Defense, OUSD (P&R) WWCTP, 200 Stovall Street, Alexandria, VA 22332–0800.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Principal Deputy for Care Coordination, Office of Wounded Warrior Care and Transition Policy, Office of the Secretary of Defense, OUSD (P&R) WWCTP, 200 Stovall Street, Alexandria, VA 22332–0800.

Written requests must be signed and contain the individual's full name, mailing address and Social Security Number (SSN).

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington DC 20301–1155.

Written requests must include the name and number of this system of record notice, the Service member's full name and Social Security Number (SSN) and be signed.

CONTESTING RECORDS PROCEDURES:

The Office of the Secretary of Defense rules for accessing records, for contesting contents and appealing initial agency determinations are published in Office of the Secretary of Defense Administrative Instruction 81, 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individuals, the Operational Data Store Enterprise system, the Total Force Data Warehouse, and the Defense Casualty Information Processing System.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–24167 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE Co-Pay Waiver at Captain James A. Lovell Federal Health Care Center Demonstration Project

AGENCY: Office of the Secretary, Department of Defense.

ACTION: Notice of TRICARE Co-Pay waiver at Captain James A. Lovell Federal Health Care Center demonstration project.

SUMMARY: This notice is to advise interested parties of a demonstration project entitled "TRICARE Co-Pay Waiver at Captain James A. Lovell Federal Health Care (FHCC) Demonstration Project." Under this demonstration, there would be no deductibles, cost shares, or co-pays for eligible beneficiaries seeking care at the FHCC. This demonstration would take place under the authority of 10 U.S.C. Section 1092(a)(1)(B) Cost-sharing by eligible beneficiaries. The effectiveness of this demonstration will be tested by comparing the volume of care for beneficiaries that would have paid co-payments to the prior year volume to determine if increased utilization actually occurred as a result of the elimination of co-payments. Increased utilization would be an indicator of what to expect in future Department of Defense (DoD)/Department of Veterans Affairs (VA) mergers of this nature and would influence decisions regarding financial integration.

DATES: *Effective Date:* This five-year demonstration project will be effective October 1, 2010.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth E. Cox, Director, DoD/VA Program Coordination Office, Health Affairs, Telephone (703) 681–4258.

SUPPLEMENTARY INFORMATION:

A. Background: The Captain James A. Lovell FHCC, which is scheduled to open in October 2010, will be the first Federal health care facility in the nation to be operated jointly between the VA and the Navy. New construction will be completed to combine the North Chicago VA Medical Center (NCVAMC) and Naval Health Clinic Great Lakes (NHCGL) into a single, fully integrated federal health care facility. The completely integrated medical center will be led by a VA Chief Executive Officer, and a U.S. Navy medical department officer as the Deputy.

Title XVII of the National Defense Authorization Act (NDAA) for Fiscal Year 2010 authorized the Department of Defense and Department of Veterans Affairs Medical Facility Demonstration Project in North Chicago/Great Lakes, IL. Because the legislation did not address the issue of beneficiary cost sharing, it is being addressed through this notice.

DoD and VA have carefully analyzed the impact of requiring co-pays by beneficiaries, and believe that the requirement may adversely impact the success of the integration. At this time, it is estimated that keeping the co-pays in place would result in at least a 50 percent reduction in DoD beneficiaries treated at the FHCC since those patients would see no added benefit to traveling to FHCC and will seek care at facilities closer to home. Furthermore, beneficiaries who had previously received care at the NHCGL when it was designated as an MTF, would be required to make a co-payment for medical care provided, including emergency, hospitalization, and behavioral health services. Since the VAMC will no longer be a separate authorized TRICARE provider, but will be under the integrated structure, there will be no health care claim prepared to bill TRICARE. The organizations are merged financially in accordance with the Executive Agreement. The Department will therefore test whether waiver of the co-pay by the beneficiary will impact the utilization and cost effectiveness of the demonstration.

B. Details of the Demonstration: The April 23, 2010, Executive Agreement (EA) between VA and DoD reads "Active

Duty members and Active Duty dependents enrolled in TRICARE Prime pay no co-payments for inpatient or outpatient health care services. DoD may establish special co-pay rules for the FHCC under demonstration project authority of 10 U.S.C. 1092 for other beneficiaries." Under this demonstration, co-pays will be waived for any eligible DoD beneficiary seeking healthcare at the FHCC. The waiver of cost sharing applies to all impatient, outpatient, and ancillary services and all outpatient prescription drugs provided at the FHCC. The waiver is consistent with current policies and procedures followed at all MTFs. According to an Independent Government Cost Estimate (IGCE), it is estimated that waiving the co-pays for all beneficiaries including Medicare-eligible beneficiaries will cost DoD an additional $101,518 a year. This cost assumes that the lack of co-pays would lead to a 20 percent increase in utilization by the affected groups (i.e. induced demand) at this facility. Without this assumption, the waiver would cost DoD an additional $84,599 annually. The cost of additional staffing required to compute and collect co-payments could easily be more than $100,000 per year.

The effectiveness of this demonstration will be tested by comparing the volume of care for beneficiaries that would have paid co-payments to the prior year volume to determine if increased utilization actually occurred as a result of the elimination of co-payments. Increased utilization would be an indicator of what to expect in future DoD/VA mergers of this nature and would influence decisions regarding financial integration. The final report on this demonstration will accompany the final report on the FHCC demonstration required by Section 1701, NDAA 2010.

Dated: September 20, 2010.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–24092 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID USAF–2010–0022]

Proposed Collection; Comment Request

AGENCY: Department of the Air Force, DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Department of the Air Force announces a proposed new public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by November 26, 2010.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

• *Federal eRulemaking 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, docket number and title 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: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Air Force Institute of Technology, 2950 Hobson Way, WPAFB, OH, 45433, 937–255–3636 x4674.

Title; Associated Form; and OMB Number: Leading Edge Supply Chain Survey; OMB Number 0701–TBD.

Needs and Uses: This study seeks to uncover the emerging trends in supply chain management (SCM) practices, processes and metrics that could be beneficial to the Department of Defense, with particular emphasis on the U.S. Air Force.

Affected Public: Business or other for profit.

Annual Burden Hours: 613.5.

Number of Respondents: 818.

Responses per Respondent: 1.

Average Burden per Response: 45 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Potential respondents to this survey are individuals with in depth experience in commercial supply chain management.

Dated: August 27, 2010.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–24090 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2010–0032]

Privacy Act of 1974; System of Records

AGENCY: U.S. Marine Corps, Department of the Navy, DoD.

ACTION: Notice to reinstate a system of records.

SUMMARY: The U.S. Marine Corps proposes to reinstate a system of records to its inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

After review, it has been determined that the records covered under this previously deleted notice (*see* 75 FR 43502, July 26, 2010) are not covered elsewhere as stated; therefore this notice is being reinstated.

DATES: This proposed action will be effective without further notice on October 27, 2010, unless comments are received which 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, Room 3C843 Pentagon, 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: Ms. Tracy Ross at (703) 614–4008.

SUPPLEMENTARY INFORMATION: The U.S. Marine Corps system 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: Headquarters, U.S. Marine Corps, FOIA/PA Section (ARSF), 2 Navy Annex, Room 3134, Washington, DC 20380–1775.

The U.S. Marine Corps proposes to reinstate a system of records to its inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The previous system of records notice is being republished in its entirety, below. The reinstatement is not within the purview of subsection 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: September 22, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

M01070–6

SYSTEM NAME:

Marine Corps Official Military Personnel Files.

SYSTEM LOCATION:

Primary Location: For the Official Military Personnel File (OMPF) records of active regular and reserve members, those members who are on the Temporary Disability Retired List, and those members who retired, separated, died while in service, or with a remaining military service obligation after December 31, 1997, or later: Headquarters, U.S. Marine Corps (Code MMSB), 2008 Elliot Road, Quantico, VA 22134–5030.

For OMPF records of members who retired, separated, or died while in service, prior to 1998: National Personnel Records Center, Military Personnel Records, 9700 Page Avenue, St. Louis, MO 63132–5100.

Secondary Locations: For OQRs/SRBs records of Marine Corps Inactive Ready Reserve (IRR) members: Commanding General, Marine Corps Mobilization Command, 15303 Andrews Road, Kansas City, MO 64147–1207.

For OQRs/SRBs records of Marine Corps officer's or enlisted members: The duty Commanding Officer who has responsibility for the administration of the records.

Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx.*

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active duty and Corps Inactive Ready Reserve (IRR) members who are enlisted, appointed, or commissioned status; members of the U.S. Marine Corps who were enlisted, appointed, or commissioned status and were separated by discharge, death, or other termination of military status.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, Social Security Number (SSN), enlistment contract, Department of Veterans Affairs benefit forms, physical evaluation board proceedings, military occupational specialty data, statement of service, qualification record, group life insurance election, emergency data, application for appointment, qualification/evaluation report, oath of office, medical examination, security clearance questionnaire, application/memo for retired pay, application for correction of military records, field/application for active duty, transfer or discharge report/Certificate of Release or Discharge from Active Duty, active duty report, voluntary reduction, line of duty and misconduct determinations, discharge or separation reviews, police record checks, consent/declaration of parent/guardian, Army Reserve Officers Training Corps supplemental agreement, award recommendations, academic reports, line of duty casualty report, U.S. field medical card, retirement points, deferment, pre-induction processing and commissioning data, transcripts of military records, summary sheets review of conscientious objector, options election, oath of enlistment, enlistment extensions, survivor benefit plans, efficiency reports, records of proceeding, 10 U.S.C. section 815 appellate actions, determinations of moral eligibility, waiver of disqualifications, temporary disability record, change of name, statements for enlistment, acknowledgments of service requirements, retired benefits, application for review by physical evaluation and disability boards, appointments, designations, evaluations, birth certificates, citizenship statements and status, educational constructive credit transcripts, flight status board reviews, assignment agreements, limitations/waivers/election and travel reports, efficiency appeals, promotion/reduction/recommendations, approvals/declinations announcements/notifications, reconsiderations/worksheets elections/letters or memoranda of notification to deferred officers and promotion passover notifications, absence without leave and desertion records, FBI reports, Social Security Administration correspondence, miscellaneous correspondence, documents, military orders relating to military service including information pertaining to dependents, interservice action and in service details, determinations, relief's, component, awards, pay entitlement, and other military service data, commendatory and derogatory material, performance evaluations for E5's and above, photographs, and other documents considered significant to document a Marine's military history.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5041, Headquarters, Marine Corps; 42 U.S.C. 10606 as implemented by DoD Instruction 1030.1, Victim and Witness Assistance Procedures; and E.O. 9397 (SSN).

PURPOSE(S):

To assist officials and employees of the U.S. Marine Corps in the management, supervision, and administration of Marine Corps personnel (officer and enlisted), and the operations of related personnel affairs and functions.

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, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To officials and employees of the National Research Council in Cooperative Studies of the National History of Disease, of Prognosis and of Epidemiology. Each study in which the records of members and former members of the Marine Corps service are used must be approved by the Deputy Commandant for Manpower and Reserve Affairs.

To the U.S. Citizenship and Immigration Services for use in alien admission and naturalization inquiries.

To officials and employees of the Coast Guard in the performance of their official duties relating to screening members who have expressed a positive interest in an interservice transfer, enlistment, appointment, or acceptance.

To Secret Service agents in connection with matters under the jurisdiction of that agency upon presentation of credentials.

To the Office of Personnel Management for verification of military service for benefits, leave, or reduction-in-force purposes, and to establish Civil Service employee tenure and leave accrual rate.

To the Director of Selective Service System in the performance of official duties related to registration with the Selective Service System.

To the Social Security Administration to obtain or verify Social Security Numbers or to substantiate applicant's credit for social security compensation.

To officials and employees of the American Red Cross and Navy Relief Society in the performance of their duties. Access will be limited to those portions of the member's record required to effectively assist the member.

To officials and employees of the Sergeants at Arms of the U.S. House of Representatives and the U.S. Senate in the performance of official duties related to the verification of Marine Corps service. Access will be limited to those portions of the member's record required to verify service time, active, and reserve.

To officials and employees of the Department of Veterans Affairs, Department of Health and Human Services, and Selective Service Administration in the performance of their official duties related to eligibility, notification, and assistance in obtaining benefits by members and former members of the Marine Corps.

To officials and employees of the Department of Veterans Affairs in the performance of their official duties relating to approved research projects.

To officials and employees of other Departments and Agencies of the Executive Branch of government, upon request, in performance of their official duties related to the management, supervision, and administration of members and former members of the Marine Corps.

To Federal agencies, their contractors and grantees, and to private organizations, such as the National Academy of Sciences, for the purposes of conducting personnel and/or health-related research in the interest of the Federal government and the public. When not considered mandatory, the names and other identifying data will be eliminated from records used for such research studies.

To officials and employees of Navy-Marine Corps Relief Society and the American Red Cross in the performance of their duties relating to the assistance of the members and their dependents and relatives, or related to assistance previously furnished such individuals, without regard to whether the individual assisted or his/her sponsor continues to be a member of the Marine Corps. Access will be limited to those portions of the member's record required to effectively assist the member.

To duly appointed Family Ombudsmen and Key Volunteers in the performance of their duties related to the assistance of the members and their families.

To victims and witnesses of a crime for purposes of providing information consistent with the Victim and Witness Assistance Program and the Sexual Assault Prevention and Response Program regarding the investigation and disposition of an offense. Access will be limited to information concerning the processing and final disposition, results of any criminal or adverse proceeding (*e.g.,* court-martial, non-judicial punishment, administrative separation), with the exception of victims and witnesses identified as protected persons on a Military Protective Order, who may receive a copy of the Military Protective Order.

Information as to current military addresses and assignments may be provided to military banking facilities who provide banking services overseas and who are reimbursed by the Government for certain checking and loan losses. For personnel separated, discharged, or retired from the Armed Forces information as to last known residential or home of record address may be provided to the military banking facility upon certification by a banking facility officer that the facility has a returned or dishonored check negotiated by the individual or the individual has defaulted on a loan and that if restitution is not made by the individual the United States Government will be liable for the losses the facility may incur.

To other governmental entities or private organizations under government contract to perform random analytical research into specific aspects of military personnel management and administrative procedures.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Marine Corps compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

Individual's name, Social Security Number (SSN), and/or service number.

SAFEGUARDS:

Records are maintained in secure, limited access, or monitored areas. Physical entry by unauthorized persons is restricted through the use of locks, guards, passwords, or other administrative procedures. Access to personal information is limited to those individuals who require the records to perform their official assigned duties.

RETENTION AND DISPOSAL:

Official Military Personnel File records are permanent.

Records of Marines who separated, retired, or whose military service obligation expired prior to 1 January 1998 are maintained at the National Personnel Records Center, 9700 Page Avenue, St. Louis, MO 63132–5100.

The records of Marines with remaining military service obligation or contractual obligations after 31 December 1997 are maintained at Headquarters, U.S. Marine Corps, U.S. Marine Corps (Code MMSB), 2008 Elliot Road, Quantico, VA 22134–5030.

Permanent records are transferred to the National Archives and Records Administration (NARA) 62 years after the completion of the service member's obligated service.

For Official Military Personnel File records of Marine Corps members in the regular or reserve components as of 1 January 1998 or those members who separated, retired, or died while in service, in the year 1998 or later are maintained at the National Personnel Records Center, Military Personnel Records Branch, 9700 Page Avenue, St. Louis, MO 63132–5100.

SYSTEM MANAGER(S) AND ADDRESS:

Commandant of the Marine Corps, Headquarters, U.S. Marine Corps, Washington, DC 20380–1775.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the following officials:

Inquiries regarding permanent Official Military Personnel File records of all active duty and reserve members, former members discharged, deceased, or retired after 31 December 1997 should be addressed to the Commandant of the Marine Corps (Code MMSB), Headquarters, U.S. Marine Corps, 2008 Elliot Road, Quantico, VA 22134–5030.

Inquiries regarding field Service Record Books/Officer Qualification

Records of reserve members serving in the Individual Ready Reserve should be addressed to the Commanding General, Marine Corps Mobilization Command, 15303 Andrews Road, Kansas City, MO 64147–1207.

Inquiries regarding Official Military Personnel File records of former members discharged, deceased, or retired before 1 January 1998 should be addressed to the Director, National Personnel Records Center, Military Personnel Records, 9700 Page Avenue, St. Louis, MO 63132–5100.

Veterans and relatives of deceased veterans may obtain information on how to obtain copies of records from the NPRC Web site at *http://www.archives.gov/st-louis/military-personnel/index.html.*

Inquiries regarding field Service Record Books/Officer Qualification Records of current members should be addressed to the Commanding Officer of the Marine Corps unit to which they are attached.

Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx.*

Requests should contain the member's full name, Social Security Number (SSN) (and/or enlisted or officer service number), rank/rate, approximate dates of service, address, and signature of the requester. Transfer or Discharge (DD Form 214), discharge certificate, driver's license, or other data sufficient to ensure that the member is the subject of the record.

Current members (active and reserve) and former members may visit any of the above activities for review of records. Proof of identification will be required and may consist of an individual's active, reserve, or retired identification card, Armed Forces Report of.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written requests to the following officials:

Inquiries regarding permanent Official Military Personnel File records of all active duty and reserve members, former members discharged, deceased, or retired after 31 December 1997 should be addressed to the Commandant of the Marine Corps (Code MMSB), Headquarters, U.S. Marine Corps, 2008 Elliot Road, Quantico, VA 22134–5030.

Inquiries regarding field Service Record Books/Officer Qualification Records of reserve members serving in the Individual Ready Reserve should be addressed to the Commanding General, Marine Corps Mobilization Command, 15303 Andrews Road, Kansas City, MO 64147–1207.

Inquiries regarding Official Military Personnel File records of former members discharged, deceased, or retired before 1 January 1998 should be addressed to the Director, National Personnel Records Center, Military Personnel Records, 9700 Page Avenue, St. Louis, MO 63132–5100.

Veterans and relatives of deceased veterans may obtain information on how to obtain copies of records from the National Personnel Records Center Web site at *http://www.archives.gov/st-louis/military-personnel/index.html.*

Inquiries regarding field Service Record Books/Officer Qualification Records of current members should be addressed to the Commanding Officer of the Marine Corps unit to which they are attached.

Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx.*

Requests should contain the member's full name, Social Security Number (SSN) (and/or enlisted or officer service number), rank/rate, approximate dates of service, address, and signature of the requester.

Current members (active and reserve) and former members may visit any of the above activities for review of records. Proof of identification will be required and may consist of an individual's active, reserve, or retired identification card, Armed Forces Report of Transfer or Discharge (DD Form 214), discharge certificate, driver's license, or other data sufficient to ensure that the member is the subject of the record.

CONTESTING RECORD PROCEDURES:

The USMC rules for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; Marine Corps Order P5211.2; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Staff agencies and subdivisions of Headquarters, U.S. Marine Corps; Marine Corps commands and organizations; other agencies of Federal, State, and local government; medical reports; correspondence from financial and other commercial enterprises; correspondence and records of educational institutions; correspondence of private citizens addressed directly to the Marine Corps or via the U.S. Congress and other agencies; investigations to determine suitability for enlistment, security clearances, and special assignments; investigations related to disciplinary proceedings; and the individual of the record.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–24168 Filed 9–24–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before November 12, 2010.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, *Attention:* Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov*. Please note that written comments received in response to this notice will be considered public records.

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. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those

who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: September 22, 2010.

Sheila Carey,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Pending.

Title of Collection: Criteria for Foreign Schools to Apply to Participate in Title IV, Higher Education Act of 1965, as amended (HEA) Programs.

OMB Control Number: 1845—NEW.

Agency Form Number(s): N/A.

Frequency of Responses: On Occasion; Annually.

Affected Public: Businesses or other for-profit; Individuals or households; Not-for-profit institutions State, Local, or Tribal Government, State Educational Agencies or Local Education Agencies.

Total Estimated Number of Annual Responses: 4,364.

Total Estimated Annual Burden Hours: 513.

Abstract: These regulations (34 CFR 600.54, 600.55, 600.57) propose changes to aspects of foreign school criteria for eligibility to apply for participation in Title IV, HEA programs (demonstrate method of determining academic work in a non-degree program is equivalent to the definition of an academic year that is required for domestic schools and to report the language in which instruction will be offered); changes to reporting requirements for foreign graduate medical schools (Medical College Admission Test (MCAT)) scores for incoming students and United States Medical Licensing Examination (USMLE) scores for graduates) and new reporting requirements for foreign nursing schools (National Council Licensure Examination for Registered Nurses (NCLEX–RN)) scores, as well as new requirements for obtaining consent forms from US students attending foreign medical and nursing schools to gather such scores.

Requests for copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's website at *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4289. 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 the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

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. 2010–24149 Filed 9–24–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Privacy Act of 1974; System of Records

AGENCY: Federal Student Aid, U.S. Department of Education.

ACTION: Notice of altered system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (Privacy Act), 5 U.S.C. 552a, the Chief Operating Officer for Federal Student Aid (FSA) of the Department of Education (Department) publishes this notice to rename and revise the system of records entitled "Recipient Financial Management System (RFMS)" (18–11–02).

In this notice, the Department is replacing the RFMS system with the "Common Origination and Disbursement" (COD) system. The COD system is designed to assist the Department in administering Federal grant and loan programs authorized by title IV of the Higher Education Act of 1965, as amended (HEA), and to include information needed under Federal grant programs created by the Higher Education Reconciliation Act of 2005, title VIII of Public Law 109–171.

The COD system will contain records associated with the activities required of participating educational institutions to originate an award (establish the eligibility of an individual to receive a Federal grant or loan) from those programs authorized by the HEA for which the Department provides funds directly to those institutions on a student-level or recipient-level basis. This system will also contain records evidencing the disbursement of program funds by participating educational institutions to those individuals whose eligibility was previously established.

The Department seeks comments on the proposed routine uses described in this altered system of records notice, in accordance with the requirements of the Privacy Act.

DATES: We must receive your comments on the proposed routine uses for the system of records on or before October 27, 2010.

The Department filed a report describing the altered system of records covered by this notice with the Chair of the Senate Committee on Homeland Security and Governmental Affairs, the Chair of the House Committee on Oversight and Government Reform, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on September 22, 2010. This altered system of records will become effective at the later date of: (1) The expiration of the 40-day period for OMB review on November 1, 2010; or (2) October 27, 2010, unless the system of records needs to be changed as a result of public comment or OMB review.

ADDRESSES: Address all comments about the proposed routine uses to: Director, COD Systems, Program Management Services, FSA, U.S. Department of Education, Union Center Plaza (UCP), 830 First Street, NE., Washington, DC 20202–5454. *Telephone:* 202–377–3676. If you prefer to send comments by e-mail, use the following address: *comments@ed.gov*.

You must include the term "Common Origination and Disbursement" in the subject line of your electronic message.

During and after the comment period, you may inspect all public comments about this notice at the Department in Room 62E4, UCP, 6th Floor, 830 First Street, NE., Washington, DC 20202–5454 between the hours of 8:00 a.m. and 4:30 p.m., Eastern Time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Director, COD Systems, Program Management Services, FSA, U.S. Department of Education, UCP, 830 First Street, NE., Washington, DC 20202–5454. *Telephone:* 202–377–3676. 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 this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to the contact person listed under this section.

SUPPLEMENTARY INFORMATION:

Introduction

The Privacy Act (5 U.S.C. 552a(e)(4) and (11)) requires the Department to publish in the **Federal Register** this notice of an altered system of records. The Department's regulations implementing the Privacy Act are contained in 34 CFR part 5b.

The Privacy Act applies to information about individuals that contains individually identifying information and that is retrieved by a unique identifier associated with each individual, such as a name or social security number (SSN). The information about each individual is called a "record," and the system, whether manual or computer-based, is called a "system of records."

The Privacy Act requires each agency to publish a system of records notice in the **Federal Register** and to submit, whenever the agency publishes a new system of records or significantly alters an established system of records, a report to the Administrator of the Office of Information and Regulatory Affairs, OMB. Each agency is also required to send copies of the report to the Chair of the Senate Committee on Homeland Security and Governmental Affairs and the Chair of the House of Representatives Committee on Oversight and Government Reform.

A system of records is considered "altered" whenever an agency expands the types or categories of information maintained, significantly expands the types or categories of individuals about whom records are maintained, changes the purpose for which the information is used, changes the equipment configuration in a way that creates substantially greater access to the records, or adds a routine use disclosure to the system.

This notice of an altered system of records renames RFMS as the COD system, expands the categories of records maintained in the system, clarifies the categories of individuals covered by the system and the system's purposes, updates the system locations, and reflects the current programmatic routine use disclosures needed to carry out responsibilities under the HEA. A notice for the previous version of the COD system, the RFMS, was published in the **Federal Register** on June 4, 1999 (64 FR 30161–62) and amended on December 27, 1999 (64 FR 72407).

The COD system includes records on individuals who have received title IV, HEA program assistance. These records include information provided by recipients of title IV, HEA program assistance and the parents of dependent recipients. The records contain individually identifying information about the recipient, including, but not limited to his or her: name, SSN, address, date of birth, e-mail address, and citizenship status.

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 Web site: *http://www.ed.gov/news/fedregister/index.html.*

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.*

Dated: September 22, 2010.

William J. Taggart,

Chief Operating Officer, Federal Student Aid.

For the reasons discussed in the preamble, the Chief Operating Officer, Federal Student Aid, U.S. Department of Education (Department) publishes a notice of altered system of records to read as follows:

SYSTEM NUMBER 18–11–02

SYSTEM NAME:

Common Origination and Disbursement (COD) System.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATIONS:

Total Systems Services, Inc. (TSYS), 1600 First Ave., P.O. Box 2567, Columbus, GA 31902–2567. (This is the Computer Center for the COD Application.) All electronic COD information is processed and stored here. This includes the William D. Ford Federal Direct Loan (Direct Loan) Program, the Federal Pell Grant Program, the Academic Competitiveness Grant (ACG) Program, the National Science and Mathematics Access to Retain Talent (National SMART) Grant Program, the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program, and the Iraq and Afghanistan Service Grant Program.)

Affiliated Computer Services, Inc. (ACS), 2429 Military Road, Suite 200, Niagara Falls, NY 14304–1551. (This is the COD Customer Service Center.)

HP Enterprise Services, COD Ancillary Services, 201 TechnaCenter Dr., Suite 300, Montgomery, AL 36117–6044. (This center images and stores all of the Direct Loan promissory notes.)

Dell Perot Systems, 2300 W. Plano Parkway, Plano, TX 75075–8427. (The Direct Loan electronic promissory notes, TEACH Agreement to Serve promissory notes, Direct Loan Entrance Counseling, TEACH Entrance Counseling, and the COD archives are stored here.)

HP Enterprise Services, D5–2B–14, 6901 Windcrest Parkway, Plano, TX 75024–8427. (This is the data center for the paper promissory notes processed by COD Ancillary Services.)

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records of individuals who apply for or receive a Federal grant or loan under one of the following programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA): (1) The Federal Pell Grant Program; (2) the ACG Program; (3) the National SMART Grant Program; (4) the TEACH Grant Program; (5) the Iraq and Afghanistan Service Grant Program; and (6) the Direct Loan Program, which consists of Federal Direct Unsubsidized and Subsidized Stafford/Ford Loans, and Federal Direct PLUS Loans. COD also contains records of individuals who have completed Direct Loan Entrance Counseling.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in the COD system include, but are not limited to: (1) Recipient identifier information including name, social security number (SSN), and date of birth; (2) recipient demographic information such as address, e-mail address, driver's license number, telephone number, citizenship status, dependency status, estimated family contribution, cost of attendance, post-secondary school identifier, and enrollment information; (3) Federal Pell Grant, ACG, SMART Grant, TEACH Grant, Iraq and Afghanistan Service Grant, and Direct Loan award amounts and dates of disbursements; (4) Federal Pell Grant, ACG, SMART Grant, and Iraq and Afghanistan Service Grant collection referral and payment amounts; (5) Direct Loan promissory notes; (6) TEACH Agreement to Serve documents; and, (7) Direct Loan and TEACH entrance counseling

information, including the SSNs of the recipients and the dates that they completed the entrance counseling.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

This system of records is authorized under title IV of the HEA, 20 U.S.C. 1070 *et seq.*

PURPOSES:

The information contained in this system is maintained for the following purposes related to students and borrowers: (1) To determine recipient eligibility and benefits for the title IV, HEA programs; (2) to store electronic data that support the existence of a legal obligation to repay funds disbursed under the title IV, HEA programs, including documentation such as promissory notes, and other agreements; (3) to identify whether an individual may have received a title IV, HEA Federal grant or loan at more than one educational institution for the same enrollment period in violation of title IV, HEA program regulations; and (4) to identify whether an individual may have exceeded the annual award limits under the title IV, HEA Federal grant or loan programs in violation of title IV, HEA program regulations.

The information in this system is also maintained for the following purposes relating to institutions participating in and administering the title IV, HEA programs: (1) To enable an educational institution to reconcile, on an aggregate and recipient-level basis, the amount of title IV, HEA Federal grant and Direct Loan funds that an institution received with disbursements it made to, or on behalf of, eligible students (including reconciling verification codes, reconciling the funds received with disbursements made by type of funds received, and making necessary corrections and adjustments); (2) to enable an institution of higher education to perform on-line credit checks to determine the credit worthiness of a borrower for title IV, HEA Federal Direct PLUS Loans; and (3) to assist an institution of higher education, a software vendor, or a third-party servicer with questions about a title IV, HEA Federal grant or loan.

The information in this system is also maintained for the following purposes relating to the Department's oversight of the title IV, HEA programs: (1) To support the investigation of possible fraud and abuse and to detect and prevent fraud and abuse in the title IV, HEA Federal grant and loan programs; (2) to confirm that an institution of higher education, or a program offered by an institution of higher education, is eligible to receive title IV, HEA program funds; (3) to set and adjust program funding authorization levels for each institution; (4) to enforce institutional compliance with Department reporting deadlines; and (5) to apply appropriate title IV, HEA funding controls.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The Department may disclose information contained in a record in this system of records under the routine uses listed in this system of records without the consent of the individual if the disclosure is compatible with the purposes for which the record was collected. The Department may make these disclosures on a case-by-case basis or, if the Department has complied with the computer matching requirements of the Privacy Act of 1974, as amended (Privacy Act), under a computer matching agreement.

(1) *Program Purposes.* The Department may disclose records from the system of records for the following program purposes:

(a) To verify the identity of the recipient involved or the accuracy of the record, or to assist with the determination of program eligibility and benefits, the Department may disclose records to institutions of higher education; financial institutions; third-party servicers; and Federal, State, or local agencies;

(b) To store electronic data that support the existence of a legal obligation to repay funds disbursed under the title IV, HEA programs, including documentation such as promissory notes and other agreements, the Department may disclose records to institutions of higher education, third-party servicers, and Federal agencies;

(c) To identify whether an individual may have received a title IV, HEA Federal grant or loan at more than one institution of higher education for the same enrollment period in violation of title IV, HEA regulations, the Department may disclose records to institutions of higher education; third-party servicers; and Federal, State, or local agencies;

(d) To identify whether an individual may have exceeded the annual award limits under the title IV, HEA Federal grant or Direct Loan Programs in violation of title IV, HEA regulations, the Department may disclose records to institutions of higher education, third-party servicers, and Federal agencies;

(e) To enable institutions of higher education to reconcile, on an aggregate and recipient-level basis, the amount of title IV, HEA Federal grant and Direct Loan funds that an institution received with disbursements it made to, or on behalf of, eligible students (including reconciling verification codes, reconciling the funds received with disbursements made by type of funds received, and making necessary corrections and adjustments), the Department may disclose records to institutions of higher education; third-party servicers; and Federal, State, or local agencies;

(f) To enable an institution of higher education to perform on-line credit checks to determine the credit worthiness of a borrower for title IV, HEA Federal Direct PLUS Loans, disclosures may be made to institutions of higher education, third-party servicers, credit reporting agencies, and Federal agencies;

(g) To assist an individual, institutions of higher education, third-party servicers, or software vendors with questions about a title IV, HEA Federal grant or loan, disclosures may be made to institutions of higher education; software vendors; third-party servicers; and Federal, State, or local agencies;

(h) To support the investigation of possible fraud and abuse and to detect and prevent fraud and abuse in the title IV, HEA Federal grant and loan programs, disclosures may be made to institutions of higher education; third-party servicers; and Federal, State, or local agencies.

(2) *Congressional Member Disclosure.* The Department may disclose the records of an individual to a member of Congress or the member's staff when necessary to respond to an inquiry from the member made at the written request of that individual. The member's right to the information is no greater than the right of the individual who requested it.

(3) *Disclosure for Use by Other Law Enforcement Agencies.* The Department may disclose information to any Federal, State, local, or foreign agency or other public authority responsible for enforcing, investigating, or prosecuting violations of administrative, civil, or criminal law or regulation if that information is relevant to any enforcement, regulatory, investigative, or prosecutorial responsibility within the receiving entity's jurisdiction.

(4) *Enforcement Disclosure.* In the event that information in this system of records indicates, either on its face or in connection with other information, a violation or potential violation of any applicable statute, regulation, or order of a competent authority, the Department may disclose the relevant records to the appropriate agency, whether foreign, Federal, State, Tribal, or local, charged with the responsibility

of investigating or prosecuting that violation or charged with enforcing or implementing the statute, Executive order, rule, regulation, or order issued pursuant thereto.

(5) *Litigation or Alternative Dispute Resolution (ADR) Disclosure.*

(a) *Introduction.* In the event that one of the following parties listed below is involved in litigation or ADR, or has an interest in litigation or ADR, the Department may disclose certain records from this system of records to the parties described in paragraphs (b), (c) and (d) of this routine use under the conditions specified in those paragraphs:

(i) The Department or any of its components.

(ii) Any Department employee in his or her official capacity.

(iii) Any Department employee in his or her individual capacity if the Department of Justice (DOJ) has been requested to or has agreed to provide or arrange for representation of the employee.

(iv) Any Department employee in his or her individual capacity when the Department has agreed to represent the employee.

(v) The United States when the Department determines that the litigation is likely to affect the Department or any of its components.

(b) *Disclosure to the DOJ.* If the Department determines that disclosure of certain records to the DOJ is relevant and necessary to litigation or ADR, the Department may disclose those records as a routine use to the DOJ.

(c) *Adjudicative Disclosure.* If the Department determines that it is relevant and necessary to litigation or ADR to disclose certain records from this system of records to an adjudicative body before which the Department is authorized to appear or to an individual or an entity designated by the Department or otherwise empowered to resolve or mediate disputes, the Department may disclose those records as a routine use to the adjudicative body, individual, or entity.

(d) *Disclosure to Parties, Counsel, Representatives, or Witnesses.* If the Department determines that disclosure of certain records to a party, counsel, representative, or witness is relevant and necessary to the litigation or ADR, the Department may disclose those records as a routine use to the party, counsel, representative, or witness.

(6) *Employment, Benefit, and Contracting Disclosure.*

(a) *For Decisions by the Department.* The Department may disclose information from this system of records to a Federal, State, or local agency or to another public authority or professional organization, if necessary, to obtain information relevant to a Department decision concerning the hiring or retention of an employee or other personnel action; the issuance of a security clearance; the letting of a contract; or the issuance of a license, grant, or other benefit.

(b) *For Decisions by Other Public Agencies and Professional Organizations.* The Department may disclose information from this system of records to a Federal, State, local, or foreign agency or other public authority or professional organization, in connection with the hiring or retention of an employee or other personnel action; the issuance of a security clearance; the reporting of an investigation of an employee; the letting of a contract; or the issuance of a license, grant, or other benefit, to the extent that the record is relevant to the receiving entity's decision on the matter.

(7) *Employee Grievance, Complaint, or Conduct Disclosure.* If a record is relevant and necessary to a grievance, complaint, or disciplinary proceeding involving a present or former employee of the Department, the Department may disclose a record from this system of records in the course of investigation, fact-finding, or adjudication to any party to the grievance, complaint, or action; to the party's counsel or representative; to a witness; or to a designated fact-finder, mediator, or other person designated to resolve issues or decide the matter. The disclosure may only be made during the course of investigation, fact-finding, or adjudication.

(8) *Labor Organization Disclosure.* The Department may disclose a record from this system of records to an arbitrator to resolve disputes under a negotiated grievance procedure or to officials of a labor organization recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation.

(9) *Freedom of Information Act (FOIA) and Privacy Act Advice Disclosure.* The Department may disclose records from this system of records to the DOJ or Office of Management and Budget (OMB) if the Department concludes that disclosure is desirable or necessary in determining whether particular records are required to be disclosed under the FOIA or the Privacy Act.

(10) *Disclosure to the DOJ.* The Department may disclose records from this system of records to the DOJ to the extent necessary for obtaining DOJ advice on any matter relevant to an audit, inspection, or other inquiry related to the programs covered by this system.

(11) *Contract Disclosure.* If the Department contracts with an entity for the purposes of performing any function that requires disclosure of records in this system to employees of the contractor, the Department may disclose the records to those employees. Before entering into such a contract, the Department must require the contractor to maintain Privacy Act safeguards as required under 5 U.S.C. 552a(m) with respect to the records in the system.

(12) *Research Disclosure.* The Department may disclose records from this system of records to a researcher if the Department determines that the individual or organization to which the disclosure would be made is qualified to carry out specific research related to functions or purposes of this system of records. The official may disclose records from this system of records to that researcher solely for the purpose of carrying out that research related to the functions or purposes of this system of records. The researcher must be required to maintain Privacy Act safeguards with respect to the disclosed records.

(13) *Disclosure to OMB for Credit Reform Act (CRA) Support.* The Department may disclose records from this system of records to OMB as necessary to fulfill CRA requirements.

(14) *Disclosure in the Course of Responding to Breach of Data.* The Department may disclose records from this system of records to appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in this system has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or by another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures pursuant to 5 U.S.C. 552a(b)(12): the Department may disclose to a consumer reporting agency information regarding a valid, overdue claim of the Department. Such

information is limited to (1) the name, address, taxpayer identification number, and other information necessary to establish the identity of the individual responsible for the claim; (2) the amount, status, and history of the claim; and (3) the program under which the claim arose. The Department may disclose the information specified in this paragraph under 5 U.S.C. 552a(b)(12) and the procedures contained in 31 U.S.C. 3711(e). A consumer reporting agency to which these disclosures may be made is defined at 15 U.S.C. 1681a(f) and 31 U.S.C. 3701(a)(3).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The Department electronically stores origination and disbursement records on hard disk at TSYS in Columbus, Georgia. It stores electronic master promissory notes on hard disk at the Dell Perot Systems Data Center in Plano, Texas. Paper Direct Loan promissory notes are stored in locked vaults in Montgomery, Alabama and at a Federal Records Center near Atlanta, Georgia. Data obtained from the paper promissory notes are stored on hard disks at TSYS in Columbus, Georgia. This data is referred to as metadata and is used by the system to link promissory notes to borrower data. The Department also creates electronic images of the paper promissory notes at the HP facility in Montgomery, AL and stores the images at the HP facility in Plano, Texas.

RETRIEVABILITY:

Records in the system are retrieved by the individual's SSN or name, or by the institution's Office of Postsecondary Education identification number (OPEID).

SAFEGUARDS:

All physical access to the sites of the Department's contractors where this system of records is maintained, is controlled and monitored by security personnel who check each individual entering the buildings for his or her employee or visitor badge.

In accordance with the Department's Administrative Communications System Directive OM: 5–101 entitled "Contractor Employee Personnel Security Screenings," all contract and Department personnel who have facility access and system access must undergo a security clearance investigation. Individuals requiring access to Privacy Act data are required to hold, at a minimum, a moderate-risk security clearance level. These individuals are required to undergo periodic screening at five-year intervals.

In addition to undergoing security clearances, contract and Department employees are required to complete security awareness training on an annual basis. Annual security awareness training is required to ensure that contract and Department users are appropriately trained in safeguarding Privacy Act data in accordance with OMB Circular No. A–130, Appendix III.

The computer system employed by the Department offers a high degree of resistance to tampering and circumvention. This security system limits data access to Department and contract staff on a "need-to-know" basis and controls individual users' ability to access and alter records within the system. All users of this system of records are given a unique user identification. The Department's Federal Student Aid (FSA) Information Security and Privacy Policy requires the enforcement of a complex password policy. In addition to the enforcement of the complex password policy, users are required to change their password at least every 90 days in accordance with the Department's information technology standards.

RETENTION AND DISPOSAL:

Federal Direct Loan Records:

Records are maintained and disposed of in accordance with ED 072 FSA Application, Origination, and Disbursement Records, Item b.2. Records are destroyed 15 years after final repayment or audit, or after relevant data is transferred to an alternate recordkeeping system (i.e., loan servicing system), whichever occurs first.

Grant Records:

Records are maintained and disposed of in accordance with ED 072 FSA Application, Origination, and Disbursement Records, Item b.2. Records are destroyed 15 years after final repayment or audit, or after relevant data is transferred to an alternate recordkeeping system (*i.e.,* National Student Loan Data System), whichever occurs first.

SYSTEM MANAGER AND ADDRESS:

System Manager, Common Origination and Disbursement System, FSA, U.S. Department of Education, UCP, 830 First Street, NE., 6th Floor, Washington, DC 20202–5454.

NOTIFICATION PROCEDURE:

If you wish to determine whether a record exists regarding you in the system of records, provide the system manager with your name, date of birth, and SSN. Requests must meet the requirements in 34 CFR 5b.5, including proof of identity.

RECORD ACCESS PROCEDURE:

If you wish to gain access to a record in this system, provide the system manager with your name, date of birth, and SSN. Requests by an individual for access to a record must meet the requirements in 34 CFR 5b.5, including proof of identity.

CONTESTING RECORD PROCEDURE:

If you wish to change the content of a record regarding you in the system of records, provide the system manager with your name, date of birth, and SSN. Identify the specific items to be changed, and provide a written justification for the change. Requests to amend a record must meet the requirements in 34 CFR 5b.7.

RECORD SOURCE CATEGORIES:

This system includes records on individuals who have received title IV, HEA program assistance. These records include information provided by recipients of title IV, HEA program assistance and the parents of dependent recipients. This system also includes information from Federal Grant and Direct Loan origination and disbursement records provided by institutions of higher education or their agents to the Department. The Central Processing System (CPS) (covered by the Department's Privacy Act system of records notice entitled "Federal Student Aid Application File" (18–11–01)) electronically sends the COD system the Abbreviated Applicant File to validate all CPS-processed Free Application for Federal Student Aid (FAFSA) records with the Federal Grant and Direct Loan disbursement data processed through the COD system.

The Department's Privacy Act system of records notice entitled "Common Services for Borrowers (CSB)" (18–11–16) sends COD booking acknowledgements, discharge information, and payments to servicer data.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–24162 Filed 9–24–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Revision and Renewal

AGENCY: 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 revision and renewal under the provisions of the Paperwork Reduction Act of 1995. The information collection requests a three-year extension of its Privacy Act Information Request Form, OMB Control Number 1910–1700. This voluntary information collection request covers information necessary to establish the identity of individuals who request access to their records maintained in a system of records established under the Privacy Act, and to authorize agency personnel to locate and review the records.

DATES: Comments regarding this collection must be received on or before October 27, 2010. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at (202) 395–4650.

ADDRESSES: Written comments should be sent to the Office of Information and Regulatory Affairs, Attention: Department of Energy Desk Officer, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street, NW., Washington, DC 20503; or to Jerry Hanley, Chief Privacy Officer, Office of Information Resources, MA–90, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585 or by fax at (202) 586–0575.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Jerry Hanley at the address or number listed above.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) *OMB No.* 1910–1700; (2) *Information Collection Request Title:* Privacy Act Information Request; (3) *Purpose:* Use of the form to request records from the DOE is voluntary. The information in the form is used to authorize agency personnel to locate and review records in a system of records established under the Privacy Act. The form indicates the information the DOE requires to process a request under the Privacy Act. Use of the form reduces the number of incomplete submissions, and therefore, reduces delays in processing. Use of the form also can reduce processing time by the agency to provide records that may be necessary for claims under the Energy Employees Occupational Illness Compensation Program Act and other employment-related compensation programs; (4) *Estimated Number of Respondents:* 2,500 annually; (5) *Estimated Total Burden Hours:* .25 hour per response for respondents or 625 hours annually, including the time for reviewing instructions; (6) *Number of Collections:* The information collection request contains no information and/or recordkeeping requirements.

Statutory Authority: The Privacy Act of 1974, Title 5, United States Code 552a; the Paperwork Reduction Act of 1995, Title 44, United States Code, 3501, *et seq.*

Issued in Washington, DC, on September 10, 2010.

Ingrid Kolb,

Director, Office of Management.

[FR Doc. 2010–24123 Filed 9–24–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

September 16, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER97–4281–023; ER99–2161–011; ER99–3000–010; ER02–1572–009; ER02–1571–009; ER99–1115–015; ER99–1116–015; ER00–2810–009; ER99–4359–008; ER99–4358–008; ER99–2168–011; ER98–1127–015; ER07–649–005; ER10–1291–001; ER09–1300–002; ER09–1301–002; ER99–2162–011; ER00–2807–009; ER00–2809–009; ER98–1796–014; ER07–1406–006; ER00–1259–011; ER99–4355–008; ER99–4356–008; ER00–3160–013; ER99–4357–008; ER00–3160–014; ER00–2313–010; ER02–2032–008; ER02–1396–008; ER02–1412–008; ER10–574–003; ER08–666–002; ER00–3718–010; ER99–3637–009; ER07–486–006; ER99–1712–011; ER00–2808–010; ER01–642–015.

Applicants: EL Segundo Power II LLC, Long Beach Generation LLC, Long Beach Peakers LLC, NRG Power Marketing Inc., Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power LLC, NRG Solar Blythe LLC, Saguaro Power Company, A Limited Partnership, Arthur Kill Power, LLC, Astoria Gas Turbine Power LLC, Bayou Cove Peaking Power LLC, Big Cajun I Peaking Power LLC, Conemaugh Power LLC, Connecticut Jet Power LLC, Devon Power LLC, Dunkirk Power LLC, GenConn Energy LLC, GenCon Devon LLC, GenConn Middletown LLC, Huntley Power LLC, Indian River Power LLC, Keystone Power LLC, Louisiana Generating LLC, Middletown Power LLC, Montville Power LLC, NEO Freehold-Gen LLC, Norwalk Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG New Jersey Energy Sales LLC, NRG Rockford LLC, NRG Rockford II LLC, NRG Southaven LLC, NRG Sterlington Power, LLC, Oswego Harbor Power LLC, Somerset Power LLC, Vienna Power LLC, Cottonwood Energy Company LP.

Description: NRG MBR Entities *et al.* submits notice of change in status to notify the Commission that the NRG MBR Entities and Cottonwood expect to become affiliated by virtue of the proposed acquisition, etc.

Filed Date: 08/27/2010.

Accession Number: 20100909–0203.

Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2387–001.

Applicants: Tampa Electric Company.

Description: Tampa Electric Company submits tariff filing per 35.17(b): Amendment to Service Agreement No. 4 With Seminole Electric Cooperative to be effective 8/26/2010.

Filed Date: 09/16/2010.

Accession Number: 20100916–5072.

Comment Date: 5 p.m. Eastern Time on Thursday, September 30, 2010.

Docket Numbers: ER10–2657–000.

Applicants: Huntrise Energy Fund LLC.

Description: Huntrise Energy Fund LLC submits notice of cancellation of FERC Electric Tariff, Original Volume No. 1, to be effective September 30, 2010.

Filed Date: 09/15/2010.

Accession Number: 20100915–0205.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 06, 2010.

Docket Numbers: ER10–2658–000.

Applicants: HOP Energy, LLC.

Description: HOP Energy, LLC submits an application for authorization to make wholesale sales of energy and capacity at negotiated, market-based rates.

Filed Date: 09/15/2010.

Accession Number: 20100915–0206.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 06, 2010.

Docket Numbers: ER10–2659–000.

Applicants: Kennebec River Energy, LLC.

Description: Kennebec River Energy, LLC submits an application for authorization to make wholesale sales of energy and capacity at negotiated, market-based rates.

Filed Date: 09/15/2010.

Accession Number: 20100915–0207.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 06, 2010.

Docket Numbers: ER10–2660–000.
Applicants: Turner Energy, LLC.
Description: Turner Energy, LLC submits an application for authorization to make wholesale sales of energy and capacity at negotiated, market-based rates.
Filed Date: 09/15/2010.
Accession Number: 20100915–0208.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 06, 2010.

Docket Numbers: ER10–2661–000.
Applicants: Viridian Energy NY LLC.
Description: Viridian Energy NY LLC submits Petition for Acceptance of Initial Tariff, Waivers and Blanket Authority.
Filed Date: 09/15/2010.
Accession Number: 20100915–0202.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 06, 2010.

Docket Numbers: ER10–2662–000.
Applicants: MidAmerican Energy Company.
Description: MidAmerican Energy Company submits an Amended and Restated Services Agreement for Substation Operator Services etc with Cordova Energy Center LLC.
Filed Date: 09/15/2010.
Accession Number: 20100915–0209.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 06, 2010.

Docket Numbers: ER10–2663–000.
Applicants: Southern Company—Florida LLC.
Description: Southern Company—Florida LLC submits tariff filing per 35.12: Baseline Filing to be effective 9/15/2010.
Filed Date: 09/15/2010.
Accession Number: 20100915–5198.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 06, 2010.

Docket Numbers: ER10–2664–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits a Revised Small Generator Interconnection Facilities Agreement and Service Agreement etc with FlexEnergy, LLC, to be effective 11/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5005.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2665–000.
Applicants: UNS Electric, Inc.
Description: UNS Electric, Inc. submits its Baseline Filing—UNS Electric, Inc. Open Access Transmission Tariff to be effective 9/14/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5006.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2666–000.
Applicants: New England Power Company.
Description: New England Power Company submits tariff filing per 35: New England Power Compliance Filing of Baseline Market Based Rate Tariff to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5050.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2667–000.
Applicants: Invenergy Cannon Falls LLC.
Description: Invenergy Cannon Falls LLC submits tariff filing per 35.12: Initial Baseline Filing of Reactive Power Tariff to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5056.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2668–000.
Applicants: EDFD-Handsome Lake.
Description: EDFD-Handsome Lake submits tariff filing per 35.12: EDFD-Handsome Lake Baseline to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5057.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2669–000.
Applicants: ANP Bellingham Energy Company, LLC.
Description: ANP Bellingham Energy Company, LLC submits tariff filing per 35.12: Baseline MBR Tariff Filing of ANP Bellingham Energy Company, LLC to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5058.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2670–000.
Applicants: ANP Blackstone Energy Company, LLC.
Description: ANP Blackstone Energy Company, LLC submits tariff filing per 35.12: Baseline MBR Tariff Filing of ANP Blackstone Energy Company, LLC to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5059.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2671–000.
Applicants: ANP Funding I, LLC.
Description: ANP Funding I, LLC submits tariff filing per 35.12: Baseline MBR Tariff Filing of ANP Funding I, LLC to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5060.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2672–000.
Applicants: ANP Marketing Company.
Description: ANP Marketing Company submits tariff filing per 35.12: Baseline MBR Tariff Filing of ANP Marketing Company to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5061.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2673–000.
Applicants: Armstrong Energy Limited Partnership, L.L.L.P.
Description: Armstrong Energy Limited Partnership, L.L.L.P. submits tariff filing per 35.12: Baseline MBR Tariff Filing of Armstrong Energy Limited Partnership, L.L.L.P. to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5062.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2674–000.
Applicants: Calumet Energy Team, LLC.
Description: Calumet Energy Team, LLC submits tariff filing per 35.12: Baseline MBR Tariff Filing of Calumet Energy Team, LLC to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5064.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2675–000.
Applicants: IPA Trading, Inc.
Description: IPA Trading, Inc. submits tariff filing per 35.12: Baseline MBR Tariff Filing of IPA Trading, Inc. to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5065.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2676–000.
Applicants: Milford Power Limited Partnership.
Description: Milford Power Limited Partnership submits tariff filing per 35.12: Baseline MBR Tariff Filing of Milford Power Limited Partnership to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5066.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2677–000.
Applicants: Pleasants Energy, LLC.
Description: Pleasants Energy, LLC submits tariff filing per 35.12: Baseline MBR Tariff Filing of Pleasants Energy, LLC to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5069.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2678–000.

Applicants: Troy Energy, LLC.
Description: Troy Energy, LLC submits tariff filing per 35.12: Baseline MBR Tariff Filing of Troy Energy, LLC to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5071.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2679–000.
Applicants: Puget Sound Energy, Inc.
Description: Puget Sound Energy, Inc. submits tariff filing per 35.15: Cancellation of Gas Tariff—Jackson Prairie to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5079.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2680–000.
Applicants: Puget Sound Energy, Inc.
Description: Puget Sound Energy, Inc. submits tariff filing per 35.12: OATT—Open Access Transmission Tariff to be effective 9/15/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5084.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2681–000.
Applicants: Niagara Mohawk Power Corporation.
Description: Niagara Mohawk Power Corporation submits tariff filing per 35: Niagara Mohawk Power Company Filing of Baseline Market Based Rate Tariff to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5091.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2682–000.
Applicants: Granite State Electric Company.
Description: Granite State Electric Company submits tariff filing per 35: Granite State Electric Compliance Filing of Baseline Market Based Rate Tariff to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5097.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2683–000.
Applicants: EDF Inc.
Description: EDF Inc. submits tariff filing per 35.12: EDF Inc. Baseline Filing to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5100.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2684–000.
Applicants: Kentucky Utilities Company.
Description: Notice of Cancellation of Kentucky Utilities Company.
Filed Date: 09/16/2010.
Accession Number: 20100916–5101.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2685–000.
Applicants: The Potomac Edison Company.
Description: The Potomac Edison Company submits tariff filing per 35.12: Potomac Edison OATT baseline to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5103.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2687–000.
Applicants: Monongahela Power Company.
Description: Monongahela Power Company submits tariff filing per 35.12: Allegheny Power Market Rate Tariff Baseline Filing to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5108.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2688–000.
Applicants: The Potomac Edison Company.
Description: The Potomac Edison Company submits tariff filing per 35.12: Allegheny Power Market Tariff (Potomac Edison) to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5110.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2689–000.
Applicants: West Penn Power Company.
Description: West Penn Power Company submits tariff filing per 35.12: Allegheny Power Market Tariff (West Penn) baseline to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5111.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2690–000.
Applicants: The Potomac Edison Company.
Description: The Potomac Edison Company submits tariff filing per 35.12: Potomac Edison First Revised Volume No. 3 Baseline filing to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5113.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2691–000.
Applicants: The Narragansett Electric Company.
Description: The Narragansett Electric Company submits tariff filing per 35: Narragansett Electric Compliance Filing of Baseline Market Based Rate Tariff to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5116.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2692–000.
Applicants: EDFD-Perryman.
Description: EDFD-Perryman submits tariff filing per 35.12: EDF-Perryman Baseline to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5117.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2693–000.
Applicants: National Grid Glenwood Energy Center LLC.
Description: National Grid Glenwood Energy Center LLC submits tariff filing per 35: National Grid—Glenwood Compliance Filing of Baseline Market Based Rate Tariff to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5119.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2694–000.
Applicants: EDFD-Keystone.
Description: EDFD-Keystone submits tariff filing per 35.12: EDFD Keystone Baseline to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5121.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2695–000.
Applicants: National Grid Port Jefferson.
Description: National Grid Port Jefferson submits tariff filing per 35: National Grid—Port Jeff Compliance Filing of Baseline Market Based Rate Tariff to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5122.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2696–000.
Applicants: EDFD-Conemaugh.
Description: EDFD-Conemaugh submits tariff filing per 35.12: EDFD Conemaugh Baseline to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accession Number: 20100916–5125.
Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES10–59–000.
Applicants: South Carolina Generating Company, Inc.

Description: Application of South Carolina Electric & Gas Company and South Carolina Generating Company, Inc. for Authority to Issue Short-term Debt Securities.

Filed Date: 09/15/2010.

Accession Number: 20100915–5207.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 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.

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. 2010–24086 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

September 20, 2010.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG10–69–000.

Applicants: Arizona Solar One LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Arizona Solar One LLC.

Filed Date: 09/20/2010.

Accession Number: 20100920–5119.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER06–560–010.

Applicants: Credit Suisse Energy LLC.

Description: Credit Suisse Energy LLC Notice of Non-Material Change in Status.

Filed Date: 09/17/2010.

Accession Number: 20100917–5197.

Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER06–758–007; ER06–635–005; ER06–634–005; ER01–2741–008; ER06–759–006; ER07–34–005; ER99–3320–008; ER95–1007–024.

Applicants: Plains End, LLC, Chambers Cogeneration, Limited Partnership, Edgecombe Genco, LLC, Logan Generating Company, L.P., Plains End II, LLC, Rathdrum Power, LLC, Selkirk Cogen Partners, L.P., Spruance Genco, LLC.

Description: Chambers Cogeneration, Limited Partnership, et al. Notice of Non-Material Change in Status.

Filed Date: 09/17/2010.

Accession Number: 20100917–5093.

Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2477–000.

Applicants: ISO New England Inc.

Description: ISO New England Inc. submits Supplement to Forward Capacity Auction Results Filing.

Filed Date: 09/17/2010.

Accession Number: 20100917–5196.

Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2495–001.

Applicants: Fulgora Arbitrage Fund, LLC.

Description: Fulgora Arbitrage Fund, LLC submits tariff filing per 35.17(b): Supplement to Market-Based Rate Application of Fulgora Arbitrage Fund, LLC to be effective 9/15/2010.

Filed Date: 09/17/2010.

Accession Number: 20100917–5154.

Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2686–000.

Applicants: West Penn Power Company.

Description: The West Penn Power Company submits Certificate of Concurrence with Allegheny Power's baseline Open Access Transmission, Third Revised Volume No. 5, filed on September 16, 2010.

Filed Date: 09/16/2010.

Accession Number: 20100916–5158.

Comment Date: 5 p.m. Eastern Time on Thursday, October 07, 2010.

Docket Numbers: ER10–2723–000.

Applicants: Monongahela Power Company.

Description: Monongahela Power Company submits tariff filing per 35.12: Allegheny Power Open Access Transmission Tariff Baseline Filing to be effective 9/17/2010.

Filed Date: 09/17/2010.

Accession Number: 20100917–5056.

Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2724–000.

Applicants: El Paso Electric Company.

Description: El Paso Electric Company submits tariff filing per 35.12: Baseline Filing of WestConnect Regional Experimental Tariff to be effective 9/17/2010.

Filed Date: 09/17/2010.

Accession Number: 20100917–5057.

Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2725–000.

Applicants: Monongahela Power Company.
Description: Monongahela Power Company submits tariff filing per 35.12: Monongahela Power Company Baseline Filing to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5058.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2726–000.
Applicants: West Penn Power Company.
Description: West Penn Power Company submits tariff filing per 35.12: West Penn Power Company Baseline Tariff filing to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5059.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2727–000.
Applicants: Allegheny Energy Supply Company, LLC.
Description: Allegheny Energy Supply Company, LLC submits tariff filing per 35.12: Allegheny Energy Supply Co. Baseline Filing to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5060.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2728–000.
Applicants: Green Valley Hydro, LLC.
Description: Green Valley Hydro, LLC submits tariff filing per 35.12: Green Valley Hydro, LLC Baseline Tariff filing to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5061.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2729–000.
Applicants: Buchanan Generation, LLC.
Description: Buchanan Generation, LLC submits tariff filing per 35.12: Buchanan Generation, LLC Baseline Tariff to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5062.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2730–000.
Applicants: El Paso Electric Company.
Description: El Paso Electric Company submits tariff filing per 35.12: Baseline Filing of Open Access Transmission Tariff to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5063.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2731–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company's (SCE) Notice of Cancellation of Letter Agreement SES LA–48.
Filed Date: 09/17/2010.
Accession Number: 20100917–5080.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2732–000.
Applicants: Emera Energy Services, Inc.
Description: Emera Energy Services, Inc. submits tariff filing per 35.12: Emera Energy Services MBR Tariff to be effective 9/20/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5089.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2733–000.
Applicants: Emera Energy U.S. Subsidiary No. 1, Inc.
Description: Emera Energy U.S. Subsidiary No. 1, Inc. submits tariff filing per 35.12: Emera US Sub 1 MBR Tariff to be effective 9/20/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5098.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2734–000.
Applicants: Emera Energy U.S. Subsidiary No. 2, Inc.
Description: Emera Energy U.S. Subsidiary No. 2, Inc. submits tariff filing per 35.12: Emera U.S. Sub 2 MBR Tariff to be effective 9/20/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5105.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2735–000.
Applicants: Anthracite Power and Light Company.
Description: Anthracite Power and Light Company submits tariff filing per 35.12: Baseline Tariff Filing to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5110.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2736–000.
Applicants: Emera Energy Services Subsidiary No. 1 LLC.
Description: Emera Energy Services Subsidiary No. 1 LLC submits Wholesale Market Based Rates Power Sales Tariff, to be effective 9/20/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5116.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2737–000.
Applicants: Emera Energy Services Subsidiary No. 2 LLC.
Description: Emera Energy Services Subsidiary No. 2 LLC submits tariff filing per 35.12: EES Sub 2 MBR Tariff to be effective 9/20/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5117.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2738–000.
Applicants: The Empire District Electric Company.
Description: The Empire District Electric Company submits tariff filing per 35.12: The Empire District Electric Company FERC Electric Tariffs to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5118.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2739–000.
Applicants: LS Power Marketing, LLC.
Description: LS Power Marketing, LLC submits tariff filing per 35.12: Market-Based Rate Tariff in Compliance with Order No. 714 to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5119.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2740–000.
Applicants: Rocky Road Power, LLC.
Description: Rocky Road Power, LLC submits tariff filing per 35.12: Market-Based Rate Tariff in Compliance with Order No. 714 to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5127.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2741–000.
Applicants: Emera Energy Services Subsidiary No. 3 LLC.
Description: Emera Energy Services Subsidiary No. 3 LLC submits tariff filing per 35.12: EES Sub 3 MBR Tariff to be effective 9/20/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5128.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2742–000.
Applicants: Tilton Energy, LLC.
Description: Tilton Energy, LLC submits tariff filing per 35.12: Market-Based Rate Tariff in Compliance with Order No. 714 to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5135.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2743–000.
Applicants: Bluegrass Generation Company, L.L.C.
Description: Bluegrass Generation Company, L.L.C. submits tariff filing per 35.12: Market-Based Rate Tariff in Compliance with Order No. 714 to be effective 9/17/2010.

Filed Date: 09/17/2010.
Accession Number: 20100917–5136.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2744–000.
Applicants: Riverside Generating Company, L.L.C.
Description: Riverside Generating Company, L.L.C. submits tariff filing per 35.12: Market-Based Rate Tariff in Compliance with Order No. 714 to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5137.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2745–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM interconnection, LLC submits executed Wholesale Market Participation Agreement with Space Energy Terrestrial, Inc et al.
Filed Date: 09/17/2010.
Accession Number: 20100917–0210.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 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.

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. 2010–24088 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

September 17, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER06–739–027; ER06–738–027; ER03–983–027; ER07–501–027; ER02–537–030; ER08–649–020; ER07–758–023.
Applicants: Cogen Technologies Linden Venture, L.P., Fox Energy Company LLC, Birchwood Power Partners, L.P., Shady Hills Power Company, L.L.C., East Coast Power Liden Holding, LLC, EFS Parlin Holdings, LLC, Inland Empire Energy Center, LLC.
Description: Notice of Non-Material Change in Status and Request for Waiver of the GE Companies.
Filed Date: 09/16/2010.
Accesstion Number: 20100916–5164.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2662–000.
Applicants: MidAmerican Energy Company.
Description: MidAmerican Energy Company submits an Amended and Restated Services Agreement for Substation Operator Services etc. with Cordova Energy Center LLC.
Filed Date: 09/15/2010.
Accesstion Number: 20100915–0209.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 6, 2010.

Docket Numbers: ER10–2697–000.
Applicants: EDFD–C.P. Crane.
Description: EDFD–C.P. Crane submits tariff filing per 35.12: EDFD–C.P. Crane Baseline to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accesstion Number: 20100916–5132.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2698–000.
Applicants: EDFD–West Valley.
Description: EDFD–West Valley submits tariff filing per 35.12: EDFD–West Valley Baseline to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accesstion Number: 20100916–5134.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2699–000.
Applicants: Citizens' Electric Company of Lewisburg,
Description: Citizens' Electric Company of Lewisburg, PA submits tariff filing per 35.12: Baseline Tariff Filing to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accesstion Number: 20100916–5141.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2700–000.
Applicants: Massachusetts Electric Company.
Description: Massachusetts Electric Company submits tariff filing per 35: Massachusetts Electric Compliance Filing of Baseline Market Based Rate Tariff to be effective 9/16/2010.
Filed Date: 09/16/2010.
Accesstion Number: 20100916–5147.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2701–000.
Applicants: Midwest Independent Transmission System.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35: 09–16–10 RAR Compliance to be effective 7/28/2010.
Filed Date: 09/16/2010.
Accesstion Number: 20100916–5156.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2702–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits revised interconnection construction service agreement with Evergreen Community Power *et al. Part 1 of 2.*
Filed Date: 09/16/2010.
Accesstion Number: 20100917–0206.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2703–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits revised rate schedule cover sheet to cancel PJM Electric Tariff Rate Schedule FERC No 40, effective 6/1/10.

Filed Date: 09/16/2010.
Accession Number: 20100917–0205.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2704–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits an executed interim interconnection service agreement with Meadow Lake Wind Farm IV LLC *et al.*
Filed Date: 09/16/2010.
Accession Number: 20100917–0204.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2705–000.
Applicants: Merchants Plaza Energy, LLC.
Description: Merchants Plaza Energy, LLC submits application for authorization to make wholesale of energy and capacity at negotiated market-based rates.
Filed Date: 09/16/2010.
Accession Number: 20100917–0202.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2706–000.
Applicants: Dennis Energy, Inc.
Description: Dennis Energy, Inc. submits application for authorization to make wholesale of energy and capacity at negotiated market-based rates.
Filed Date: 09/16/2010.
Accession Number: 20100917–0203.
Comment Date: 5 p.m. Eastern Time on Thursday, October 7, 2010.

Docket Numbers: ER10–2707–000.
Applicants: Mid-Continent Energy Marketers Association.
Description: Mid-Continent Energy Marketers Association submits tariff filing per 35.12: Baseline Tariff Filing to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5021.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2708–000.
Applicants: Wells Fargo Commodities, LLC.
Description: Wells Fargo Commodities, LLC submits tariff filing per 35.12: Wells Fargo, LLC Market-Based Rate Tariff to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5028.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2709–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits an executed interim interconnection service agreement and an executed interconnection construction service agreement.
Filed Date: 09/17/2010.
Accession Number: 20100917–0209.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2710–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits tariff filing per 35.12: Intra-PJM tariffs BASELINE—locked down to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5030.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2711–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits an executed interconnection service agreement and an executed interconnection construction service agreement.
Filed Date: 09/17/2010.
Accession Number: 20100917–0208.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2712–000.
Applicants: Cargill Power Markets, LLC.
Description: Cargill Power Markets, LLC submits tariff filing per 35.12: Baseline MBR Tariff Filing of Cargill Power Markets, LLC to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5035.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2713–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits tariff filing per 35.12: Rate schedules BASELINE—locked down to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5036.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2714–000.
Applicants: Carolina Power & Light Company.
Description: Notice of Cancellation of Rate Schedule No. 171 of Carolina Power & Light Company.
Filed Date: 09/17/2010.
Accession Number: 20100917–5038.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2715–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits tariff filing per 35.12: PJM Service Agreement Baseline Filing to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5044.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2716–000.
Applicants: Wellsboro Electric Company.
Description: Wellsboro Electric Company submits tariff filing per 35.12: Baseline Tariff Filing to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5045.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2717–000.
Applicants: EFS Parlin Holdings, LLC.
Description: EFS Parlin Holdings, LLC submits tariff filing per 35.12: Baseline Filing for EFSPH Market Based Rate Tariff to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5048.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2718–000.
Applicants: Cogen Technologies Linden Venture, L.P.
Description: Cogen Technologies Linden Venture, L.P. submits tariff filing per 35.12: Baseline Filing for CTLV Market Based Rate Tariff to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5049.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2719–000.
Applicants: East Coast Power Linden Holding, LLC.
Description: East Coast Power Linden Holding, LLC submits tariff filing per 35.12: Baseline Filing for ECPLH Market Based Rate Tariff to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5050.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2720–000.
Applicants: Minco Wind, LLC.
Description: Minco Wind, LLC submits tariff filing per 35.12: Minco Wind, LLC MBR Tariff Filing to be effective 11/1/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5051.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2721–000.
Applicants: El Paso Electric Company.
Description: El Paso Electric Company submits tariff filing per 35.12: Baseline Filing of Market-Based Rate Tariff to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5053.

Comment Date: 5 p.m. Eastern Time on Friday, October 8, 2010.

Docket Numbers: ER10–2722–000.
Applicants: Eurus Combine Hills I LLC.
Description: Eurus Combine Hills I LLC submits tariff filing per 35.12: Baseline Electric Market-Based Rates to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accesstion Number: 20100917–5054.
Comment Date: 5 p.m. Eastern Time on Friday, October 8, 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.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–24087 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

September 20, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2746–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.12: Interregional Agreements baseline to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5140.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2747–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits executed Wholesale Market Participation Agreement with SX Landfill Energy, LLC *et al.*
Filed Date: 09/17/2010.
Accession Number: 20100917–0212.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2748–000.
Applicants: Entergy Arkansas, Inc.
Description: Entergy Arkansas, Inc. submits tariff filing per 35.13(a)(2)(iii: Entergy Services, Inc. to be effective 11/16/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5145.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2749–000.
Applicants: Emera Energy Services Subsidiary No. 4 LLC.
Description: Emera Energy Services Subsidiary No. 4 LLC submits tariff filing per 35.12: EES Sub 4 MBR Tariff to be effective 9/20/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5147.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2750–000.
Applicants: The Order of St. Benedict of New Hampshire.
Description: The Order of St. Benedict of New Hampshire submits application for authorization to make wholesale sales of energy and capacity at negotiated market based rates.
Filed Date: 09/17/2010.
Accession Number: 20100917–0213.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2751–000.
Applicants: Renaissance Power, L.L.C.
Description: Renaissance Power, L.L.C. submits tariff filing per 35.12: Market-Based Rate Tariff in Compliance with Order No. 714 to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5151.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2752–000.
Applicants: Emera Energy Services Subsidiary No. 5 LLC.
Description: Emera Energy Services Subsidiary No. 5 LLC submits tariff filing per 35.12: EES Sub 5 MBR Tariff to be effective 9/20/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5152.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2753–000.
Applicants: Domtar.
Description: Domtar submits tariff filing per 35.12: Baseline eTariff Filing Pursuant to Order No. 714 to be effective 9/20/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5153.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2754–000.
Applicants: New England Wire Technologies Corporation.
Description: New England submits application for authorization to make wholesale sales of energy and capacity at negotiated market based rates.
Filed Date: 09/17/2010.

Accession Number: 20100917–0211.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2755–000.
Applicants: Las Vegas Power Company, LLC.
Description: Las Vegas Power Company, LLC submits tariff filing per 35.12: Market-Based Rate Tariff in Compliance with Order No. 714 to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5155.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2756–000.
Applicants: Griffith Energy LLC.
Description: Griffith Energy LLC submits tariff filing per 35.12: Market-Based Rate Tariff in Compliance with Order No. 714 to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5157.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2757–000.
Applicants: Arlington Valley, LLC.
Description: Arlington Valley, LLC submits tariff filing per 35.12: Market-Based Rate Tariff in Compliance with Order No. 714 to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5161.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2758–000.
Applicants: EnergyConnect, Inc.
Description: EnergyConnect, Inc. submits tariff filing per 35.12: Energy Connect, Inc. Rate Schedule FERC No. 1 to be effective 11/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5165.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2759–000.
Applicants: Bridgeport Energy, LLC.
Description: Bridgeport Energy, LLC submits tariff filing per 35.12: Market-Based Rate Tariff in Compliance with Order No. 714 to be effective 9/17/2010.
Filed Date: 09/17/2010.
Accession Number: 20100917–5170.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2760–000.
Applicants: Waterbury Generation LLC.
Description: Request for Waiver of Unreserved Transmission Use Penalties, Shortened Notice Period and Expedited Approval of Waterbury Generation LLC.
Filed Date: 09/17/2010.
Accession Number: 20100917–5195.
Comment Date: 5 p.m. Eastern Time on Friday, October 08, 2010.

Docket Numbers: ER10–2761–000
Applicants: Fulcrum Power Marketing LLC
Description: Fulcrum Power Marketing LLC submits tariff filing per 35.12: Fulcrum Market-Based Rate Tariff to be effective 9/21/2010.
Filed Date: 09/20/2010
Accession Number: 20100920–5030
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2762–000.
Applicants: Linde Energy Services, Inc.
Description: Linde Energy Services, Inc. submits tariff filing per 35.12: MBRA Tariff to be effective 9/20/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5036.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2763–000.
Applicants: Bangor Hydro Electric Company.
Description: Bangor Hydro Electric Company submits their proposed tariff Wholesale Market Based Rates Power Sales Tariff, to be effective 9/21/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5041.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2764–000.
Applicants: Vantage Wind Energy LLC.
Description: Vantage Wind Energy LLC submits tariff filing per 35.12: Baseline Filing of Market-Based Rate Tariff to be effective 9/20/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5045.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2765–000.
Applicants: Dighton Power, LLC.
Description: Dighton Power, LLC submits tariff filing per 35.12: Baseline Filing of Market-Based Rate Tariff to be effective 9/20/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5057.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2766–000.
Applicants: Lake Road Generating Company, L.P.
Description: Lake Road Generating Company, L.P. submits tariff filing per 35.12: Baseline Filing of Market-Based Rate Tariff to be effective 9/20/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5058.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2767–000.
Applicants: MASSPOWER.
Description: MASSPOWER submits tariff filing per 35.12: Baseline Filing of Market-Based Rate Tariff to be effective 9/20/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5059.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2768–000.
Applicants: Empire Generating Co, LLC.
Description: Empire Generating Co, LLC submits tariff filing per 35.12: Baseline Filing of Market-Based Rate Tariff to be effective 9/20/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5060.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2769–000.
Applicants: ECP Energy I, LLC.
Description: ECP Energy I, LLC submits tariff filing per 35.12: Baseline Filing of Market-Based Rate Tariff to be effective 9/20/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5061.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2770–000.
Applicants: EquiPower Resources Management, LLC.
Description: EquiPower Resources Management, LLC submits tariff filing per 35.12: Baseline Filing of Market-Based Rate Tariff to be effective 9/20/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5062.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2771–000.
Applicants: National Grid Generation LLC.
Description: National Grid Generation LLC submits tariff filing per 35.12: Filing to Create Tariff Identifier for Service Agreements and Rate Schedules to be effective 9/20/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5070.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2772–000.
Applicants: New England Hydro Transmission Corporation.
Description: New England Hydro Transmission Corporation submits tariff filing per 35.12: Filing to Create Tariff Identifier for Service Agreements and Rate Schedules to be effective 9/20/2010.
Filed Date: 09/20/2010.
Accession Number: 20100920–5084.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2773–000.
Applicants: New England Hydro Transmission Electric.

Description: New England Hydro Transmission Electric Company submits tariff filing per 35.12: Filing to Create Tariff Identifier for Service Agreements and Rate Schedules to be effective 9/20/2010.

Filed Date: 09/20/2010.

Accession Number: 20100920–5090.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2774–000.

Applicants: Arizona Solar One LLC.

Description: Arizona Solar One LLC submits tariff filing per 35.12: Initial Market-Based Rate Application to be effective 10/11/2010 under ER10–02774–000. Filing Type: 400.

Filed Date: 09/20/2010.

Accession Number: 20100920–5106.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2775–000.

Applicants: Beacon Power Corporation.

Description: Beacon Power Corporation submits tariff filing per 35.12: Stephentown FERC Electric Tariff, Volume No. 1 Baseline Filing to be effective 9/20/2010 under ER10–02775–000. Filing Type: 360.

Filed Date: 09/20/2010.

Accession Number: 20100920–5109.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2776–000.

Applicants: Wells Fargo Commodities, LLC.

Description: Wells Fargo Commodities, LLC submits tariff filing per 35.12: Wells Fargo Commodities, LLC Market-Based Rate Tariff to be effective 9/17/2010 under ER10–02776–000. Filing Type: 360.

Filed Date: 09/20/2010.

Accession Number: 20100920–5111.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2777–000.

Applicants: Avista Corporation.

Description: Avista Corporation submits tariff filing per 35: Compliance Filing Docket No. OA10–11 to be effective 9/22/2010 under ER10–02777–000. Filing Type: 80.

Filed Date: 09/20/2010.

Accession Number: 20100920–5113.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Docket Numbers: ER10–2778–000.

Applicants: Rainbow Energy Marketing Corp.

Description: Rainbow Energy Marketing Corp. submits tariff filing per 35.12: Rainbow Energy Marketing—FERC Electric Tariff to be effective 9/20/2010 under ER10–02778–000. Filing Type: 360.

Filed Date: 09/20/2010.

Accession Number: 20100920–5114.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 12, 2010.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF10–669–000.

Applicants: PowerSecure, Inc.

Description: Self-Certification of QF of PowerSecure Inc.

Filed Date: 09/17/2010.

Accession Number: 20100917–5077.

Comment Date: Not Applicable.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RD10–15–000.

Applicants: North American Electric Reliability Corporation

Description: Petition of the North American Electric Reliability Corporation for Approval of Proposed Modifications to Reliability Standards BAL–002–1; EOP–002–3; FAC–002–1; MOD–021–2; PRC–004–2; and VAR–001–2.

Filed Date: 09/09/2010.

Accession Number: 20100909–5184.

Comment Date: 5 p.m. Eastern Time on Wednesday, September 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. 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 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. 2010–24078 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13830–000]

Eastport Tidal Power LLC; Notice of Competing Preliminary Permit Application Accepted for Filing and Soliciting Comments and Motions To Intervene

September 17, 2010.

On August 9, 2010, Eastport Tidal Power LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Half Moon Cove Tidal Power Plant Project to be located in Half Moon Cove and Cobscook Bay, Washington County, Maine. The sole purpose of a

preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) The existing 544-acre Half Moon Cove; (2) a new 410-foot-long and a new 115-foot-long impervious core, sand, and gravel embankments; (3) a new 860-foot-long concrete modular wall panel extending about 11 feet above mean sea level consisting of: (a) New concrete support columns; (b) a new filling and emptying gated section; (c) a new boat lift; and (d) a new powerhouse with four reversible bulb generating units with a total capacity of 20 megawatts; and (4) a new 34.5 kilovolt, 7.1-mile-long transmission line. The project would produce an estimated average annual generation of about 52,500 megawatt-hours.

Applicant Contact: Andrew Landry, 45 Memorial Circle, PO Box 1058, Augusta, ME 04332, *phone:* (207) 791–3191, *e-mail: alandry@preti.com.*

FERC Contact: Tom Dean (202) 502–6041.

Competing Application: This application competes with Project No. 12704–004 filed April 12, 2010. The deadline to file a competing application or notice of intent ended July 16, 2010.

Deadline for filing comments or motions to intervene: 60 days from the issuance of this notice. Comments and motions to intervene may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13830) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–24074 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–2706–000]

Dennis Energy, Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

September 17, 2010.

This is a supplemental notice in the above-referenced proceeding of Dennis Energy, Inc.'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 October 7, 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 Street, 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. 2010–24073 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–2705–000]

Merchants Plaza Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

September 17, 2010.

This is a supplemental notice in the above-referenced proceeding of Merchants Plaza 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 October 7, 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 Street, 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 *FERC OnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–24076 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–2568–000]

Chestnut Flats Wind, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

September 16, 2010.

This is a supplemental notice in the above-referenced proceeding of Chestnut Flats Wind, 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 October 6, 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 Street, 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.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–24079 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–2653–000]

Snowflake Power, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

September 16, 2010.

This is a supplemental notice in the above-referenced proceeding of Snowflake Power, 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 October 6, 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 Street, 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 *FERC OnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–24081 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–2661–000]

Viridian Energy NY LLC; Supplemental Notice that Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

September 16, 2010.

This is a supplemental notice in the above-referenced proceeding of Viridian Energy NY 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 October 6, 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 Street, 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 *FERC OnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–24085 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–2660–000]

Turner Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

September 16, 2010.

This is a supplemental notice in the above-referenced proceeding of Turner 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 October 6, 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 Street, 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 *FERC OnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–24084 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–2659–000]

Kennebec River Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

September 16, 2010.

This is a supplemental notice in the above-referenced proceeding of Kennebec River 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 October 6, 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 Street, 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 *FERC OnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–24083 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–2658–000]

HOP Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

September 16, 2010.

This is a supplemental notice in the above-referenced proceeding of HOP 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 October 6, 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 Street, 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 *FERC OnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–24082 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–2644–000]

Hardwood Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

September 16, 2010.

This is a supplemental notice in the above-referenced proceeding of Hardwood 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 October 6, 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 Street, 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.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–24080 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RM06–16–010; RM06–16–011]

Mandatory Reliability Standards for the Bulk Power System; Supplemental Notice of Technical Conference

September 17, 2010.

On August 19, 2010 the Federal Energy Regulatory Commission announced that a Technical Conference on Frequency Response in the Wholesale Electric Grid would be held on Thursday, September 23, from 10 a.m. to 4 p.m. This staff-led conference will be held in the Commission Meeting Room at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. The conference will be open for the public to attend and advance registration is not required. Members of the Commission may attend the conference. A supplemental notice issued on September 14, 2010 contained the agenda for this conference.

We hereby announce that a free webcast of the technical conference in this proceeding will be available. Anyone with Internet access interested in viewing this conference can do so by navigating to *http://www.ferc.gov's* Calendar of Events and locating the appropriate event in the Calendar. The Calendar of Events will contain a link to the applicable webcast option. The Capitol Connection provides technical support for the webcasts and offers the option of listening to the conferences via phone-bridge for a fee. If you have any questions, visit *http://www.Capitol Connection.org* or call (703) 993–3100.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an e-mail to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–1659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For more information about this conference, please contact: Sarah McKinley, Office of External Affairs, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8368, *sarah.mckinley@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–24075 Filed 9–24–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2010–0568; FRL–8835–9]

Agency Information Collection Activities; Proposed Collection; Comment Request; Asbestos-Containing Materials in Schools Rule and Revised Asbestos Model Accreditation Plan Rule; EPA ICR No. 1365.09, OMB Control No. 2070–0091

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR, entitled: "Asbestos-Containing Materials in Schools Rule and Revised Asbestos Model Accreditation Plan Rule" and identified by EPA ICR No. 1365.09 and OMB Control No. 2070–0091, is scheduled to expire on March 31, 2011. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection.

DATES: Comments must be received on or before November 26, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2010–0568, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery*: OPPT Document Control Office (DCO), EPA East, Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2010–0568. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2010–0568. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact*: Robert

Courtnage, National Program Chemicals Division (7404T), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 566–1081; fax number: (202) 566–0473; e-mail address: *courtnage.robert@epa.gov*.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. What Information is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of PRA, EPA specifically solicits comments and information to enable it 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 estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
3. Enhance the quality, utility, and clarity of the information to be collected.
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What Should I Consider when I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the collection activity.
7. Make sure to submit your comments by the deadline identified under **DATES**.
8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

III. What Information Collection Activity or ICR Does this Action Apply to?

Affected entities: Entities potentially affected by this ICR are local education agencies (LEAs, e.g., elementary or secondary public school districts or a private school or school system); asbestos training providers to schools and educational systems; state education departments or commissions; or state public health departments or commissions.

Title: Asbestos-Containing Materials in Schools Rule and Revised Asbestos Model Accreditation Plan Rule.

ICR numbers: EPA ICR No. 1365.09, OMB Control No. 2070–0091.

ICR status: This ICR is currently scheduled to expire on March 31, 2011. 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 Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The Asbestos Hazard Emergency Response Act (AHERA) requires LEAs to conduct inspections, develop management plans, and design or conduct response actions with respect to the presence of asbestos-containing materials in school buildings. AHERA also requires states to develop model accreditation plans for persons who perform asbestos inspections, develop management control plans, and design or conduct response actions. This information collection addresses the burden associated with recordkeeping requirements imposed on LEAs by the asbestos in schools rule and reporting and recordkeeping requirements imposed on states and training providers related to the model accreditation plan rule.

Responses to the collection of information are mandatory (see 40 CFR part 763, subpart E). Respondents may claim all or part of a document confidential. EPA will disclose information that is covered by a claim of confidentiality only to the extent permitted by, and in accordance with, the procedures in TSCA section 14 and 40 CFR part 2.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to range between 5.5 hours and 140 hours per response, depending on the category of the respondent. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of this estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 133,980.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: 1.

Estimated total annual burden hours: 2,592,888 hours.

Estimated total annual costs: $86,972,753. This includes an estimated burden cost of $86,972,753 and an estimated cost of $0 for capital investment or maintenance and operational costs.

IV. Are There Changes in the Estimates from the Last Approval?

There is an increase of 62,288 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This increase reflects EPA's estimate of the number of schools with nonfriable asbestos-containing material and the number of training providers affected by this information collection. The change is an adjustment.

V. What is the Next Step in the Process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Reporting and recordkeeping requirements.

Dated: September 20, 2010.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2010–24133 Filed 9–24–10; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comments concerning the collection of information titled: Interagency Guidance on Sound Incentive Compensation Practices. (3064–0175).

DATES: Comments must be submitted on or before November 26, 2010.

ADDRESSES: Interested parties are invited to submit written comments. All comments should refer to the name and number of the collection. Comments may be submitted by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *E-mail: comments@fdic.gov.*
- *Mail:* Gary A. Kuiper (202.898.3877), Federal Deposit Insurance Corporation, 550 17th Street, NW., F–1086, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

A copy of the comments may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Gary A. Kuiper (address above).

SUPPLEMENTARY INFORMATION: The FDIC is proposing to renew, without change, the following information collection.

Title: Interagency Guidance on Sound Incentive Compensation Practices.

OMB Number: 3064–0175.

Form Number: None.

Frequency of Response:

Implementation: Once.

Maintenance: Annual.

Affected Public: Insured state nonmember banks.

Estimated Number of Responses:

Implementation:

Large Banks: 20.

Small Banks: 4870.

Maintenance:

All Banks: 4890.

Estimated Time per Response:

Implementation:

Large Banks: 480 hours.

Small Banks: 80 hours.

Maintenance:

Large Banks: 40 hours.

Small Banks: 40 hours.

Total Annual Burden:

Large Banks: $20 \times 480 + 20 \times 40 = 10{,}400$ hours.

Small Banks: $4870 \times 80 + 4870 \times 40 = 389{,}600$ hours.

Total: 594,800 hours (399,200 hours for implementing policies and procedures is a one-time burden).

General Description of Collection: The Guidance would help ensure that incentive compensation policies at insured state non-member banks do not encourage excessive risk-taking and are consistent with the safety and soundness of the organization. Under the Guidance, banks would be required to: (i) Have policies and procedures that identify and describe the role(s) of the personnel and units authorized to be involved in incentive compensation arrangements, identify the source of significant risk-related inputs, establish appropriate controls governing these inputs to help ensure their integrity, and identify the individual(s) and unit(s) whose approval is necessary for the establishment or modification of incentive compensation arrangements; (ii) create and maintain sufficient documentation to permit an audit of the organization's processes for incentive compensation arrangements; (iii) have any material exceptions or adjustments to the incentive compensation arrangements established for senior executives approved and documented by its board of directors; and (iv) have its board of directors receive and review, on an annual or more frequent basis, an assessment by management of the effectiveness of the design and operation of the organization's incentive compensation system in providing risk-taking incentives that are consistent with the organization's safety and soundness.

Request for Comment

Comments are invited on: (a) Whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the collection should be modified prior to submission to OMB for review and approval. Comments submitted in response to this notice also will be summarized or included in the FDIC's request to OMB for renewal of this collection. All comments will become a matter of public record.

Dated at Washington, DC, this 22nd day of September, 2010.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2010–24151 Filed 9–24–10; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

SUMMARY:

Background

Notice is hereby given of the final approval of proposed information collections by the Board of Governors of the Federal Reserve System (Board) under OMB delegated authority, as per 5 CFR 1320.16 (OMB Regulations on Controlling Paperwork Burdens on the Public). Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act (PRA) Submission, supporting statements and approved collection of information instrument(s) are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

FOR FURTHER INFORMATION CONTACT:

Federal Reserve Board Clearance Officer—Michelle Shore—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202–452–3829).

OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

Final approval under OMB delegated authority of the extension for three years, without revision, of the following report:

Report title: Recordkeeping and Disclosure Requirements Associated with Securities Transactions Pursuant to Regulation H.

Agency form number: Reg H–3.

OMB control number: 7100–0196.

Frequency: On occasion.

Reporters: State member banks.

Estimated annual reporting hours: 97,279 hours.

Estimated average hours per response: State member banks (de novo): recordkeeping, 40 hours. State member banks *with* trust departments: recordkeeping, 2 hours; disclosure, 16 hours. State member banks *without* trust departments: recordkeeping, 15 minutes; disclosure, 5 hours.

Number of respondents: 3 new state member banks (de novo), 224 state member banks *with* trust departments and state member trust companies, and 621 state member banks *without* trust departments.

General description of report: This information collection is mandatory pursuant the Federal Deposit Insurance Corporation Act (12 U.S.C. 325), which authorizes the Federal Reserve to require recordkeeping, disclosure and policy establishment requirements associated with Sections 208.34(c), (d), and (g) of Regulation H, and 15 U.S.C. 78w. If the records maintained by state member banks come into the possession of the Federal Reserve, they are given confidential treatment (5 U.S.C. 552(b)(4), (b)(6), and (b)(8)) under the Freedom of Information Act.

Abstract: The Federal Reserve's Regulation H requires state member banks to maintain records for three years following a securities transaction. These requirements are necessary to protect the customer, to avoid or settle customer disputes, and to protect the institution against potential liability arising under the anti-fraud and insider trading provisions of the Securities Exchange Act of 1934.

Current Actions: On July 8, 2010, the Federal Reserve published a notice in the **Federal Register** (75 FR 39258) seeking public comment for 60 days on the extension, without revision, of the Recordkeeping and Disclosure Requirements Associated with Securities Transactions Pursuant to Regulation H. The comment period for this notice expired on September 7, 2010. The Federal Reserve did not receive any comments.

Dated: Board of Governors of the Federal Reserve System, September 21, 2010.

Jennifer J. Johnson,

Secretary of the Board..

[FR Doc. 2010–24060 Filed 9–24–10; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 22, 2010.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) P.O. Box 55882, Boston, Massachusetts 02106–2204:

1. Rockville Financial, Rockville, Connecticut; to become a bank holding company by acquiring 100 percent of the voting shares of Rockville Bank, Rockville, Connecticut, in connection with the reorganization of Rockville Financial, MHC, Rockville, Connecticut, from mutual to stock form.

Board of Governors of the Federal Reserve System, September 22, 2010.

Margaret McCloskey Shanks,

Associate Secretary of the Board.

[FR Doc. 2010–24150 Filed 9–24–10; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Secretary's Advisory Committee on Human Research Protections

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health.

ACTION: Notice.

SUMMARY: Pursuant to Section 10(a) of the Federal Advisory Committee Act, U.S.C. Appendix 2, notice is hereby given that the Secretary's Advisory Committee on Human Research Protections (SACHRP) will hold its twenty-fourth meeting. The meeting will be open to the public. Information about SACHRP and the meeting agenda will be posted on the SACHRP Web site at: *http://www.hhs.gov/ohrp/sachrp/index.html.*

DATES: The meeting will be held on Tuesday, October 19, 2010, from 8:30 a.m. until 5:15 p.m. and Wednesday,

October 20, 2010, from 8:30 a.m. until 5:15 p.m.

ADDRESSES: U.S. Department of Health and Human Services, 200 Independence Avenue SW., Hubert H. Humphrey Building, Room 800, Washington, DC 20201.

FOR FUTHER INFORMATION CONTACT: Jerry Menikoff, M.D., J.D., Director, Office for Human Research Protections (OHRP), or Julia Gorey, J.D., Executive Director, SACHRP; U.S. Department of Health and Human Services, 1101 Wootton Parkway, Suite 200, Rockville, Maryland 20852; 240–453–8141; *fax:* 240–453–6909; *e-mail address: Julia.Gorey@hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the authority of 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended, SACHRP was established to provide expert advice and recommendations to the Secretary of Health and Human Services and the Assistant Secretary for Health on issues and topics pertaining to or associated with the protection of human research subjects.

On October 19, 2010, SACHRP will hear a panel of four experts discuss the evolving concepts of identifiability and anonymization of data in the context of current and future research. Following the panel, the Subcommittee on Harmonization (SOH) will present a report. The SOH was established by SACHRP at its July 2009 meeting, and is charged with identifying and prioritizing areas in which regulations and/or guidelines for human subjects research adopted by various agencies or offices within HHS would benefit from harmonization, consistency, clarity, simplification and/or coordination.

On October 20, 2010, the morning will begin with a panel discussing the use of deception in human subjects research. Subpart A Subcommittee (SAS) will make a report focusing on improvements to the informed consent process. SAS is charged with developing recommendations for consideration by SACHRP about the application of subpart A of 45 CFR part 46 in the current research environment. This subcommittee was established by SACHRP at its October 2006 meeting. Public comment will be heard on both days.

Public attendance at the meeting is limited to space available. Individuals who plan to attend the meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the designated contact persons. Members of the public will have the opportunity to provide comments on both days of the meeting. Public comment will be limited to five minutes per speaker. Any members of the public who wish to have printed materials distributed to SACHRP members for this scheduled meeting should submit materials to the Executive Director, SACHRP, prior to the close of business Friday, October 15, 2010.

Dated: September 21, 2010.

Jerry Menikoff,

Director, Office for Human Research Protections, Executive Secretary, Secretary's Advisory Committee on Human Research Protections.

[FR Doc. 2010–24128 Filed 9–24–10; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60-Day–10–10GY]

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 to provide 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, 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

Community Assessment and Engagement Process—New—Division of Health Assessment and Consultation (DHAC), Agency for Toxic Substances and Disease Registry (ATSDR), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

ATSDR serves the public through responsive public health actions to promote healthy and safe environments and to prevent harmful exposures. To effectively implement ATSDR's programs, the agency works with communities by listening to and understanding their health concerns and seeking their guidance on where, when, and how to take public health actions. Communities in proximity to hazardous waste sites are concerned that they are being exposed to hazardous substances being released into the environment. Community assessment data will enable ATSDR to determine the perceived needs, concerns, values, and priorities of communities we serve and determine their willingness, interest and ability to participate in community engagement activities.

In order to secure this data, ATSDR will interview adult males and females ages 18 and over living near petitioned or National Priorities List sites. ATSDR will also identify health and other concerns and the most effective channels of communication and venues for engagement.

ATSDR staff will work with key stakeholders in communities to interview participants. These interviews will take the form of in-depth or telephone interviews with five audiences: General residential population (n = 600), public/private health care providers (n = 200), community leaders (n = 200), elected officials (n = 100), and industry leaders (n = 100).

In-depth Interviews will take place at the individual's residence, at a predetermined interview location, at ATSDR-sponsored town hall meetings, or other ATSDR-sponsored functions. Telephone interviews will take place at the individual's residence or business location. Findings from these interviews will be used to determine how ATSDR will engage the community in addressing environmental concerns. Interview findings will also help ATSDR reach as many of the members of the affected community as possible and ensure that all community members are given an opportunity to provide input to ATSDR regarding public health assessment and community involvement activities. There are no costs to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Responses per respondent	Average burden per response (in hours)	Total burden hours
General Resident	In-depth Interview/phone	600	1	1.5	900
	Screener	1,200	1	6/60	120
Health care provider	In-depth Interview/phone	200	1	.5	100
	Screener	400	1	6/60	40
Community Leader	In-depth Interview/phone	200	1	1.5	300
	Screener	400	1	6/60	40
Elected Official	In-depth Interview/phone	100	1	.5	50
Industry	In-depth Interview/phone	100	1	.5	50
Total					1,600

Dated: September 21, 2010.

Maryam I. Daneshvar,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–24181 Filed 9–24–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0355]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Current Good Manufacturing Practice in Manufacturing, Packaging, Labeling, or Holding Operations for Dietary Supplements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by October 27, 2010.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0606. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Current Good Manufacturing Practice in Manufacturing, Packaging, Labeling, or Holding Operations for Dietary Supplements (OMB Control Number 0910–0606)—Extension

On October 25, 1994, the Dietary Supplement Health and Education Act (DSHEA) (Public Law 103–417) was signed into law. DSHEA, among other things, amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act) by adding section 402(g) of the FD&C Act (21 U.S.C. 342(g)). Section 402(g)(2) of the FD&C Act provides, in part, that the Secretary of Health and Human Services (the Secretary) may, by regulation, prescribe good manufacturing practices for dietary supplements. Section 402(g) of the FD&C Act also stipulates that such regulations shall be modeled after current good manufacturing practices (CGMPs) regulations for food and may not impose standards for which there are no current, and generally available, analytical methodology. Section 402(g)(1) of the FD&C Act states that a dietary supplement is adulterated if "it has been prepared, packed, or held under conditions that do not meet current good manufacturing practice regulations." Under section 701(a) of the FD&C Act (21 U.S.C. 371), FDA may issue regulations necessary for the efficient enforcement of the FD&C Act. FDA published a final rule on June 25, 2007 (72 FR 34752) (the final rule) that established, in part 111 (21 CFR part 111), the minimum CGMPs necessary for activities related to manufacturing, packaging, labeling, or holding dietary supplements to ensure the quality of the dietary supplement.

Records are an indispensable component of CGMPs. The records required by FDA's regulations in part 111 provide the foundation for the planning, control, and improvement processes that constitute a quality control system. Implementation of these processes in a manufacturing operation serves as the backbone to CGMPs. The records will show what is to be manufactured; what was, in fact, manufactured; and whether the controls that the manufacturer put in place to control the identity, purity, strength, and composition and limits on contaminants and to prevent adulteration were effective. Further, records will show whether and what deviations from control processes occurred, facilitate evaluation and corrective action concerning these deviations (including, where necessary, whether associated batches of product should be recalled from the marketplace), and enable a manufacturer to assure that the corrective action was effective. In addition, by requiring records, FDA will be able to ensure that industry follows CGMPs during manufacturing, packaging, labeling, or holding operations. The regulations in part 111 establish the minimum manufacturing practices necessary to ensure that dietary supplements are manufactured, packaged, labeled, or held in a manner that will ensure the quality of the dietary supplements during manufacturing, packaging, labeling or holding operations.

The records requirements of the regulations include written procedures and records pertaining to: (1) Personnel; (2) sanitation; (3) calibration of instruments and controls; (4) calibration, inspection, or checks of automated, mechanical, or electronic equipment; (5) maintaining, cleaning, and sanitizing equipment and utensils and other contact surfaces; (6) water

used that may become a component of the dietary supplement; (7) production and process controls; (8) quality control; (9) components, packaging, labels and product received for packaging and labeling; (10) master manufacturing and batch production; (11) laboratory operations; (12) manufacturing operations; (13) packaging and labeling operations; (14) holding and distributing operations; (15) returned dietary supplements; and (16) product complaints.

Description of Respondents: Manufacturers, dietary supplement manufacturers, packagers and repackagers, labelers and re-labelers, holders, distributors, warehousers, exporters, importers, large businesses, and small businesses.

The recordkeeping requirements of the regulations in part 111 are set forth in each subpart. In table 1 of this document we list the annual burdens associated with recordkeeping. In the table, where the same records are mentioned in more than one provision of a subpart, we list the burden under the provisions corresponding to the heading in the final rule, "Under this subpart, what records must you make and keep?" For some provisions listed in table 1, we did not estimate the annual frequency of recordkeeping because recordkeeping occasions consist of frequent brief entries of dates, temperatures, monitoring results, or documentation that specific actions were taken. Information might be recorded a few times a day, week, or month. When the records burden involves frequent brief entries, we entered one as the default for the annual frequency of recordkeeping. For example, many of the records listed under § 111.35 in table 1, such as § 111.35(b)(2) (documentation, in individual equipment logs, of the date of the use, maintenance, cleaning, and sanitizing of equipment), involve many short sporadic entries over the course of the year, varying across equipment and plants in the industry. We did not attempt to estimate the actual number of recordkeeping occasions for these provisions, but instead entered an estimate of the average number of hours per year. We entered the default value of 1 as the annual frequency of recordkeeping for these and similar provisions. For § 111.35, the entry for annual frequency is 1 as a default representing a large number of brief recordkeeping occasions.

In many rows of table 1 of this document, we list a burden under a single provision that covers the written procedures or records described in several provisions. For example, the burden of the batch production records listed in table 1 under § 111.260 includes the burden for records listed under § 111.255 because the batch production records must include those records.

The annual frequency for batch production records (and other records kept on a batch basis in table 1 of this document) equals the annual number of batches. The estimated burden for records kept by batch includes both records kept for every batch and records kept for some but not all batches. We use the annual number of batches as the frequency for records that will not necessarily be kept for every batch, such as test results or material review and disposition records, because such records are part of records, if they are necessary, that will be kept for every batch.

In the **Federal Register** of July 14, 2010 (75 FR 40840), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
111.14	15,000	4	60,000	1	60,000
111.23	15,000	1	15,000	0.2	3,000
111.35	400	1	400	12.5	5,000
111.95	250	1	250	45	11,250
111.140	240	1,163	279,120	1	279,120
111.180	240	1,163	279,120	1	279,120
111.210	240	1	240	2.5	600
111.260	145	1,408	204,160	1	204,160
111.325	120	1	120	15	1,800
111.375	260	1	260	2	520
111.430	50	1	50	12.6	630
111.475	15,000	1	15,000	0.4	6,000
111.535	110	4	440	13.5	5,940
111.570	240	600	144,000	0.5	72,000
Total					929,140

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The burden estimates in table 1 of this document are based on those in the final rule, which were based on our institutional experience with other CGMP requirements and on data provided by Research Triangle Institute (RTI) in the "Survey of Manufacturing Practices in the Dietary Supplement Industry" cited in that rule.

The estimates in table 1 of the number of firms affected by each provision of part 111 are based on the percentage of manufacturers, packagers, labelers, holders, distributors, and warehousers that reported in the survey that they have not established written standard operating procedures (SOPs) or do not maintain records that were later required by the final rule. Because we do not have survey results for general warehouses, we entered the approximate number of facilities in that category for those provisions covering general facilities. For the dietary supplement industry, the survey estimated that 1,460 firms would be covered by the final rule, including manufacturers, packagers, labelers, holders, distributors, and warehousers. The time estimates include the burden involved in documenting that certain requirements are performed and in recordkeeping. We used an estimated annual batch production of 1,408 batches per year to estimate the burden of requirements that are related to the number of batches produced annually, such as § 111.260, "What must the batch production record include?" The estimate of 1,408 batches per year is near the midpoint of the number of annual batches reported by survey firms.

The length of time that CGMP records must be maintained is set forth in § 111.605. Table 1 of this document reflects the estimated burdens for written procedures, record maintenance, periodically reviewing records to determine if they may be discarded, and for any associated documentation for that activity for records that are required under part 111. We have not included a separate estimate of burden for those sections that require maintaining records in accordance with § 111.605, but have included those burdens under specific provisions for keeping records. For example, § 111.255(a) requires that the batch production records be prepared every time a batch is manufactured, and § 111.255(d) requires that batch production records be kept in accordance with § 111.605. The estimated burdens for both § 111.255(a) and (d) are included under § 111.260 (what the batch record must include).

Dated: September 21, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–24105 Filed 9–24–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0434]

Draft Guidance for Industry: Acidified Foods; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled "Guidance for Industry: Acidified Foods." The draft guidance, when finalized, will complement FDA's regulations regarding acidified foods, including regulations for specific current good manufacturing practice (CGMP), establishment registration, and process filing. The draft guidance is intended to assist commercial food processors in determining whether their food products are subject to these regulations. The draft guidance also is intended to assist processors of acidified foods in ensuring safe manufacturing, processing, and packing processes and in employing appropriate quality control procedures. Under the draft guidance, processors of non-acidified foods (e.g., some acid foods or fermented foods) who are not subject to the acidified food regulations may choose to voluntarily register and file scheduled processes with us using existing forms (Forms FDA 2541 and 2541a). If such processors voluntarily submit this information, we plan to make the results of any FDA evaluation of the information available to our investigators, e.g., during inspections of food facilities and during evaluations of foods offered for import.

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 concerning the draft guidance by December 27, 2010. Submit either electronic or written comments concerning the collection of information provisions by December 27, 2010.

ADDRESSES: Submit electronic comments on the draft guidance and the proposed collection of information provisions to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit written requests for single copies of the draft guidance entitled "Guidance for Industry: Acidified Foods" to the Office of Food Safety, Center for Food Safety and Applied Nutrition (HFS–302), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your request, or fax your request to 301–436–2669. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance.

FOR FURTHER INFORMATION CONTACT:

With regard to the draft guidance document: Michael Mignogna, Center for Food Safety and Applied Nutrition (HFS–302), Food and Drug Administration, 5100 Paint Branch Parkway, College Park, MD 20740, 301–436–1565.

With regard to the information collection: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance entitled "Guidance for Industry: Acidified Foods." The draft guidance, when finalized, will complement FDA's regulations regarding acidified foods, including regulations for specific CGMP, establishment registration, and process filing. The draft guidance is intended to assist commercial food processors in determining whether their food products are subject to these regulations. Under the draft guidance, processors of acid foods and fermented foods who conclude that such foods they produce are not also acidified foods[1] may voluntarily register and file scheduled processes with us using existing forms (Forms FDA 2541 and 2541a) for acidified foods. Processors of

[1] Fermented foods, such as some kinds of sauerkraut, cucumber pickles, and green olives, are low-acid foods subjected to the action of acid-producing microorganisms to reduce the pH of the food. Not all fermented foods meet the definition of "acidified foods" in 21 CFR 114.3(b). However, some fermented foods that contain acid are also acidified foods. We also note that fermented dairy products, such as yogurt, belong to a separate category that is not relevant to the fermented foods that are discussed in this guidance.

acid foods and fermented foods, which foods are not also acidified foods, would not be subject to the acidified food regulations. When processors of such acid foods or fermented foods voluntarily register and file scheduled processes with us using existing forms, we plan to make the results of any FDA evaluation of such information available to our investigators, e.g., during inspections of food facilities and during evaluations of foods offered for import, to facilitate investigators' decisions about the regulatory status of those food products. The draft guidance recommends that such processors, who voluntarily file scheduled processes with us, file a single scheduled process for each product, rather than filing a separate form for each container size, as required for processors of acidified foods. The draft guidance also is intended to assist processors of acidified foods in ensuring safe manufacturing, processing, and packing processes and in employing appropriate quality control procedures. FDA is issuing this draft guidance as a level 1 draft guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent FDA'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.

II. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Title: Recommendations for Establishment-Specific Written Quality Control Plans and Recordkeeping for Acidified Foods, and Voluntary Registration and Process Filing.

Description of respondents: The likely respondents to this proposed collection of information are processors of acidified foods as well as processors of foods that may not be acidified foods who voluntarily choose to provide us with information about these foods.

Description: The draft guidance is intended to assist processors of acidified foods in ensuring safe manufacturing, processing, and packing processes and in employing appropriate quality control procedures. Further, this guidance notes that processors who are not certain as to whether specific food products, including foods that may be acid or fermented foods, are acidified foods subject to registration and process filing requirements may provide us with information about these products by voluntarily submitting Forms FDA 2541 and 2541a. This guidance also recommends that firms prepare a written plan to investigate product lots for signs of spoilage and document any investigation and corrective actions relevant to spoilage.

This draft guidance also refers to previously approved collections of information found in FDA regulations. The collections of information in § 108.25 (21 CFR 108.25) and part 114 (21 CFR part 114) have been approved under OMB control no. 0910–0037.

Under the draft guidance, when processors voluntarily submit Forms FDA 2541 and 2541a for foods that they conclude are not acidified foods, we intend to continue to evaluate the process information to determine whether it is consistent with a processor's conclusion that a food is not an acidified food. The burden approved under OMB control no. 0910–0037 does not include the burden associated with voluntary reporting.

The burden approved under OMB control no. 0910–0037 also does not include the burden associated with the recommendations in the draft guidance to prepare a written plan (the establishment-specific written plan) that includes quality control procedures with respect to spoilage and to document spoilage events if they occur. We estimate the recordkeeping burden of the draft guidance by assuming that those in the industry that process acidified foods and that do not currently follow the recommendations put forth in the draft guidance will find it of value to do so. The conservative assumptions and estimates made in this analysis regarding the recordkeeping burden are intended to provide the upper bound estimates of anticipated impact of the guidance on the acidified food industry and others that choose to file voluntary submissions with FDA. These burdens would be realized if every operation, plant, or processor of acidified foods that does not already follow the recommendations of the draft guidance would choose to do so.

We estimate the proposed collection of information consists of one-time and recurring recordkeeping burdens, summarized in table 1 of this document.

We estimate the reporting burden of the draft guidance by assuming that processors who conclude that their specific food products are acid foods or fermented foods, rather than acidified foods subject to registration and process filing requirements, will find it of value to provide us with information about their products by voluntarily submitting Forms FDA 2541 and 2541a. The conservative assumptions and estimates made in this analysis regarding the reporting burden are intended to provide the upper bound estimates of anticipated impact of the guidance on such processors. These burdens would be realized if every operation, plant, or processor that concludes that specific food products are acid or fermented foods that are not also acidified foods, would choose to submit Forms FDA 2541 and 2541a. We estimate that the proposed collection of information consists of one-time and recurring reporting burdens, summarized in table 2 of this document.

Current Information Available to FDA

The existing reporting requirements in § 108.25 provide us with information about the acidified foods industry, including the total number of establishment registrations, the annual number of establishment registrations, and the annual number of processes filed. As of February 4, 2010, there are a total of 4,872 establishments registered with FDA in accordance with § 108.25 as commercial processors of acidified foods.

The available data for the past 6 years (2004 through 2009)[2] indicate that, on average, there are 6,754 process filings submitted by an average of 892 acidified foods establishments each year. In addition, since 2004, when we began implementing an electronic filing system, approximately 750 establishments that registered using Form FDA 2541 submitted process filings to us for food products that we determined were not covered by either part 113 (21 CFR part 113) or part 114. The available information includes the number of establishments that submitted such filings, but not the number of filings.

We also have data on estimated reporting burdens, available to us from our most recent analysis of the reporting burden under parts 113 and 114 (OMB control no. 0910–0037; 73 FR 11649 at 11650, March 4, 2008). In that analysis, we estimated that there are 8,950 establishments that keep records on an annual basis as processors of acidified foods or low-acid canned foods (LACF), that 515 establishments submit a registration form (Form FDA 2541) on an annual basis, for either acidified foods or LACF; that it takes 0.17 hours to complete Form FDA 2541; that 1,489 establishments each submit 8.62 process filings (Form FDA 2541a) on an annual basis; and that it takes 0.33 hours to complete Form FDA 2541a. We use this information to estimate the reporting burden associated with the draft guidance.

In addition to establishment registration and process filing under § 108.25, acidified food establishments also must promptly report to us any instance of spoilage when the nature of the spoilage is such that it has potential health-endangering significance and any lot of such food has in whole or in part entered distribution in commerce (§ 108.25(d)). In the period from 2004 to January 2010, we received 1 report of spoilage of a commercially distributed acidified food. Therefore, for this analysis, we assume that such spoilage events are rare.

Recordkeeping Burden

Establishment-Specific Written Plan Including Quality Control Procedures for Acidified Foods (One-Time Burden): Currently, acidified foods establishments must employ appropriate quality control procedures to ensure that finished foods do not present a health hazard (§ 114.80(a)). To assist manufacturers in employing appropriate quality control procedures under § 114.80(a), the draft guidance recommends that each acidified food establishment prepare a written plan (the establishment-specific written plan) that includes quality control procedures with respect to spoilage, regardless of whether the spoilage has potential health-endangering significance. Currently existing models (e.g., Ref. 1) suitable for use in developing such a written plan are readily available to acidified foods establishments.

Because we rarely receive reports under § 108.25(d) regarding spoilage of commercially distributed acidified foods with potential health-endangering significance, for this analysis we assume that the quality control procedures of all acidified foods establishments currently address spoilage. Because the potential health consequences of spoilage may not be apparent in the initial stages of an investigation of spoilage, we assume that these establishments address spoilage regardless of the potential for health consequences. We also assume that the quality control procedures of 80 percent of registered establishments address spoilage through an establishment-specific written plan such as the one recommended in the draft guidance. We further assume that the quality control procedures of the remaining 20 percent of registered establishments (i.e., 4,872 x 0.20 = 974.4, rounded to 974 establishments) address spoilage by relying on a generally available document (e.g., Ref. 1), the establishment's unwritten procedures, or a combination of both. Based on our experience with quality control procedures, we estimate it would take 8 hours for an acidified foods establishment to prepare an establishment-specific written plan. If all of the 974 registered establishments that do not currently have an establishment-specific written plan develop such a plan, the associated recordkeeping burden would be 7,792 hours (974 establishments x 8 hours/establishment). This would be a one-time recordkeeping burden. Table 1 of this document includes the estimated one-time recordkeeping burden associated with preparation of establishment-specific written plans.

Documentation of Spoilage for Acidified Foods (Recurring Burden): The draft guidance recommends that an acidified food establishment document all investigations and corrective actions relevant to spoilage. We assume that an acidified food establishment that currently has an establishment-specific written plan in place to address spoilage also currently documents investigations and corrective actions relevant to spoilage. We assume that spoilage problems are relatively rare and, therefore, estimate that one spoilage event per establishment occurs every 5 years. Accordingly, we estimate 195 spoilage events requiring recordkeeping will occur (974 establishments that do not currently have an establishment-specific written plan x 0.2 events/establishment = 194.8 events, rounded to 195). Assuming that establishments follow procedures such as those in Ref. 1, and based on our experience with investigations and corrective actions, we estimate it would take 2 hours to document a spoilage event. Thus, we estimate a recurring recordkeeping burden of 390 hours (195 events x 2 hours/event = 390 hours). Table 1 of this document includes the estimated recurring recordkeeping burden associated with documenting investigations of spoilage events.

TABLE 1.—ESTIMATED ONE-TIME AND RECURRING RECORDKEEPING BURDEN[1]

Activity	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
Quality control plan to address spoilage[2]	974	1	974	8.00	7,792
Spoilage event documentation	195	1	195	2.00	390
Total one-time burden					7,792

[2] We began implementing an electronic filing system in 2004 and used information available in that system for this analysis.

TABLE 1.—ESTIMATED ONE-TIME AND RECURRING RECORDKEEPING BURDEN[1]—Continued

Activity	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
Total recurring burden					390

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] One-time recordkeeping burden.

Reporting Burden

Voluntary Registration (Form FDA 2541) (One-Time and Recurring Burdens): Currently, we place information documenting whether acidified food establishments have made appropriate submissions on Forms FDA 2541 and 2541a in an acidified food database that is readily available to our investigators who inspect food facilities or evaluate foods offered for import. This information facilitates decisions by our investigators about the regulatory status of specific food products.

In our experience, establishments are cautious about decisions they make about the regulatory status of their products, and many establishments that process non-acidified fermented foods and/or acid foods have contacted us with information about their facilities and the products they make. For example, our records show that, since 2004, we have informed approximately 750 different registered establishments that submitted electronic process filings that a food product that was the subject of a process filing was not covered by either part 113 (as a low-acid food) or part 114 (as an acidified food). In the past, we did not add information about these products to the acidified foods databases that are available to our investigators.

The draft guidance clarifies that establishments that conclude that the foods they process are acid foods or fermented foods that are not also acidified foods, may voluntarily register and file scheduled processes with us using Forms FDA 2541 and 2541a. As we do currently, if we receive information from such establishments, we would evaluate the submitted information to determine whether it is consistent with the establishment's conclusion that a product is not an acidified food. We plan to make the results of these evaluations available to our investigators, for example, during inspections of food facilities and during evaluations of foods offered for import. If we conclude that the submitted information is not consistent with the processor's conclusion that its products are not acidified foods, we may request additional information to assist us in evaluating the processor's conclusion about its products or take other action as appropriate. From our past experience, we believe that many processors of foods that may be acid foods or fermented foods that are not also acidified foods would choose to submit information to us on Forms FDA 2541 and 2541a because doing so would facilitate decisions by our investigators about the regulatory status of specific food products.

We estimate that there are 3,000 establishments that process products that they would conclude are acid foods or fermented foods that are not also acidified foods—4 times the approximate number of registered establishments (750) that have submitted process filings to FDA for food products we determined were not covered by either part 113 or part 114. We assume that all 3,000 establishments are not already registered as processors of acidified foods or LACF. Because 750 of these establishments have already registered voluntarily using Form FDA 2541, we estimate that the number of establishments that may register for the first time under the draft guidance is 2,250 establishments (3,000 - 750 = 2,250), resulting in a one-time reporting burden of 383 hours (2,250 establishments x 0.17 hours/establishment = 382.5 hours, rounded to 383 hours). Table 2 of this document includes the estimated one-time reporting burden for establishments that conclude that their foods are acid foods or fermented foods that are not also acidified foods, and voluntarily register their facilities in the first year after the draft guidance is issued.

After this initial registration, we also estimate that, on average, a number of establishments equal to 6 percent of the 3,000 total estimated establishments that will voluntarily register in the first year (i.e., 0.06 x 3,000 establishments = 180 establishments) will voluntarily register using Form FDA 2541 each year, resulting in an annual reporting burden of 31 hours (180 establishments x 0.17 hours/establishment = 30.6 hours, rounded to 31 hours). Proportionally, this would be comparable to the current percentage of acidified foods and LACF establishments that, on average, register using Form FDA 2541 each year (515 establishments that register on an annual basis/8,950 establishments that keep records on an annual basis x 100 = 5.75 percent rounded to 6 percent). Table 2 of this document includes the estimated recurring annual reporting burden for establishments that process foods that they conclude are acid foods or fermented foods that are not also acidified foods, and that would voluntarily register their facilities.

Voluntary Process Filing (Form FDA 2541a) (One-Time and Recurring Burdens): As discussed, we do not have information about the number of process filings voluntarily submitted by firms that registered their establishments but whose food products we determined were not covered by either part 113 or part 114. However, we do have information that, on average, over the 6-year period from 2004 through 2009, there was a total of 6,754 annual process filings submitted by an average of 892 acidified foods establishments each year, and that there were 4,872 registered acidified foods establishments; from this information we calculate that, on average, 18 percent of registered acidified foods establishments submit process filings each year (892 establishments/4,872 establishments x 100 = 18.3 percent, rounded to 18 percent). To be conservative, we also estimate that, on average, acidified foods establishments submitted process filings for 3 container sizes per product and that the total number of products reported by acidified foods establishments each year during that period was thus 2,251 products (6,754 process filings/3 container sizes/product = 2,251.33 products, rounded to 2,251 products). For the purpose of this analysis, we estimate that, on average, 18 percent of establishments that process foods that they conclude are acid foods or fermented foods that are not also acidified foods in a given year will submit process filings; i.e., 540 establishments (0.18 x 3,000 establishments = 540 establishments). To be conservative, we also estimate that, on average, the 540 establishments that would submit process filings in a given year will submit process filings for twice as many products as would be submitted by acidified foods establishments; per the

recommendations in the draft guidance, these establishments could submit a single process form that covers all container sizes of a product. Thus, the estimated number of annual voluntary process filings is 2,725 process filings (2,251 products/892 establishments x 540 establishments x 2 = 2,725.4 process filings, rounded to 2,725). On average, we calculate that the annual frequency of reporting would be 5 process filings (2,725 process filings/540 establishments = 5.04, rounded to 5). For the purpose of this analysis, we use the rounded number of process filings (i.e., 5) and, thus, calculate that the estimated recurring reporting burden for submission of Form 2541a is 2,700 process filings rather than 2,725 process filings (540 establishments x 5 process filings per establishment = 2,700 process filings), resulting in an annual reporting burden of 891 hours (2,700 process filings x 0.33 hours/process filing = 891 hours). Table 2 of this document includes the estimated one-time and recurring reporting burden for establishments that voluntarily submit process filings for foods that they conclude are acid foods or fermented foods that are not also acidified foods.

We also estimate that all 3,000 establishments that process foods that they conclude are acid foods or fermented foods that are not also acidified foods and voluntarily register their establishments will submit a total of 30,000 process filings in the first year—i.e., twice as many process filings as would be submitted, on average, by any given establishment on an annual basis (2 x 5 process filings/establishment on an annual basis x 3,000 establishments = 30,000 process filings), resulting in a one-time reporting burden of 9,900 hours (30,000 process filings x 0.33 hours/establishment = 9,900 hours). Table 2 of this document includes the estimated one-time reporting burden for establishments that voluntarily submit process filings for fermented foods and/or acid foods.

TABLE 2.—ESTIMATED ONE-TIME AND RECURRING REPORTING BURDEN[1]

Activity	No. of Reporters	Annual Frequency per Reporter	Total Annual Records	Hours per Record	Total Hours
Registration (Form FDA 2541)[2]	2,250	1	2,250	0.17	383
Registration (Form FDA 2541)	180	1	180	0.17	31
Process filing (Form FDA 2541a)[2]	3,000	10	30,000	0.33	9,900
Process filing (Form FDA 2541a)	540	5	2,700	0.33	891
Total one-time burden					10,283
Total recurring burden					922

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] One-time reporting burden.

III. 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 document at *http://www.regulations.gov* or at *http://www.fda.gov/FoodGuidances*.

V. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site address, but FDA is not responsible for any subsequent changes to Web site after this document publishes in the **Federal Register**.)

1. Codex Alimentarius Commission, Recommended International Code of Hygienic Practice for Low and Acidified Low Acid Canned Foods CAC/RCP 23–1979, Rev. 2 (1993), Available at *http://www.codexalimentarius.net/download/standards/24/CXP_023e.pdf*, Accessed and printed on June 17, 2008.

Dated: September 21, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–24089 Filed 9–24–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1820–NC]

Medicare and Medicaid Programs; Announcement of an Application from a Hospital Requesting Waiver for Organ Procurement Service Area

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice with comment period.

SUMMARY: A hospital has requested a waiver of statutory requirements that would otherwise require the hospital to enter into an agreement with its designated Organ Procurement Organization (OPO). The request was made in accordance with section 1138(a)(2) of the Social Security Act (the Act). This notice requests comments from OPOs and the general public for our consideration in determining whether we should grant the requested waiver.

DATES: *Comment Date:* To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on November 26, 2010.

ADDRESSES: In commenting, please refer to file code CMS–1820–NC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the "More Search Options" tab.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–1820–NC, P.O. Box 8010, Baltimore, MD 21244–1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Department of Health and Human Services, Attention: CMS–1820–NC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Mark A. Horney, (410) 786–4554.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

Organ Procurement Organizations (OPOs) are not-for-profit organizations that are responsible for the procurement, preservation, and transport of transplantable organs to transplant centers throughout the country. Qualified OPOs are designated by the Centers for Medicare & Medicaid Services (CMS) to recover or procure organs in CMS-defined exclusive geographic service areas, pursuant to section 371(b)(1) of the Public Health Service Act (42 U.S.C. 273(b)(1) and our regulations at 42 CFR 486.306. Once an OPO has been designated for an area, hospitals in that area that participate in Medicare and Medicaid are required to work with that OPO in providing organs for transplant, pursuant to section 1138(a)(1)(C) of the Social Security Act (the Act) and our regulations at 42 CFR § 482.45.

Section 1138(a)(1)(A)(iii) of the Act provides that a hospital must notify the designated OPO (for the service area in which it is located) of potential organ donors. Under section 1138(a)(1)(C) of the Act, every participating hospital must have an agreement to identify potential donors only with its designated OPO.

However, section 1138(a)(2)(A) of the Act provides that a hospital may obtain a waiver of the above requirements from the Secretary under certain specified conditions. A waiver allows the hospital to have an agreement with an OPO other than the one initially designated by CMS, if the hospital meets certain conditions specified in section 1138(a)(2)(A) of the Act. In addition, the Secretary may review additional criteria described in section 1138(a)(2)(B) of the Act to evaluate the hospital's request for a waiver.

Section 1138(a)(2)(A) of the Act states that in granting a waiver, the Secretary must determine that the waiver—(1) is expected to increase organ donations; and (2) will ensure equitable treatment of patients referred for transplants within the service area served by the designated OPO and within the service area served by the OPO with which the hospital seeks to enter into an agreement under the waiver. In making a waiver determination, section 1138(a)(2)(B) of the Act provides that the Secretary may consider, among other factors: (1) Cost-effectiveness; (2) improvements in quality; (3) whether there has been any change in a hospital's designated OPO due to the changes made in definitions for metropolitan statistical areas; and (4) the length and continuity of a hospital's relationship with an OPO other than the hospital's designated OPO. Under section 1138(a)(2)(D) of the Act, the Secretary is required to publish a notice of any waiver application received from a hospital within 30 days of receiving the application, and to offer interested parties an opportunity to comment in writing during the 60-day period beginning on the publication date in the **Federal Register**.

The criteria that the Secretary uses to evaluate the waiver in these cases are the same as those described above under sections 1138(a)(2)(A) and (B) of the Act and have been incorporated into the regulations at § 486.308(e) and (f).

II. Waiver Request Procedures

In October 1995, we issued a Program Memorandum (Transmittal No. A–95–11) detailing the waiver process and discussing the information hospitals must provide in requesting a waiver. We indicated that upon receipt of a waiver request, we would publish a **Federal Register** notice to solicit public comments, as required by section 1138(a)(2)(D) of the Act.

According to these requirements, we will review the request and comments received. During the review process, we may consult on an as-needed basis with the Health Resources and Services

Administration's Division of Transplantation, the United Network for Organ Sharing, and our regional offices. If necessary, we may request additional clarifying information from the applying hospital or others. We will then make a final determination on the waiver request and notify the hospital and the designated and requested OPOs.

III. Hospital Waiver Requests

As permitted by § 486.308(e), the following hospital has requested a waiver in order to enter into an agreement with a designated OPO other than the OPO designated for the service area in which the hospital is located: War Memorial Hospital (Medicare provider number 51–1309), of Berkeley Springs, West Virginia, is requesting a waiver to work with:

LifeNet Health, 1864 Concert Drive, Virginia Beach, VA 23453.

The Hospital's Designated OPO is:

Center for Organ Recovery and Education, RIDC Park, 204 Sigma Drive, Pittsburgh, PA 15238.

IV. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; Program No. 93.774, Medicare—Supplementary Medical Insurance, and Program No. 93.778, Medical Assistance Program)

Dated: *September 21, 2010.*

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2010–24100 Filed 9–24–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1825–NC]

Medicare and Medicaid Programs; Announcement of Application from Hospital Requesting Waiver for Organ Procurement Service Area

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice with comment period.

SUMMARY: A hospital has requested a waiver of statutory requirements that would otherwise require the hospital to enter into an agreement with its designated Organ Procurement Organization (OPO). The request was made in accordance with section 1138(a)(2) of the Social Security Act (the Act). This notice requests comments from OPOs and the general public for our consideration in determining whether we should grant the requested waiver.

DATES: *Comment Date:* To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on November 26, 2010.

ADDRESSES: In commenting, please refer to file code CMS–1825–NC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the "More Search Options" tab.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–1825–NC, P.O. Box 8010, Baltimore, MD 21244–1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Department of Health and Human Services, *Attention:* CMS–1825–NC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to one of the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Mark A. Horney, (410) 786–4554.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

Organ Procurement Organizations (OPOs) are not-for-profit organizations that are responsible for the procurement, preservation, and transport of transplantable organs to transplant centers throughout the country. Qualified OPOs are designated by the Centers for Medicare & Medicaid Services (CMS) to recover or procure organs in CMS-defined exclusive geographic service areas, pursuant to section 371(b)(1) of the Public Health Service Act (42 U.S.C. 273(b)(1) and our regulations at 42 CFR 486.306. Once an OPO has been designated for an area, hospitals in that area that participate in Medicare and Medicaid are required to

work with that OPO in providing organs for transplant, pursuant to section 1138(a)(1)(C) of the Social Security Act (the Act) and our regulations at § 482.45.

Section 1138(a)(1)(A)(iii) of the Act provides that a hospital must notify the designated OPO (for the service area in which it is located) of potential organ donors. Under section 1138(a)(1)(C) of the Act, every participating hospital must have an agreement to identify potential donors only with its designated OPO.

However, section 1138(a)(2)(A) of the Act provides that a hospital may obtain a waiver of the above requirements from the Secretary under certain specified conditions. A waiver allows the hospital to have an agreement with an OPO other than the one initially designated by CMS, if the hospital meets certain conditions specified in section 1138(a)(2)(A) of the Act. In addition, the Secretary may review additional criteria described in section 1138(a)(2)(B) of the Act to evaluate the hospital's request for a waiver.

Section 1138(a)(2)(A) of the Act states that in granting a waiver, the Secretary must determine that the waiver—(1) is expected to increase organ donations; and (2) will ensure equitable treatment of patients referred for transplants within the service area served by the designated OPO and within the service area served by the OPO with which the hospital seeks to enter into an agreement under the waiver. In making a waiver determination, section 1138(a)(2)(B) of the Act provides that the Secretary may consider, among other factors: (1) Cost-effectiveness; (2) improvements in quality; (3) whether there has been any change in a hospital's designated OPO due to the changes made in definitions for metropolitan statistical areas; and (4) the length and continuity of a hospital's relationship with an OPO other than the hospital's designated OPO. Under section 1138(a)(2)(D) of the Act, the Secretary is required to publish a notice of any waiver application received from a hospital within 30 days of receiving the application, and to offer interested parties an opportunity to comment in writing during the 60-day period beginning on the publication date in the **Federal Register**.

The criteria that the Secretary uses to evaluate the waiver in these cases are the same as those described above under sections 1138(a)(2)(A) and (B) of the Act and have been incorporated into the regulations at § 486.308(e) and (f).

II. Waiver Request Procedures

In October 1995, we issued a Program Memorandum (Transmittal No. A–95–11) detailing the waiver process and discussing the information hospitals must provide in requesting a waiver. We indicated that upon receipt of a waiver request, we would publish a **Federal Register** notice to solicit public comments, as required by section 1138(a)(2)(D) of the Act.

According to these requirements, we will review the request and comments received. During the review process, we may consult on an as-needed basis with the Health Resources and Services Administration's Division of Transplantation, the United Network for Organ Sharing, and our regional offices. If necessary, we may request additional clarifying information from the applying hospital or others. We will then make a final determination on the waiver request and notify the hospital and the designated and requested OPOs.

III. Hospital Waiver Requests

As permitted by § 486.308(e), the following hospital has requested a waiver in order to enter into an agreement with a designated OPO other than the OPO designated for the service area in which the hospital is located: Highland District Hospital (Medicare provider number 36–1332), of Hillsboro, Ohio, is requesting a waiver to work with LifeCenter Organ Donor Network, 615 Elsinore Place, Suite 400, Cincinnatti, Ohio 45202.

The Hospital's Designated OPO is: Lifeline of Ohio Organ Procurment, 770 Kinnear Road, Suite 200, Columbus, Ohio 43212.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; Program No. 93.774, Medicare—Supplementary Medical Insurance, and Program No. 93.778, Medical Assistance Program)

Dated: *September 21, 2010.*

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2010–24101 Filed 9–24–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Cancer Etiology Study Section, October 7, 2010, 8 a.m. to October 8, 2010, 5 p.m. Marina del Rey Marriott, 4100 Admiralty Way, Marina del Rey, CA, 90292 which was published in the **Federal Register** on August 31, 2010, 75 FR 53317–53319.

The meeting will be held at the Marina del Rey Hotel, 13534 Bali Way, Marina del Rey, CA 90292. The meeting dates and time remain the same. The meeting is closed to the public.

Dated: September 20, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–24138 Filed 9–24–10; 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, Member Conflict: Neuronal Channel Function and Dysfunction.

Date: October 1, 2010.

Time: 2:30 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: Carol Hamelink, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7850, Bethesda, MD 20892, (301) 213–9887, *hamelinc@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: September 20, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–24139 Filed 9–24–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; 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 a meeting of the Board of Scientific Counselors of the NIH Clinical Center.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the CLINICAL CENTER, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors of the NIH Clinical Center.

Date: October 4–5, 2010.

Time: 8 a.m. to 2 p.m.

Agenda: To review and evaluate the Department of Rehabilitation Medicine.

Place: National Institutes of Health, Building 10, 10 Center Drive, Room 4–2551, Bethesda, MD 20892.

Contact Person: David K Henderson, MD, Deputy Director for Clinical Care, Office of the Director, Clinical Center, National Institutes of Health, Building 10, Room 6–1480, Bethesda, MD 20892, (301) 496–3515.

This notice is being published less than 15 days prior to the meeting due to the urgent need tomeet timing limitations imposed by the intramural research review cycle.

Dated: September 17, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–24145 Filed 9–24–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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: National Heart, Lung, and Blood Institute Special Emphasis Panel; Translational Programs in Lung Diseases.

Date: October 14–15, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Shelley S. Sehnert, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7206, Bethesda, MD 20892–7924, 301–435–0303, *ssehnert@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Mentored Scientist Awards.

Date: October 14–15, 2010.

Time: 8:30 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Holly K. Krull, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7188, Bethesda, MD 20892–7924, 301–435–0280, *krullh@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: *September 21, 2010.*

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–24142 Filed 9–24–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Targeted Clinical Trials To Reduce the Risk of Antimicrobial Resistance (TB).

Date: October 22, 2010.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, 1216, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Lynn Rust, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, (301) 402–3938, *lr228v@nih.gov*.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Targeted Clinical Trials To Reduce the Risk of Antimicrobial Resistance (CAP/HCAP).

Date: November 8, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Potomac III, Washington, DC 20037.

Contact Person: Lynn Rust, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, (301) 402–3938, *lr228v@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 21, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–24140 Filed 9–24–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 75 FR 51091–93, dated August 18, 2010) is amended to reflect the reorganization of the Division of Adult and Community Health within the National Center for Chronic Disease Prevention and Health Promotion, Office of Noncommunicable Diseases, Injury and Environmental Health, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the mission statement for the Division of Adult and Community Health (CUCE) and insert the following.

Division of Adult and Community Health (CUCE). (1) Develops and promotes community-based interventions and programs; (2) provides national and international leadership in health education and health promotion; (3) conducts studies to enhance public health activities in health services and managed care; (4) manages public health research, training, cooperative, and intervention activities in diverse settings such as cities, universities, state health departments, and other countries; (5) promotes the understanding and improvement of the determinants and issues related to arthritis, aging, epilepsy, and emerging chronic disease and health promotion issues; (6) coordinates activities with other federal, state, and local governmental agencies, academia, and nongovernmental organizations, in cooperation with other components of NCCDPHP.

Delete in its entirety the functional statement for the Office of the Director (CUCE1) and insert the following:

Office of the Director (CUCEI). (1) Manages, coordinates, and evaluates the activities and programs of the division; (2) ensures that division activities are coordinated with other components of CDC both within and outside the center, with federal, state, and local health agencies, and with voluntary and professional health agencies; (3) provides leadership and coordinates division responses to requests for research, consultation, training, collaboration, and technical assistance or information on managed care, health promotion, aging, epilepsy, and arthritis; (4) provides administrative, logistical, and management support for division field staff; (5) provides administrative and management support for the division including guidance on the organization of personnel and the use of financial resources, and oversight of grants, cooperative agreements, contracts, and reimbursable agreements; (6) provides leadership and technical assistance to communities to promote policy, systems, and environmental changes that improve community health; (7) supports a network of academic researchers, public health agencies, and community members that conducts applied research in disease prevention and control.

Delete in their entirety the title and functional statement for the Arthritis, Epilepsy and Quality of Life Branch (CUCç) and insert the following:

State Support, Arthritis, Epilepsy and Quality of Life Branch (CUCEC). (1) Directs and supports activities to reach people affected by arthritis and improve their quality of life by fostering public health science and translating science into population based interventions; (2) coordinates CDC Preventive Health and Health Services Block Grant (PHHSBG) activities and develops and administers guidelines, uniform reporting procedures, and evaluation criteria for state programs supported by PHHSBG; (3) directs and supports activities that improve quality of life for people affected by epilepsy, including improving access to appropriate medical care and self-management support, improving policy and systems to support people with epilepsy, supporting surveillance, epidemiologic, and prevention research, combating stigma and increasing public awareness and knowledge about epilepsy; (4) directs and administers surveillance efforts that provide knowledge to influence the public health community to improve health related quality of life and well-being through public health action; (5) develops, validates refines and promotes health-related quality of life and well-being measures for use in surveillance, program planning, evaluation and public health intervention and policy development; (6) directs and coordinates the evaluation of community and state-based intervention programs for arthritis and epilepsy; (7) develops arthritis and health-related quality of life epidemiology capacity and other programmatic capabilities in state health department settings; and (8) disseminates health promotion and disease prevention programs and information through state and national partners.

Delete item (4) of the functional statement for the Emerging Investigations and Analytic Methods Branch (CUC1J and insert the following:

(4) performs research on adverse childhood events, mental health, and alcohol.

Delete in their entirety the title and functional statement for the Community Health and Program Services Branch (CUCEG) and insert the following:

Community Health and Equity Branch (CUCEG). (1) Provides technical assistance to state and local health agencies, community-based organizations, academic institutions, and other federal, national, and international organizations to plan, implement, and evaluate community-based chronic disease prevention and health promotion programs, with an emphasis on improving equity and reducing disparities; (2) develops, implements, and evaluates training in the areas of chronic disease intervention, social determinants of health, and community health promotion for state and local health departments, other agencies, and community organizations; (3) supports health promotion and disease prevention research conducted at university-based prevention centers; (4) develops chronic disease epidemiology capacity in state health departments through training and support of chronic disease field epidemiologists and other capacity building efforts; (5) provides professional statistical and programming services to the division, including assistance in design of data collection instruments, computer programming, and statistical analysis; (6) provides administrative and management support for the branch, including oversight of grants, cooperative agreements, contracts, and reimbursable agreements.

Dated: September 3, 2010.

William P. Nichols,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–23785 Filed 9–24–10; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2010–0078]

Homeland Security Advisory Council

AGENCY: The Office of Policy, DHS.

ACTION: Notice of Closed Federal Advisory Committee Meeting.

SUMMARY: The Homeland Security Advisory Council (HSAC) will meet on October 14, 2010 in Washington, DC. The meeting will be closed to the public.

DATE: The HSAC will meet on Thursday, October 14, 2010 from 8 a.m. to 3 p.m. EST.

ADDRESSES: The meeting will be held at DHS Headquarters at the Nebraska Avenue Complex, Washington, DC 20528. Written comments must be submitted and received by October 8, 2010. Comments must be identified by Docket No. DHS–2010–0078 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: HSAC@dhs.gov.* Include docket number in the subject line of the message.
- *Fax:* (202) 282–9207.
- *Mail:* Homeland Security Advisory Council, Department of Homeland Security, Mailstop 0450, 245 Murray Lane, SW., Washington, DC 20528.

Instructions: All submissions received must include the words "Department of Homeland Security" and DHS–2010–0078, the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the DHS Homeland Security Advisory Council, go to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: HSAC Staff at *hsac@dhs.gov* or 202–447–3135.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. The HSAC provides independent, objective advice and recommendations for the consideration of the Secretary of the Department of Homeland Security on matters related to homeland security. The Council is comprised of leaders of local law enforcement, first responders, state and local government, the private sector, and academia.

The HSAC will meet for the purpose of receiving sensitive operational information from senior DHS leadership. The briefings will focus on sensitive sharing of real time information among TSA and federal and local law enforcement agencies concerning transportation infrastructure. Members will also receive domestic and international intelligence briefings that are focused on threats against the homeland which require responsive federal and law enforcement involvement. Members will learn about the potential capabilities and vulnerabilities identified in a cyber exercise and discuss potential methods to improve a federal response. Members will also be briefed on current operational plans for the Governors and Homeland Security Advisors January 2011 transition.

Summary of the Agenda

Sensitive Threat Briefings against the Homeland.

Governor and Homeland Security Advisors' Transitions.

Policy and Planning Issues related to the "If you see something, say something" campaign.

Watch List Operational Improvements.

Lessons Learned from the cyber exercise.

Basis for Closure: In accordance with Section 10(d) of the Federal Advisory Committee Act, it has been determined that this HSAC meeting's briefings and discussions require closure. Premature disclosure to the public of information which is shared in real time among TSA and local law enforcement agencies, and premature disclosure of the Governors and Homeland Security Advisors transitions plan could disclose investigative techniques and procedures not generally available to the public. This would allow those with interests against the United States to circumvent the law, thereby endangering the life or physical safety of law enforcement personnel. Consequently, the meeting will be closed in accordance with the criteria in 5 U.S.C. 552b(c)(7)(E)&(F). Furthermore, premature disclosure of the information from these briefings, as well as the capabilities and vulnerabilities gleaned from the cyber exercise, is likely to significantly frustrate implementation of changes specifically focused on DHS' internal plans, planning and sensitive processes within the meaning of 5 U.S.C. 552b(c)(9)(B).

Dated: September 21, 2010.

Becca Sharp,

Executive Director, Homeland Security Advisory Council, DHS.

[FR Doc. 2010–24170 Filed 9–24–10; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2010–0853]

Information Collection Request to Office of Management and Budget; OMB Control Numbers: 1625–0062, 1625–0078, and 1625–0082

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit Information Collection Requests (ICRs) and Analyses to the Office of Management and Budget (OMB) requesting a revision of its approval for the following collections of information: (1) 1625–0062, Approval of Alterations to Marine Portable Tanks; Approval of Non-Specification Portable Tanks; (2) 1625–0078, Licensing and Manning Requirements for Officers of Towing Vessels; and (3) 1625–0082, Navigation Safety Information and Emergency Instructions for Certain Towing Vessels. Before submitting these ICRs to OMB, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before November 26, 2010.

ADDRESSES: To avoid duplicate submissions to the docket [USCG–2010–0853], please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* Docket Management Facility (DMF) (M–30), U.S. Department of Transportation (DOT), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand deliver:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as

documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–611), Attn Paperwork Reduction Act Manager, U.S. Coast Guard, 2100 2ND St., SW. Stop 7101, Washington DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Contact Mr. Arthur Requina, Office of Information Management, telephone 202–475–3523, or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

The Coast Guard invites comments on whether these ICRs should be granted based on the collections being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of information subject to the collections; and (4) ways to minimize the burden of the collections on respondents, including the use of automated collection techniques or other forms of information technology.

We encourage you to respond to this request by submitting comments and related materials. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the "Privacy Act" paragraph below.

Submitting comments: If you submit a comment, please include the docket number [USCG–2010–0853], indicate the specific section of the document to which each comment applies, providing a reason for each comment. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8–1/2 by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing comments and documents: Go to *http://www.regulations.gov* to view documents mentioned in this Notice as being available in the docket. Enter the docket number for this Notice [USCG–2010–0853] in the Search box, and click "Go >>." You may also visit the DMF in Room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the Privacy Act statement regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Information Collection Request

1. Title: Approval of Alterations to Marine Portable Tanks; Approval of Non-Specification Portable Tanks.

OMB Control Number: 1625–0062.

Summary: The information will be used to evaluate the safety of proposed alterations to marine portable tanks and non-specification portable tank designs used to transfer hazardous materials during offshore operations.

Need: Approval by the Coast Guard of alterations to marine portable tanks under 46 CFR part 64 ensures the altered tank retains the level of safety to which it was originally designed. In addition, rules allowing for the approval of non-specification portable tanks ensure innovation and new designs are not impeded by the regulation.

Forms: None.

Respondents: Owners of marine portable tanks and owners/designers of non-specification portable tanks.

Frequency: On occasion.

Burden Estimate: The estimated burden remains unchanged at 18 hours a year.

2. Title: Licensing and Manning Requirements for Officers of Towing Vessels.

OMB Control Number: 1625–0078.

Summary: Licensing and manning requirements ensure towing vessels operating on the navigable waters of the U.S. are under the control of licensed officers who meet certain qualification and training standards.

Need: Title 46 CFR part 10 prescribes regulations for the licensing of maritime personnel. This collection is necessary to ensure a mariner's training information is available to assist in determining the mariner's overall qualifications to hold certain licenses.

Forms: None.

Respondents: Owners and operators of towing vessels.

Frequency: On occasion.

Burden Estimate: The estimated burden has decreased from 19,746 hours to 16,770 hours a year.

3. Title: Navigation Safety Information and Emergency Instructions for Certain Towing Vessels.

OMB Control Number: 1625–0082.

Summary: Navigation safety regulations in 33 CFR part 164 help assure the mariner piloting a towing vessel has adequate equipment, charts, maps, and other publications. For inspected towing vessels, under 46 CFR 199.80, a muster list and emergency instructions provide effective plans/references for crew to follow in an emergency situation.

Need: The purpose of the regulations is to improve the safety of towing vessels and the crews that operate them.

Forms: None.

Respondents: Owners, operators, and masters of vessels.

Frequency: On occasion.

Burden Estimate: The estimated burden has increased from 362,907 hours to 410,465 hours a year.

Dated: September 15, 2010.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2010–24201 Filed 9–24–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Quarterly IRS Interest Rates Used In Calculating Interest On Overdue Accounts and Refunds On Customs Duties

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties. For the calendar quarter beginning October 1, 2010, the interest rates for overpayments will be 3 percent for corporations and 4 percent for non-corporations, and the interest rate for underpayments will be 4 percent. This notice is published for the convenience of the importing public and Customs and Border Protection personnel.

DATES: *Effective Date:* October 1, 2010.

FOR FURTHER INFORMATION CONTACT: Ron Wyman, Revenue Division, Collection and Refunds Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 614–4516.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105–206, 112 Stat. 685) to provide different interest rates applicable to overpayments: One for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2010–21, the IRS determined the rates of interest for the calendar quarter beginning October 1, 2010, and ending on December 31, 2010. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%). For corporate overpayments, the rate is the Federal short-term rate (1%) plus two percentage points (2%) for a total of three percent (3%). For overpayments made by non-corporations, the rate is the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%). These interest rates are subject to change for the calendar quarter beginning January 1, 2011, and ending March 31, 2011.

For the convenience of the importing public and Customs and Border Protection personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending Date	Under-payments (percent)	Overpayments (percent)	Corporate Overpayments (Eff. 1–1–99) (percent)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3

Beginning date	Ending Date	Under-payments (percent)	Overpayments (percent)	Corporate Overpayments (Eff. 1–1–99) (percent)
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3

Dated: September 21, 2010.

Alan Bersin,

Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2010–24046 Filed 9–24–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2010–0797]

Recognition of Foreign Certificates Under the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as Amended, Regulation I/10

AGENCY: Coast Guard, DHS.

ACTION: Notice and request for comments.

SUMMARY: Regulation I/10 of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended, (STCW) requires Parties to the Convention to establish procedures to recognize STCW certificates issued by or under the authority of another Party. In order to start this process, the Coast Guard is developing a policy regarding the United States' recognition of foreign certificates held by foreign maritime officers who may be employed on some United States flag vessels. The Coast Guard is soliciting comments from mariners, industry, and the public to assist in development of this policy. The Coast Guard is particularly interested in identifying which United States flag vessels employ foreign citizens, the nationalities of these mariners, and the countries that issue their STCW certificates.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before October 27, 2010 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–2010–0797 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. *See* the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice, call or e-mail Luke B. Harden, Mariner Credentialing Program Policy Division (CG–5434), U.S. Coast Guard; telephone 202–372–1206, e-mail *Luke.B.Harden@uscg.mil.* If you have questions on viewing material in the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to submit comments and related material on the development of a policy regarding the recognition of foreign International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW) certificates held by foreign mariners who may be employed on United States flag vessels. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting comments: If you submit a comment, please include the docket number for this notice (USCG–2010–0797) and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Notices" and insert "USCG–2010–0797" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Viewing the comments: To view the comments, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2010–0797" and click "Search." Click the "Open Docket Folder" in the "Actions" column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal

holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act: Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act system of records notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Background and Purpose

STCW requirements: Regulation I/10 of the STCW requires Parties to the Convention to establish procedures to recognize certificates issued to maritime officers by or under the authority of another Party. STCW also requires the flag state of a vessel to ensure that all officers serving on board hold properly recognized and endorsed credentials.

Citizenship waiver provisions within the United States Code: Title 46 of the United States Code (U.S.C.) allows the employment of foreign citizens aboard certain United States flag vessels. Specifically, 46 U.S.C. 8103(b)(3) establishes authority to waive the requirement for United States citizenship for:

(A) An offshore supply vessel or other similarly engaged vessel of less than 1,600 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title that operates from a foreign port;

(B) A mobile offshore drilling unit or other vessel engaged in support of exploration, exploitation, or production of offshore mineral energy resources operating beyond the water above the outer Continental Shelf (as that term is defined in section 2(a) of the Outer Continental Shelf Lands Act (43 U.S.C. 1331(a)); and

(C) Any other vessel if the Secretary determines, after an investigation, that qualified seamen who are citizens of the United States are not available.

Need for the policy: Recognition of seafarer competence certificates from other countries would ensure compliance with the STCW Convention requirements, be in accordance with the citizenship waiver requirements in 46 U.S.C. 8103(b)(3), and help ensure that United States flagged vessels are not subject to detention in foreign ports due to allegations of improperly credentialed seafarers. It would also be done in anticipation of the regulatory changes that would be needed to bring the United States into compliance with the STCW requirements.

The Proposed Policy

Given this need, the Coast Guard is developing a policy to start establishing a process for the United States' recognition of foreign certificates held by foreign officers who may be employed on some United States flag vessels.

The Coast Guard is beginning to develop policy guidance for arrangements between parties to STCW for recognition of certificates under STCW Regulation I/10. The policy would provide guidance for Coast Guard on how and when to recognize STCW certificates issued by other countries. The policy would also provide a list of which countries' certificates may be recognized and the process used to determine that list.

As part of this policy, we expect that once the United States is satisfied that a certificate-issuing country complies with the STCW Convention requirements concerning standards of competence, the issuing and endorsement of certificates, and record keeping, both countries could sign a written formal agreement establishing recognition of each country's STCW certificates.

The proposed policy could also offer guidance for mariners and/or vessel operators/employers with regard to applying for and obtaining a United States-issued endorsement of their foreign certificates.

We welcome your comments on the above proposals. In particular, the Coast Guard is interested in the following information:

1. Which United States flag vessels employ foreign citizens?

2. What are the nationalities of foreign citizens working United States flag vessels?

3. What countries issue STCW certificates for foreign citizens working United States flag vessels?

We will review and analyze all comments received in order to develop the policy.

Authority: We issue this notice of under the authority of 5 U.S.C. 552(a) and 46 U.S.C. 8103(b)(3).

Dated: September 1, 2010.

Kevin S. Cook,

Rear Admiral, U.S. Coast Guard, Director of Prevention Policy.

[FR Doc. 2010–24154 Filed 9–24–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5415–N–17]

Notice of Availability: Notice of Funding Availability (NOFA) for Fiscal Year (FY) 2010 Continuum of Care (CoC) Homeless Assistance Program

AGENCY: Office of the Chief of the Human Capital Officer, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its Web site of the applicant information, deadline information, and other requirements for the Continuum of Care (CoC) Homeless Assistance Program NOFA for FY2010. Approximately $1.68 billion is made available through this NOFA, through Consolidated Appropriations Act, 2010 (Pub. L. 111–117, approved December 16, 2009). Carried over or recaptured funds from previous fiscal years, if available, may be added to this amount. Applicants may obtain copies of HUD's FY2010 CoC NOFA and the HUD's Fiscal Year 2010 Notice of Funding Availability (NOFA) Policy Requirements and General Section to HUD's FY2009 NOFAs for Discretionary Programs (General Section) at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm.* Applicants will be required to complete and submit their applications in *e-snaps* at *http://www.hud.gov/esnaps.* This system is not part of Grants.gov. Applicants are strongly encouraged to carefully review application submission requirements contained in the FY2010 CoC NOFA.

The Catalogue of Federal Domestic Assistance (CFDA) numbers for the CoC Homeless Assistance Program are: 14.235, Supportive Housing Program (SHP); 14.238, Shelter Plus Care (S+C) and 14.249, Section 8 Moderate Rehabilitation Single Room Occupancy (SRO).

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Questions regarding the 2010 General Section should be directed to the Office of Departmental Grants Management and Oversight at 202–708–0667 (this is not a toll-free number) or the NOFA Information Center at 1–800–HUD–8929 (toll-free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 1–800–877–8339.

Dated: September 20, 2010.

Barbara S. Dorf,

Director, Office of Departmental Grants, Management and Oversight, Office of the Chief of the Human Capital Officer.

[FR Doc. 2010–24041 Filed 9–24–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–FR–5383–N–22]

Notice of Proposed Information Collection for Public Comment; Public/Private Partnerships for the Mixed Finance Development of Public Housing Units

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments Due Date: November 26, 2010

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name. The OMB Control number for this Information Collection (IC) is pending, since this IC is being detached from the IC for the Public Housing Capital Fund Program, 2577–0157. Comments should be sent to: Leroy McKinney, Jr., Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Room 4178, Washington, DC 20410–5000; telephone 202–402–5564, (this is not a toll-free number) or email Mr. McKinney at *Leroy.McKinneyJr@hud.gov.* Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339. (Other than the HUD USER information line and TTY numbers, telephone numbers are not toll-free.)

FOR FURTHER INFORMATION CONTACT: Arlette Mussington, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street, SW., Room LP2206, Washington, DC 20410; telephone 202–402–4109, (this is not a toll-free number). Additional information can be obtained at *http://ecfr.gpoaccess.gov/under* Title 24, part 941, subpart F.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Public/Private Partnerships for the Mixed Finance Development of Public Housing Units.

OMB Control Number: 2577—*pending.*

Description of the need for the information and proposed use: The Quality Housing and Work Responsibility (QHWRA) Act of 1998 (HUD Reform Act) authorized PHAs to use a combination of private financing and public housing development funds to develop public housing units (Mixed-Finance Development). The implementing regulation for Mixed-Finance transactions is 24 CFR 941, subpart F. Mixed-Finance public housing development is designed to enable PHAs and their partners to structure transactions that make use of private and/or public sources of financing. Many potential scenarios for ownership and transaction structures exist. HUD must ensure that public housing rental regulations and public housing development regulations, which include wider HUD and Federal statutes and regulations, e.g., OMB Circulars, Fair Housing Act, Americans with Disabilities Act, are followed by PHAs and their private sector partners.

Agency form numbers, if applicable: HUD–50029, HUD–50030, Regulatory and Operating Agreement (form number pending). All other information will be collected via unique legal documents.

Members of affected public:. Real Estate development and management entities, financial entities, Community Development entities, State and Local Governments.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

Frequency of Submission: Once per Mixed-Finance transaction.

HUD Form Number	No. of respondents	Frequency of response	Estimated hours of preparation	Total annual burden hours
HUD–50029	40	1	16	640
HUD–50030	70	1	16	1,120
Homeownership Addendum	40	1	8	320
Regulatory and Operating Agreement	70	1	4	280
Mixed-Finance Amendment to the Annual Contributions Contract	70	1	8	560
Mixed-Finance Declaration of Restrictive Covenants	70	1	.25	17.5
Mixed-Finance Certifications and Assurances	70	1	.25	17.5
Mixed-Finance Final Title Policy	70	1	.25	17.5
Mixed-Finance Legal Opinion	70	1	1	70
Total Hrs.				3,042.5

Members of affected public: local governments, public housing authorities, nonprofits, and for-project developers that apply jointly with a public entity.

Status of the proposed information collection: New collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: September 17, 2010.

Merrie Nichols-Dixon,

Acting Deputy Assistant Secretary for Policy, Programs, and Legislative Initiatives.

[FR Doc. 2010–24039 Filed 9–24–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–94]

Notice of Submission of Proposed Information Collection to OMB; Financial Standards for Housing Agency-Owned Insurance Entities

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.

Collection of this information is required by HUD Appropriations Act for FY 1992, Public Law 102.139, 105 Stat. 736 (approved October 28, 1991). The Act provided that public housing agencies (PHAs) could purchase insurance coverage without regard to competitive selection procedures, if the insurance was purchased from a nonprofit insurance entity owned and controlled by PHAs approved HUD, in accordance with standards established by regulation. A PHA-owned insurance entity selected by a PHA to provide coverage must submit a certification to HUD, stating that the entity management and underwriting staff have certain levels of experience.

DATES: *Comments Due Date:* October 27, 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 (2503–0033) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; *fax:* 202–395–5806. *E-mail: OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Collette.Pollard@hud.gov* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

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: Financial Standards for Housing Agency-Owned Insurance Entities.

OMB Approval Number: 2577–0186.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: Collection of this information is required by HUD Appropriations Act for FY 1992, Public Law 102.139, 105 Stat. 736 (approved October 28, 1991). The Act provided that public housing agencies (PHAs) could purchase insurance coverage without regard to competitive selection procedures, if the insurance was purchased from a nonprofit insurance entity owned and controlled by PHAs approved HUD, in accordance with standards established by regulation. A PHA-owned insurance entity selected by a PHA to provide coverage must submit a certification to HUD, stating that the entity management and underwriting staff have certain levels of experience.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	29	1		6.55		190

Total Estimated Burden Hours: 190.

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: *September 21, 2010.*

Leroy McKinney, Jr.,

Departmental Reports Management Officer,

Office of the Chief Information Officer.

[FR Doc. 2010–24028 Filed 9–24–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–93]

Notice of Submission of Proposed Information Collection to OMB Grant Drawdown Payment Request/LOCCS/VRS Activated System

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.

Public and Indian Housing Grant recipients use the payment vouchers to request funds from HUD through the LOCCS/VRS voice activated system. The information collected on the forms serves as an internal control measure to ensure the lawful and appropriate disbursement of Federal funds.

DATES: *Comments Due Date: October 27, 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 (2503–0033) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. *E-mail: OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Collette.Pollard@hud.gov* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

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: Grant Drawdown Payment Request/LOCCS/VRS Activated System.

OMB Approval Number: 2577–0166.

Form Numbers: HUD 50080–CFP, 50080–NN, RSDF, SC; 50080–PHTA, 50080–URP, 50080–FSS, 50080–IHBG, 50080–HOMI, and 50080–TIHD.

Description of the Need for the Information and Its Proposed Use: Public and Indian Housing Grant recipients use the payment vouchers to request funds from HUD through the LOCCS/VRS voice activated system. The information collected on the forms serves as an internal control measure to ensure the lawful and appropriate disbursement of Federal funds.

Frequency of Submission: On Occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	4,746	73,266		15.44		10,990

Total Estimated Burden Hours: 10,990.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: September 21, 2010.

Leroy McKinney, Jr.,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–24029 Filed 9–24–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R8-R-2010-N169; 80230-1265-0000-S3]

Sonny Bono Salton Sea National Wildlife Refuge Complex (Sonny Bono Salton Sea National Wildlife Refuge and Coachella Valley National Wildlife Refuge), Imperial and Riverside Counties, CA

Correction

Notice document 2010–22731, on pages 55600–55601, in the issue of Monday, September 13, 2010, was published in error. It should not have appeared in the issue.

[FR Doc. C1–2010–22731, Filed X–XX–08; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2010–N207; 1122–0000–81440–F2]

Endangered and Threatened Wildlife and Plants; Permit, San Luis Obispo County, CA

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application from Barkwood Development, LLC (applicant) for an incidental take permit under the Endangered Species Act of 1973, as amended (Act). We are considering issuance of an incidental take permit (ITP) that would authorize the applicant's take of the federally endangered Morro shoulderband snail (*Helminthoglypta walkeriana*) incidental to a 5.5-acre (239,580-square foot) redevelopment project in the community of Los Osos, San Luis Obispo County, California. We invite comments from the public on the application, which includes the Bahia Vista Estates Habitat Conservation Plan (HCP), and on our preliminary determination that the HCP qualifies as a low-effect plan that is eligible for a categorical exclusion under the National Environmental Policy Act (NEPA) of 1969, as amended.

DATES: To ensure consideration, please send your written comments by October 27, 2010.

ADDRESSES: You may download a copy of the HCP, draft Environmental Action Statement, Low-Effect Screening Form, and related documents on the Internet at *http://www.fws.gov/ventura/,* or you may request documents by U.S. mail or phone (see below). Please address written comments to Diane K. Noda, Field Supervisor, Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003. You may alternatively send comments by facsimile to (805) 644–3958.

FOR FURTHER INFORMATION CONTACT: Julie M. Vanderwier, Fish and Wildlife Biologist, or Jen Lechuga, HCP Coordinator, at the Ventura address above or by telephone at (805) 644–1766.

SUPPLEMENTARY INFORMATION:

Background

The Morro shoulderband (also known as banded dune) snail was listed by the U.S. Fish and Wildlife Service as endangered on December 15, 1994 (59 FR 64613). Section 9 of the Act (16 U.S.C. 1531 *et seq.*) and its implementing regulations prohibit the "take" of fish or wildlife species listed as endangered or threatened." "Take" is defined under the Act to include the following activities: to harass, harm, pursue, hunt, shoot, wound, kill, trap,

capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. 1532). However, under Section 10(a)(1)(B) of the Act, we may issue permits to authorize incidental take of listed species. "Incidental Take" is defined by the Act as take that is incidental to, and not the purpose of, carrying out of an otherwise lawful activity. Regulations governing incidental take permits for threatened and endangered species are, respectively, in the Code of Federal Regulations at 50 CFR 17.32 and 17.22. Issuance of an ITP also must not jeopardize the existence of federally listed fish, wildlife, or plant species.

The Act's take prohibitions do not apply to federally listed plant species on private lands unless such take would be in violation of State law. In addition to meeting other criteria, actions undertaken through implementation of the HCP must not jeopardize the continued existent of federally listed plant or animal species.

The applicant seeks an ITP for direct impacts to 5.5 acres to ruderal, disturbed, and landscaped habitat occupied by Morro shoulderband snail in association with a residential redevelopment project. The project is proposed for a single Residential Single Family-zoned parcel located along Los Osos Valley Road, between Pine and Broderson Avenues in the west-central portion of the unincorporated community of Los Osos, San Luis Obispo County, California. The parcel is legally described as Assessor Parcel Number 074–052–049. The site was originally developed for residential use more than 50 years ago and most of the original residential structures remain on the site. The applicant is requesting a 20-year ITP for take of Morro shoulderband snail that would result from the "Covered Activities" that would include the subdivision of land, demolition and removal of existing structures, grubbing and regrading of the site, installation of site infrastructure, phased construction of up to 26 new homes, and occupation of these homes.

The applicant proposes to avoid, minimize, and mitigate take of Morro shoulderband snails associated with the covered activities by fully implementing the plan. The following measures will be implemented to minimize the effects of the taking: (1) A Service-approved biologist who possesses a valid recovery permit for the species will conduct preconstruction and construction monitoring activities throughout project implementation, inclusive of both construction phases, and as needed during all facets of project construction when measurable rain or heavy fog/dew occurs; (2) all live Morro shoulderband snails that are found during the pre-construction surveys or construction monitoring will be relocated to appropriate habitat at a Service-approved parcel by the Service-approved biologist; (3) the Service-approved biologist will conduct a preconstruction training meeting for all personnel who will work onsite during construction; and (4) the applicant will provide a Letter of Credit to ensure adequate funding is available to perform these tasks. The following measure will be implemented to mitigate for unavoidable take: Payment of no less than $50,000 to the "Morro Shoulderband Snail in-Lieu Fee Account (ID #52–138–4139) held by the National Fish and Wildlife Foundation. This funding will implement recovery tasks identified in the *Recovery Plan for the Morro Shoulderband Snail and Four Plants from Western San Luis Obispo County, California* (USFWS, 1998) by facilitating: (1) Development and preparation of a standardized survey methodology for Morro shoulderband snail populations on conserved lands, (2) implementation of species surveys using the standardized methodology on selected conserved parcels, (3) compilation and analysis of the collected data, and (4) preparation of a final report that presents the study results and Morro shoulderband snail population estimates on those surveyed lands.

In the proposed HCP, the applicant considers three alternatives to the proposed action. Under the "No Action" alternative, current conditions would be maintained, the HCP for Morro shoulderband snail would not be implemented, and the Service would not issue an ITP. The other alternatives include an alternative location for the project and project redesign.

We are requesting comments on our preliminary determination that the applicant's proposal will have a minor or negligible effect on the Morro shoulderband snail and that the plan qualifies as a low-effect HCP as defined by our Habitat Conservation Planning Handbook (November 1996). We base our determinations on three criteria: (1) Implementation of the proposed project as described in the HCP would result in minor or negligible effects on federally listed, proposed, and/or candidate species and their habitats; (2) implementation of the HCP would result in minor negligible effects on other environmental values or resources; and (3) HCP impacts, considered together with those of other past, present, and reasonably foreseeable future projects, would not result in cumulatively significant effects. Based upon our analysis of these criteria, we have made a preliminary determination that the approval of the HCP and issuance of an ITP qualify for categorical exclusions under the NEPA (42 U.S.C. 4321 *et seq.*), as provided by the Department of Interior Manual (516 DM 2 Appendix 2 and 516 DM 8). Based upon our review of public comments that we receive in response to this notice, this preliminary determination may be revised.

Next Steps

We will evaluate the permit application, including the plan and comments we receive, to determine whether the application meets the requirements of section 10(a) of the Act. We will also evaluate whether issuance of the ITP would comply with Section 7 of the Act by conducting an intra-Service Section 7 consultation for the plan. We will use the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to issue the ITP. If the requirements are met, we will issue an ITP to the applicant for the incidental take of Morro shoulderband snail. We will make the final permit decision no sooner than 30 days after the date of this notice.

Public Comments

If you wish to comment on the permit application, HCP, and associated documents, you may submit comments by any one of the methods in **ADDRESSES.**

Public Availability of Comments

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.

Authority: We provide this notice under Section 10 of the Act (U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

Dated: September 21, 2010.

Diane K. Noda,

Field Supervisor, Ventura Fish and Wildlife Office, Ventura, California.

[FR Doc. 2010–24099 Filed 9–24–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–R2010–N147; BAC–4311–K9–S3]

Supawna Meadows National Wildlife Refuge, Salem County, NJ

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments: draft comprehensive conservation plan/environmental assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the draft comprehensive conservation plan (CCP) and the environmental assessment (EA) for Supawna Meadows National Wildlife Refuge (NWR), located in Salem County, New Jersey. The refuge is administered by staff located at Cape May NWR in Cape May County, New Jersey. The draft CCP/EA describes three alternatives, including our Service-preferred alternative, for managing this refuge for the next 15 years. Also available for public review and comment are the draft compatibility determinations for uses to be allowed upon initial completion of the plan if Alternative B is selected. These are included as appendix B in the draft CCP/EA.

DATES: To ensure our consideration of your written comments, please send them *no later than October 27, 2010.* We will also hold public meetings in Pennsville, New Jersey. We will announce and post details of the public meetings in local news media, via our project mailing list, and on our Regional planning Web site, *http://www.fws.gov/northeast/planning/SupawnaMeadows/ccphome.html.*

ADDRESSES: Send your comments or requests for copies of the draft CCP/EA by one of the following methods.

U.S. Mail: Lia McLaughlin, Natural Resource Planner, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035.

Facsimile: Attention: Lia McLaughlin, 413–253–8468.

Electronic mail: northeastplanning@fws.gov. Please put the words "Supawna Meadows NWR CCP" in the subject line of your electronic mail.

Agency Web site: View or download the draft document on the Web at *http://library.fws.gov/RefugePlanningDocuments.html.*

FOR FURTHER INFORMATION CONTACT: Howard Schlegel, Refuge Manager, Cape May NWR, 24 Kimbles Beach Road, Cape May Court House, NJ 08210; *phone:* 609–463–0994; *facsimile:* 609–463–1667; or *electronic mail: capemaynwr@fws.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

This notice continues the CCP process for Supawna Meadows NWR. This draft CCP/EA for Supawna NWR combines two documents required by Federal laws: A CCP, required by the National Wildlife Refuge System Administrative Act of 1966 (16 U.S.C. 668 dd–ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997; and an EA, required by the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321–4347). We published our original notice of intent to prepare a CCP in the **Federal Register** on September 24, 2007 (72 FR 54280).

Supawna Meadows NWR currently includes 3,016 acres of marsh, grassland, shrubland, and forest habitats. The approved acquisition boundary encompasses 4,527 acres along the Upper Delaware Bay in Salem County. The refuge was originally established as the Goose Pond addition to the Killcohook NWR (currently termed Killcohook Dredge Spoil Disposal Area), which was established by Executive Order 6582 on February 3, 1934, and was renamed as Supawna Meadows NWR in 1974. Supawna Meadows NWR was established to benefit migratory birds, breeding birds, wild animals, protect natural resources, and provide opportunities for suitable wildlife-oriented recreation.

Refuge visitors engage in wildlife observation and photography, hunting, and fishing. Portions of the refuge are open to deer hunting, waterfowl hunting, and fishing and crabbing per State regulations. Finns Point Rear Range Light, listed on the National Register of Historic Places, draws a number of visitors as well.

Background

The CCP Process

CCPs provide refuge managers with 15-year plans for achieving refuge purposes and the mission of the National Wildlife Refuge System (NWRS), in conformance with sound principles of fish and wildlife management, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify opportunities for wildlife-dependent recreation available to the public, which includes opportunities for hunting, fishing, observing and photographing wildlife, and participating in environmental education and interpretation programs. We will review and update each CCP at least every 15 years, in accordance with the Administration Act.

Public Outreach

In August 2007, we published and distributed our first newsletter. In September 2007, we held two public scoping meetings in Pennsville, New Jersey. The purpose of those meetings was to solicit comments from the community and other interested parties on the scope of the CCP and the issues and impacts that should be evaluated in the CCP/EA. Throughout the process, we have conducted additional outreach via participation in community meetings, events, and other public forums, and requested public input on managing the refuge and its programs.

Some key issues expressed by the public and partners meetings included:

- Identifying which key species should be focused on for management;
- Managing invasive, exotic, and overabundant species;
- Managing impoundments and forested wetlands;
- Managing nonpriority public uses on the refuge, such as dog walking;
- Conducting community outreach efforts for support of the Service mission and refuge-established purposes;
- Expanding the refuge through land acquisition;
- Staffing and funding necessary to complete priority projects;
- Protecting cultural and historic resources; and,
- Conducting scientific research.

CCP Actions We Are Considering, Including the Service-Preferred Alternative

We developed three management alternatives based on the purposes for establishing the refuge, its vision and goals, and the issues and concerns of the public, State agencies, and the Service that arose during the planning process. The alternatives share some actions in common, such as acquiring land within the current refuge acquisition boundary, protecting cultural resources, distributing refuge revenue sharing payments, and monitoring water quality. There are also some actions shared by Alternatives A and B only. These include assessing public use opportunities on the acquired lands, monitoring and abating wildlife diseases, and supporting biological and ecological research investigations.

Other actions distinguish the alternatives. The draft CCP/EA describes the alternatives in detail, and relates

them to the issues and concerns. Highlights follow.

Alternative A (Current Management)

This alternative is the "No Action" alternative required by NEPA. Alternative A (current management) satisfies the NEPA requirement of a "No Action" alternative, which we define as "continuing current management." It describes our existing management priorities and activities, and serves as a baseline for comparing and contrasting Alternatives B and C. It would maintain our present levels of approved refuge staffing and the biological and visitor programs now in place. We would continue to focus efforts on providing native tidal marsh habitat for Federal trust resources, in particular, for migrating and nesting wading birds, wintering habitats for marshbirds, waterfowl, shorebirds, and other wildlife. We would continue to actively manage tidal marsh and grassland habitats and would maintain dikes and water levels on impoundments that have water control structures.

Alternative B (Focus on Species of Conservation Concern)

This alternative is the Service-preferred alternative. It combines the actions we believe would most effectively achieve refuge purposes, vision, and goals, and respond to public issues. This alternative emphasizes management of specific refuge habitats to support Federal trust resources and species of conservation concern in the area. In particular, the priority would be to protect and restore the refuge's native tidal marsh habitat to benefit Pea Patch Island colonial-breeding wading birds, as well as secretive marshbirds, migratory waterfowl, shorebirds, and other birds of conservation concern. A secondary consideration would be to manage a diversity of other refuge wetland and upland habitats to benefit breeding and migrating songbirds, waterfowl, and raptors, as well as amphibians, reptiles, and mammals of conservation concern. Our Visitor Services program would be enhanced to provide more opportunities for a wide variety of compatible wildlife-dependent activities. In 2005, the Northeast Regional Visitor Services Review Team identified visitor programs of emphasis for each refuge. The programs identified for this refuge are interpretation and wildlife observation and photography. The determination of programs for Supawna Meadows NWR was based on careful consideration of our natural resources, existing staff, operational funds, existing and potential facilities, and which programs we would be most effective in providing "quality" opportunities for visitors.

Alternative C (Cease Management and Close Refuge to Public Uses)

Under this alternative, we would close Supawna Meadows NWR to all public uses and cease all habitat management activities. There would be no funding allocated for any projects at the refuge. This alternative would only partially achieve the refuge purposes, vision, and goals, and respond to public issues, however, budgetary constraints make it a reasonable alternative to consider. Under this alternative, the public would be notified of the closure, and appropriate signage would be placed on all buildings and along the refuge boundary. Cape May NWR staff would conduct semiannual site inspections requiring about 40 staff hours per year. We would continue to meet our trust obligations under the Endangered Species Act, which requires us to take measures to benefit the recovery of any federally listed species that might be found on the refuge in the future. We would also continue to comply with the National Historic Preservation Act by maintaining Finns Point Rear Range Light.

Public Meetings

We will give the public opportunities to provide input at public meetings in Pennsville, New Jersey, near the refuge. You can obtain the schedule from the refuge manager or natural resource planner, or visit the planning Web site (*see* **ADDRESSES** or **FOR FURTHER INFORMATION CONTACT,** above). You may also submit comments at any time during the public comment period, by any means shown in the **ADDRESSES** section.

Public Availability of Comments

Before including your address, phone number, electronic mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: August 20, 2010.

Anthony D. Léger,

Acting Regional Director, U.S. Fish and Wildlife Service, Hadley, MA 01035.

[FR Doc. 2010–23871 Filed 9–24–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before September 4, 2010. Pursuant to section 60.13 of 36 CFR Part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by October 12, 2010.

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.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

ARIZONA

Maricopa County

Phoenix Homesteads Historic District Boundary Increase, Roughly bounded by Pinchot and Flower Sts, 26th to 28th Sts, Phoenix, 10000844

ARKANSAS

Jefferson County

Williams Building, 418–420 N University, Pine Bluff, 10000833

Polk County

Shady Lake CCC Bridge #1, (Facilities Constructed by the CCC in Arkansas MPS) Forest Service Road 38 over the South Fork of the Saline River, Athens, 10000841

Shady Lake CCC Bridge #2, (Facilities Constructed by the CCC in Arkansas MPS) Shady Lake Campground loop road over the East Fork of the Saline River, Athens, 10000842

CALIFORNIA

Alameda County

Niles Canyon Transcontinental Railroad Historic District, Railway corridor from Niles to Pleasanton, Fremont, Sunol, and Pleasanton, 10000843

CONNECTICUT

Fairfield County

Little Bethel African Methodist Episcopal Church, 44 Lake Ave, Greenwich, 10000831

New Haven County

Elam Ives House, 95 Ives St, Hamden, 10000832

FLORIDA

Sarasota County

John Nolen Plan of Venice Historic District, Laguna Dr on N, Home Park Rd on E, the Corso on S, The Esplanade on W, Venice, 10000840

GEORGIA

Thomas County

Glenwood Historic District, Roughly bounded by Clay St, Glenwood Dr, East Jackson St, and Euclid Dr, Thomasville, 10000826

ILLINOIS

Jo Daviess County

Miller, Henry W., House, 11672 W Norris Ln, Galena, 10000836

MARYLAND

Frederick County

Smeltzer, Henry, Farmstead, 3231 Bidle Rd, Middletown, 10000830

Washington County

Funk, Jacob M., Farm, 21116 Black Rock Road, Hagerstown, 10000829

MISSOURI

Jackson County

Southeast Green Street Historic Cottage District, (Lee's Summit, Missouri MPS) 311–330, and 400 and 401 SE Green St, Lee's Summit, 10000837

Southeast Third Street Residential Historic District, (Lee's Summit, Missouri MPS) Roughly comprised of the 400 block of SE Third St btw SE Grand and SE Howard, Lee's Summit, 10000838

NEW JERSEY

Camden County

Westmont Theatre, 49 Haddon Ave, Haddon Township, 10000834

Gloucester County

Downer Methodist Episcopal Church, 2226 Fries Mill Rd, Monroe Township, 10000835

OHIO

Franklin County

North Columbus Commercial Historic District, Roughly Centered on N High St between Hudson and Dodridge, Columbus, 10000828

Montgomery County

Squirrel—Forrest Historic District, North of Homewood Ave and along the west side of Forest Ave, Dayton, 10000827

WISCONSIN

La Crosse County

23rd and 24th Streets Historic District, Generally bounded b Campbell Rd, Losey Blvd N, Main St, Vine St, and 23rd St N, La Crosse, 10000839

[FR Doc. 2010–24042 Filed 9–24–10; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Removal of Listed Property

Pursuant to section 60.15 of 36 CFR part 60, comments are being accepted on the following properties being considered for removal from the National Register of Historic Places. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by October 12, 2010.

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.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

Request for REMOVAL has been made for the following resources:

OREGON

Multnomah County

Canterbury Castle, 2910 SW., Canterbury Ln., Portland, 87001509

TEXAS

Hunt County

Mayo Hall, Monroe and Stonewall Sts., Commerce, 03000727

[FR Doc. 2010–24045 Filed 9–24–10; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before August 28, 2010. Pursuant to section 60.13 of 36 CFR Part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by October 12, 2010.

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.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

CONNECTICUT

Hartford County

First Lutheran Church of the Reformation, 77 Franklin Square, New Britain, 10000825

FLORIDA

Palm Beach County

Vedado Historic District, Roughly bounded Merril Ave, Southern Blvd, Parker Ave & Paseo Morella, West Palm Beach, 10000821

Sarasota County

Downtown Sarasota Historic District (Boundary Decrease), 1400 block of Main St, Sarasota, 10000815

MISSOURI

Callaway County

White Cloud Presbyterian Church and Cemetery, S side SR F at intersection with CR 232, Fulton, 10000817

Jackson County

Baltimore Avenue Historic District, 807–815 Wyandotte, Kansas City, 10000824

Jasper County

Joplin and Wall Avenues Historic District, (Historic Resources of Joplin, Missouri) Portions of S. Joplin and Wall Aves, W First, Second, Third Sts, Joplin, 10000819

South Main Street Historic District, (Historic Resources of Joplin, Missouri) W side S Main St, between W First and W Second Sts, Joplin, 10000818

TEXAS

Travis County

Westgate Tower, 1122 Colorado St, Travis, 10000820

WISCONSIN

Milwaukee County

Kegel's Inn, 5901–5905 W National Ave, West Allis, 10000823

Koelsch Funeral Home, 7622 W Greenfield Ave, West Allis, 10000822

McMicken, Alexander Herschel and Pauline G., House, 1508 S 80th St, West Allis, 10000816

[FR Doc. 2010–24043 Filed 9–24–10; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–715]

In the Matter of Certain Game Controllers; Notice of Commission Determination Not To Review an Initial Determination Terminating the Investigation on the Basis of a Settlement Agreement; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the final initial determination ("ID") (Order No. 6) issued by the presiding administrative law judge ("ALJ") on August 24, 2010 granting a joint motion to terminate the above-captioned investigation based upon a settlement agreement.

FOR FURTHER INFORMATION CONTACT: Jia Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–4737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 9, 2010, based on a complaint filed by Microsoft Corporation ("Microsoft") of Redmond, Washington. 75 FR 24743 (May 9, 2010). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain game controllers by reason of infringement of U.S. Patent Nos. D521,015; D522,011; D547,763; D581,422; D563,480; and D565,668. The complaint named the following respondents: Datel Design and Development Inc. of Clearwater, Florida, and Datel Design and Development Ltd. of Staffordshire, United Kingdom (collectively, "Datel").

On August 12, 2010, Microsoft and Datel jointly moved to terminate this investigation on the basis of a settlement agreement pursuant to Commission Rule 210.21(b). On August 17, 2010, the Commission investigative attorney filed a response supporting the motion. On August 24, 2010, the ALJ issued the subject ID granting the joint motion. No petitions for review of the ID were filed.

The Commission has determined not to review the subject ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.21(b) and 210.42–.45 of the Commission's Rules of Practice and Procedure (19 CFR 210.21(b), 210.42–.45).

By order of the Commission.

Issued: September 21, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–24067 Filed 9–24–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–737]

In the Matter of Certain Liquid Crystal Display Devices and Products Interoperable With the Same; Notice of Investigation

AGENCY: U.S. International Trade Commission

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on August 23, 2010, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Chimei Innolux Corporation of Taiwan; Chi Mei Optoelectronics U.S.A., Inc. of San Jose, California; and Innolux Corporation of Austin, Texas. Letters supplementing the complaint were filed on September 2 and 10, 2010. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain liquid crystal display devices and products interoperable with the same by reason of infringement of certain claims of U.S. Patent No. 6,134,092 ("the '092 patent"); U.S. Patent No. 6,671,019 ("the '019 patent"); and U.S. Patent No. 5,732,241 ("the '241 patent"). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the

Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Vu Q. Bui, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2582.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2010).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on September 21, 2010, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain liquid crystal display devices and products interoperable with the same that infringe one or more of claims 1, 5, 12, 17, 18, 20, 21, and 26 of the '092 patent; claims 1–4, 8, 11–14, and 19 of the '019 patent; and claims 1, 5–7, 9, 10, 16, 19–21, 23, and 25 of the '241 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Chimei Innolux Corporation, No. 160 Kesyue Rd., Jhunan Science Park, Miaoli County 350, Taiwan;

Chi Mei Optoelectronics U.S.A., Inc., 101 Metro Dr., STE 510, San Jose, CA 95110;

Innolux Corporation, 2525 Brockton Drive, Austin, TX 78758.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Sony Corporation, 1–7–1, Konan, Minato-ku, Tokyo, Japan;

Sony Corporation of America, 550 Madison Ave., New York, NY 10022;

Sony Electronics Corporation, 16530 Via Esprillo, San Diego, CA 92127;

Sony Computer Entertainment America, LLC, 919 East Hillsdale Blvd., Foster City, CA 94404.

(c) The Commission investigative attorney, party to this investigation, is Vu Q. Bui, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: September 21, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–24062 Filed 9–24–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–736]

In the Matter of: Certain Wind and Solar-Powered Light Posts and Street Lamps; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on August 6, 2010, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Duggal Dimensions LLC of New York, New York; Duggal Energy Solutions, LLC of New York, New York; and Duggal Visual Solutions, Inc. of New York, New York. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain wind and solar-powered light posts and street lamps by reason of infringement of the claimed design of U.S. Patent No. D610,732 ("the '732 patent"). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Christopher G. Paulraj, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–3052.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2010).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on September 21, 2010, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain wind and solar-

powered light posts and street lamps that infringe the claimed design of the '732 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Duggal Dimensions LLC, 10 West 24th Street, New York, NY 10010.

Duggal Energy Solutions, LLC, 9 West 20th Street, New York, NY 10011.

Duggal Visual Solutions, Inc., 10 West 24th Street, New York, NY 10010.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Gus Power Incorporated, 770 Gana Court, Mississauga, Ontario, L5S 1P1 Canada.

Efston Science Inc., 3350 Dufferin Street, Toronto, Ontario, M6A 3A4 Canada.

King Luminaire, Inc., 1153 State Route 46 North, P.O. Box 266, Jefferson, OH 44047.

The StressCrete Group, 840 Walkers Lane, Burlington, Ontario, L7R 3X9.

(c) The Commission investigative attorney, party to this investigation, is Christopher G. Paulraj, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Issued: September 21, 2010.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–24064 Filed 9–24–10; 8:45 am]

BILLING CODE 7020–02–P

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee; Meeting

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Executive Director of the Joint Board for the Enrollment of Actuaries gives notice of a closed meeting of the Advisory Committee on Actuarial Examinations.

DATES: The meeting will be held on October 22, 2010, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at Internal Revenue Service, 230 S. Dearborn Street, Room 1720, Chicago, IL.

FOR FURTHER INFORMATION CONTACT: Patrick W. McDonough, Executive Director of the Joint Board for the Enrollment of Actuaries, 202–622–8225.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will meet at Internal Revenue Service, 230 S. Dearborn Street, Room 1720, Chicago, IL on Friday, October 22, 2010, from 8:30 a.m. to 5 p.m.

The purpose of the meeting is to discuss questions that may be recommended for inclusion on future Joint Board examinations in actuarial mathematics, pension law and methodology referred to in 29 U.S.C. 1242(a)(1)(B).

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App., that the subject of the meeting falls within the exception to the open meeting requirement set forth in Title 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such meeting be closed to public participation.

Dated: September 8, 2010.

Patrick W. McDonough,

Executive Director, Joint Board for the Enrollment of Actuaries.

[FR Doc. 2010–24152 Filed 9–24–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

Notice of Proposed Consent Decree Under the Resource Conseation and Recovery Act

Notice is hereby given that, on September 20, 2010, a proposed Consent Decree in *United States* v. *High Plains Resources, Inc.,* Civil Action No. 2:09–CV–00087–ABJ, was lodged with the United States District Court for the District of Wyoming.

The proposed Consent Decree will settle the United States' claims on behalf of the U.S. Environmental Protection Agency ("EPA") pursuant to Section 7003 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. 6973, for civil penalties and permanent injunctive relief for failure to comply with the Administrative Order, Docket No. RCRA–08–226–004, issued by EPA to Defendant on September 21, 2006 (the "2006 AO"), and abate an imminent and substantial endangerment, particularly to wildlife, associated with a commercial oilfield waste disposal facility known as the Parkman Reservoir Disposal Facility (the "Facility") located in Johnson County, Wyoming. The Consent Decree resolves all claims in the Complaint, in return for which Defendant will (a) Implement an operation and maintenance ("O&M") plan to prevent endangering migratory birds and wildlife while the Facility remains open; (b) establish a trust fund in the amount of $206,000 to cover the cost of the eventual closure of the Facility; and (c) pay a civil penalty in the amount of $40,000.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of 30 days from the date of this publication. Comments on the Consent Decree should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcommentees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *High Plains Resources Inc.,* Civil Action No. 2:09–CV–00087–ABJ, D.J. Ref. No. 90–7–1–09271. Commenters may request an opportunity for a public meeting in the

affected area, in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

The proposed Consent Decree may be examined at the Office of the United States Attorney, District of Wyoming, J.C. O'Mahoney Federal Building, 2120 Capitol Avenue, Suite 4002, Cheyenne, WY 82001, and at U.S. EPA, Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129. During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone number (202) 514–1547. If requesting a copy by mail from the Consent Decree Library, please enclose a check in the amount of $11.25 ($0.25 per page reproduction cost) payable to the United States Treasury or, if requesting by e-mail or fax, forward the check in that amount to the Consent Decree Library at the address stated above. If requesting a copy exclusive of appendices, please enclose a check in the amount of $6.75 ($0.25 per page reproduction cost) payable to the United States Treasury.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–24072 Filed 9–24–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0283]

Agency Information Collection Activities: Reinstatement, With Change, of a Previously Approved Collection for Which Approval Has Expired; Comments Requested

ACTION: 60–Day notice of information collection under review: State Court Organization 2009.

The Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until November 26, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have additional comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Thomas H. Cohen, (202) 514–8344, Bureau of Justice Statistics, Office of Justice Programs, Department of Justice, 810 Seventh Street, NW., Washington, DC 20531 or *Thomas.H.Cohen@usdoj.gov.*

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information

(1) *Type of information collection:* Reinstatement, with change, of a previously approved collection for which OMB approval has expired, State Court Organization, 2009.

(2) *The title of the form/collection:* State Court Organization, 2009 or SCO 2009.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form label is SCO–2009, Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice.

(4) *Affected Public Who Will be Asked or Required to Respond, as well as a Brief Abstract:* State trial and appellate courts and state administrative court offices. Abstract: State Court Organization 2009 will focus on the organizational structure of state courts throughout the country. Emphasis will be placed on collecting information pertaining to the number of trial and appellate court judges, the selection of judicial officers, the governance of the judicial branch, the funding and budgets of state courts, appellate and trial court staffing, the use of juries, and sentencing procedures. Moreover, information will be collected on the utilization of information technology systems in state courts. All data collected will be accurate as of December 2009.

(5) *An Estimate of the Total Number of Respondents and the Amount of Time Estimated for an Average Respondent to Respond:* The State Court Organization (SCO) data collection forms will be sent to each of the nation's 56 court systems (those for the 50 states, the District of Columbia, Puerto Rico, and the U.S territories including American Samoa, Guam, Northern Mariana Islands, and the Virgin Islands). The data collection instruments will be in the form of spreadsheets that will basically mirror the electronic and PDF tables produced for the SCO report. There are a total of 62 spreadsheets that the respondents will be asked to complete for their individual states or courts. Consistent with past data collections, recurring tables will be populated with data previously reported in prior SCO publications. Previous SCO surveys, along with pretests of the current data collection spreadsheets, have shown that it should take an estimated half an hour for the 56 court systems to review and revise each pre-populated spreadsheets. Since 38 of the 62 spreadsheets hail from prior SCO surveys, the total burden hours to review, revise, and update the pre-populated SCO spreadsheets for each of the court systems should be about 19 hours (38 spreadsheets × half an hour per spreadsheet = 19 hours per state or U.S. territory). For new spreadsheets, no historical data will be available, and the data collection forms will be blank. Pretests have shown that it should take an hour to provide the requested information for each data collection spreadsheet. Since 24 of the 62 spreadsheets involve the collection of new SCO data, the total burden hours to collect the requested data for each court systems should be about 24 hours (24 spreadsheets × one hour per spreadsheet = 24 hours per state or U.S. territory). Therefore, each of the 56 respondent state court systems will require 43 hours to complete the SCO data collection request.

(6) *An Estimate of the Total Public Burden (in hours) Associated with the*

collection: The total burden hours to complete revision and review portion of the SCO data collection will be 1,064 hours (19 hours to review and revise 38 spreadsheets per court system × 56 respondents = 1,064 hours). The total burden hours involved in collection of the new SCO data will be 1,344 hours (24 hours to provide data for 24 spreadsheets per court system × 56 respondents = 1,344 hours). Therefore, it is estimated that the 56 court systems should require 2,408 hours (1,064 hours to revise and update 38 prior SCO spreadsheets + 1,344 hours to provide data for 24 new SCO spreadsheets) to complete data collection for the SCO project.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E–502, Washington, DC 20530.

Dated: September 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–24031 Filed 9–24–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0008]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Application for Procurement Quota for Controlled Substances and Ephedrine, Pseudoephedrine, and Phenylpropanolamine

ACTION: 30-Day Notice of Information Collection Under Review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 75, Number 138, page 42133 on July 20, 2010, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until October 27, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection 1117–0008

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Procurement Quota for Controlled Substances and Ephedrine, Pseudoephedrine, and Phenylpropanolamine (DEA Form 250).

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* DEA Form 250, Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: 21 U.S.C. 826 and 21 CFR 1303.12 and 1315.32 require that U.S. companies who desire to use any basic class of controlled substances listed in Schedule I or II or the List I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine for purposes of manufacturing during the next calendar year shall apply on DEA Form 250 for procurement quota for such class or List I chemical.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 255 individual respondents will respond for controlled substances and that 165 individual respondents will respond for List I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. Each form takes 1 hour to complete.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 255 individual respondents will spend one hour completing 2077 forms annually for controlled substances for 2077 hours annually and 165 individual respondents will spend one hour completing 271 forms annually for 271 hours annually for List I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. Therefore, the total public burden for this collection is 2,348 hours annually.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E–502, Washington, DC 20530.

Dated: September 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–24032 Filed 9–24–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for The Data Validation Requirement for Employment and Training Programs (OMB Control No. 1205–0448): extension With No Changes

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public

and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration is soliciting comments concerning the collection of data validation for the following employment and training programs: Workforce Investment Act (WIA) Title IB, Wagner-Peyser, Trade Adjustment Assistance (TAA), National Farmworker Jobs Program (NFJP) and Senior Community Service Employment Program (SCSEP). The current expiration date is February 28, 2011.

A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addresses section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before November 26, 2010.

ADDRESSES: Submit written comments to the U.S. Department of Labor, Employment and Training Administration, Office of Policy Development and Research, 200 Constitution Avenue NW., Room S–5206, Washington, DC 20210, *Attention:* Karen A. Staha. *Telephone number:* (202) 693–2917 (this is not a toll-free number). *Fax:* (202) 693–3490. *E-mail: Staha.Karen@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The accuracy and reliability of program reports submitted by States and grantees using Federal funds are fundamental elements of good public administration and are necessary tools for maintaining and demonstrating system integrity. States and grantees receiving funding under WIA Title IB, Wagner-Peyser Act, TAA, and the Older Americans Act are required to maintain and report accurate program and financial information (WIA section 185 (29 U.S.C. 2935) and WIA Regulations 20 CFR 667.300(e)(2); Wagner-Peyser Act section 10 (29 U.S.C. 49i), Older Americans Act section 503(f)(3) and (4) (42 U.S.C. 3056a(f)(3) and (4)), and TAA Regulations 20 CFR 617.57).

Data Validation. The data validation requirement for employment and training programs strengthens the workforce system by ensuring that accurate and reliable information on program activities and outcomes is available. Data validation is intended to accomplish the following goals:

- Ensure that critical performance data are valid and accurate.
- Detect and identify specific problems with a State's or grantee's reporting processes, including the software used for compiling this information, to enable the State or grantee to correct any problems.
- Help States and grantees analyze the causes of performance successes and failures by displaying participant data organized by performance outcomes. In addition, the process enables States and grantees to calculate error rates by means of randomly selected validation subsamples of the complete set of records.

Data validation consists of two parts:

1. Report validation evaluates the validity of aggregate reports submitted to ETA by externally verifying the accuracy of the reporting software used to calculate the reports. Report validation is conducted by separately processing the complete file of participant records and comparing the validation results to those reported by the State or grantee.

2. Data element validation assesses the accuracy of participant data records. Data element validation is conducted via comprehensive manual reviews sampled participant records against source documentation in order to ensure accuracy and compliance with Federal definitions.

Data Validation Background. In response to an Office of Inspector General (OIG) finding that programmatic performance data submitted to ETA by the State grantees lacked adequate systematic and independent verification, ETA began the current Data Validation Initiative in 2003. This initiative utilizes a comprehensive data validation methodology embedded in specific Data Validation software for gauging the accuracy and validity of the aggregate State-level reports submitted annually to ETA, as well as the individual participant-level data underlying these aggregate reports. ETA programs that have implemented Data Validation include: WIA Title IB, Wagner-Peyser, TAA, NFJP and SCSEP. States received training prior to beginning validation and receive ongoing training and technical assistance from ETA's data validation contractor throughout the validation process.

Resources. The requirement to perform validation originates from States' and grantees' responsibility to provide accurate information on program activities and outcomes to ETA. States and grantees are expected to provide resources for conducting validation from their administrative funds. Validation of program performance is a basic responsibility of grantees, who are required to report on program performance, in accordance with statutory provisions and Department of Labor regulations (29 CFR 95.51 and 97.40).

Data Validation Tools. In an effort to minimize the costs of implementing data validation, ETA developed standardized software and user handbooks that States and grantees can use to conduct data validation.

- Software developed by ETA generates samples, worksheets, and reports on data accuracy. For report validation, the software validates the accuracy of aggregate reports that are generated by the State's or grantee's reporting software and produces an error rate for each reported count. For data element validation, the software generates a sample of the participant records and data elements for the State or grantee to validate. The software produces worksheets on which the validator records information after checking the source documentation in the sampled case files. The software calculates error rates for each data element, with confidence intervals of 3.5 percent for large States/grantees and 4 percent for small States/grantees.
- User handbooks provide detailed information on software installation, building and importing a validation file, and completing report and data element validation. The handbooks also explain the validation methodology, including sampling specifications and data element validation instructions for each data element to be validated.

Data Recording and Reports. States and grantees submit their validation results electronically to ETA in the same manner as other reports. The results are stored in a data base in ETA's headquarters in Washington, DC.

Training and Technical Assistance. ETA has provided data validation training and technical assistance to States in regional sessions on an ongoing basis since its inception. States and grantees may obtain technical assistance on validation procedures and the use of the validation tools by contacting ETA's data validation contractor.

II. Review Focus

The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed continuation of the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has considerable practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes.

Title: The Data Validation Requirement for Employment and Training Programs.

OMB Number: 1205–0448.

Affected Public: State, local and tribal government entities and private non-profit organizations.

Form(s): Workforce Investment Act Data Reporting and Validation System (DRVS) User Handbook, Labor Exchange DRVS Software Users Guide, NFJP Data Validation Handbook, TAA Data Validation Handbook.

Total Annual Respondents: 179 (53 States, 52 NFJP and 74 SCSEP grantees).

Annual Frequency: Complete data validation annually.

Total Annual Responses: 285 (3 responses each for the 53 States, 1 response for each of the 52 NFJP grantees and 1 response for each of the 74 SCSEP grantees).

Average Time per Response: 347 hours.

Estimated Total Annual Burden Hours: 62,174.

Total Annual Burden Cost for Respondents: $0.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: September 21, 2010.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2010–24052 Filed 9–24–10; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Engineering; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Engineering (1170).

Date/Time: October 20, 2010: 12 p.m. to 6 p.m. October 21, 2010: 8 a.m. to 12 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Suite 1235, Arlington, Virginia 22230.

Type of Meeting: Open.

Contact Person: Deborah Young, National Science Foundation, 4201 Wilson Boulevard, Suite 505, Arlington, Virginia 22230, 703/292–8300.

Purpose of Meeting: To provide advice, recommendations and counsel on major goals and policies pertaining to engineering programs and activities.

Agenda: The principal focus of the meeting on both days will be to discuss emerging issues and opportunities for the Directorate for Engineering and its divisions and review Committee of Visitors Reports.

Dated: September 21, 2010.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2010–24050 Filed 9–24–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2010–0208]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on June 23, 2010.

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* 10 CFR Part 21 "Reporting of Defects and Noncompliance".

3. *Current OMB approval number:* 3150–0035.

4. *The form number if applicable:* NA.

5. *How often the collection is required:* On occasion, as defects and noncompliance are reportable as they occur.

6. *Who will be required or asked to report:* Individual directors and responsible officers of firms constructing, owning, operating, or supplying the basic components of any facility or activity licensed under the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974, as amended, to report immediately to the NRC the discovery of defects in basic components or failures to comply that could create a substantial safety hazard (SSH).

7. *An estimate of the number of annual responses:* 122 (74 responses plus 48 recordkeepers).

8. *The estimated number of annual respondents:* 48.

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 8,926 hours (5,350 hours reporting plus 3,576 hours recordkeeping).

10. *Abstract:* The 10 CFR part 21 regulation requires each individual, corporation, partnership, commercial grade dedicating entity, or other entity subject to the regulations in this part to adopt appropriate procedures to evaluate deviations and failures to comply to determine whether a defect exists that could result in a substantial safety hazard. Depending upon the outcome of the evaluation, a report of the defect must be submitted to NRC. Reports submitted under 10 CFR part 21 are reviewed by the NRC staff to determine whether the reported defects or failures to comply in basic components at NRC licensed facilities or activities are potentially generic safety problems. These reports have been the basis for the issuance of numerous NRC Generic Communications that have contributed to the improved safety of the nuclear industry. The records required to be maintained in accordance with 10 CFR part 21 are subject to inspection by the NRC to determine compliance with the subject regulation.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The

document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments and questions should be directed to the OMB reviewer listed below by October 27, 2010. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Christine J. Kymn, Desk Officer, Office of Information and Regulatory Affairs (3150–0035), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *Christine.J.Kymn@omb.eop.gov* or submitted by telephone at (202) 395–4638.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 20th day of September 2010.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–24134 Filed 9–24–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2010–0233]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on July 7, 2010.

1. *Type of submission, new, revision, or extension:* Revision

2. *The title of the information collection:* NRC Form 327, "Special Nuclear Material (SNM) and Source Material Physical Inventory Summary Report" and NUREG/BR–0096, "Instructions and Guidance for Completing Physical Inventory Summary Reports."

3. *Current OMB approval number:* 3150–0139

4. *The form number if applicable:* NRC Form 327

5. *How often the collection is required:* Certain licensees possessing strategic SNM are required to report inventories every six months. Licensees possessing SNM of moderate strategic significance must report every nine months. Licensees possessing SNM of low strategic significance must report annually, except three licensees must report their dynamic inventories every two months and a static inventory on an annual basis.

6. *Who will be required or asked to report:* Fuel facility licensees possessing special nuclear material.

7. *An estimate of the number of annual responses:* 31.

8. *The estimated number of annual respondents:* 10.

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 124 hours (4 hours per response × 31 responses).

10. *Abstract:* NRC Form 327 is submitted by fuel facility licensees to account for special nuclear material. The data is used by NRC to assess licensee material control and accounting programs and to confirm the absence of (or detect the occurrence of) SNM theft or diversion. NUREG/BR–0096 provides specific guidance and instructions for completing the form in accordance with the requirements appropriate for a particular licensee.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by October 27, 2010. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Christine J. Kymn, Desk Officer, Office of Information and Regulatory Affairs (3150–0139), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *Christine.J.Kymn@omb.eop.gov* or submitted by telephone at (202) 395–4638.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 20th day of September 2010.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–24136 Filed 9–24–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0002]

Sunshine Act Meeting

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission

DATE: Week of September 27, 2010.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

ADDITIONAL ITEMS TO BE CONSIDERED:

Week of September 27, 2010

Wednesday, September 29, 2010

12:55 p.m.

Affirmation Session (Public Meeting) (Tentative).

c. *Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2), LBP–10–7 (Apr. 2, 2010), Docket Nos. 50–438–CP & 50–439–CP (Tentative).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

* * * * *

* 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.*

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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: September 22, 2010.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2010–24266 Filed 9–23–10; 11:15 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 203–2 and Form ADV–W; SEC File No. 270–40; OMB Control No. 3235–0313.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the previously approved collection of information discussed below.

The title for the collection of information is "Rule 203–2 (17 CFR 275.203–2) and Form ADV–W (17 CFR 279.2) under the Investment Advisers Act of 1940 (15 U.S.C. 80b)." Rule 203–2 under the Investment Advisers Act of 1940 establishes procedures for an investment adviser to withdraw its registration with the Commission. Rule 203–2 requires every person withdrawing from investment adviser registration with the Commission to file Form ADV–W electronically on the Investment Adviser Registration Depository ("IARD"). The purpose of the information collection is to notify the Commission and the public when an investment adviser withdraws its pending or approved SEC registration. Typically, an investment adviser files a Form ADV–W when it ceases doing business or when it is ineligible to remain registered with the Commission.

The potential respondents to this information collection are all investment advisers registered with the Commission. The Commission has estimated that compliance with the requirement to complete Form ADV–W imposes a total burden of approximately 0.75 hours (45 minutes) for an adviser filing for full withdrawal and approximately 0.25 hours (15 minutes) for an adviser filing for partial withdrawal. Based on historical filings, the Commission estimates that there are approximately 500 respondents annually filing for full withdrawal and approximately 500 respondents annually filing for partial withdrawal. Based on these estimates, the total estimated annual burden would be 500 hours ((500 respondents × .75 hours) + (500 respondents × .25 hours)).

Rule 203–2 and Form ADV–W do not require recordkeeping or records retention. The collection of information requirements under the rule and form are mandatory. The information collected pursuant to the rule and Form ADV–W are filings with the Commission. These filings are not kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Office for the Securities and Exchange Commission, Officer of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an email to: Shagufta Ahmed at *Shagufta_Ahmed@omb.eop.gov;* and (ii) Jeff Heslop, Acting Director/CIO, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: September 20, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24071 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17a–7; Sec File No. 270–147; OMB Control No. 3235–0131.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the previously approved collection of information discussed below.

Rule 17a–7 (17 CFR 240.17a–7) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) ("Exchange Act") requires non-resident broker-dealers registered or applying for registration pursuant to Section 15 of the Exchange Act to maintain—in the United States—complete and current copies of books and records required to be maintained under any rule adopted under the Exchange Act. Alternatively, Rule 17a–7 provides that non-resident broker-dealers may sign written undertakings to furnish the requisite books and records to the Commission upon demand.

There are approximately 63 non-resident broker-dealers. Based on the Commission's experience in this area, it is estimated that the average amount of time necessary to preserve the books and records required by Rule 17a–7 is one hour per year. Accordingly, the total burden is 63 hours per year. With an average cost per hour of approximately $294, the total cost of compliance for the respondents is approximately $18,522 per year.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an e-mail to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Jeff Heslop, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312, or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted within 30 days of this notice.

Dated: September 20, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24069 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–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 Wednesday, September 29, 2010 at 10:30 a.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 Wednesday, September 29, 2010 will be:

institution and settlement of injunctive actions; institution and settlement of administrative proceedings; 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: September 23, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–24228 Filed 9–23–10; 11:15 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62961; File No. SR–NYSEAmex–2010–80]

Self-Regulatory Organizations; NYSE Amex LLC; Order Approving a Proposed Rule Change Amending Its Price List To Reflect Fees Charged for Co-Location Services

September 21, 2010.

On August 4, 2010, NYSE Amex LLC ("Amex" or the "Exchange") 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 amend its Price List to reflect fees charged for co-location services. The proposed rule change was published for comment in the **Federal Register** on August 20, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

In its proposal, Amex proposed to amend its Price List to identify fees pertaining to co-location services, which allow Users [4] of the Exchange to rent space on premises controlled by the Exchange so that they may locate their electronic servers in close physical proximity to the Exchange's trading and execution systems. Amex represented that it planned to begin operating a data center in Mahwah, New Jersey, from which it will offer co-location services. The Exchange represented that it will offer space at the data center in cabinets with power usage capability of either four or eight kilowatts (kW).[5] In addition, the Exchange stated that it will offer Users services related to co-location, including cross connections, equipment and cable installation, and remote "hot-hands" services, which allow Users to use on-site data center personnel to maintain User equipment. The Exchange proposed tiered co-location fees based on the level of service (1Gb circuit, 10Gb circuit and various bundled options), and additional fees for related services.

Amex represented that Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from or superior to that of Users that do not receive co-location services. The Exchange noted that all orders sent to Amex enter the Exchange's trading and execution systems through the same order gateway regardless of whether the sender is co-located in the Exchange's data center or not. Furthermore, Amex noted that co-located Users do not receive any market data or data service product that is not available to all Users. Users that receive co-location services normally would expect reduced latencies in sending orders to the Exchange and receiving market data from the Exchange.

In addition, the Exchange represented that co-located Users have the option of obtaining access to the Exchange's Liquidity Center Network ("LCN"), a local area network available in the data center.[6] Co-located Users have the option of using either the LCN or the Exchange's Secure Financial Transaction Infrastructure ("SFTI") network, to which all Users have access. Because it operates as a local area network within the data center, the LCN provides reduced latencies in comparison with SFTI. Other than the reduced latencies, the Exchange believes that there are no material differences in terms of access to the Exchange between Users that choose to co-locate and those that do not. According to Amex, SFTI and LCN both provide Users with access to the Exchange's trading and execution systems and to the Exchange's proprietary market data products. User access to non-proprietary market data products is available through SFTI and not through LCN.

Amex represented that it offers co-location space based on availability and the Exchange believes that it has sufficient space in the Mahwah data center to accommodate current demand on an equitable basis for the foreseeable future. In addition, the Exchange believes that any difference among the positions of the cabinets within the data center does not create any material difference to co-location Users in terms of access to the Exchange.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, the Commission finds that the proposed rule change is consistent with Section

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62731 (Aug. 16, 2010), 75 FR 51512 ("Notice").

[4] For the purposes of this filing, the term "Users" includes any "member organization," as that term is defined in NYSE Amex Equities Rule 2(b) and any "Sponsored Participant," as that term is defined in NYSE Amex Equities Rule 123B.30(a)(ii)(B).

[5] The Exchange represented that it also allows Users, for a monthly fee (*i.e.,* 40% of the applicable monthly per kW fee), to obtain an option for future use on available, unused cabinet space in proximity to their existing cabinet space. Specifically, Users may reserve cabinet space of up to 30% of the cabinet space under contract, which the Exchange will endeavor to provide as close as reasonably possible to the User's existing cabinet space, taking into consideration power availability within segments of the data center and the overall efficiency of use of data center resources as determined by the Exchange.

[6] Amex represented that pricing for LCN access is provided on a stand-alone basis and on a bundled basis in combination with SFTI connections and optic connections to outside access centers and within the data center. The SFTI and optic connections are not related to the co-location services.

[7] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

6(b)(4) of the Act,[8] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[9] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposed tiered fees for co-location and related services are reasonable and equitably allocated insofar as they are applied on the same terms to similarly situated market participants. In addition, the Commission believes that the connectivity options described in the proposed rule change are not unfairly discriminatory because Amex makes the co-location services uniformly available to all Users who voluntarily request them and pay the fees as detailed in the proposal. As represented by Amex, these fees are uniform for all such customers and may vary from User to User due to each User's choice of service package. Finally, the Commission believes that the proposal will further the protection of investors and the public interest because it will provide greater transparency regarding the connectivity options available to market participants.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–NYSEAmex–2010–80) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24063 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–P

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62953; File No. SR–FINRA–2010–049]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Relating to Quotation Requirements on the Alternative Display Facility

September 20, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 17, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rule 6272 to enhance quotation requirements on the Alternative Display Facility ("ADF").

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In 2002, FINRA created the ADF to ensure that any FINRA member, including alternative trading systems, seeking to display quotations for NMS stocks in the over-the-counter ("OTC") market, rather than through an exchange platform, has an alternative venue through which to post its OTC quotations and report trades.[3]

FINRA and numerous exchanges are filing proposed rule changes to enhance the minimum quotation requirements for market makers by requiring market makers for each stock in which they are registered to continuously maintain two-sided quotations within a designated percentage of the National Best Bid and National Best Offer (or if there is not a National Best Bid or Offer, the last reported sale). These proposed rule changes are intended to eliminate trade executions against market maker "placeholder" quotations that are priced far away from the inside market, commonly known as "stub quotes." Under these proposed rules, limitations on permissible quotations are determined by the individual character of the security, the time of day in which the quote is entered, and any applicable stock trading pause triggers.

In order to ensure consistency in quotation requirements across markets, FINRA is proposing to amend Rule 6272 to impose the same limitations on a Registered Reporting ADF Market Maker's quotations on the ADF that will apply to market makers on national securities exchanges. The proposed rule change would thus require all Registered Reporting ADF Market Makers to have systems in place to ensure that any quotations displayed on the ADF met the requirements of Rule 6272.

FINRA will announce the implementation date on its Web site.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[4] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will ensure consistent treatment of quotations across markets and could prevent the execution of numerous transactions at

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Initially, the ADF was limited to quotations and trade reports in Nasdaq securities. *See* Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002). In 2006, the ADF was expanded to include all NMS stocks. *See* Securities Exchange Act Release No. 54537 (September 28, 2006), 71 FR 59173 (October 6, 2006).

[4] 15 U.S.C. 78*o*–3(b)(6).

stub quote prices, such as those on May 6, 2010.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 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 or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2010–049 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2010–049. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–FINRA–2010–049 and should be submitted on or before October 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[5]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24057 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–P

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62964; File No. SR–NYSE–2010–53]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending NYSE Rule 36

September 21, 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 September 14, 2010, the New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 36 ("Communications Between Exchange and Members' Offices") to incorporate the provisions of its current Wireless Policy. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE proposes to amend NYSE Rule 36 ("Communications Between Exchange and Members' Offices") to incorporate the provisions of its current Wireless Policy into Supplementary Material .70 of the Rule.[3] The Wireless Policy was previously approved by the Commission.[4]

Background

Current NYSE rules permit a Floor broker to communicate information to a customer using a wired telephone line,[5] NYSE approved portable telephones,[6] or through a written electronic communication from the Floor brokers' hand-held device as permitted by the NYSE's "Wireless Data Communications Initiatives." Wireless communications

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that parallel changes are proposed to the rules of its affiliate, NYSE Amex LLC. *See* SR–NYSEAmex–2010–71.

[4] *See* Securities Exchange Act Release No. 36156 (August 25, 1995), 60 FR 45756 (September 1, 1995) (SR–NYSE–95–22). The Wireless Policy was attached as an exhibit to the proposed rule change that most recently amended the Wireless Policy. *See* Securities Exchange Act Release No. 59626 (March 25, 2009), 74 FR 14831 (April 1, 2009) (SR–NYSE–2009–33).

[5] NYSE Rule 36.20.

[6] NYSE Rule 36.21.

can be sent and received directly to and from a Floor broker's hand-held device and orders entered from off the Floor may be transmitted directly to a hand-held device, bypassing the booth. Floor brokers may send order-related messages and information (*e.g.,* cancellations and administrative messages, as well as market probes and market looks) back to the customer directly through the hand-held device.

Pursuant to the Exchange's Wireless Policy, a record must be established and maintained for transmissions that are sent: (1) From a member's off-Floor location to a booth terminal and then retransmitted from the booth terminal to a member's hand-held device; or (2) directly to the hand-held device, bypassing the booth. Orders sent from off-Floor to the booth or the hand-held device are first sent through a secured network and routed to an Exchange-wired database that captures and records the orders. Likewise, order-related messages or information generated from the Floor broker's booth or hand-held device are transmitted back to the Exchange-wired databases via the secured wireless network, where the information is captured and recorded, and then sent off-Floor to the customer via the Exchange's secured network. The Exchange records all of the information sent to and transmitted from the hand-held devices.

Proposed Amendments to NYSE Rule 36

The Exchange proposes to revise NYSE Rule 36 to incorporate the provisions of its Wireless Policy, previously approved by the Commission, in Supplementary Material .70 of the Rule. In addition, the Exchange is making certain clarifying changes as part of the incorporation of the Wireless Policy into the Rule.

First, the Exchange proposes to clarify the language in Supplementary Material .70 and the Wireless Policy by using consistent terminology when referring to the hand-held devices in the proposed rule change. Thus, for example, references in paragraph (a) of the current Supplementary Material to "wireless trading devices" would be changed to "wireless hand-held devices." The use of consistent terminology would make clear that the Exchange is referencing the same type of device in both paragraphs of the proposed rule.

Second, the Exchange is clarifying that Floor brokers may send order-related messages outside their member organizations only to customers. In this regard, the Exchange is clarifying the rule text to provide that order-related messages and information include market looks. The Exchange also notes that a customer must be specifically enabled by the Floor broker to receive communications from the Floor broker's hand-held device.

For purposes of this proposed rule change, the term "customer" means a person who the Floor broker reasonably believes is receiving the order-related message(s) in consideration of a securities transaction or potential securities transaction with the Floor broker. Whether such a belief is reasonable is based on the relevant facts and circumstances including, without limitation: whether the customer is a bona fide market participant; any prior history of the customer entering orders with the Floor broker for execution on the Exchange; and acknowledgement by the customer (including by negative consent) that the customer is receiving order-related messages in consideration of a securities transaction or potential securities transaction with the Floor broker. A Floor broker may provide order-related messages to a customer pursuant to proposed Supplementary Material .70 notwithstanding the fact that the customer's receipt of particular messages does not lead to an order with the Floor broker.

Third, the Exchange is clarifying that the Wireless Policy does not allow Floor brokers to retransmit datafeeds received on hand-held devices or send orders to another hand-held device.[7]

Fourth, the Exchange is clarifying that Floor brokers may send trade reports on their hand-held devices.

Finally, the Exchange is clarifying that the Wireless Policy applies not only to member organizations but also to employees of member organizations.

As proposed, Supplementary Material .70 is substantially similar to the Exchange's Wireless Policy as previously filed with and approved by the Commission.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[8] that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The instant proposal is in keeping with these principles because the incorporation of the Wireless Policy in the Exchange's rules promotes transparency and makes clear what type of information may be communicated to and from hand-held devices.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change 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, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[11] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. NYSE requests that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission notes that the proposed rule change codifies into rule text an existing policy and provides certain other clarifications. For this reason, the Commission believes that waiving the 30-day operative delay[13] is consistent with the protection of investors and the public interest. Therefore, the

[7] However, Floor brokers are permitted to provide their customers with specific data points from datafeeds made available on the hand-held devices.

[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. NYSE has satisfied this requirement.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6).

[13] 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).

Commission designates the proposal operative upon filing.

At any time within the 60-day period beginning on the date of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–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–NYSE–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,[14] 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–NYSE–2010–53 and should be submitted on or before October 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24176 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–P

[14] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62956; File No. SR–OCC–2010–09]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of Proposed Rule Change Relating to Sprott Physical Gold Shares

September 20, 2010.

I. Introduction

On June 7, 2010, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission the proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 [1] and Rule 19b–4 thereunder [2] to clarify that OCC will clear and treat as options on securities any option contract on Sprott Physical Gold Shares that are traded on a securities exchange and will clear and treat as security futures any futures contracts on Sprott Physical Gold Shares. The proposed rule change was published for comment in the **Federal Register** on June 28, 2010.[3] No comment letters were received on the proposal. This order approves the proposal.

II. Description of the Proposal

The proposed rule change will add an interpretation following the definition of "fund share" in Article I, Section 1(F)(8), of OCC's By-Laws to clarify that OCC will clear and treat as options on securities any option contract on Sprott Physical Gold Shares that is traded on a securities exchange and will clear and treat as security futures any futures contracts on Sprott Physical Gold Shares.[4] This treatment is essentially the same as that extended to other options that OCC currently clears clears pursuant to rule changes approved by the Commission.[5]

In its capacity as a "derivatives clearing organization" registered as such with the CFTC, OCC also filed this proposed rule change for prior approval by the CFTC pursuant to provisions of the Commodity Exchange Act ("CEA") in order to foreclose potential liability based on an argument that the clearing by OCC of such options as securities options constitutes a violation of the CEA.

III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and derivative transactions.[6] By amending its By-Laws to make clear that OCC will clear and treat as options on securities any option contract on Sprott Physical Gold Shares that is traded on a securities exchange and will clear and treat as security futures any futures contracts on Sprott Physical Gold Shares, OCC's rule change should help clarify OCC's treatment of such contracts and accordingly should help to promote the prompt and accurate clearance and settlement of securities transactions and of derivative transactions. In accordance with the Memorandum of Understanding entered into between the CFTC and the Commission on March 11, 2008, and in particular the addendum thereto concerning Principles Governing the Review of Novel Derivative Products, the Commission believes that novel derivative products that implicate areas of overlapping regulatory concern should be permitted to trade in either a CFTC or Commission-regulated environment or both in a manner consistent with laws and regulations (including the appropriate use of all available exemptive and interpretive authority).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 62329 (June 21, 2010), 75 FR 36724.

[4] The specific language of the new interpretation can be found on OCC's Web site at *http://www.theocc.com/about/publications/bylaws.jsp.*

[5] Securities and Exchange Commission Release Nos. 57895 (May 30, 2008), 73 FR 32066 (June 5, 2008) (SPDR Gold Trust); 59054 (Dec. 4, 2008), 73 FR 75159 (Dec. 10, 2008) (iShares COMEX Gold Shares and iShares Silver Shares); 61591 (Feb. 25, 2010), 75 FR 9979 (Mar. 4, 2010) (ETFS Physical Gold Shares and ETFS Physical Silver Shares); 61958 (Apr. 22, 2010), 75 FR 22673 (Apr. 29, 2010) (ETFS Palladium Shares And ETFS Platinum Shares).

[6] 15 U.S.C. 78q–1(b)(3)(F).

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act [7] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (File No. SR–OCC–2010–09) be and hereby is approved.[9]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24174 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–P

[7] 15 U.S.C. 78q–1.

[8] 15 U.S.C. 78s(b)(2).

[9] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62959; File No. SR–BX–2010–065]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide an Additional Order Type Which Will Give Options Participants Greater Control Over the Circumstances in Which Their Orders Are Executed

September 21, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 13, 2010, NASDAQ OMX BX, Inc. (the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter V, Section 14 (Order Entry) of the Rules of the Boston Options Exchange Group, LLC ("BOX") to provide an additional order type which will give Options Participants greater control over the circumstances in which their orders are executed. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to provide an additional order type, the "Session Order", which will give Options Participants greater control over the circumstances in which their orders are cancelled or executed. By designating the Session Order duration type for an order, an Options Participant will be able to specify on an order by order basis that the designated Session Order it has sent to BOX should be cancelled as soon as the Options Participant loses its connection to the BOX system and its ability to either directly modify or cancel the order.[3] The proposal will offer protection to Options Participants' orders in the event that they lose communication with the BOX Trading Host [4] due to a loss of connectivity between their system and BOX or when there is a disconnection between internal BOX components.

An order sent to BOX with this Session Order duration type will remain active in the BOX trading system until one of the following events ("Triggering Event") occurs:

- The connection between the Options Participant and BOX that was used to enter the order is interrupted;
- There is a disconnection between internal BOX components used to process orders, causing a component to lose its connection to the Options Participant or the Trading Host while in possession of the Session Order;
- A component of the Trading Host experiences a system error in which it is unable to process open orders while in possession of the Session Order.

Upon the occurrence of one of these Triggering Events, meaning the Options Participant has lost its ability to either directly modify or cancel the order, only those Session Orders residing in the affected BOX internal system(s) will be automatically cancelled by BOX. Any Triggering Events are connection or component specific. Therefore, when a particular external connection between BOX and the Options Participant is interrupted, only those Session Orders that came through the interrupted connection will be automatically cancelled by BOX. Similarly, when the Triggering Event is a disconnection between internal BOX components, the BOX system will only automatically cancel Session Orders related to the component that is not "responding". The cancellation of the Session Orders from an affected connection will neither impact nor determine the treatment of the orders of the same or other Options Participants entered into the Trading Host via a separate and distinct connection. All Session Orders will be cancelled at the end of the normal trading day.

A Session Order will not be cancelled and shall remain active in the BOX market if the order is not allowed to be cancelled pursuant to another BOX Rule or it is in one of the following BOX system processes when a Triggering Event occurs:

- The order is being exposed to the BOX market pursuant to the NBBO trade through filter process; [5]
- The order is a Directed Order to which the Executing Participant has not yet responded; [6]
- The order has been routed to an away exchange pursuant to the Routing Rules.[7]

When a Session Order is automatically cancelled, BOX will immediately generate a cancellation message to notify the Options Participant that its order is no longer active. After the Session Order(s) are

[3] Session Order duration type is not available for PIP Orders, Primary Improvement Orders or Improvement Orders. *See* proposed Section 16(d)(3) of Chapter V of the BOX Rules.

[4] References herein to the term Trading Host will have the meaning as set forth in Section 1(a)(67) of Chapter I of the BOX Rules.

[5] *See* Section 16(b) of Chapter V of the BOX Rules.

[6] *See* Section 5(c)(ii) of Chapter VI of the BOX Rules.

[7] *See* Section 5 of Chapter XII of the BOX Rules.

automatically cancelled for an Options Participant that lost its connection to BOX, and upon a reconnection between the Options Participant and the Trading Host on the same trading day, the Options Participant will be able to retrieve any Session Order cancellation notices when it reconnects.

BOX will inform Options Participants via Information Circular about the functionality and use of the Session Order duration type and the implementation date prior to its implementation in the BOX trading system.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[8] in general, and Section 6(b)(5) of the Act,[9] in particular, in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the Exchange believes that this proposed rule change will benefit the marketplace and protect investors because it will reduce the risk of erroneous or stale orders on the BOX Book in the event that an Options Participant loses connectivity with the Trading Host. Furthermore, the proposed Session Order will provide for the protection of Options Participants and their customers, who must bear the burden of market risk for stale orders caused by circumstances outside of their control, as well as for the protection of investors and the efficiency and fairness of the market as a whole.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

III. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Because the foregoing rule 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, provided that the self-regulatory organization has given 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 proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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–BX–2010–065 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.

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intention 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 filing of the proposed change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

All submissions should refer to File Number SR–BX–2010–065. 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 website viewing and printing in the Commission's Public Reference Room, located at 100 F Street, NE., Washington, DC 20549, on business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2010–065 and should be submitted on or before October 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24077 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62954; File No. SR–BX–2010–066]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of a Proposed Rule Change To Enhance Quotation Requirements for Market Makers

September 20, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 17, 2010, NASDAQ OMX

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

BX, Inc. ("BX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to enhance quotation requirements for market makers. The text of the proposed rule change is below. Proposed new language is in *italics;* proposed deletions are in [brackets].[3]

* * * * *

[4613. Character of Quotations]

A member registered as an Equities Market Maker shall engage in a course of dealings for its own account to assist in the maintenance, insofar as reasonably practicable, of fair and orderly markets in accordance with this Rule.

(a) Quotation Requirements and Obligations

(1) Two-Sided Quote Obligation. For each security in which a member is registered as an Equities Market Maker, the member shall be willing to buy and sell such security for its own account on a continuous basis and shall enter and maintain a two-sided quotation ("Principal Quote"), which is attributed to the market maker by a special market participant identifier ("MPID") and is displayed in the NASDAQ OMX BX Equities Market at all times, subject to the procedures for excused withdrawal set forth in Rule 4619.

(A) A registered Equities Market Maker must display a quotation size for at least one normal unit of trading (or a larger multiple thereof) when it is not displaying a limit order in compliance with SEC Rule 604, provided, however, that a registered Equities Market Maker may augment its displayed quotation size to display limit orders priced at the Equities Market Maker's quotation. Unless otherwise designated, a "normal unit of trading" shall be 100 shares.

(B) The minimum quotation increment for quotations of $1.00 or above in all System Securities shall be $0.01. The minimum quotation increment in the System for quotations below $1.00 in System Securities shall be $0.0001.

(2) The first MPID issued to a member pursuant to subparagraph (1) of this rule, or Rule 4623, shall be referred to as the member's "Primary MPID." Market makers and ECNs may request the use of additional MPIDs that shall be referred to as "Supplemental MPIDs." A market maker may request the use of a Supplemental MPIDs for displaying Attributable Quotes/Orders in the Exchange's Quotation Montage for any security in which it is registered and meets the obligations set forth in subparagraph (1) of this rule. An ECN may request the use of Supplemental MPIDS for displaying Attributable Quotes/Orders in the Exchange's Quotation Montage for any security in which it meets the obligations set forth in Rule 4623. A market maker or ECN that ceases to meet the obligations appurtenant to its Primary MPID in any security shall not be permitted to use a Supplemental MPID for any purpose in that security.

(3) Market makers and ECNs that are permitted the use of Supplemental MPIDs for displaying Attributable Quotes/Orders pursuant to subparagraph (2) of this rule are subject to the same rules applicable to the member's first quotation, with two exceptions: (a) The continuous two-sided quote requirement and excused withdrawal procedures described in subparagraph (1) above do not apply to market maker's Supplemental MPIDs; and (b) Supplemental MPIDs may not be used by market makers to enter stabilizing bids pursuant to Equity Rule 4614.]

4613. Market Maker Obligations

A member registered as an Equities Market Maker shall engage in a course of dealings for its own account to assist in the maintenance, insofar as reasonably practicable, of fair and orderly markets in accordance with this Rule.

(a) Quotation Requirements and Obligations

(1) Two-Sided Quote Obligation. For each security in which a member is registered as a Equities Market Maker, the member shall be willing to buy and sell such security for its own account on a continuous basis during regular market hours and shall enter and maintain a two-sided trading interest ("Two-Sided Obligation") that is identified to the Exchange as the interest meeting the obligation and is displayed in the Exchange's quotation montage at all times. Interest eligible to be considered as part of an Equities Market Maker's Two-Sided Obligation shall have a displayed quotation size of at least one normal unit of trading (or a larger multiple thereof); provided, however, that an Equities Market Maker may augment its Two-Sided Obligation size to display limit orders priced at the same price as the Two-Sided Obligation. Unless otherwise designated, a "normal unit of trading" shall be 100 shares. After an execution against its Two-Sided Obligation, Equities a Market Maker must ensure that additional trading interest exists in the Exchange to satisfy its Two-Sided Obligation either by immediately entering new interest to comply with this obligation to maintain continuous two-sided quotations or by identifying existing interest on the Exchange book that will satisfy this obligation.

(2) Pricing Obligations. For NMS stocks (as defined in Rule 600 under Regulation NMS) an Equities Market Maker shall adhere to the pricing obligations established by this Rule during Regular Market Hours.

(A) Bid Quotations. At the time of entry of bid interest satisfying the Two-Sided Obligation, the price of the bid interest shall be not more than the Designated Percentage away from the then current National Best Bid, or if no National Best Bid, not more than the Designated Percentage away from the last reported sale from the responsible single plan processor. In the event that the National Best Bid (or if no National Best Bid, the last reported sale) increases to a level that would cause the bid interest of the Two-Sided Obligation to be more than the Defined Limit away from the National Best Bid (or if no National Best Bid, the last reported sale), or if the bid is executed or cancelled, the Equities Market Maker shall enter new bid interest at a price not more than the Designated Percentage away from the then current National Best Bid (or if no National Best Bid, the last reported sale), or identify to the Exchange current resting interest that satisfies the Two-Sided Obligation.

(B) Offer Quotations.—At the time of entry of offer interest satisfying the Two-Sided Obligation, the price of the offer interest shall be not more than the Designated Percentage away from the then current National Best Offer, or if no National Best Offer, not more than the Designated Percentage away from the last reported sale received from the responsible single plan processor. In the event that the National Best Offer (or if no National Best Offer, the last reported sale) decreases to a level that would cause the offer interest of the Two-Sided Obligation to be more than the Defined

[3] Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at *http://nasdaqomxbx.cchwallstreet.com.*

Limit away from the National Best Offer (or if no National Best Offer, the last reported sale), or if the offer is executed or cancelled, the Equities Market Maker shall enter new offer interest at a price not more than the Designated Percentage away from the then current National Best Offer (or if no National Best Offer, the last reported sale), or identify to the Exchange current resting interest that satisfies the Two-Sided Obligation.

(C) The National Best Bid and Offer shall be determined by the Exchange in accordance with its procedures for determining protected quotations under Rule 600 under Regulation NMS.

(D) For purposes of this Rule, the term "Designated Percentage" shall mean the individual stock pause trigger percentage under Rule 4120(a)(11) (or comparable rule of another exchange) less two (2) percentage points. For times during regular market hours when stock pause triggers are not in effect under Rule 4120(a)(11) (or comparable rule of another exchange), the Designated Percentage calculation will assume a trigger percentage of 22%. For NMS stocks that are not subject to such stock pause triggers the Designated Percentage will assume a trigger percentage of 32%.

(E) For purposes of this Rule, the term "Defined Limit" shall mean the individual stock pause trigger percentage under Rule 4120(a)(11) (or comparable rule of another exchange) less one-half (½) percentage point. For times during regular market hours when stock pause triggers are not in effect under Rule 4120(a)(11) (or comparable rule of another exchange), the Defined Limit calculation will assume a trigger percentage of 22%. For NMS stocks that are not subject to such stock pause triggers the Defined Limit calculation will assume a trigger percentage of 32%.

(F) Quotation Creation and Adjustment. For each Issue in which an Equities Market Maker is registered, the System shall automatically create a quotation for display to comply with this Rule. System-created compliant displayed quotations will thereafter be allowed to rest and not be further adjusted by the System unless the relationship between the quotation and its related National Best Bid or National Best Offer, as appropriate, shrinks to the greater of: (a) 4 percentage points, or, (b) one-quarter the applicable percentage necessary to trigger an individual stock trading pause as described in NASDAQ OMX BX Rule 4120(a)(11), or expands to within that same percentage less 0.5%, whereupon the System will immediately re-adjust and display the Equities Market Maker's quote to the appropriate Designated Percentage set forth in section (D) above. As the System allows for multiple attributable quotations by a Equities Market Maker in an issue, quotations originally entered by Equities Market Makers shall be allowed to move freely towards or away from the National Best Bid or National Best Offer, as appropriate, for potential execution.

(G) Quotation Refresh After Execution. In the event of an execution against a System-created compliant quotation, the Equities Market Maker shall have its quote refreshed by the System on the executed side of the market at the applicable Designated Percentage away from the then National Best Bid (Offer) (or if no National Best Bid (Offer), the last reported sale).

(H) Nothing in this Rule shall preclude an Equities Market Maker from quoting at price levels that are closer to the National Best Bid and Offer than the levels required by this Rule.

(I) The minimum quotation increment for quotations of $1.00 or above in all System Securities shall be $0.01. The minimum quotation increment in the System for quotations below $1.00 in System Securities shall be $0.0001.

(J) The individual Market Participant Identifier ("MPID") assigned to a member to meet its Two-Sided Obligation pursuant to subparagraph (a)(1) of this Rule, or Rule 4623, shall be referred to as the member's "Primary MPID." Equities Market Makers and ECNs may request the use if additional MPIDs that shall be referred to as "Supplemental MPIDs." An Equities Market Maker may request the use of Supplemental MPIDs for displaying Attributable Quotes/Orders in the Quotation Montage for any security in which it is registered and meets the obligations set forth in subparagraph (1) of this rule. An ECN may request the use of Supplemental MPIDs for displaying Attributable Quotes/Orders in the Quotation Montage for any security in which it meets the obligations set forth in Rule 4623. An Equities Market Maker or ECN that ceases to meet the obligations appurtenant to its Primary MPID in any security shall not be permitted to use a Supplemental MPID for any purpose in that security.

(K) Equities Market Makers and ECNs that are permitted the use of Supplemental MPIDs for displaying Attributable Quotes/Orders pursuant to subparagraph (2) of this rule are subject to the same rules applicable to the members' first quotation, with two exceptions: (a) The continuous two-sided quote requirement and excused withdrawal procedures described in subparagraph (1) above do not apply to Equities Market Makers' Supplemental MPIDs; and (b) Supplemental MPIDs may not be used by Equities Market Makers to engage in passive market making or to enter stabilizing bids pursuant to Rule 4614.

(b)–(e) No Change.

* * * * *

(b) Not applicable.

(c) Not applicable.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Market Maker Quote Obligations:

The Exchange proposes to adopt rules to enhance minimum quotation requirements for market makers. Under the proposal, the Exchange will require market makers for each stock in which they are registered to continuously maintain a two-sided quotation within a designated percentage of the National Best Bid and National Best Offer as appropriate. These enhanced market maker quotation requirements are intended to eliminate trade executions against market maker placeholder quotations traditionally priced far away from the inside market, commonly known as "stub quotes." They are also intended to augment and work in relation to the single stock pause standards already in place on a pilot basis for stocks in the S&P 500, Russell 1000, and specified ETFs.[4] Under the proposal, the Exchange will require registered market makers to enter and maintain quotes priced at no more than a certain percentage away from the national inside bid and offer. Permissible quotes are determined by the individual character of the security, the time of day in which the quote is entered, and other factors which are summarized below:

[4] *See* Exchange Act Release No. 62884 (September 10, 2010).

For issues subject to an individual stock trading trigger pause, a permissible quote is determined by first looking at the applicable stock trading pause trigger percentage of the security and then reducing that number by 2%. Since currently the stock pause trigger percentage across all exchanges is 10%, a market maker's quote in such a security may not be more than 8% away from the national best bid or best offer as appropriate. Once a compliant quote is entered, it may rest without adjustment until such time as it moves to within ½ of 1% of the applicable trigger pause percentage (*i.e.,* currently 9.5%) whereupon the market maker must immediately move its quote back to at least the permissible default level of 8% away from the national best bid or best offer. During times in which a trigger pause percentage is not applicable (*e.g.* before 9:45 a.m. and after 3:35 p.m.), a market maker must maintain a quote no further than 20% away from the inside (*i.e.* it may rest without adjustment until it reaches 21.5%). In the absence of national best or best offer, the above calculations will remain the same, but will use the national last sale instead of the absent bid or offer.

For securities not subject to any individual stock pause trigger, the proposal will a [sic] assume a hypothetical 32% trigger pause, apply a 2% reduction, and require market makers in those issues to maintain quotes no more than 30% away from the national best and national best offer. Like securities subject to stock trading pauses, once a compliant quote is entered, it may rest without adjustment until such time as it moves to within ½ of 1% of its applicable trigger pause percentage (31.5%) whereupon the market maker must immediately move its quote back to at least the permissible default level of 30%. These requirements shall apply to Regulation NMS securities during normal market hours.

Nothing in the above precludes a market maker from voluntarily quoting at price levels that are closer to the national best bid and best offer than required under the proposal.

Automated Quote Management:

In order to assist market makers in meeting their enhanced quotation obligations, the Exchange will also provide automated quote management functionality. For each issue in which a market maker is registered, the Exchange will automatically create a quotation for display to comply with this standard set forth in this proposal. Compliant displayed quotations will thereafter be allowed to rest and not be further adjusted by the Exchange unless the relationship between the quotation and its related national best bid or national best offer, as appropriate, shrinks to the greater of: (a) 4 percentage points, or, (b) one-quarter the applicable percentage necessary to trigger an individual stock trading pause as described in NASDAQ OMX BX Rule 4120(a)(11), or expands to within that same percentage less 0.5%, whereupon the Exchange will immediately re-adjust and display the market maker's quote to the appropriate designated percentage. Quotations originally entered by market makers shall be allowed to move freely towards the national best bid or national best offer, as appropriate, for potential execution.

In the event of an execution against a System-created compliant quotation, the market maker shall have its quote refreshed by the System on the executed side of the market at the applicable designated percentage away from the then national best bid (offer), or if no national best bid (offer), the last reported sale.

Previously Approved Rule Text:

Finally, the sections (I), (J) and (K) of the proposed rule are portions of previously approved text of Rule 4613 that have moved so as to group the proposed market making standard sections together within the rule.

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"),[5] 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)[6] 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 minimum market maker quotation requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78k–1(a)(1).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BX–2010–066 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2010–066. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the

provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–BX–2010–066 and should be submitted on or before October 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24059 Filed 9–24–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62951; File No. SR–CBOE–2010–087]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Related to CBSX Market-Maker Obligations

September 20, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 17, 2010, Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend CBOE Stock Exchange's ("CBSX", the CBOE's stock trading facility) rules to enhance quotation requirements. The text of the rule proposal is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

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 adopt rules to enhance minimum quotation requirements for CBSX Remote Market-Makers, CBSX Designated Primary Market-Makers ("CBSX DPMs"), and CBSX Lead Market-Makers ("CBSX LMMs") (collectively "CBSX Market-Makers"). Under the proposal, the Exchange will amend Rules 53.23, *Obligations of CBSX Remote Market-Makers,* and Rule 53.56, *CBSX DPM Obligations,*[3] to require CBSX Market-Makers for each stock in which they are registered to continuously maintain a two-sided quotation within a designated percentage of the National Best Bid and National Best Offer as appropriate during CBSX Regular Trading Hours after the primary listing market has disseminated an opening quote in the stock on a given trading day.[4] These enhanced market maker quotation obligations and [sic] are intended to eliminate trade executions against market maker placeholder quotations traditionally priced far away from the inside market, commonly known as "stub quotes." They are also intended to augment and work in relation to the single stock pause standards already in place on a pilot basis for stocks in the S&P 500, the Russell 1000 and certain exchange-trade products.[5]

Under the proposal, the Exchange will require CBSX Market-Makers to enter and maintain quotes priced at no more than a certain percentage away from the national inside bid and offer. Permissible quotes are determined by the individual character of the security, the time of day in which the quote is entered, and other factors which are summarized below:

For issues subject to an individual stock trading trigger pause, a permissible quote is determined by first looking at the applicable stock trading pause trigger percentage of the security and then reducing that number by 2%. Since currently the stock pause trigger percentage across all exchanges is 10%, a CBSX Market-Maker's quote in a such a security may not be more than 8% away from the national best bid or best offer as appropriate. Once a compliant quote is entered, it may rest without adjustment until such time as it moves to within ½ of 1% of the applicable trigger pause percentage (*i.e.,* currently 9.5%) whereupon the CBSX Market-Maker must immediately move its quote back to at least the permissible default level of 8% away from the national best bid or best offer. During times in which a trigger pause percentage is not applicable (*e.g.,* before 8:45 a.m. and after 2:35 p.m. Chicago Time), a market maker must maintain a quote no further than 20% away from the inside (*i.e.,* it may rest without adjustment until it reaches 21.5%). In the absence of national best or best offer, the above calculations will remain the same, but will use the national last sale instead of the absent bid or offer.

For securities not subject to any individual stock pause trigger, the proposal will a [sic] assume a hypothetical 32% trigger pause, apply a 2% reduction, and require CBSX Market-Makers in those issues to maintain quotes no more than 30% away from the national best and national best offer. Like securities subject to stock trading pauses, once a compliant quote is entered, it may rest without adjustment until such time as it moves to within ½ of 1% of its

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that no change is necessary to the text related to CBSX LMM obligations as existing Rule 53.51, *CBSX LMM Defined,* already provides that CBSX LMMs will have the same obligations of CBSX Remote Market-Makers plus those additional obligations of CBSX DPMs.

[4] A CBSX Remote Market-Maker would be obligated to provide continuous quotes only when the CBSX Remote Market-Maker is quoting in a particular security during CBSX Regular Trading Hours after the primary listing market has disseminated an opening quote in the stock on a given trading day. *See* proposed Rule 53.23.01(a), which is similar to CBOE's existing rule for options Market-Makers, Rule 8.7(d)(iii). A CBSX DPM or CBSX LMM would be obligated to provide continuous quotes during the CBSX Regular Trading Hours after the primary listing market has disseminated an opening quote in the stock on a given trading day. *See* proposed Rule 53.56.01(a), which is similar to CBOE's existing rules for options DPMs and LMMs, Rules 8.85(a)(i) and 8.15A(b)(i).

[5] *See* Exchange Act Release Nos. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) and 62886 (September 10, 2010).

applicable trigger pause percentage (31.5%) whereupon the CBSX Market-Maker must immediately move its quote back to at least the permissible default level of 30%. These requirements shall apply to Regulation NMS stocks during CBSX Regular Trading Hours after the primary listing market has disseminated an opening quote in the stock for the given trading day.

Nothing in the above precludes a CBSX Market-Maker from voluntarily quoting at price levels that are closer to the national best bid and best offer than required under the proposal.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of 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 minimum market maker quotation requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 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 or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2010–087 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–087. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–CBOE–2010–087 and should be submitted on or before October 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24055 Filed 9–24–10; 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. 34–62960; File No. SR–NYSE–2010–56]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change Amending Its Price List To Reflect Fees Charged for Co-Location Services

September 21, 2010.

On August 3, 2010, New York Stock Exchange LLC ("NYSE" or the "Exchange") 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 amend its Price List to reflect fees charged for co-location services. The proposed rule change was published for comment in the **Federal Register** on August 20, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

In its proposal, NYSE proposed to amend its Price List to identify fees pertaining to co-location services, which allow Users[4] of the Exchange to rent space on premises controlled by the Exchange so that they may locate their electronic servers in close physical proximity to the Exchange's trading and execution systems. NYSE represented that it planned to begin operating a data center in Mahwah, New Jersey, from which it will offer co-location services. The Exchange represented that it will offer space at the data center in cabinets with power usage capability of either four or eight kilowatts (kW).[5] In

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR240.19b–4.

[3] *See* Securities Exchange Act Release No. 62732 (Aug 16, 2010), 75 FR 51512 ("Notice").

[4] For the purposes of this filing, the term "Users" includes any "member organization," as that term is defined in NYSE Rule 2(b) and any "Sponsored Participant," as that term is defined in NYSE Rule 123B.30(a)(ii)(B).

[5] The Exchange represented that it also allows Users, for a monthly fee (*i.e.,* 40% of the applicable monthly per kW fee), to obtain an option for future use on available, unused cabinet space in proximity to their existing cabinet space. Specifically, Users may reserve cabinet space of up to 30% of the

addition, the Exchange stated that it will offer Users services related to co-location, including cross connections, equipment and cable installation, and remote "hot-hands" services, which allow Users to use on-site data center personnel to maintain User equipment. The Exchange proposed tiered co-location fees based on the level of service (1Gb circuit, 10Gb circuit and various bundled options), and additional fees for related services.

NYSE represented that Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from or superior to that of Users that do not receive co-location services. The Exchange noted that all orders sent to NYSE enter the Exchange's trading and execution systems through the same order gateway regardless of whether the sender is co-located in the Exchange's data center or not. Furthermore, NYSE noted that co-located Users do not receive any market data or data service product that is not available to all Users. Users that receive co-location services normally would expect reduced latencies in sending orders to the Exchange and receiving market data from the Exchange.

In addition, the Exchange represented that co-located Users have the option of obtaining access to the Exchange's Liquidity Center Network ("LCN"), a local area network available in the data center.[6] Co-located Users have the option of using either the LCN or the Exchange's Secure Financial Transaction Infrastructure ("SFTI") network, to which all Users have access. Because it operates as a local area network within the data center, the LCN provides reduced latencies in comparison with SFTI. Other than the reduced latencies, the Exchange believes that there are no material differences in terms of access to the Exchange between Users that choose to co-locate and those that do not. According to NYSE, SFTI and LCN both provide Users with access to the Exchange's trading and execution systems and to the Exchange's proprietary market data products. User access to non-proprietary market data products is available through SFTI and not through LCN.

NYSE represented that it offers co-location space based on availability and the Exchange believes that it has sufficient space in the Mahwah data center to accommodate current demand on an equitable basis for the foreseeable future. In addition, the Exchange believes that any difference among the positions of the cabinets within the data center does not create any material difference to co-location Users in terms of access to the Exchange.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[8] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[9] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposed tiered fees for co-location and related services are reasonable and equitably allocated insofar as they are applied on the same terms to similarly-situated market participants. In addition, the Commission believes that the connectivity options described in the proposed rule change are not unfairly discriminatory because NYSE makes the co-location services uniformly available to all Users who voluntarily request them and pay the fees as detailed in the proposal. As represented by NYSE, these fees are uniform for all such customers and may vary from User to User due to each User's choice of service package. Finally, the Commission believes that the proposal will further the protection of investors and the public interest because it will provide greater transparency regarding the connectivity options available to market participants.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–NYSE–2010–56) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24061 Filed 9–24–10; 8:45 am]

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cabinet space under contract, which the Exchange will endeavor to provide as close as reasonably possible to the User's existing cabinet space, taking into consideration power availability within segments of the data center and the overall efficiency of use of data center resources as determined by the Exchange.

[6] NYSE represented that pricing for LCN access is provided on a stand-alone basis and on a bundled basis in combination with SFTI connections and optic connections to outside access centers and within the data center. The SFTI and optic connections are not related to the co-location services.

[7] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62950; File No. SR–NASDAQ–2010–115]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of a Proposed Rule Change To Enhance Quotation Requirements for Market Makers

September 20, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 17, 2010, The NASDAQ Stock Market LLC ("Nasdaq" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to enhance quotation requirements for market makers.

The text of the proposed rule change is below. Proposed new language is in * * * proposed deletions are in [brackets].[3]

* * * * *

4751. Definitions

The following definitions apply to the Rule 4600 and 4750 Series for the trading of securities listed on Nasdaq or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b 4.

[3] Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at *http://nasdaqomx.cchwallstreet.com.*

a national securities exchange other than Nasdaq.

(a)–(b) No Change.

(c) The term "Participant" shall mean an entity that fulfills the obligations contained in Rule 4611 regarding participation in the System, and shall include:

(1) No Change.

(2) "Nasdaq Market Makers[,]" *or* "*Market Makers,*" members that are registered as Nasdaq Market Makers for purposes of participation in the System on a fully automated basis with respect to one or more System securities.

(3) No Change.

(d)–(i) No Change

* * * * *

[4613. Character of Quotations

A member registered as a Nasdaq Market Maker shall engage in a course of dealings for its own account to assist in the maintenance, insofar as reasonably practicable, of fair and orderly markets in accordance with this Rule.

(a) Quotation Requirements and Obligations

(1) Two-Sided Quote Obligation. For each security in which a member is registered as a Nasdaq Market Maker, the member shall be willing to buy and sell such security for its own account on a continuous basis and shall enter and maintain a two-sided quotation ("Principal Quote"), which is attributed to the market maker by a special maker participant identifier ("MPID") and is displayed in the Nasdaq Market Center at all times, subject to the procedures for excused withdrawal set forth in Rule 4619.

(A) A registered market maker must display a quotation size for at least one normal unit of trading (or a larger multiple thereof) when it is not displaying a limit order in compliance with SEC Rule 604, provided, however, that a registered Nasdaq Market Maker may augment its displayed quotation size to display limit orders priced at the market maker's quotation. Unless otherwise designated, a "normal unit of trading" shall be 100 shares.

(B) The minimum quotation increment for quotations of $1.00 or above in all System Securities shall be $0.01. The minimum quotation increment in the System for quotations below $1.00 in System Securities shall be $0.0001.

(2) The first MPID issued to a member pursuant to subparagraph (1) of this rule, or Rule 4623, shall be referred to as the member's "Primary MPID." Market makers and ECNs may request the use if additional MPIDs that shall be referred to as "Supplemental MPIDs." A market maker may request the use of Supplemental MPIDs for displaying Attributable Quotes/Orders in the Nasdaq Quotation Montage for any security in which it is registered and meets the obligations set forth in subparagraph (1) of this rule. An ECN may request the use of Supplemental MPIDs for displaying Attributable Quotes/Orders in the Nasdaq Quotation Montage for any security in which it meets the obligations set forth in Rule 4623. A market maker or ECN that ceases to meet the obligations appurtenant to its Primary MPID in any security shall not be permitted to use a Supplemental MPID for any purpose in that security.

(3) Market makers and ECNs that are permitted the use of Supplemental MPIDs for displaying Attributable Quotes/Orders pursuant to subparagraph (2) of this rule are subject to the same rules applicable to the members' first quotation, with two exceptions: (a) The continuous two-sided quote requirement and excused withdrawal procedures described in subparagraph (1) above do not apply to market makers' Supplemental MPIDs; and (b) Supplemental MPIDs may not be used by market makers to engage in passive market making or to enter stabilizing bids pursuant to Nasdaq Rules 4614 and 4619.]

4613. Market Maker Obligations

A member registered as a Market Maker shall engage in a course of dealings for its own account to assist in the maintenance, insofar as reasonably practicable, of fair and orderly markets in accordance with this Rule.

(a) Quotation Requirements and Obligations

(1) Two-Sided Quote Obligation. For each security in which a member is registered as a Market Maker, the member shall be willing to buy and sell such security for its own account on a continuous basis during regular market hours and shall enter and maintain a two-sided trading interest ("Two-Sided Obligation") that is identified to the Exchange as the interest meeting the obligation and is displayed in the Exchange's quotation montage at all times. Interest eligible to be considered as part of a Market Maker's Two-Sided Obligation shall have a displayed quotation size of at least one normal unit of trading (or a larger multiple thereof); provided, however, that a Market Maker may augment its Two-Sided Obligation size to display limit orders priced at the same price as the Two-Sided Obligation. Unless otherwise designated, a "normal unit of trading" shall be 100 shares. After an execution against its Two-Sided Obligation, a Market Maker must ensure that additional trading interest exists in the Exchange to satisfy its Two-Sided Obligation either by immediately entering new interest to comply with this obligation to maintain continuous two-sided quotations or by identifying existing interest on the Exchange book that will satisfy this obligation.

(2) Pricing Obligations. For NMS stocks (as defined in Rule 600 under Regulation NMS) a Market Maker shall adhere to the pricing obligations established by this Rule during Regular Market Hours.

(A) Bid Quotations. At the time of entry of bid interest satisfying the Two-Sided Obligation, the price of the bid interest shall be not more than the Designated Percentage away from the then current National Best Bid, or if no National Best Bid, not more than the Designated Percentage away from the last reported sale from the responsible single plan processor. In the event that the National Best Bid (or if no National Best Bid, the last reported sale) increases to a level that would cause the bid interest of the Two-Sided Obligation to be more than the Defined Limit away from the National Best Bid (or if no National Best Bid, the last reported sale), or if the bid is executed or cancelled, the Market Maker shall enter new bid interest at a price not more than the Designated Percentage away from the then current National Best Bid (or if no National Best Bid, the last reported sale), or identify to the Exchange current resting interest that satisfies the Two-Sided Obligation.

(B) Offer Quotations. At the time of entry of offer interest satisfying the Two-Sided Obligation, the price of the offer interest shall be not more than the Designated Percentage away from the then current National Best Offer, or if no National Best Offer, not more than the Designated Percentage away from the last reported sale received from the responsible single plan processor. In the event that the National Best Offer (or if no National Best Offer, the last reported sale) decreases to a level that would cause the offer interest of the Two-Sided Obligation to be more than the Defined Limit away from the National Best Offer (or if no National Best Offer, the last reported sale), or if the offer is executed or cancelled, the Market Maker shall enter new offer interest at a price not more than the Designated Percentage away from the then current National Best Offer (or if no National Best Offer, the last reported sale), or identify to the

Exchange current resting interest that satisfies the Two-Sided Obligation.

(C) The National Best Bid and Offer shall be determined by the Exchange in accordance with its procedures for determining protected quotations under Rule 600 under Regulation NMS.

(D) For purposes of this Rule, the term "Designated Percentage" shall mean the individual stock pause trigger percentage under NASDAQ Rule 4120(a)(11) (or comparable rule of another exchange) less two (2) percentage points. For times during regular market hours when stock pause triggers are not in effect under Rule 4120(a)(11) (or comparable rule of another exchange), the Designated Percentage calculation will assume a trigger percentage of 22%. For NMS stocks that are not subject to such stock pause triggers the Designated Percentage will assume a trigger percentage of 32%.

(E) For purposes of this Rule, the term "Defined Limit" shall mean the individual stock pause trigger percentage under NASDAQ Rule 4120(a)(11) (or comparable rule of another exchange) less one-half (1/2) percentage point. For times during regular market hours when stock pause triggers are not in effect under Rule 4120(a)(11) (or comparable rule of another exchange), the Defined Limit calculation will assume a trigger percentage of 22%. For NMS stocks that are not subject to such stock pause triggers the Defined Limit calculation will assume a trigger percentage of 32%.

(F) Quotation Creation and Adjustment. For each Issue in which a Market Maker is registered, the System shall automatically create a quotation for display to comply with this Rule. System-created compliant displayed quotations will thereafter be allowed to rest and not be further adjusted by the System unless the relationship between the quotation and its related National Best Bid or National Best Offer, as appropriate, shrinks to the greater of: (a) 4 percentage points, or, (b) one-quarter the applicable percentage necessary to trigger an individual stock trading pause as described in NASDAQ Rule 4120(a)(11), or expands to within that same percentage less 0.5%, whereupon the System will immediately re-adjust and display the Market Maker's quote to the appropriate Designated Percentage set forth in section (D) above. As the System allows for multiple attributable quotations by a Market Maker in an issue, quotations originally entered by Market Makers shall be allowed to move freely towards or away from the National Best Bid or National Best Offer, as appropriate, for potential execution.

(G) Quotation Refresh After Execution. In the event of an execution against a System-created compliant quotation, the Market Maker shall have its quote refreshed by the System on the executed side of the market at the applicable Designated Percentage away from the then National Best Bid (Offer) (or if no National Best Bid (Offer), the last reported sale).

(H) Nothing in this Rule shall preclude a Market Marker from quoting at price levels that are closer to the National Best Bid and Offer than the levels required by this Rule.

(I) The minimum quotation increment for quotations of $1.00 or above in all System Securities shall be $0.01. The minimum quotation increment in the System for quotations below $1.00 in System Securities shall be $0.0001.

(J) The individual Market Participant Identifier ("MPID") assigned to a member to meet its Two-Sided Obligation pursuant to subparagraph (a)(1) of this Rule, or Rule 4623, shall be referred to as the member's "Primary MPID." Market Makers and ECNs may request the use if additional MPIDs that shall be referred to as "Supplemental MPIDs." A Market Maker may request the use of Supplemental MPIDs for displaying Attributable Quotes/Orders in the Nasdaq Quotation Montage for any security in which it is registered and meets the obligations set forth in subparagraph (1) of this rule. An ECN may request the use of Supplemental MPIDs for displaying Attributable Quotes/Orders in the Nasdaq Quotation Montage for any security in which it meets the obligations set forth in Rule 4623. A Market Maker or ECN that ceases to meet the obligations appurtenant to its Primary MPID in any security shall not be permitted to use a Supplemental MPID for any purpose in that security.

(K) Market Makers and ECNs that are permitted the use of Supplemental MPIDs for displaying Attributable Quotes/Orders pursuant to subparagraph (2) of this rule are subject to the same rules applicable to the members' first quotation, with two exceptions: (a) The continuous two-sided quote requirement and excused withdrawal procedures described in subparagraph (1) above do not apply to Market Makers' Supplemental MPIDs; and (b) Supplemental MPIDs may not be used by Market Makers to engage in passive market making or to enter stabilizing bids pursuant to Nasdaq Rules 4614 and 4619.

(b)–(e) No Change.

* * * * *

(b) Not applicable.

(c) Not applicable.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Market Maker Quote Obligations

The Exchange proposes to adopt rules to enhance minimum quotation requirements for market makers. Under the proposal, the Exchange will require market makers for each stock in which they are registered to continuously maintain a two-sided quotation within a designated percentage of the National Best Bid and National Best Offer as appropriate. These enhanced market maker quotation requirements are intended to eliminate trade executions against market maker placeholder quotations traditionally priced far away from the inside market, commonly known as "stub quotes." They are also intended to augment and work in relation to the single stock pause standards already in place on a pilot basis for stocks in the S&P 500, Russell 1000, and specified ETFs.[4]

Under the proposal, the Exchange will require registered market makers to enter and maintain quotes priced at no more than a certain percentage away from the national inside bid and offer. Permissible quotes are determined by the individual character of the security, the time of day in which the quote is entered, and other factors which are summarized below:

For issues subject to an individual stock trading trigger pause, a permissible quote is determined by first looking at the applicable stock trading pause trigger percentage of the security and then reducing that number by 2%. Since currently the stock pause trigger percentage across all exchanges is 10%, a market maker's quote in a such a

[4] *See* Exchange Act Release No. 62884 (September 10, 2010).

security may not be more than 8% away from the national best bid or best offer as appropriate. Once a compliant quote is entered, it may rest without adjustment until such time as it moves to within ½ of 1% of the applicable trigger pause percentage (*i.e,* currently 9.5%) whereupon the market maker must immediately move its quote back to at least the permissible default level of 8% away from the national best bid or best offer. During times in which a trigger pause percentage is not applicable (*e.g.* before 9:45 a.m. and after 3:35 p.m.), a market maker must maintain a quote no further than 20% away from the inside (*i.e.* it may rest without adjustment until it reaches 21.5%). In the absence of national best or best offer, the above calculations will remain the same, but will use the national last sale instead of the absent bid or offer.

For securities not subject to any individual stock pause trigger, the proposal will a [sic] assume a hypothetical 32% trigger pause, apply a 2% reduction, and require market makers in those issues to maintain quotes no more than 30% away from the national best and national best offer. Like securities subject to stock trading pauses, once a compliant quote is entered, it may rest without adjustment until such time as it moves to within ½ of 1% of its applicable trigger pause percentage (31.5%) whereupon the market maker must immediately move its quote back to at least the permissible default level of 30%. These requirements shall apply to Regulation NMS securities during normal market hours.

Nothing in the above precludes a market maker from voluntarily quoting at price levels that are closer to the national best bid and best offer than required under the proposal.

Automated Quote Management

In order to assist market makers in meeting their enhanced quotation obligations, the Exchange will also provide automated quote management functionality. For each issue in which a market maker is registered, the Exchange will automatically create a quotation for display to comply with this standard set forth in this proposal. Compliant displayed quotations will thereafter be allowed to rest and not be further adjusted by the Exchange unless the relationship between the quotation and its related national best bid or national best offer, as appropriate, shrinks to the greater of: (a) 4 percentage points, or, (b) one-quarter the applicable percentage necessary to trigger an individual stock trading pause as described in NASDAQ Rule 4120(a)(11), or expands to within that same percentage less 0.5%, whereupon the Exchange will immediately re-adjust and display the market maker's quote to the appropriate designated percentage. Quotations originally entered by market makers shall be allowed to move freely towards the national best bid or national best offer, as appropriate, for potential execution.

In the event of an execution against a System-created compliant quotation, the market maker shall have its quote refreshed by the System on the executed side of the market at the applicable designated percentage away from the then national best bid (offer), or if no national best bid (offer), the last reported sale.

Previously Approved Rule Text

Finally, the sections (I), (J) and (K) of the proposed rule are portions of previously approved text of Rule 4613 that have moved so as group the proposed market making standard sections together within the rule.

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"),[5] 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)[6] 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 minimum market maker quotation requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78k–1(a)(1).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2010–115 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2010–115. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be

available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NASDAQ–2010–115 and should be submitted on or before October 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24054 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62949; File No. SR–CHX–2010–22]

Self-Regulatory Organizations; The Chicago Stock Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Enhance Quotation Requirements for Market Makers

September 20, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 17, 2010, The Chicago Stock Exchange, Inc. ("CHX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CHX proposes to amend its rules to enhance quotation requirements for market makers. The text of this proposed rule change is available on the Exchange's Web site at (*http://www.chx.com*) and in 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 CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Market Maker Quote Obligations

The Exchange proposes to adopt rules to enhance minimum quotation requirements for market makers. Under the proposal, the Exchange will require market makers for each stock in which they are registered to continuously maintain a two-sided quotation within a designated percentage of the National Best Bid and National Best Offer as appropriate. These enhanced market maker quotation requirements are intended to eliminate trade executions against market maker placeholder quotations traditionally priced far away from the inside market, commonly known as "stub quotes." They are also intended to augment and work in relation to the single stock pause standards already in place on a pilot basis for stocks in the S&P 500, Russell 1000 and certain Specified Exchange Traded Products.[3]

Under the proposal, the Exchange will require registered market makers to enter and maintain quotes priced at no more than a certain percentage away from the national inside bid and offer. Permissible quotes are determined by the individual character of the security, the time of day in which the quote is entered, and other factors which are summarized below:

For issues subject to an individual stock trading trigger pause, a permissible quote is determined by first looking at the applicable stock trading pause trigger percentage of the security and then reducing that number by 2%. Since currently the stock pause trigger percentage across all exchanges is 10%, a market maker's quote in such a security may not be more than 8% away from the national best bid or best offer as appropriate. Once a compliant quote is entered, it may rest without adjustment until such time as it moves to within ½ of 1% of the applicable trigger pause percentage (*i.e.,* currently 9.5%) whereupon the market maker must immediately move its quote back to at least the permissible default level of 8% away from the national best bid or best offer. During times in which a trigger pause percentage is not applicable (*e.g.* before 9:45 a.m. and after 3:35 p.m.), a market maker must maintain a quote no further than 20% away from the inside (*i.e.,* it may rest without adjustment until it reaches 21.5%). In the absence of national best or best offer, the above calculations will remain the same, but will use the national last sale instead of the absent bid or offer.

For securities not subject to any individual stock pause trigger, the proposal will a [sic] assume a hypothetical 32% trigger pause, apply a 2% reduction, and require market makers in those issues to maintain quotes no more than 30% away from the national best and national best offer. Like securities subject to stock trading pauses, once a compliant quote is entered, it may rest without adjustment until such time as it moves to within ½; of 1% of its applicable trigger pause percentage (31.5%) whereupon the market maker must immediately move its quote back to at least the permissible default level of 30%. These requirements shall apply to Regulation NMS securities during normal market hours.

Nothing in the above precludes a market maker from voluntarily quoting at price levels that are closer to the national best bid and best offer than required under the proposal.

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"),[4] 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)[5] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010); Exchange Act Release No. 62883 (September 10, 2010), 75 FR 56608 (September 16, 2010).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78k–1(a)(1).

Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning minimum market maker quotation requirements.

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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 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 or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CHX–2010–22 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2010–22. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–CHX–2010–22 and should be submitted on or before October 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24053 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62952; File No. SR–NSX–2010–12]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend NSX Rule 11.8 To Enhance Quotation Requirements for Market Makers

September 20, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 17, 2010, National Stock Exchange, Inc. ("NSX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

National Stock Exchange, Inc. ("NSX®" or the "Exchange") is proposing to amend NSX Rule 11.8 to enhance quotation requirements for market makers.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Market Maker Quote Obligations:

The Exchange proposes to adopt rules to enhance minimum quotation requirements for market makers. Under the proposal, the Exchange will require market makers for each stock in which they are registered to continuously maintain a two-sided quotation within a designated percentage of the National Best Bid and National Best Offer as appropriate. These enhanced market maker quotation requirements are intended to eliminate trade executions against market maker placeholder quotations traditionally priced far away from the inside market, commonly known as "stub quotes." They are also intended to augment and work in relation to the single stock pause standards already in place on a pilot basis for stocks in the S&P 500, Russell

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

1000 and select exchange traded products.[3]

Under the proposal, the Exchange will require registered market makers to enter and maintain quotes priced at no more than a certain percentage away from the national inside bid and offer. Permissible quotes are determined by the individual character of the security, the time of day in which the quote is entered, and other factors which are summarized below:

For issues subject to an individual stock trading trigger pause, a permissible quote is determined by first looking at the applicable stock trading pause trigger percentage of the security and then reducing that number by 2%. Since currently the stock pause trigger percentage across all exchanges is 10%, a market maker's quote in a such a security may not be more than 8% away from the national best bid or best offer, as appropriate. Once a compliant quote is entered, it may rest without adjustment until such time as it moves to within ½ of 1% of the applicable trigger pause percentage (*i.e.,* currently 9.5%) whereupon the market maker must immediately move its quote back to at least the permissible default level of 8% away from the national best bid or best offer. During times in which a trigger pause percentage is not applicable (*e.g.,* before 9:45 a.m. and after 3:35 p.m.), a market maker must maintain a quote no further than 20% away from the inside (*i.e.,* it may rest without adjustment until it reaches 21.5%). In the absence of national best bid or best offer, the above calculations will remain the same, but will use the national last sale instead of the absent bid or offer.

For securities not subject to any individual stock pause trigger, the proposal will a [sic] assume a hypothetical 32% trigger pause, apply a 2% reduction, and require market makers in those issues to maintain quotes no more than 30% away from the national best bid and national best offer. Like securities subject to stock trading pauses, once a compliant quote is entered, it may rest without adjustment until such time as it moves to within ½ of 1% of its applicable trigger pause percentage (31.5%) whereupon the market maker must immediately move its quote back to at least the permissible default level of 30%. These requirements shall apply to Regulation NMS securities during normal market hours.

Nothing in the above precludes a market maker from voluntarily quoting at price levels that are closer to the national best bid and best offer than required under the proposal.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[4] 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)[5] 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 minimum market maker quotation requirements.

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 Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate 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 or disapprove 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–NSX–2010–12 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSX–2010–12. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NSX–2010–12 and should be submitted on or before October 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–24056 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–P

[3] *See* Exchange Act Release Nos. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010), and 62884 (September 10, 2010).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78k–1(a)(1).

[6] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment 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 revisions to 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, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at 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.*

I. The information collections below are pending at SSA. SSA will submit them 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 November 26, 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 email address.

1. *State Mental Institution Policy Review Booklet—20 CFR 404.2035, 404.2065, 416.635, & 416.665—0960–0110.* SSA uses the information collected on Form SSA–9584–BK to determine whether: (1) The policies and practices of a state mental institution acting as a representative payee for SSA beneficiaries conform to SSA's regulations regarding the use of benefits and payments; and (2) the institution is performing other duties and responsibilities required of representative payees. SSA also uses the information as the basis for conducting onsite reviews of the institution and preparing subsequent reports of findings. The respondents are state mental institutions serving as representative payees for Social Security beneficiaries and Supplemental Security Income recipients.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 88.

Frequency of Response: 1.

Average Burden per Response: 60 minutes.

Estimated Annual Burden: 88 hours.

2. *Employee Identification Statement—20 CFR 404.702—0960–0473.* When two or more individuals report earnings under the same Social Security number (SSN), SSA collects information on the SSA–4156 so we can credit earnings to the correct individual and the correct SSN. We send this form to the employer to identify the employees involved, to resolve the discrepancy, and to post earnings to the correct SSN. The respondents are employers involved in erroneous wage information reporting for an employee.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 4,750.

Frequency of Response: 1.

Average Burden per Response: 10 minutes.

Estimated Annual Burden: 792 hours.

II. SSA has submitted the information collections listed below to OMB for clearance. Your comments on the information collections would be most useful if OMB and SSA receive them within 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than October 27, 2010. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–8783 or by writing to the above email address.

1. *Requests for Self-Employment Information, Employee Information, Employer Information—20 CFR 422.120—0960–0508.* SSA collects information on the SSA–L2765, SSA–L3365, and SSA–L4002 to credit the reported earnings to the proper earnings record. When SSA cannot identify Form W–2 wage data for an individual, we place the data in the earnings suspense file and send one of the forms cited above to the employee (and in certain instances to the employer) to obtain the correct name and SSN. If the respondent furnishes the name and SSN information that agrees with SSA's records, or provides information that resolves the discrepancy, SSA adds the reported earnings to the respondent's Social Security record. While SSA does not require respondents to provide the information to keep a benefit, if they do not furnish the missing or corrected information, we cannot credit the wages or self-employment income to the proper earnings record. The respondents are self-employed individuals and employees whose name and SSN information do not agree with SSA's records and their employers.

Note: This is a correction notice. When SSA published the 60-day **Federal Register** Notice for this collection on May 13, 2010 at 75 FR 27036, the burden figures we reported were correct at that time. However, we have since received updated burden data (the addition of the DECOR Notice category), which we are reporting in the new burden chart below.

Type of Request: Revision of an OMB approved information collection.

Form	Number of respondents	Frequency of response	Response time (minutes)	Burden (hours)
SSA–L2765	7,870	1	10	1,312
SSA–L3365	158,334	1	10	26,389
SSA–L4002	218,891	1	10	36,482
DECOR Notice One-Time Study	3,000	1	5	250
Totals	388,095			64,433

2. *Beneficiary Recontact Report—20 CFR 404.703 and 404.705—0960–0536.* Studies show that payees of children receiving Social Security benefits who marry fail to report the marriage. Therefore, SSA periodically determines eligibility for benefits for children ages 15 through 17 by asking for information about marital status using the SSA–1587–OCR–SM. SSA uses the information to detect overpayments and avoid continuing payment to those no

longer entitled. Respondents are representative payees for children ages 15 through 17.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 982,357.

Frequency of Response: 1.

Average Burden per Response: 3 minutes.

Estimated Annual Burden: 49,118 hours.

3. *Request for Proof(s) from Custodian of Records—20 CFR 404.703, 404.704, 404.720, 404.721, 404.723, 404.725, & 404.728—0960–0766.* SSA sends records custodians the SSA–L707 on behalf of individuals who need help obtaining evidence of death, marriage, or divorce in connection with claims for benefits. SSA uses the information from the SSA–L707 to determine eligibility for benefits. The respondents are custodians including statistics and religious entities, coroners, funeral directors, attending physicians, and state agencies.

Type of Request: Revision of an OMB-approved information collection.

Type of respondents	Number of respondents	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
State or Local Government	501	1	10	84
Private Sector	99	1	10	17
Totals	600			101

Faye Lipsky,

Reports Clearance Officer, Center for Reports Clearance, Social Security Administration.

[FR Doc. 2010–24058 Filed 9–24–10; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket Number NHTSA–2010–0124]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for public comment on proposed collection of information, amendment.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatements of previously approved collections. On September 3, 2010, NHTSA published a request for comment on one collection of information for which it intends to seek OMB approval (75 FR 54217). This notice elaborates on some specific areas NHTSA is requesting comment on that were not mentioned in the original notice.

DATES: Comments must be received on or before November 2, 2010.

ADDRESSES: You may submit comments, identified by the docket number in the heading of this document, by any of the following methods:

- *Federal eRulemaking Portal*: Go to *http://www.regulations.gov*. Follow the instructions for submitting comments on the electronic docket site by clicking on "Help" or "FAQ."
- *Hand Delivery:* 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Regardless of how you submit comments, you should mention the docket number of this document.

You may call the Docket Management Facility at 202–366–9826.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

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) or you may visit *http://www.dot.gov/privacy.html.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*, or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Kil-Jae Hong, NHTSA, 1200 New Jersey Avenue, SE., W52–232, NPO–520, Washington, DC 20590. Ms. Hong's telephone number is (202) 493–0524.

SUPPLEMENTARY INFORMATION: On September 3, 2010, NHTSA published a request for comment on one collection of information for which it intends to seek OMB approval (75 FR 54217). That notice explained that to further NHTSA's development of a national tire fuel efficiency consumer information program required under the Energy Independence and Security Act of 2007,[1] NHTSA is proposing a multi-phased consumer research project and is currently requesting comment on the first phase of that research, which will consist of qualitative focus group market research. This notice elaborates on some specific areas NHTSA is requesting comment on that were not mentioned in the original notice. These areas are focus group location, testing for the impact of basing a tire fuel efficiency rating on rolling resistance coefficient (RRC) vs. rolling resistance force (RRF), and testing for the recognition of existing labeling.

NHTSA notes that comments have already been sought on and a public meeting has already been held on a draft research plan for the consumer research that is the subject of this collection of information.[2] The relevance and poignancy of stakeholders' comments may be enhanced by reviewing that draft research plan and comments received in response to the draft research plan and public meeting.

[1] Public Law 110–140, 121 Stat. 1492 (Dec. 18, 2007).

[2] *See* Docket No. NHTSA–2010–0018.

With regard to focus group location, the notice indicated that NHTSA intended to conduct two (2) focus groups in three (3) cities. NHTSA plans to conduct the focus groups in one city each in the Northeast, South or Midwest, and the West to achieve geographic diversity. NHTSA is particularly interested in comments regarding whether or not the western location should be in California.

In 2003, the California legislature adopted Assembly Bill No. 844 (AB 844), which required the California Energy Commission to develop a comprehensive fuel efficient tire program. In 2009, a draft regulation was made public which specified testing and reporting requirements for manufacturers, described the database of fuel efficiency of replacement tires sold in California, and defined a "fuel efficient tire." As a result of these regulations, if California is included, NHTSA wonders whether the results might differ from other locations because those consumers might be more exposed to the issues of fuel efficiency and tires than other consumers, which would offer potential insight into comprehension of tire information while possibly conveying consumer understanding that is unique to consumers that have been exposed to advanced information as compared to the general population. NHTSA seeks comments on whether focus groups results from California may not be generally applicable to a national population of replacement tire consumers. On the other hand, if the results were similar to other locations, that might indicate the difficulty in raising awareness of this type of information.

With regard to *RRC* vs. *RRF,*[3] in the March 30, 2010 final rule NHTSA stated that it was deferring the decision on which measurement metric was the appropriate metric to base the fuel efficiency rating upon (75 FR 15894, 15919). Previous comments received by the agency were split between those who supported basing a fuel efficiency rating on RRF because it directly relates to the amount of fuel consumed, and those who supported basing a fuel efficiency rating on RRC because ratings based on RRF would tend to cluster small tires around high ratings and larger tires around low ratings. These commenters argued that basing a fuel efficiency rating on RRC would spread out ratings for tires available to a single consumer so that the consumer would be able to get a top-rated tire, and that denying consumers the ability to purchase a top-rated tire would discourage consumers. NHTSA believes that a rating based on RRC could only be used to compare tires of the same size and load rating. Therefore, from the standpoint of consumer perception, the agency's main concern is that if a consumer is looking at fuel efficiency ratings across a range of different-sized tires, *e.g.,* if the consumer has one family vehicle that requires 18-inch replacement tires and another family vehicle that requires 15-inch replacement tires, fuel efficiency ratings based on RRC would not accurately reflect the contribution of a tire to fuel consumption since RRCs for larger tires (with greater test loads) can be lower than those of smaller tires, *i.e.,* they would get a higher fuel efficiency rating than a small tire in a rating system based on RRC. To assist in a decision on this issue, NHTSA intends to explore how often consumers consider different size tires in their purchase decisions, and what the perceptual implications are if a consumer cannot find a top-rated tire among the replacement tire choices that are available for their vehicle. NHTSA requests comment on whether there is other information NHTSA could explore with regard to this issue.

Finally, NHTSA is requesting information on any labeling or other information that is currently voluntarily provided by tire manufacturers or tire retailers, on tires or otherwise. NHTSA intends to explore what information participants have seen, and how they recall, interpret, and apply it. This will assist the agency in evaluating how well the participants comprehend the information, which types of information are meaningful to their purchasing choices, and which information impacts their behavior.

Issued on: September 21, 2010.

Rebecca Pennington,

Associate Administrator, Planning, Administrative and Financial Management.

[FR Doc. 2010–24115 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–59–P

[3] RRF is the rolling resistance force measurement measured by a rolling resistance test procedure. RRC is RRF divided by the test load of the tire, where most test procedures specify test load as a percentage of the maximum load rating of the tire being tested. In a June 2009 notice of proposed rulemaking, NHTSA proposed to base the fuel efficiency rating on the RRF metric because such a rating translates more directly to the fuel required to move a tire. *See* 74 FR 29542 (June 22, 2009).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection(s): Certification Procedures for Products and Parts

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The Federal Register Notice with a 60-day comment period soliciting comments on the following collection of information was published on June 25, 2010, vol. 75, no. 122, page 36464. 14 CFR part 21 prescribes certification standards for aircraft, aircraft engines, propellers appliances and parts. The information collected is used to determine compliance and applicant eligibility. The respondents are aircraft parts designers, manufacturers, and aircraft owners. Public burden for FAA form 8130–3 had previously been included with this information collection in error, and has been removed.

DATES: Written comments should be submitted by October 27, 2010.

FOR FURTHER INFORMATION CONTACT: Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0018.

Title: Certification Procedures for Products and Parts.

Form Numbers: FAA Forms 8110–12, 8130–1, 8130–6, 8130–9, 8130–12.

Type of Review: Renewal of an information collection.

Background: 14 CFR part 21 prescribes certification standards for aircraft, aircraft engines, propellers appliances and parts. The information collected is used to determine compliance and applicant eligibility. FAA Airworthiness inspectors, designated inspectors, engineers, and designated engineers review the required data submittals to determine that aviation products and articles and their manufacturing facilities comply with the applicable requirements, and that the products and articles have no unsafe features.

Respondents: Approximately 13,339 aircraft parts designers, manufacturers, and aircraft owners.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 17 minutes.

Estimated Total Annual Burden: 19,487 hours.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202)395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on September 20, 2010.

Carla Scott,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2010–24106 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2010–0086]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Request for public comment on proposed collection of information.

SUMMARY: This notice solicits public comment on continuation of the requirements for the collection of information on safety standards. Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections. This document describes a collection of information for an exisiting regulation for the aftermarket modifications of vehicles to accommodate people with disabilities for which NHTSA intends to seek renewed OMB approval.

DATES: Comments must be received on or before October 27, 2010.

ADDRESSES: Comments must refer to the docket notice number cited at the beginning of this notice, and the OMB control number, 2127–0635, and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attn:* Desk Officer for NHTSA, 725 17th Street, NW., Washington, DC 20503. It is requested, but not required, that 2 copies of the comment be provided.

Commenters may also, but are not required to, submit their comments to the docket number identified in the heading of this document by any of the following methods:

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

You may call the Docket Management Facility at 202–366–9826.

Regardless of how you submit your comments, you should mention the docket number of this document.

FOR FURTHER INFORMATION CONTACT: Complete copies of each request for collection may be obtained from Mrs. Gayle Dalrymple, NVS–123, National Highway Traffic Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590. Mrs. Dalrymple's telephone number is (202) 366–5559.

SUPPLEMENTARY INFORMATION: On February 27, 2001 NHTSA published a final rule (66 FR 12638) to facilitate the modification of motor vehicles so that persons with disabilities can drive or ride in them as passengers. In that final rule, the agency issued a limited exemption from a statutory provision that prohibits specified types of commercial entities from either removing safety equipment or features installed on motor vehicles pursuant to the Federal motor vehicle safety standards or altering the equipment or features so as to adversely affect their performance. The exemption is limited in that it allows repair businesses to modify only certain types of Federally-required safety equipment and features, under specified circumstances. The regulation is found at 49 CFR part 595 subpart C—Vehicle Modifications to Accommodate People with Disabilities.

This final rule included two new "collections of information," as that term is defined in 5 CFR part 1320 *Controlling Paperwork Burdens on the Public:* modifier identification and a document to be provided to the owner of the modified vehicle stating the exemptions used for that vehicle and any reduction in load carrying capacity of the vehicle of more than 100 kg (220 lbs).

Modifiers who take advantage of the exemption created by this rule are required to furnish NHTSA with a written document providing the modifier's name, address, and telephone number, and a statement that the modifier is availing itself of the exemption. The rule requires:

"S595.6 Modifier Identification

(a) Any motor vehicle repair business that modifies a motor vehicle to enable a person with a disability to operate, or ride as a passenger in, the motor vehicle and intends to avail itself of the exemption provided in 49 CFR 595.7 shall furnish the information specified in paragraphs (a)(1) through (3) of this section to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

(1) Full individual, partnership, or corporate name of the motor vehicle repair business.

(2) Residence address of the motor vehicle repair business and State of incorporation if applicable.

(3) A statement that the motor vehicle repair business modifies a motor vehicle to enable a person with a disability to operate, or ride as a passenger in, the motor vehicle and intends to avail itself of the exemption provided in 49 CFR 595.7.

(b) Each motor vehicle repair business required to submit information under paragraph (a) of this section shall submit the information not later than August 27, 2001. After that date, each motor vehicle repair business that modifies a motor vehicle to enable a

person with a disability to operate, or ride as a passenger in, the motor vehicle and intends to avail itself of the exemption provided in 49 CFR 595.7 shall submit the information required under paragraph (a) not later than 30 days after it first modifies a motor vehicle to enable a person with a disability to operate, or ride as a passenger in, the motor vehicle. Each motor vehicle repair business who has submitted required information shall keep its entry current, accurate and compete by submitting revised information not later than 30 days after the relevant changes in the business occur."

This requirement is a one-time submission unless changes are made to the business as described in paragraph (b). NHTSA estimates that there are currently 471 businesses making modifications to motor vehicles to accommodate persons with disabilities. Of those 471, we estimate 85 percent will need to use the exemptions provided by 49 CFR 595.7 (400 businesses). The initial registration of modifiers wishing to use the exemptions occurred in 2001. Now, we assume that five percent of the 400 businesses currently modifying vehicles will need to change their information or new registrants will elect to use the exemptions. We estimate registrations from 20 businesses each year of: 20 businesses × 10 minutes/business = 3.33 hours.

We estimate the material cost associated with each submission to be 54 cents per responding business, or $10.80 nationwide annually.

Burden means the total time, effort, or financial resources expended by a person to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; and transmit or otherwise disclose the information.

We seek comment on:

1. Is our estimate of 471 businesses engaged in vehicle modification to accommodate people with disabilities correct?

2. Are we correct in assuming that a maximum of 85 percent of those 471 businesses, or 400 businesses, will need to use the exemptions provided by 49 CFR 595.7?

3. Are our estimates of the burden hours and material cost of compliance with 49 CFR 595.6 reasonable?

Modifiers who avail themselves of the exemptions in 49 CFR 595.7 are required to keep a record, for each applicable vehicle, listing which standards, or portions thereof, no longer comply with the Federal motor vehicle safety standards and to provide a copy to the owner of the vehicle modified (*see* 49 CFR 595.7(b) and (e) as published in the final rule).

We estimate that:

1. There are approximately 2,700 vehicles modified for persons with disabilities per year by 471 businesses,

2. If 85 percent of the 471 businesses use the exemptions provided by 49 CFR 595.7, those 400 businesses will modify 2,300 vehicles annually, and

3. The burden for producing the record required by 49 CFR 595.7 in accordance with paragraph (e) for those vehicles will be 767 hours per year nationwide.

In the final rule we anticipated that the least costly way for a repair business to comply with this portion of the new rule would be to annotate the vehicle modification invoice as to the exemption, if any, involved with each item on the invoice. The cost of preparing the invoice is not a portion of our burden calculation, as that preparation would be done in the normal course of business. The time needed to annotate the invoice, we estimate, is 20 minutes. Therefore, the burden hours for a full year are calculated as: 2,300 vehicles × 20 minutes/vehicle = 766.7 hours.

This burden includes the calculation required by 49 CFR 595.7(e)5, but not the gathering of the information required for the calculation. That information would be gathered in the normal course of the vehicle modification. The only extra burden required by the rule is the calculation of the reduction in loading carrying capacity and conveying this information to the vehicle owner. Again we are assuming that annotation on the invoice is the least burdensome way to accomplish this customer notification.

There will be no additional material cost associated with compliance with this requirement since no additional materials need be used above those used to prepare the invoice in the normal course of business. We are assuming it is normal and customary in the course of vehicle modification business to prepare an invoice, to provide a copy of the invoice to the vehicle owner, and to keep a copy of the invoice for five years after the vehicle is delivered to the owner in finished form.

We seek comment on whether our assumptions about the following are reasonable:

1. The document required by 49 CFR 595.7(b) and specified in paragraph (e) will need to be prepared for approximately 2,300 vehicles modified nationwide per year,

2. Annotation of each vehicle modification invoice as to which exemptions were used will take an average of 20 minutes, and

3. It is normal in the course of vehicle modification business to prepare an invoice, to provide a copy of the invoice to the vehicle owner, and to keep a copy of the invoice for five years after the vehicle is delivered to the owner in finished form.

Affected Public: Business or other for profit.

Estimated Annual Burden: 770 hours, and $10.80.

Estimated Number of Respondents: 400.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued on: September 22, 2010.

Nathaniel M. Beuse,

Office of Crash Avoidance Standards, Director.

[FR Doc. 2010–24127 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Availability of Answers to Frequently Asked Questions Regarding Buy America & FRA's High-Speed Intercity Passenger Rail Program

AGENCY: Federal Railroad Administration (FRA), United States Department of Transportation (DOT).

ACTION: Notice of Availability.

SUMMARY: FRA announces the availability of Answers to Frequently Asked Questions regarding Buy America and FRA's High Speed Intercity

Passenger Rail Program. The Answers to Frequently Asked Questions can be found on FRA's Web site at *http://www.fra.dot.gov/Pages/11.shtml.*

DATES: Written comments on FRA's Buy America Answers to Frequently Asked Questions may be provided to the FRA on or before October 18, 2010.

ADDRESSES: Please submit your comments by one of the following means, identifying your submissions by docket number FRA–2010–0147. All electronic submissions must be made to the U.S. Government electronic site at *http://www.regulations.gov.* Commenters should follow the instructions below for mailed and hand-delivered comments.

(1) *Web Site: http://www.regulations.gov.* Follow the instructions for submitting comments on the U.S. Government electronic docket site;

(2) *Fax:* (202) 493–2251;

(3) *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Docket Operations, M–30, Room W12–140, Washington, DC, 20590–0001; or

(4) *Hand Delivery:* Room W12–140 on the first floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must make reference to the "Federal Railroad Administration" and include docket number FRA–2010–0147. Due to security procedures in effect since October 2001, mail received through the U.S. Postal Service may be subject to delays. Parties making submissions responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any personal information therein, will be posted without change or alteration to *http://www.regulations.gov.* For more information, you may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or visit *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Ms. Linda Martin, Attorney-Advisor, FRA Office of Chief Counsel, (202) 493–6062 or via e-mail at *Linda.Martin@dot.gov.*

SUPPLEMENTARY INFORMATION: The Passenger Rail Investment and Improvement Act of 2008 (PRIIA) (Division B of Pub. L. 111–432) authorized the appropriation of funds to establish several new passenger rail grant programs, including capital investment grants to support intercity passenger rail service (§ 301), high-speed corridor development (§ 501), and congestion grants (§ 302). FRA consolidated these and other closely related programs into the High-Speed Intercity Passenger Rail (HSIPR) program, as detailed in FRA's High-Speed Intercity Passenger Rail (HSIPR) Interim Guidance (74 FR 29900 (June 23, 2009)) and as further detailed in a second set of HSIPR interim program guidance governing the distribution of fiscal year 2010 funding (75 FR 38344 and 38365 (July 1, 2010). Spending authorized under PRIIA is subject to the Buy America provision of 49 U.S.C. 24405(a).

In 2009, President Obama, together with Vice President Biden and Secretary of Transportation LaHood, articulated a new "Vision for High-Speed Rail in America" (available on FRA's Web site). The HSIPR program is a component of that vision, as is the American Recovery and Reinvestment Act of 2009 (ARRA), which appropriated funds for PRIIA-authorized grant programs. The vision includes a goal to bolster American passenger rail expertise and resources. The Buy America requirements reinforce this goal, and aid in encouraging a domestic market in the rail sector. PRIAA authorized FRA to operate the grant programs under guidance, prior to the issuance of final regulations. FRA is beginning the process of implementing regulations to govern the application of the Buy America statute to all PRIIA-authorized spending as part of the HSIPR program. As required, the proposed regulation will be published in the **Federal Register** for public comment under RIN 2130–AC23 and docket number FRA–2010–0147. In the interim, to aid grantees who must immediately apply Section 24405(a) to funds granted them by FRA, FRA is providing Answers to Frequently Asked Questions describing its procedures for applying the Buy America provision in the HSIPR program on its Web site at *http://www.fra.dot.gov/Pages/11.shtml.*

Issued in Washington, DC, on *September 22, 2010.*

Mark E. Yachmetz,

Associate Administrator for Railroad Policy and Development, Federal Railroad Administration.

[FR Doc. 2010–24126 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Early Scoping for the Alternatives Analysis of the North Corridor Transit Project in Metropolitan Seattle

AGENCY: Federal Transit Administration, DOT.

ACTION: Early Scoping Notice.

SUMMARY: The Federal Transit Administration (FTA) and the Central Puget Sound Regional Transit Authority (Sound Transit) issue this early scoping notice to advise other agencies and the public that they intend to explore alternatives for improving transit service between Northgate in Seattle and Lynnwood, in King and Snohomish counties, Washington. The early scoping is being conducted within the context of the Council on Environmental Quality's regulations for complying with the National Environmental Policy Act (NEPA) and is part of a planning Alternatives Analysis (AA) required by Title 49 United States Code (U.S.C.) 5309 to analyze the potential for a fixed guideway alternative to be implemented as an FTA-assisted major capital transit investment. The AA process results in the selection or confirmation of a locally preferred alternative which is the proposed action. The early scoping notice is intended to invite public comments on the scope of the AA study, including the transportation problems to be addressed, a range of alternatives, the transportation and community impacts and benefits to be considered, the capital and operating costs, the financial plans and other factors that the public and agencies believe should be considered in analyzing alternatives. If preparation of an environmental impact statement (EIS) is warranted following completion of the planning AA, a notice of intent to prepare an EIS will be published. This early scoping process is intended to support the future NEPA scoping process. Public meetings and the range of alternatives currently identified to address the project's purpose are described below.

DATES: Three public scoping meetings and one agency scoping meeting to accept comments will be held on the following dates and locations:

Public Meetings

North Seattle: October 7, 2010. Ingraham High School, 1819 N. 135th St., Seattle, 98133.

Lynnwood: October 12, 2010. Lynnwood Convention Center, 3711 196th St., SW., Lynnwood, 98036.

Shoreline: October 14, 2010. Shoreline Conference Center, 18560 1st Ave., NE., Shoreline, 98155.

All public meetings will be from 6 to 8:30 p.m.

Agency Meeting

Seattle: October 13, 2010, 1 p.m. to 3 p.m. Sound Transit offices, 401 S. Jackson St., Seattle, 98104.

Invitations to the interagency scoping meeting will be sent to appropriate Federal, state, local, and tribal governmental units.

In addition to the supplemental information provided below, information on the AA will be provided at the public meetings, which will also provide opportunities for spoken or written comments. Information is also available on Sound Transit's Web site at: *http://www.soundtransit.org/NorthHCT.* Written scoping comments are requested by October 25, 2010 and can be sent or e-mailed to the address below, submitted at the public meetings, or provided via the online comment form available at *http://www.soundtransit.org/NorthHCT.*

ADDRESSES: Roger Iwata, North Corridor Project, Sound Transit, 401 S. Jackson Street, Seattle, WA 98104–2826, or by e-mail to *roger.iwata@soundtransit.org.*

FOR FURTHER INFORMATION CONTACT: John Witmer, Community Planner, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174; *Phone:* (206) 220–7954; *e-mail: John.Witmer@dot.gov.*

SUPPLEMENTARY INFORMATION:

Early Scoping

As defined by law, alternatives analysis (AA) is the first step of the New Starts project development process. AA is the local forum for evaluating the costs, benefits, and impacts of a range of transportation alternatives designed to address mobility problems and other locally-identified objectives in a defined transportation corridor, and for determining which particular investment strategy should be advanced for more focused study and development. For AA studies which may result in the local selection of a project eligible for FTA New Starts or Small Starts funding, the AA further serves as the process for development of the technical information necessary to support a candidate project's entry into New Starts preliminary engineering. Early scoping for the North Corridor project is being conducted in support of NEPA requirements and in accordance with the Council on Environmental Quality's regulations and guidance for implementing NEPA. *See* 40 CFR 1501.2 through 8, which encourage federal agencies to initiate NEPA early in their planning processes. Early scoping allows the scoping process to begin as soon as there is enough information to describe the proposal so that the public and relevant agencies can participate effectively. This is particularly useful in situations when a proposed action involves a broadly defined corridor with an array of modal and alignment alternatives under consideration.

This early scoping notice is intended to generate public comments on the scope of the planning AA, including the purpose and need for the project, a range of alternatives, the financial plans, and the environmental, transportation and community impacts and benefits to be considered.

The North Corridor and the Regional Transit System

The North Corridor is approximately eight to nine miles long depending on routing. Starting at Northgate in north Seattle and ending in Lynnwood, the corridor generally follows Interstate 5 (I–5), which is the major north-south route through Washington State and serves a large commuter market traveling between Snohomish and King Counties and the City of Seattle. The corridor is within a geographically constrained urban area that lies between the Puget Sound to the west and Lake Washington to the east, which limits transportation options. This is one of the densest urban areas in the Pacific Northwest and comprises one of the region's most productive markets for transit.

Sound Move, the first phase of regional transit investments, was approved and funded by voters in 1996. Sound Transit is now completing the development of *Sound Move,* which includes light rail, commuter rail and regional express bus infrastructure and service, including the Central Link light rail system between Northgate, the University of Washington, downtown Seattle, Tukwila and SeaTac. In 2009, Sound Transit began light rail operations between downtown Seattle and SeaTac. Link light rail north from downtown Seattle to Capitol Hill and the University of Washington is now under construction and is scheduled to open in 2016. The final section of Central Link light rail from the University of Washington to Northgate is about to enter final design with operation to begin in 2020.

In 2004, Sound Transit initiated planning for the second phase of investment to follow *Sound Move.* This work included updating Sound Transit's Long-Range Plan and associated environmental review. Following several years of system planning work to detail, evaluate, and prioritize the next round of regional transit system expansion, voters in 2008 authorized funding for the extension of the regional light rail system in the North Corridor as part of the Sound Transit 2 (ST2) Plan. The ST2 Plan also includes an East Link light rail line from downtown Seattle to Bellevue and Redmond to the east, and from SeaTac to Federal Way to the south.

Transportation Purpose of the North Corridor Project

The purpose of the project is to improve transit service from Seattle north into Snohomish County by:

(1) Providing reliable, rapid, and efficient two-way, all-day transit service of sufficient capacity to meet the existing and projected demand between the communities and activity centers located in the North Corridor and the other urban centers in the central Puget Sound area by providing a mobility alternative to travel on congested roadways and improved connections to the regional multimodal transportation system;

(2) Supporting North Corridor communities' and the region's land use, transportation and economic development vision, which promotes the well-being of people and communities, ensures economic vitality and preserves a healthy environment; and

(3) Supporting the long-range vision, goals, and objectives for transit service established by Sound Transit's Long-Range Plan for high quality regional transit service connecting major activity centers in King, Pierce and Snohomish counties.

The project is needed to:

- Meet the rapidly growing transportation needs of the corridor and the region's future residents and workers by increasing mobility, access, and transportation capacity to and from regional growth and activity centers in the North Corridor and the rest of the region, as called for in the region's adopted plans, including the Puget Sound Regional Council's VISION 2040 and *Transportation 2040,* as well as related county and city comprehensive plans.
- Address the problems of increasing and unreliable travel times for transit users in the North Corridor, who are now dependent on the corridor's highly congested roadway and high occupancy vehicle systems.
- Address overcrowding facing current and future North Corridor transit riders due to insufficient

capacity of the infrastructure that supports the current transit system.

• Provide an alternative to automobile trips on I–5 and SR 99, the two primary highways serving the corridor, which are unreliable and over capacity throughout significant portions of the day.

• Implement the long-range vision for regional transit service established by Sound Transit's Long Range Plan, with a transit investment that supports economic vitality, preserves the environment, preserves communities, and allows for the further extension of regional transit north to Everett.

• Ensure long-term regional mobility, multimodal connectivity, and convenience for North Corridor citizens and communities, including travel-disadvantaged residents and low income and minority populations.

• Provide the transit infrastructure needed to support the development of Northgate and Lynnwood as designated regional growth centers providing housing, employment, public services, and multimodal transportation connections.

• Help support the environmental and sustainability goals of the state and region, including state regulations setting goals for reducing annual per capita vehicle miles traveled by 2050, in accordance with RCW 47.01.440, and the reduction of greenhouse gas emissions (Limiting Green House Gas Emissions, RCW Chapter 702.35).

Alternatives

In developing the ST2 Plan, Sound Transit defined a light rail alignment that helped establish the ridership potential and costs for the transit improvements in the North Corridor. The alignment was assumed to be entirely elevated primarily along I–5. The project elements included a light rail guideway, track, and systems extending approximately 8.5 miles north from Northgate Station to Lynnwood Transit Center. After leaving Northgate Station, the alignment followed the east side of I–5 to about 48th Avenue W. in Snohomish County and then crossed to the west side of I–5 to enter Lynnwood Transit Center. Four new stations were anticipated at NE. 145th Street, NE. 185th Street, SW., 236th Street, and the Lynnwood Transit Center (terminal station), all sized to accommodate 4-car trains. Park-and-ride structures of 500 stalls each would be provided at NE 145th Street, NE., 185th Street, and Lynnwood Transit Center.

As part of the AA and in accordance with FTA guidance for New Start projects, Sound Transit will explore alternative mode, alignment, station, and design configurations for improved transit in the North Corridor. All alternatives will be compared to a "No-Build" alternative, which represents the future transportation system through the year 2030 without North Corridor transit improvements, and a Transportation Systems Management (TSM) alternative, which will examine methods for improving transit in the North Corridor without a new fixed guideway. Potential elements of a TSM alternative could include more frequent bus service, new or expanded park-and-ride capacity, or freeway or arterial transit priority improvements.

Sound Transit is inviting comments on the alternative transit modes, alignments, station locations, and design configurations to be studied, as well as comment on proposed evaluation measures to be used to compare alternatives. Routes that may be considered follow portions of State Route 99, the Interurban Trail, Interstate 5 and 15th Avenue NE. The definition of these alternatives will reflect a range of high and low cost capital improvements, including non-guideway options which can serve as a "baseline" for measuring the merits of higher level investments. Measures for evaluating the relative merits of alternatives will be identified, as will technical methodologies for generating the information used to support such measures; these will typically include disciplines such as travel forecasting, capital and operations and maintenance costing, and environmental and land use analyses. Finally, costs, benefits, and impacts of each alternative are developed and evaluated, funding strategies are analyzed, and a locally preferred alternative (LPA) is affirmed to be advanced for further development.

At the conclusion of the AA process, Sound Transit and the FTA anticipate narrowing the range of alternatives for further evaluation in a draft environmental impact statement (EIS), if warranted, potentially including identification of a locally preferred alternative. If the resulting range of alternatives involves the potential for significant environmental impacts requiring an EIS, a Notice of Intent to prepare an EIS will be published in the **Federal Register**, and public and agency comment on the scope of the EIS will be invited and considered at that time.

Issued on: September 17, 2010.

Linda Gehrke,

Deputy Regional Administrator.

[FR Doc. 2010–24103 Filed 9–24–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in North Carolina

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by FHWA and Other Federal Agencies.

SUMMARY: This notice announces actions taken by the FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(I)(1). The actions relate to a proposed highway project, the Monroe Connector/Bypass, from US 74 near I–485 in Mecklenburg County, North Carolina, to US 74 between the towns of Wingate and Marshville in Union County, North Carolina. The Monroe Connector/Bypass is also known as State Transportation Improvement Program Project R–3329/R–2559. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(I)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before March 28, 2011. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Mr. George Hoops, P.E., Major Projects Engineer, Federal Highway Administration, 310 New Bern Avenue, Suite 410, Raleigh, North Carolina 27601–1418, *Telephone:* (919) 747–7022; *e-mail: george.hoops@dot.gov.* FHWA North Carolina Division Office's normal business hours are 8 a.m. to 5 p.m. (Eastern Time). Ms. Jennifer Harris, P.E., Director of Planning and Environmental Studies, North Carolina Turnpike Authority (NCTA), 5400 Glenwood Avenue, Suite 400, Raleigh, North Carolina 27612, *Telephone:* (919) 571–3000; *e-mail: jennifer.harris@ncturnpike.org.* NCTA's normal business hours are 8 a.m. to 5 p.m. (Eastern Time).

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA and other Federal agencies have taken final agency actions by issuing a Record of Decision (ROD) for the following highway project in the State of North Carolina: The Monroe Connector/Bypass, a 20-mile long, multi-lane, fully access-controlled, new location toll road. The project is

also known as State Transportation Improvement Program (STIP) Project R–3329/R–2559. The project would run generally in an east-west direction, roughly parallel to US 74. On the west, the project begins at I–485 in Mecklenburg County; on the east, it ends at US 74 between the towns of Wingate and Marshville in Union County. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Impact Statement (FEIS) for the project, approved on May 25, 2010, and the FHWA Record of Decision (ROD) issued on August 27, 2010 approving the Monroe Connector/Bypass project, and in other documents in the FHWA administrative record. The FEIS, ROD, and other documents in the FHWA administrative record file are available by contacting the FHWA or NCTA at the addresses provided above. The FEIS and ROD can be viewed and downloaded from the project Web site at *http://www.ncturnpike.org/projects/monroe* or viewed at the offices of the North Carolina Turnpike Authority, 5400 Glenwood Avenue, Suite 400, Raleigh, North Carolina 27612. A final decision regarding section 404 permits for this project has not yet been made. This notice, therefore, does not apply to the section 404 permitting process for this project. This notice applies to all Federal agency actions and decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Anadromous Fish Conservation Act [16 U.S.C. 757(a)–757(g)], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712], Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended [16 U.S.C. 1801 *et seq.*].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 401, Section 319); Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287); Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [42 U.S.C. 9601–9675]; Superfund Amendments and Reauthorization Act of 1986 (SARA); Resource Conservation and Recovery Act (RCRA) [42 U.S.C. 6901–6992(k)].

9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination With Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O.13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(I)(1).

Issued on: September 21, 2010.

George Hoops,

Major Projects Engineer, Federal Highway Administration, Raleigh, North Carolina.

[FR Doc. 2010–24173 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Eighth Meeting—RTCA Special Committee 220: Automatic Flight Guidance and Control

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 220: Automatic Flight Guidance and Control meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 220: Automatic Flight Guidance and Control.

DATES: The meeting will be held October 12–14, 2010. October 12th and 13th from 9 a.m. to 5 p.m. and October 14th from 9 a.m. to 2 p.m.

ADDRESSES: The meeting will be held at the Wichita Airport Hilton, 2098 Airport Road, Wichita, Kansas, 67209–1941, USA. telephone (316) 945–5272, fax (316) 945–7620, *e-mail: Julie.Hill@hilton.com.*

FOR FURTHER INFORMATION CONTACT: (1) RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 220: Automatic Flight Guidance and Control meeting. The agenda will include:

- Welcome/Agenda Overview.
- Consider for Approval—New Document—*Minimum Operational Performance Standards (MOPS) for Automatic Flight Guidance and Control Systems and Equipment,* RTCA Paper No. 088–10/SC220–016.
- Continue Development of Installation Guidance White Papers.
- Wrap-up and Review of Action Items.
- Establish Dates, Location, Agenda for Next Meeting.
- Other Business.

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 17, 2010.

Robert L. Bostiga,

RTCA Advisory Committee.

[FR Doc. 2010–24111 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Seventh Meeting—RTCA Special Committee 217: Joint With EUROCAE WG–44 Terrain and Airport Mapping Databases

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 217: Joint with EUROCAE WG–44 Terrain and Airport Mapping Databases.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 217: Joint with EUROCAE WG–44 Terrain and Airport Mapping Databases.

DATES: The meeting will be held on October 25–29, 2010.

ADDRESSES: The meeting will be held at Jeppesen World Headquarters, Wilbur Wright Room, 55 Invernes Drive East, Englewood, Colorado, 80112, USA, John Kasten, *E-mail: john.kasten@jeppesen.com,* telephone (303) 328–4535, mobile (303) 260–9652. Alternate Contact, Lisa Haskell, *E-mail: lisa.haskell@jeppesen.com,* telephone (303) 328–6891.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036–5133; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a RTCA Special Committee 217: Joint with EUROCAE WG–44 Terrain and Airport Mapping Databases meeting. The agenda will include:

Monday, October 25th

- Opening Plenary Session.
- Chairmen's remarks and introductions.
- Housekeeping.
- Approve minutes from previous meeting.
- Review and approve meeting agenda.
- Schedule for this week.
- Action Item Review.
- Presentations (Not linked to Working Group Activity).
- None Scheduled. Note: Coordination with both co-chairs required to add something here.
- Working Group Reports (Activity Status).
- During this block, the Working Group Leads are to report on activities that have occurred since the April meeting, i.e. meetings held, materials developed. Work-in-progress is covered later in the week. For Working Groups and Leads, see last page. Data Quality—Non-Numeric Requirements.

Tuesday, October 26th

- Working Group Reports on What is Ready for Publication.
- During this block, the Working Group Leads review for the Committee those items of their work programs that have been finalized and either have or will be provided for document(s) update within the current schedule. For Working Groups and Leads, see last page.

Wednesday, October 27th

- Specific Working Group Sessions (As Required):
- During this block, the Working Group Leads will present their work-in-progress and with Committee participate, prioritize in terms of "next document release or later". For Working Group Leads, see last page.

Thursday, October 28th

- Continuation of Specific Working Group Sessions (if required) (TBD).
- Working Group Road Map Review.
- During this block, the existing Road Map will be reviewed to ensure all items have been or will be addressed within the appropriate Working Group. Not every Working Group will be required to address this, only those with Road Map Items. For Working Group and Leads, see last page.
- Action Item Review—News items from October 2010 Meeting.
- Any Other Business (TBD).
- Closing Plenary Session—Joint RTCA SC–217/EUROCAE WG–44.

Friday, October 29th.

- D-Taxi Coordination Report (Tiger Team).
- Andre Bourdais to report on the Tiger Team activities with Eurocae WG–78 (assisted by his co-chair). This will be an opportunity for SC–217/WG–44 to meet with the Tiger Team for detailed discussions and issue resolution.

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 17, 2010.

Robert L. Bostiga,

RTCA Advisory Committee.

[FR Doc. 2010–24112 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7165; FMCSA–2000–8398; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2008–0266]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 21 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective October 27, 2010. Comments must be received on or before October 27, 2010.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2000–7165; FMCSA–2000–8398; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2008–0266, using any of the following methods.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line 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., Monday through Friday, except Federal Holidays.

• *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 21 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 21 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Paul G. Albrecht
Elijah A. Allen, Jr.
David W. Brown
Monty G. Calderon
Awilda S. Colon
David M. Hagadorn
Zane G. Harvey, Jr.
Jeffrey M. Keyser
Donnie A. Kildow
Daniel A. McNabb
David G. Meyers
Thomas L. Oglesby
Michael J. Paul
Russell A. Payne
Rodney M. Pegg
Raymond E. Peterson
Zbigniew P. Pietranik
John C. Rodriguez
Terrance L. Trautman
Charles E. Wood
Joseph F. Wood

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two-year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 21 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (65 FR 33406; 65 FR 57234; 67 FR 57266; 69 FR 52741; 71 FR 53489; 73 FR 61925; 65 FR 78256; 66 FR 16311; 69 FR 33997; 69 FR 61292; 71 FR 55820; 69 FR 53493; 69 FR 62742; 71 FR 62148; 73 FR 51689; 73 FR 63047). Each of these 21 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by October 27, 2010.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 21 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications.

The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: September 21, 2010.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. 2010–24195 Filed 9–24–10; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF VETERANS AFFAIRS

Reasonable Charges for Inpatient MS–DRGs and SNF Medical Services; 2011 Fiscal Year Update

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Section 17.101 of Title 38 of the Code of Federal Regulations sets forth the Department of Veterans Affairs (VA) medical regulations concerning "Reasonable Charges" for medical care or services provided or furnished by VA to a veteran:

—For a nonservice-connected disability for which the veteran is entitled to care (or the payment of expenses of care) under a health plan contract;

—For a nonservice-connected disability incurred incident to the veteran's employment and covered under a worker's compensation law or plan that provides reimbursement or indemnification for such care and services; or

—For a nonservice-connected disability incurred as a result of a motor vehicle accident in a State that requires automobile accident reparations insurance.

The regulations include methodologies for establishing billed amounts for the following types of charges: Acute inpatient facility charges; skilled nursing facility/sub-acute inpatient facility charges; partial hospitalization facility charges; outpatient facility charges; physician and other professional charges, including professional charges for anesthesia services and dental services; pathology and laboratory charges; observation care facility charges; ambulance and other emergency transportation charges; and charges for durable medical equipment, drugs, injectables, and other medical services, items, and supplies identified by Healthcare Common Procedure Coding System (HCPCS) Level II codes. The regulations also provide that data for calculating actual charge amounts at individual VA facilities based on these methodologies will either be published in a notice in the **Federal Register** or will be posted on the Internet site of the Veterans Health Administration (VHA) Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under "Charge Data." Certain charges are hereby updated as described in the Supplementary Information section of this notice. These changes are effective October 1, 2010.

When charges for medical care or services provided or furnished at VA expense by either VA or non-VA providers have not been established under other provisions of the regulations, the method for determining VA's charges is set forth at 38 CFR 17.101(a)(8).

FOR FURTHER INFORMATION CONTACT: Romona Greene, Chief Business Office (168), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–1595. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: Of the charge types listed in the Summary section of this notice, only the acute inpatient facility charges and skilled nursing facility/sub-acute inpatient facility charges are being changed. Charges for the following charge types: partial hospitalization facility charges; outpatient facility charges; physician and other professional charges, including professional charges for anesthesia services and dental services; pathology and laboratory charges; observation care facility charges; ambulance and other emergency transportation charges; and charges for durable medical equipment, drugs, injectables, and other medical services, items, and supplies identified by HCPCS Level II codes are not being changed. These Outpatient facility charges and Professional charges remain the same as set forth in a notice published in the **Federal Register** on December 28, 2009 (74 FR 247).

Based on the methodologies set forth in 38 CFR 17.101(b), this document provides an update to acute inpatient charges that were based on 2010 Medicare severity diagnosis related groups (MS–DRGs). Acute inpatient facility charges by MS–DRGs are set forth in Table A and are posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under "Charge Data." This Table A corresponds to the Table A referenced in the September 17, 2009, **Federal Register** Notice. Table A referenced in this notice provides updated charges based on 2011 MS–DRGs and will replace Table A posted on the Internet site of the VHA Chief Business Office, which corresponds to the Table A referenced in the September 17, 2009, **Federal Register** notice.

Also, this document provides for an updated all-inclusive per diem charge for skilled nursing facility/sub-acute inpatient facility charge using the methodologies set forth in 38 CFR 17.101(c), and it is adjusted by a geographic area factor based on the location where the care is provided. The skilled nursing facility/sub-acute inpatient facility per diem charge is set forth in Table B and is posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under "Charge Data." This Table B corresponds to the Table B referenced in the September 17, 2009, Federal Register Notice. Table B referenced in this notice provides updated all-inclusive nationwide skilled nursing facility/sub-acute inpatient facility per diem charge and will replace Table B posted on the Internet site of the VHA Chief Business Office, which corresponds to the Table B referenced in the September 17, 2009, Federal Register notice.

The charges in this update for acute inpatient facility and skilled nursing facility/sub-acute inpatient facility services are effective October 1, 2010.

In this update, we are retaining the table designations used for acute inpatient facility charges by MS–DRGs which is posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under "Charge Data." We also are retaining the table designation used for skilled nursing facility/sub-acute inpatient facility charges which is posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under "Charge Data." Accordingly, the tables identified as being updated by this notice correspond to the applicable tables

referenced in the September 17, 2009, notice, beginning with Table A through Table B.

We have updated the list of data sources presented in Supplementary Table 1 posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp* to reflect the updated data sources used to establish the updated charges described in this notice.

We have also updated the list of VA medical facility locations. As a reminder, in Supplementary Table 3 posted on the internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* we set forth the list of VA medical facility locations, which includes their three-digit ZIP Codes and provider-based/non-provider-based designations.

Consistent with VA's regulations, the updated data tables and supplementary tables containing the changes described in this notice will be posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under "Charge Data."

Approved: August 25, 2010.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2010–24116 Filed 9–24–10; 8:45 am]

BILLING CODE P

Federal Register

Monday,
September 27, 2010

Part II

Securities and Exchange Commission

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Auditing Standards Related to the Auditor's Assessment of and Response to Risk and Related Amendments to PCAOB Standards; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62919; File No. PCAOB–2010–01]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Auditing Standards Related to the Auditor's Assessment of and Response to Risk and Related Amendments to PCAOB Standards

September 15, 2010.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on September 15, 2010, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") the proposed rules described in Items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rules

On August 5, 2010, the Board adopted the following eight auditing standards:

- Auditing Standard No. 8, *Audit Risk*
- Auditing Standard No. 9, *Audit Planning*
- Auditing Standard No. 10, *Supervision of the Audit Engagement*
- Auditing Standard No. 11, *Consideration of Materiality in Planning and Performing an Audit*
- Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement*
- Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement*
- Auditing Standard No. 14, *Evaluating Audit Results*
- Auditing Standard No. 15, *Audit Evidence*

(collectively referred to as the "Risk Assessment Standards"); and amendment to the Board's interim auditing standards (collectively, "the proposed rules "). The text of the Risk Assessment Standards and amendments to the Board's interim auditing standards are set out below.

Auditing Standard No. 8

Audit Risk

Introduction

1. This standard discusses the auditor's consideration of audit risk in an audit of financial statements as part of an integrated audit [1] or an audit of financial statements only.

Objective

2. The objective of the auditor is to conduct the audit of financial statements in a manner that reduces audit risk to an appropriately low level.

Audit Risk

3. To form an appropriate basis for expressing an opinion on the financial statements, the auditor must plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement [2] due to error or fraud. Reasonable assurance [3] is obtained by reducing audit risk to an appropriately low level through applying due professional care, including obtaining sufficient appropriate audit evidence.

4. In an audit of financial statements, audit risk is the risk that the auditor expresses an inappropriate audit opinion when the financial statements are materially misstated, i.e., the financial statements are not presented fairly in conformity with the applicable financial reporting framework. Audit risk is a function of the risk of material misstatement and detection risk.

Note: The auditor should look to the requirements of the Securities and Exchange Commission for the company under audit with respect to the accounting principles applicable to that company.

Risk of Material Misstatement

5. The risk of material misstatement refers to the risk that the financial statements are materially misstated. Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* indicates that the auditor should assess the risks of material misstatement at two levels: (1) At the financial statement level and (2) at the assertion [4] level.[5]

6. Risks of material misstatement at the financial statement level relate pervasively to the financial statements as a whole and potentially affect many assertions. Risks of material misstatement at the financial statement level may be especially relevant to the auditor's consideration of the risk of material misstatement due to fraud. For example, an ineffective control environment, a lack of sufficient capital to continue operations, and declining conditions affecting the company's industry might create pressures or opportunities for management to manipulate the financial statements, leading to higher risk of material misstatement.

7. Risk of material misstatement at the assertion level consists of the following components:

a. *Inherent risk,* which refers to the susceptibility of an assertion to a misstatement, due to error or fraud, that could be material, individually or in combination with other misstatements, before consideration of any related controls.

b. *Control risk,* which is the risk that a misstatement due to error or fraud that could occur in an assertion and that could be material, individually or in combination with other misstatements, will not be prevented or detected on a timely basis by the company's internal control. Control risk is a function of the effectiveness of the design and operation of internal control.

8. Inherent risk and control risk are related to the company, its environment, and its internal control, and the auditor assesses those risks based on evidence he or she obtains. The auditor assesses inherent risk using information obtained from performing risk assessment procedures and considering the characteristics of the accounts and disclosures in the financial statements.[6] The auditor assesses control risk using evidence obtained from tests of controls (if the auditor plans to rely on those controls to assess control risk at less than maximum) and from other sources.[7]

Detection Risk

9. In an audit of financial statements, detection risk is the risk that the procedures performed by the auditor will not detect a misstatement that exists and that could be material, individually or in combination with other misstatements. Detection risk is affected by (1) the effectiveness of the

[1] When the auditor is performing an integrated audit of financial statements and internal control over financial reporting, the requirements in Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* also apply. However, the risks of material misstatement of the financial statements are the same for both the audit of financial statements and the audit of internal control over financial reporting.

[2] Misstatement is defined in Appendix A of Auditing Standard No. 14, *Evaluating Audit Results.*

[3] *See* AU sec. 110, *Responsibilities and Functions of the Independent Auditor,* and paragraph .10 of AU sec. 230, *Due Professional Care in the Performance of Work,* for a further discussion of reasonable assurance.

[4] *See* Auditing Standard No. 15, *Audit Evidence,* for a description of financial statement assertions.

[5] Paragraph 59 of Auditing Standard No. 12.

[6] Paragraph 59.a. of Auditing Standard No. 12.

[7] Paragraphs 32–34 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*

substantive procedures and (2) their application by the auditor, i.e., whether the procedures were performed with due professional care.

10. The auditor uses the assessed risk of material misstatement to determine the appropriate level of detection risk for a financial statement assertion. The higher the risk of material misstatement, the lower the level of detection risk needs to be in order to reduce audit risk to an appropriately low level.

11. The auditor reduces the level of detection risk through the nature, timing, and extent of the substantive procedures performed. As the appropriate level of detection risk decreases, the evidence from substantive procedures that the auditor should obtain increases.[8]

Auditing Standard No. 9

Audit Planning

Introduction

1. This standard establishes requirements regarding planning an audit.

Objective

2. The objective of the auditor is to plan the audit so that the audit is conducted effectively.

Responsibility of the Engagement Partner for Planning

3. The **engagement partner**[9] is responsible for the engagement and its performance. Accordingly, the engagement partner is responsible for planning the audit and may seek assistance from appropriate engagement team members in fulfilling this responsibility. Engagement team members who assist the engagement partner with audit planning also should comply with the relevant requirements in this standard.

Planning an Audit

4. The auditor should properly plan the audit. This standard describes the auditor's responsibilities for properly planning the audit.[10]

5. Planning the audit includes establishing the overall audit strategy for the engagement and developing an audit plan, which includes, in particular, planned risk assessment procedures and planned responses to the risks of material misstatement. Planning is not a discrete phase of an audit but, rather, a continual and iterative process that might begin shortly after (or in connection with) the completion of the previous audit and continues until the completion of the current audit.

Preliminary Engagement Activities

6. The auditor should perform the following activities at the beginning of the audit:

a. Perform procedures regarding the continuance of the client relationship and the specific audit engagement,[11]

b. Determine compliance with independence and ethics requirements, and

Note: The determination of compliance with independence and ethics requirements is not limited to preliminary engagement activities and should be reevaluated with changes in circumstances.

c. Establish an understanding with the client regarding the services to be performed on the engagement.[12]

Planning Activities

7. The nature and extent of planning activities that are necessary depend on the size and complexity of the company, the auditor's previous experience with the company, and changes in circumstances that occur during the audit. When developing the audit strategy and audit plan, as discussed in paragraphs 8–10, the auditor should evaluate whether the following matters are important to the company's financial statements and internal control over financial reporting and, if so, how they will affect the auditor's procedures:

- Knowledge of the company's internal control over financial reporting obtained during other engagements performed by the auditor;
- Matters affecting the industry in which the company operates, such as financial reporting practices, economic conditions, laws and regulations, and technological changes;
- Matters relating to the company's business, including its organization, operating characteristics, and capital structure;
- The extent of recent changes, if any, in the company, its operations, or its internal control over financial reporting;
- The auditor's preliminary judgments about materiality,[13] risk, and, in integrated audits, other factors relating to the determination of material weaknesses;
- Control deficiencies previously communicated to the audit committee[14] or management;
- Legal or regulatory matters of which the company is aware;
- The type and extent of available evidence related to the effectiveness of the company's internal control over financial reporting;
- Preliminary judgments about the effectiveness of internal control over financial reporting;
- Public information about the company relevant to the evaluation of the likelihood of material financial statement misstatements and the effectiveness of the company's internal control over financial reporting;
- Knowledge about risks related to the company evaluated as part of the auditor's client acceptance and retention evaluation; and
- The relative complexity of the company's operations.

Note: Many smaller companies have less complex operations. Additionally, some larger, complex companies may have less complex units or processes. Factors that might indicate less complex operations include: fewer business lines; less complex business processes and financial reporting systems; more centralized accounting functions; extensive involvement by senior management in the day-to-day activities of the business; and fewer levels of management, each with a wide span of control.

Audit Strategy

8. The auditor should establish an overall audit strategy that sets the scope, timing, and direction of the audit and guides the development of the audit plan.

9. In establishing the overall audit strategy, the auditor should take into account:

a. The reporting objectives of the engagement and the nature of the communications required by PCAOB standards,[15]

[8] Paragraph 37 of Auditing Standard No. 13.

[9] Terms defined in Appendix A, *Definitions,* are set in boldface type the first time they appear.

[10] The term, "auditor," as used in this standard, encompasses both the engagement partner and the engagement team members who assist the engagement partner in planning the audit.

[11] Paragraphs .14–.16 of QC sec. 20, *System of Quality Control for a CPA Firm's Accounting and Auditing Practice.* AU sec. 161, *The Relationship of Generally Accepted Auditing Standards to Quality Control Standards,* explains how the quality control standards relate to the conduct of audits.

[12] AU sec. 310, *Appointment of the Independent Auditor.*

[13] Auditing Standard No. 11, *Consideration of Materiality in Planning and Performing an Audit.*

[14] If no audit committee exists, all references to the audit committee in this standard apply to the entire board of directors of the company. *See* 15 U.S.C. §§ 78c(a)58 and 7201(a)(3).

[15] *See, e.g.,* AU sec. 310 and AU sec. 380, *Communication With Audit Committees.* Also, various laws or regulations require other matters to be communicated. (*See, e.g.,* Rule 2–07 of Regulation S–X, 17 CFR 210.2–07; and Rule 10A–3 under the Securities Exchange Act of 1934, 17 CFR 240.10A–3.) The requirements of this standard do not modify communications required by those other laws or regulations.

b. The factors that are significant in directing the activities of the engagement team,[16]

c. The results of preliminary engagement activities [17] and the auditor's evaluation of the important matters in accordance with paragraph 7 of this standard, and

d. The nature, timing, and extent of resources necessary to perform the engagement.[18]

Audit Plan

10. The auditor should develop and document an audit plan that includes a description of:

a. The planned nature, timing, and extent of the risk assessment procedures; [19]

b. The planned nature, timing, and extent of tests of controls and substantive procedures; [20] and

c. Other planned audit procedures required to be performed so that the engagement complies with PCAOB standards.

Multi-Location Engagements

11. In an audit of the financial statements of a company with operations in multiple locations or business units,[21] the auditor should determine the extent to which audit procedures should be performed at selected locations or business units to obtain sufficient appropriate evidence to obtain reasonable assurance about whether the consolidated financial statements are free of material misstatement. This includes determining the locations or business units at which to perform audit procedures, as well as the nature, timing, and extent of the procedures to be performed at those individual locations or business units. The auditor should assess the risks of material misstatement to the consolidated financial statements associated with the location or business unit and correlate the amount of audit attention devoted to the location or business unit with the degree of risk of material misstatement associated with that location or business unit.

12. Factors that are relevant to the assessment of the risks of material misstatement associated with a particular location or business unit and the determination of the necessary audit procedures include:

a. The nature and amount of assets, liabilities, and transactions executed at the location or business unit, including, e.g., significant transactions executed at the location or business unit that are outside the normal course of business for the company, or that otherwise appear to be unusual given the auditor's understanding of the company and its environment; [22]

b. The materiality of the location or business unit; [23]

c. The specific risks associated with the location or business unit that present a reasonable possibility[24] of material misstatement to the company's consolidated financial statements;

d. Whether the risks of material misstatement associated with the location or business unit apply to other locations or business units such that, in combination, they present a reasonable possibility of material misstatement to the company's consolidated financial statements;

e. The degree of centralization of records or information processing;

f. The effectiveness of the control environment, particularly with respect to management's control over the exercise of authority delegated to others and its ability to effectively supervise activities at the location or business unit; and

g. The frequency, timing, and scope of monitoring activities by the company or others at the location or business unit.

Note: When performing an audit of internal control over financial reporting, refer to Appendix B, Special Topics, of Auditing Standard No. 5[25] for considerations when a company has multiple locations or business units.

13. In determining the locations or business units at which to perform audit procedures, the auditor may take into account relevant activities performed by internal audit, as described in AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements,* or others, as described in Auditing Standard No. 5. AU sec. 322 and Auditing Standard No. 5 establish requirements regarding using the work of internal audit and others, respectively.

14. AU sec. 543, *Part of Audit Performed by Other Independent Auditors,* describes the auditor's responsibilities regarding using the work and reports of other independent auditors who audit the financial statements of one or more of the locations or business units that are included in the consolidated financial statements.[26] In those situations, the auditor should perform the procedures in paragraphs 11–13 of this standard to determine the locations or business units at which audit procedures should be performed.

Changes During the Course of the Audit

15. The auditor should modify the overall audit strategy and the audit plan as necessary if circumstances change significantly during the course of the audit, including changes due to a revised assessment of the risks of material misstatement or the discovery of a previously unidentified risk of material misstatement.

Persons With Specialized Skill or Knowledge

16. The auditor should determine whether specialized skill or knowledge is needed to perform appropriate risk assessments, plan or perform audit procedures, or evaluate audit results.

17. If a person with specialized skill or knowledge employed or engaged by the auditor participates in the audit, the auditor should have sufficient knowledge of the subject matter to be addressed by such a person to enable the auditor to:

a. Communicate the objectives of that person's work;

b. Determine whether that person's procedures meet the auditor's objectives; and

c. Evaluate the results of that person's procedures as they relate to the nature, timing, and extent of other planned audit procedures and the effects on the auditor's report.

Additional Considerations in Initial Audits

18. The auditor should undertake the following activities before starting an initial audit:

[16] *See, e.g.,* paragraph 6 of Auditing Standard No. 10, *Supervision of the Audit Engagement.*

[17] Paragraph 6 of this standard.

[18] *See, e.g.,* paragraph .06 of AU sec. 230, *Due Professional Care in the Performance of Work,* paragraph 16 of this standard, and paragraph 5.a. of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*

[19] Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

[20] Auditing Standard No. 13 and Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

[21] The term "business units" includes subsidiaries, divisions, branches, components, or investments.

[22] Paragraph .66 of AU sec. 316, *Consideration of Fraud in a Financial Statement Audit.*

[23] Paragraph 10 of Auditing Standard No. 11 describes the consideration of materiality in planning and performing audit procedures at an individual location or business unit.

[24] There is a reasonable possibility of an event, as used in this standard, when the likelihood of the event is either "reasonably possible" or "probable," as those terms are used in the FASB Accounting Standards Codification, Contingencies Topic, paragraph 450–20–25–1.

[25] Paragraphs B10–B16 of Auditing Standard No. 5.

[26] For integrated audits, *see also* paragraphs C8–C11 of Auditing Standard No. 5.

a. Perform procedures regarding the acceptance of the client relationship and the specific audit engagement; and

b. Communicate with the predecessor auditor in situations in which there has been a change of auditors in accordance with AU sec. 315, *Communications Between Predecessor and Successor Auditors.*

19. The purpose and objective of planning the audit are the same for an initial audit or a recurring audit engagement. However, for an initial audit, the auditor should determine the additional planning activities necessary to establish an appropriate audit strategy and audit plan, including determining the audit procedures necessary to obtain sufficient appropriate audit evidence regarding the opening balances.[27]

Appendix A—Definition

A1. For purposes of this standard, the term listed below is defined as follows:

A2. Engagement partner—The member of the engagement team with primary responsibility for the audit.

Auditing Standard No. 10

Supervision of the Audit Engagement

Introduction

1. This standard establishes requirements regarding supervision of the audit engagement, including supervising the work of engagement team members.

Objective

2. The objective of the auditor is to supervise the audit engagement, including supervising the work of engagement team members so that the work is performed as directed and supports the conclusions reached.

Responsibility of the Engagement Partner for Supervision

3. The **engagement partner**[28] is responsible for the engagement and its performance. Accordingly, the engagement partner is responsible for proper supervision of the work of engagement team members and for compliance with PCAOB standards, including standards regarding using the work of specialists,[29] other auditors,[30] internal auditors,[31] and others who are involved in testing controls.[32] Paragraphs 5–6 of this standard describe the nature and extent of supervisory activities necessary for proper supervision of engagement team members.[33]

4. The engagement partner may seek assistance from appropriate engagement team members in fulfilling his or her responsibilities pursuant to this standard. Engagement team members who assist the engagement partner with supervision of the work of other engagement team members also should comply with the requirements in this standard with respect to the supervisory responsibilities assigned to them.

Supervision of Engagement Team Members

5. The engagement partner and, as applicable, other engagement team members performing supervisory activities, should:

a. Inform engagement team members of their responsibilities,[34] including:

(1) The objectives of the procedures that they are to perform;

(2) The nature, timing, and extent of procedures they are to perform; and

(3) Matters that could affect the procedures to be performed or the evaluation of the results of those procedures, including relevant aspects of the company, its environment, and its internal control over financial reporting,[35] and possible accounting and auditing issues;

b. Direct engagement team members to bring significant accounting and auditing issues arising during the audit to the attention of the engagement partner or other engagement team members performing supervisory activities so they can evaluate those issues and determine that appropriate actions are taken in accordance with PCAOB standards;[36]

Note: In applying due professional care in accordance with AU sec. 230, each engagement team member has a responsibility to bring to the attention of appropriate persons, disagreements or concerns the engagement team member might have with respect to accounting and auditing issues that he or she believes are of significance to the financial statements or the auditor's report regardless of how those disagreements or concerns may have arisen.

c. Review the work of engagement team members to evaluate whether:

(1) The work was performed and documented;

(2) The objectives of the procedures were achieved; and

(3) The results of the work support the conclusions reached.[37]

6. To determine the extent of supervision necessary for engagement team members to perform their work as directed and form appropriate conclusions, the engagement partner and other engagement team members performing supervisory activities should take into account:

a. The nature of the company, including its size and complexity;[38]

b. The nature of the assigned work for each engagement team member, including:

(1) The procedures to be performed, and

(2) The controls or accounts and disclosures to be tested;

c. The risks of material misstatement; and

d. The knowledge, skill, and ability of each engagement team member.[39]

Note: In accordance with the requirements of paragraph 5 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement,* the extent of supervision of engagement team members should be commensurate with the risks of material misstatement.[40]

Appendix A—Definition

A1. For purposes of this standard, the term listed below is defined as follows:

A2. Engagement partner—The member of the engagement team with primary responsibility for the audit.

[27] *See also* paragraph 3 of Auditing Standard No. 6, *Evaluating Consistency of Financial Statements.*

[28] Terms defined in Appendix A, *Definitions,* are set in boldface type the first time they appear.

[29] AU sec. 336, *Using the Work of a Specialist.*

[30] AU sec. 543, *Part of Audit Performed by Other Independent Auditors.*

[31] AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements.*

[32] Paragraphs 16–19 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

[33] *See also* paragraph .06 of AU sec. 230, *Due Professional Care in the Performance of Work.*

[34] AU sec. 230.06 and paragraph 5 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement,* establish requirements regarding the appropriate assignment of engagement team members.

[35] Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* describes the auditor's responsibilities for obtaining an understanding of the company, its environment, and its internal control over financial reporting.

[36] *See, e.g.,* paragraph 15 of Auditing Standard No. 9, *Audit Planning,* paragraph 74 of Auditing Standard No. 12, and paragraphs 20–23 and 35–36 of Auditing Standard No. 14, *Evaluating Audit Results.*

[37] Auditing Standard No. 14 describes the auditor's responsibilities for evaluating the results of the audit, and Auditing Standard No. 3, *Audit Documentation,* establishes requirements regarding audit documentation.

[38] Paragraph 10 of Auditing Standard No. 12.

[39] *See also* paragraph 5.a. of Auditing Standard No. 13 and AU sec. 230.06.

[40] Paragraph 5.b. of Auditing Standard No. 13 indicates that the extent of supervision of engagement team members is part of the auditor's overall responses to the risks of material misstatement.

Auditing Standard No. 11

Consideration of Materiality in Planning and Performing an Audit

Introduction

1. This standard establishes requirements regarding the auditor's consideration of materiality in planning and performing an audit.[41]

Materiality in the Context of an Audit

2. In interpreting the federal securities laws, the Supreme Court of the United States has held that a fact is material if there is "a substantial likelihood that the * * * fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[42] As the Supreme Court has noted, determinations of materiality require "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him * * *."[43]

3. To obtain reasonable assurance about whether the financial statements are free of material misstatement, the auditor should plan and perform audit procedures to detect misstatements that, individually or in combination with other misstatements, would result in material misstatement of the financial statements. This includes being alert while planning and performing audit procedures for misstatements that could be material due to quantitative or qualitative factors. Also, the evaluation of uncorrected misstatements in accordance with Auditing Standard No. 14, *Evaluating Audit Results,* requires consideration of both qualitative and quantitative factors.[44] However, it ordinarily is not practical to design audit procedures to detect misstatements that are material based solely on qualitative factors.

4. For integrated audits, Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* states, "In planning the audit of internal control over financial reporting, the auditor should use the same materiality considerations he or she would use in planning the audit of the company's annual financial statements."[45]

Objective

5. The objective of the auditor is to apply the concept of materiality appropriately in planning and performing audit procedures.

Considering Materiality in Planning and Performing an Audit

Establishing a Materiality Level for the Financial Statements as a Whole

6. To plan the nature, timing, and extent of audit procedures, the auditor should establish a materiality level for the financial statements as a whole that is appropriate in light of the particular circumstances. This includes consideration of the company's earnings and other relevant factors. To determine the nature, timing, and extent of audit procedures, the materiality level for the financial statements as a whole needs to be expressed as a specified amount.

Note: If financial statements for the audit period are not available, the auditor may establish an initial materiality level based on estimated or preliminary financial statement amounts. In those situations, the auditor should take into account the effects of known or expected changes in the company's financial statements, including significant transactions or adjustments that are expected to be reflected in the financial statements at the end of the period.

Establishing Materiality Levels for Particular Accounts or Disclosures

7. The auditor should evaluate whether, in light of the particular circumstances, there are certain accounts or disclosures for which there is a substantial likelihood that misstatements of lesser amounts than the materiality level established for the financial statements as a whole would influence the judgment of a reasonable investor. If so, the auditor should establish separate materiality levels for those accounts or disclosures to plan the nature, timing, and extent of audit procedures for those accounts or disclosures.

Note: Lesser amounts of misstatements could influence the judgment of a reasonable investor because of qualitative factors, e.g., because of the sensitivity of circumstances surrounding misstatements, such as conflicts of interest in related party transactions.

Determining Tolerable Misstatement

8. The auditor should determine the amount or amounts of tolerable misstatement for purposes of assessing risks of material misstatement and planning and performing audit procedures at the account or disclosure level. The auditor should determine tolerable misstatement at an amount or amounts that reduce to an appropriately low level the probability that the total of uncorrected and undetected misstatements would result in material misstatement of the financial statements. Accordingly, tolerable misstatement should be less than the materiality level for the financial statements as a whole and, if applicable, the materiality level or levels for particular accounts or disclosures.

9. In determining tolerable misstatement and planning and performing audit procedures, the auditor should take into account the nature, cause (if known), and amount of misstatements that were accumulated in audits of the financial statements of prior periods.

Considerations for Multi-Location Engagements

10. For purposes of the audit of the consolidated financial statements of a company with multiple locations or business units, the auditor should determine tolerable misstatement for the individual locations or business units at an amount that reduces to an appropriately low level the probability that the total of uncorrected and undetected misstatements would result in material misstatement of the consolidated financial statements. Accordingly, tolerable misstatement at an individual location should be less than the materiality level for the financial statements as a whole.

Considerations as the Audit Progresses

11. The auditor should reevaluate the established materiality level or levels and tolerable misstatement when, because of changes in the particular circumstances or additional information that comes to the auditor's attention, there is a substantial likelihood that misstatements of amounts that differ significantly from the materiality level or levels that were established initially would influence the judgment of a reasonable investor. Situations in which changes in circumstances or additional information that comes to the auditor's attention would require such reevaluation include:

a. The materiality level or levels and tolerable misstatement were established initially based on estimated or preliminary financial statement amounts that differ significantly from actual amounts.

b. Events or changes in conditions occurring after the materiality level or levels and tolerable misstatement were established initially are likely to affect

[41] Auditing Standard No. 14 establishes requirements regarding the auditor's consideration of materiality in evaluating audit results.

[42] *TSC Industries* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976). *See also Basic, Inc.* v. *Levinson,* 485 U.S. 224 (1988).

[43] *TSC Industries,* 426 U.S. at 450.

[44] Appendix B of Auditing Standard No. 14.

[45] Paragraph 20 of Auditing Standard No. 5.

investors' perceptions about the company's financial position, results of operations, or cash flows.

Note: Examples of such events or changes in conditions include (1) changes in laws, regulations, or the applicable financial reporting framework that affect investors' expectations about the measurement or disclosure of certain items and (2) significant new contractual arrangements that draw attention to a particular aspect of a company's business that is separately disclosed in the financial statements.

12. If the auditor's reevaluation results in a lower amount for the materiality level or levels or tolerable misstatement than initially established by the auditor, the auditor should (1) evaluate the effect, if any, of the lower amount or amounts on his or her risk assessments and audit procedures and (2) modify the nature, timing, and extent of audit procedures as necessary to obtain sufficient appropriate audit evidence.

Note: The reevaluation of the materiality level or levels and tolerable misstatement is also relevant to the auditor's evaluation of uncorrected misstatements in accordance with Auditing Standard No. 14.[46]

Auditing Standard No. 12

Identifying and Assessing Risks of Material Misstatement

Introduction

1. This standard establishes requirements regarding the process of identifying and assessing risks of material misstatement[47] of the financial statements.

2. Paragraphs 4–58 of this standard discuss the auditor's responsibilities for performing **risk assessment procedures**.[48] Paragraphs 59–73 of this standard discuss identifying and assessing the risks of material misstatement using information obtained from performing risk assessment procedures.

Objective

3. The objective of the auditor is to identify and appropriately assess the risks of material misstatement, thereby providing a basis for designing and implementing responses to the risks of material misstatement.

Performing Risk Assessment Procedures

4. The auditor should perform risk assessment procedures that are sufficient to provide a reasonable basis for identifying and assessing the risks of material misstatement, whether due to error or fraud,[49] and designing further audit procedures.[50]

5. Risks of material misstatement can arise from a variety of sources, including external factors, such as conditions in the company's industry and environment, and company-specific factors, such as the nature of the company, its activities, and internal control over financial reporting. For example, external or company-specific factors can affect the judgments involved in determining accounting estimates or create pressures to manipulate the financial statements to achieve certain financial targets. Also, risks of material misstatement may relate to, e.g., personnel who lack the necessary financial reporting competencies, information systems that fail to accurately capture business transactions, or financial reporting processes that are not adequately aligned with the requirements in the applicable financial reporting framework. Thus, the audit procedures that are necessary to identify and appropriately assess the risks of material misstatement include consideration of both external factors and company-specific factors. This standard discusses the following risk assessment procedures:

a. Obtaining an understanding of the company and its environment (paragraphs 7–17);

b. Obtaining an understanding of internal control over financial reporting (paragraphs 18–40);

c. Considering information from the client acceptance and retention evaluation, audit planning activities, past audits, and other engagements performed for the company (paragraphs 41–45);

d. Performing analytical procedures (paragraphs 46–48);

e. Conducting a discussion among engagement team members regarding the risks of material misstatement (paragraphs 49–53); and

f. Inquiring of the audit committee, management, and others within the company about the risks of material misstatement (paragraphs 54–58).

Note: This standard describes an approach to identifying and assessing risks of material misstatement that begins at the financial statement level and with the auditor's overall understanding of the company and its environment and works down to the significant accounts and disclosures and their relevant assertions.[51]

6. In an integrated audit, the risks of material misstatement of the financial statements are the same for both the audit of internal control over financial reporting and the audit of financial statements. The auditor's risk assessment procedures should apply to both the audit of internal control over financial reporting and the audit of financial statements.

Obtaining an Understanding of the Company and Its Environment

7. The auditor should obtain an understanding of the company and its environment ("understanding of the company") to understand the events, conditions, and company activities that might reasonably be expected to have a significant effect on the risks of material misstatement. Obtaining an understanding of the company includes understanding:

a. Relevant industry, regulatory, and other external factors;

b. The nature of the company;

c. The company's selection and application of accounting principles, including related disclosures;

d. The **company's objectives and strategies** and those related **business risks** that might reasonably be expected to result in risks of material misstatement; and

e. The company's measurement and analysis of its financial performance.

8. In obtaining an understanding of the company, the auditor should evaluate whether significant changes in the company from prior periods, including changes in its internal control over financial reporting, affect the risks of material misstatement.

Industry, Regulatory, and Other External Factors

9. Obtaining an understanding of relevant industry, regulatory, and other external factors encompasses industry factors, including the competitive environment and technological developments; the regulatory environment, including the applicable

[46] Paragraph 17 of Auditing Standard No. 14.

[47] Paragraphs 5–8 of Auditing Standard No. 8, *Audit Risk.*

[48] Terms defined in Appendix A, *Definitions,* are set in boldface type the first time they appear.

[49] AU sec. 316, *Consideration of Fraud in a Financial Statement Audit,* discusses fraud, its characteristics, and the types of misstatements due to fraud that are relevant to the audit, i.e., misstatements arising from fraudulent financial reporting and misstatements arising from asset misappropriation.

[50] Auditing Standard No. 15, *Audit Evidence,* describes further audit procedures as consisting of tests of controls and substantive procedures.

[51] Paragraph 11 of Auditing Standard No. 15 discusses financial statement assertions.

financial reporting framework[52] and the legal and political environment;[53] and external factors, including general economic conditions.

Nature of the Company

10. Obtaining an understanding of the nature of the company includes understanding:

- The company's organizational structure and management personnel;
- The sources of funding of the company's operations and investment activities, including the company's capital structure, noncapital funding (e.g., subordinated debt or dependencies on supplier financing), and other debt instruments;
- The company's significant investments, including equity method investments, joint ventures, and variable interest entities;
- The company's operating characteristics, including its size and complexity;

Note: The size and complexity of a company might affect the risks of misstatement and how the company addresses those risks.

- The sources of the company's earnings, including the relative profitability of key products and services; and
- Key supplier and customer relationships.

Note: The auditor should take into account the information gathered while obtaining an understanding of the nature of the company when determining the existence of related parties in accordance with AU sec. 334, *Related Parties.*

11. As part of obtaining an understanding of the company as required by paragraph 7, the auditor should consider performing the following procedures and the extent to which the procedures should be performed:

- Reading public information about the company relevant to the evaluation of the likelihood of material financial statement misstatements and, in an integrated audit, the effectiveness of the company's internal control over financial reporting, e.g., company-issued press releases, company-prepared presentation materials for analysts or investor groups, and analyst reports;
- Observing or reading transcripts of earnings calls and, to the extent publicly available, other meetings with investors or rating agencies;
- Obtaining an understanding of compensation arrangements with senior management, including incentive compensation arrangements, changes or adjustments to those arrangements, and special bonuses; and
- Obtaining information about trading activity in the company's securities and holdings in the company's securities by significant holders to identify potentially significant unusual developments (e.g., from Forms 3, 4, 5, 13D, and 13G).

Selection and Application of Accounting Principles, Including Related Disclosures

12. As part of obtaining an understanding of the company's selection and application of accounting principles, including related disclosures, the auditor should evaluate whether the company's selection and application of accounting principles are appropriate for its business and consistent with the applicable financial reporting framework and accounting principles used in the relevant industry. Also, to identify and assess risks of material misstatement related to omitted, incomplete, or inaccurate disclosures, the auditor should develop expectations about the disclosures that are necessary for the company's financial statements to be presented fairly in conformity with the applicable financial reporting framework.

13. The following matters, if present, are relevant to the necessary understanding of the company's selection and application of accounting principles, including related disclosures:

- Significant changes in the company's accounting principles, financial reporting policies, or disclosures and the reasons for such changes;
- The financial reporting competencies of personnel involved in selecting and applying significant new or complex accounting principles;
- The accounts or disclosures for which judgment is used in the application of significant accounting principles, especially in determining management's estimates and assumptions;
- The effect of significant accounting principles in controversial or emerging areas for which there is a lack of authoritative guidance or consensus;
- The methods the company uses to account for significant and unusual transactions; and
- Financial reporting standards and laws and regulations that are new to the company, including when and how the company will adopt such requirements.

Company Objectives, Strategies, and Related Business Risks

14. The purpose of obtaining an understanding of the company's objectives, strategies, and related business risks is to identify business risks that could reasonably be expected to result in material misstatement of the financial statements.

Note: Some relevant business risks might be identified through other risk assessment procedures, such as obtaining an understanding of the nature of the company and understanding industry, regulatory, and other external factors.

15. The following are examples of situations in which business risks might result in material misstatement of the financial statements:

- Industry developments (a potential related business risk might be, e.g., that the company does not have the personnel or expertise to deal with the changes in the industry.)
- New products and services (a potential related business risk might be, e.g., that the new product or service will not be successful.)
- Use of information technology ("IT") (a potential related business risk might be, e.g., that systems and processes are incompatible.)
- New accounting requirements (a potential related business risk might be, e.g., incomplete or improper implementation of a new accounting requirement.)
- Expansion of the business (a potential related business risk might be, e.g., that the demand for the company's products or services has not been accurately estimated.)
- The effects of implementing a strategy, particularly any effects that will lead to new accounting requirements (a potential related business risk might be, e.g., incomplete or improper implementation of the strategy.)
- Current and prospective financing requirements (a potential related business risk might be, e.g., the loss of financing due to the company's inability to meet financing requirements.)
- Regulatory requirements (a potential related business risk might be, e.g., that there is increased legal exposure.)

Note: Business risks could affect risks of material misstatement at the financial statement level, which would affect many accounts and disclosures in the financial statements. For example, a company's loss of financing or declining conditions affecting the company's

[52] The auditor should look to the requirements of the Securities and Exchange Commission for the company under audit with respect to the accounting principles applicable to that company.

[53] AU sec. 317, *Illegal Acts by Clients,* discusses the auditor's consideration of laws and regulations relevant to the audit.

industry could affect its ability to settle its obligations when due. This, in turn, could affect the risks of material misstatement related to, e.g., the classification of long-term liabilities or valuation of long-term assets, or it could result in substantial doubt about the company's ability to continue as a going concern. Other business risks could affect the risks of material misstatement for particular accounts, disclosures, or assertions. For example, an unsuccessful new product or service or failed business expansion might affect the risks of material misstatement related to the valuation of inventory and other related assets.

Company Performance Measures

16. The purpose of obtaining an understanding of the company's performance measures is to identify performance measures, whether external or internal, that affect the risks of material misstatement.

17. The following are examples of performance measures that might affect the risks of material misstatement:

- Measures that form the basis for contractual commitments or incentive compensation arrangements;
- Measures used by external parties, such as analysts and rating agencies, to review the company's performance; and
- Measures the company uses to monitor its operations that highlight unexpected results or trends that prompt management to investigate their cause and take corrective action, including correction of misstatements.

Note: The first two examples represent performance measures that can affect the risks of material misstatement by creating incentives or pressures for management of the company to manipulate certain accounts or disclosures to achieve certain performance targets (or conceal a failure to achieve those targets). The third example represents performance measures that management might use to monitor risks affecting the financial statements.

Note: Smaller companies might have less formal processes to measure and review financial performance. In such cases, the auditor might identify relevant performance measures by considering the information that the company uses to manage the business.

Obtaining an Understanding of Internal Control Over Financial Reporting

18. The auditor should obtain a sufficient understanding of each component [54] of internal control over financial reporting ("understanding of internal control") to (a) identify the types of potential misstatements, (b) assess the factors that affect the risks of material misstatement, and (c) design further audit procedures.

19. The nature, timing, and extent of procedures that are necessary to obtain an understanding of internal control depend on the size and complexity of the company; [55] the auditor's existing knowledge of the company's internal control over financial reporting; the nature of the company's controls, including the company's use of IT; the nature and extent of changes in systems and operations; and the nature of the company's documentation of its internal control over financial reporting.

Note: The auditor also might obtain an understanding of certain controls that are not part of internal control over financial reporting, e.g., controls over the completeness and accuracy of operating or other nonfinancial information used as audit evidence.[56]

20. Obtaining an understanding of internal control includes evaluating the design of controls that are relevant to the audit and determining whether the controls have been implemented.

Note: Procedures the auditor performs to obtain evidence about design effectiveness include inquiry of appropriate personnel, observation of the company's operations, and inspection of relevant documentation. Walkthroughs, as described in paragraphs 37–38, that include these procedures ordinarily are sufficient to evaluate design effectiveness.

Note: Determining whether a control has been implemented means determining whether the control exists and whether the company is using it. The procedures to determine whether a control has been implemented may be performed in connection with the evaluation of its design. Procedures performed to determine whether a control has been implemented include inquiry of appropriate personnel, in combination with observation of the application of controls or inspection of documentation. Walkthroughs, as described in paragraphs 37–38, that include these procedures ordinarily are sufficient to determine whether a control has been implemented.

21. Internal control over financial reporting can be described as consisting of the following components: [57]

- The control environment,
- The company's risk assessment process,
- Information and communication,
- Control activities, and
- Monitoring of controls.

22. Management might use an internal control framework with components that differ from the components identified in the preceding paragraph when establishing and maintaining the company's internal control over financial reporting. In evaluating the design of controls and determining whether they have been implemented in an audit of financial statements only, the auditor may use the framework used by management or another suitable, recognized framework.[58] For integrated audits, Auditing Standard No. 5, states, "The auditor should use the same suitable, recognized control framework to perform his or her audit of internal control over financial reporting as management uses for its annual evaluation of the effectiveness of the company's internal control over financial reporting." [59] If the auditor uses a suitable, recognized internal control framework with components that differ from those listed in the preceding paragraph, the auditor should adapt the requirements in paragraphs 23–36 of this standard to conform to the components in the framework used.

Control Environment

23. The auditor should obtain an understanding of the company's control environment, including the policies and actions of management, the board, and the audit committee concerning the company's control environment.

24. Obtaining an understanding of the control environment includes assessing:

- Whether management's philosophy and operating style promote effective internal control over financial reporting;
- Whether sound integrity and ethical values, particularly of top management, are developed and understood; and
- Whether the board or audit committee understands and exercises oversight responsibility over financial reporting and internal control.

Note: In an audit of financial statements only, this assessment may be based on the evidence obtained in

[54] Paragraphs 21–22 of this standard discuss components of internal control over financial reporting.

[55] Paragraph 13 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That is Integrated with An Audit of Financial Statements,* states, "The size and complexity of the company, its business processes, and business units, may affect the way in which the company achieves many of its control objectives. The size and complexity of the company also might affect the risks of misstatement and the controls necessary to address those risks."

[56] Paragraph 10 of Auditing Standard No. 15.

[57] Different internal control frameworks use different terms and approaches to describe the components of internal control over financial reporting.

[58] *See* Securities Exchange Act Release No. 34–47986 (June 5, 2003) for a description of the characteristics of a suitable, recognized framework.

[59] Paragraph 5 of Auditing Standard No. 5.

understanding the control environment, in accordance with paragraph 23, and the other relevant knowledge possessed by the auditor. In an integrated audit of financial statements and internal control over financial reporting, Auditing Standard No. 5 [60] describes the auditor's responsibility for evaluating the control environment.

25. If the auditor identifies a control deficiency [61] in the company's control environment, the auditor should evaluate the extent to which this control deficiency is indicative of a fraud risk factor, as discussed in paragraphs 65–66 of this standard.

The Company's Risk Assessment Process

26. The auditor should obtain an understanding of management's process for:

a. Identifying risks relevant to financial reporting objectives, including risks of material misstatement due to fraud ("fraud risks");

b. Assessing the likelihood and significance of misstatements resulting from those risks; and

c. Deciding about actions to address those risks.

27. Obtaining an understanding of the company's risk assessment process includes obtaining an understanding of the risks of material misstatement identified and assessed by management and the actions taken to address those risks.

Information and Communication

28. *Information System Relevant to Financial Reporting.* The auditor should obtain an understanding of the information system, including the related business processes, relevant to financial reporting, including:

a. The classes of transactions in the company's operations that are significant to the financial statements;

b. The procedures, within both automated and manual systems, by which those transactions are initiated, authorized, processed, recorded, and reported;

c. The related accounting records, supporting information, and specific accounts in the financial statements that are used to initiate, authorize, process, and record transactions;

d. How the information system captures events and conditions, other than transactions,[62] that are significant to the financial statements; and

e. The period-end financial reporting process.

Note: Appendix B discusses additional considerations regarding manual and automated systems and controls.

29. The auditor also should obtain an understanding of how IT affects the company's flow of transactions. (See Appendix B.)

Note: The identification of risks and controls within IT is not a separate evaluation. Instead, it is an integral part of the approach used to identify significant accounts and disclosures and their relevant assertions and, when applicable, to select the controls to test, as well as to assess risk and allocate audit effort.

30. A company's business processes are the activities designed to:

a. Develop, purchase, produce, sell and distribute a company's products or services;

b. Record information, including accounting and financial reporting information; and

c. Ensure compliance with laws and regulations relevant to the financial statements.

31. Obtaining an understanding of the company's business processes assists the auditor in obtaining an understanding of how transactions are initiated, authorized, processed, and recorded.

32. A company's period-end financial reporting process, as referred to in paragraph 28.e., includes the following:

- Procedures used to enter transaction totals into the general ledger;
- Procedures related to the selection and application of accounting principles; [63]
- Procedures used to initiate, authorize, record, and process journal entries in the general ledger;
- Procedures used to record recurring and nonrecurring adjustments to the annual financial statements (and quarterly financial statements, if applicable); and
- Procedures for preparing annual financial statements and related disclosures (and quarterly financial statements, if applicable).

33. *Communication.* The auditor should obtain an understanding of how the company communicates financial reporting roles and responsibilities and significant matters relating to financial reporting to relevant company personnel and others, including:

- Communications between management, the audit committee, and the board of directors; and
- Communications to external parties, including regulatory authorities and shareholders.

Control Activities

34. The auditor should obtain an understanding of control activities that is sufficient to assess the factors that affect the risks of material misstatement and to design further audit procedures, as described in paragraph 18 of this standard.[64] As the auditor obtains an understanding of the other components of internal control over financial reporting, he or she is also likely to obtain knowledge about some control activities. The auditor should use his or her knowledge about the presence or absence of control activities obtained from the understanding of the other components of internal control over financial reporting in determining the extent to which it is necessary to devote additional attention to obtaining an understanding of control activities to assess the factors that affect the risks of material misstatement and to design further audit procedures.

Note: A broader understanding of control activities is needed for relevant assertions for which the auditor plans to rely on controls. Also, in the audit of internal control over financial reporting, the auditor's understanding of control activities encompasses a broader range of accounts and disclosures than what is normally obtained in a financial statement audit.

Monitoring of Controls

35. The auditor should obtain an understanding of the major types of activities that the company uses to monitor the effectiveness of its internal control over financial reporting and how the company initiates corrective actions related to its controls.[65]

36. An understanding of the company's monitoring activities includes understanding the source of the information used in the monitoring activities.

Performing Walkthroughs

37. As discussed in paragraph 20, the auditor may perform walkthroughs as part of obtaining an understanding of internal control over financial reporting. For example, the auditor may perform walkthroughs in connection with understanding the flow of transactions

[60] Paragraph 25 of Auditing Standard No. 5.

[61] Paragraph A3 of Auditing Standard No. 5.

[62] Examples of such events and conditions include depreciation and amortization and conditions affecting the recoverability of assets.

[63] Paragraphs 12–13 of this standard.

[64] *Also see* paragraph B5 of Appendix B of this standard.

[65] In some companies, internal auditors or others performing an equivalent function contribute to the monitoring of controls. AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements,* establishes requirements regarding the auditor's consideration and use of the work of the internal audit function.

in the information system relevant to financial reporting, evaluating the design of controls relevant to the audit, and determining whether those controls have been implemented. In performing a walkthrough, the auditor follows a transaction from origination through the company's processes, including information systems, until it is reflected in the company's financial records, using the same documents and IT that company personnel use. Walkthrough procedures usually include a combination of inquiry, observation, inspection of relevant documentation, and re-performance of controls.

Note: For integrated audits, Auditing Standard No. 5 establishes certain objectives that the auditor should achieve to further understand likely sources of potential misstatements and as part of selecting the controls to test. Auditing Standard No. 5 states that performing walkthroughs will frequently be the most effective way of achieving those objectives.[66]

38. In performing a walkthrough, at the points at which important processing procedures occur, the auditor questions the company's personnel about their understanding of what is required by the company's prescribed procedures and controls. These probing questions, combined with the other walkthrough procedures, allow the auditor to gain a sufficient understanding of the process and to be able to identify important points at which a necessary control is missing or not designed effectively. Additionally, probing questions that go beyond a narrow focus on the single transaction used as the basis for the walkthrough allow the auditor to gain an understanding of the different types of significant transactions handled by the process.

Relationship of Understanding of Internal Control to Tests of Controls

39. The objective of obtaining an understanding of internal control, as discussed in paragraph 18 of this standard, is different from testing controls for the purpose of assessing control risk[67] or for the purpose of expressing an opinion on internal control over financial reporting in the audit of internal control over financial reporting.[68] The auditor may obtain an understanding of internal control concurrently with performing tests of controls if he or she obtains sufficient appropriate evidence to achieve the objectives of both procedures. Also, the auditor should take into account the evidence obtained from understanding internal control when assessing control risk and, in the audit of internal control over financial reporting, forming an opinion about the effectiveness of internal control over financial reporting.

40. *Relationship of Understanding of Internal Control to Evaluating Entity-Level Controls in an Audit of Internal Control Over Financial Reporting.* Auditing Standard No. 5 states, "The auditor must test those entity-level controls that are important to the auditor's conclusion about whether the company has effective internal control over financial reporting."[69] The procedures performed to obtain an understanding of certain components of internal control in accordance with this standard, e.g., the control environment, the company's risk assessment process, information and communication, and monitoring of controls, might provide evidence that is relevant to the auditor's evaluation of entity-level controls.[70] The auditor should take into account the evidence obtained from understanding internal control when determining the nature, timing, and extent of procedures necessary to support the auditor's conclusions about the effectiveness of entity-level controls in the audit of internal control over financial reporting.

Considering Information From the Client Acceptance and Retention Evaluation, Audit Planning Activities, Past Audits, and Other Engagements

41. *Client Acceptance and Retention and Audit Planning Activities.* The auditor should evaluate whether information obtained from the client acceptance and retention evaluation process or audit planning activities is relevant to identifying risks of material misstatement. Risks of material misstatement identified during those activities should be assessed as discussed beginning in paragraph 59 of this standard.

42. *Past Audits.* In subsequent years, the auditor should incorporate knowledge obtained during past audits into the auditor's process for identifying risks of material misstatement, including when identifying significant ongoing matters that affect the risks of material misstatement or determining how changes in the company or its environment affect the risks of material misstatement, as discussed in paragraph 8 of this standard.

43. If the auditor plans to limit the nature, timing, or extent of his or her risk assessment procedures by relying on information from past audits, the auditor should evaluate whether the prior years' information remains relevant and reliable.

44. *Other Engagements.* When the auditor has performed a review of interim financial information in accordance with AU sec. 722, *Interim Financial Information,* the auditor should evaluate whether information obtained during the review is relevant to identifying risks of material misstatement in the year-end audit.

45. The auditor should obtain an understanding of the nature of the services that have been performed for the company by the auditor or affiliates of the firm[71] and should take into account relevant information obtained from those engagements in identifying risks of material misstatement.[72]

Performing Analytical Procedures

46. The auditor should perform analytical procedures that are designed to:

a. Enhance the auditor's understanding of the client's business and the significant transactions and events that have occurred since the prior year end; and

b. Identify areas that might represent specific risks relevant to the audit, including the existence of unusual transactions and events, and amounts, ratios, and trends that warrant investigation.

47. In applying analytical procedures as risk assessment procedures, the auditor should perform analytical procedures relating to revenue with the objective of identifying unusual or unexpected relationships involving revenue accounts that might indicate a material misstatement, including material misstatement due to fraud. Also, when the auditor has performed a review of interim financial information in accordance with AU sec. 722, he or she should take into account the analytical procedures applied in that review when designing and applying analytical procedures as risk assessment procedures.

48. When performing an analytical procedure, the auditor should use his or

[66] *See* paragraphs 34–38 of Auditing Standard No. 5.

[67] Paragraphs 16–35 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*

[68] Paragraph B1 of Auditing Standard No. 5.

[69] Paragraph 22 of Auditing Standard No. 5.

[70] The entity-level controls included in paragraph 24 of Auditing Standard No. 5 include controls related to the control environment; the company's risk assessment process; centralized processing and controls; controls over the period-end financial reporting process; and controls to monitor other controls.

[71] *See* PCAOB Rule 3501(a)(i), which defines "affiliate of the accounting firm."

[72] Paragraph 7 of Auditing Standard No. 9, *Audit Planning.*

her understanding of the company to develop expectations about plausible relationships among the data to be used in the procedure.[73] When comparison of those expectations with relationships derived from recorded amounts yields unusual or unexpected results, the auditor should take into account those results in identifying the risks of material misstatement.

Note: Analytical procedures performed as risk assessment procedures often use data that is preliminary or data that is aggregated at a high level, and, in those instances, such analytical procedures are not designed with the level of precision necessary for substantive analytical procedures.

Conducting a Discussion Among Engagement Team Members Regarding Risks of Material Misstatement

49. The key engagement team members should discuss (1) the company's selection and application of accounting principles, including related disclosure requirements, and (2) the susceptibility of the company's financial statements to material misstatement due to error or fraud.

Note: The key engagement team members should discuss the potential for material misstatement due to fraud either as part of the discussion regarding risks of material misstatement or in a separate discussion.[74]

Note: As discussed in paragraph 67, the financial statements might be susceptible to misstatement through omission of required disclosures or presentation of inaccurate or incomplete disclosures.

50. Key engagement team members include all engagement team members who have significant engagement responsibilities, including the engagement partner. The manner in which the discussion is conducted depends on the individuals involved and the circumstances of the engagement. For example, if the audit involves more than one location, there could be multiple discussions with team members in differing locations. The engagement partner or other key engagement team members should communicate the important matters from the discussion to engagement team members who are not involved in the discussion.

Note: If the audit is performed entirely by the engagement partner, that engagement partner, having personally conducted the planning of the audit, is responsible for evaluating the susceptibility of the company's financial statements to material misstatement.

51. Communication among the engagement team members about significant matters affecting the risks of material misstatement should continue throughout the audit, including when conditions change.[75]

Discussion of the Potential for Material Misstatement Due to Fraud

52. The discussion among the key engagement team members about the potential for material misstatement due to fraud should occur with an attitude that includes a questioning mind, and the key engagement team members should set aside any prior beliefs they might have that management is honest and has integrity. The discussion among the key engagement team members should include:

- An exchange of ideas, or "brainstorming," among the key engagement team members, including the engagement partner, about how and where they believe the company's financial statements might be susceptible to material misstatement due to fraud, how management could perpetrate and conceal fraudulent financial reporting, and how assets of the company could be misappropriated, including (a) the susceptibility of the financial statements to material misstatement through related party transactions and (b) how fraud might be perpetrated or concealed by omitting or presenting incomplete or inaccurate disclosures;
- A consideration of the known external and internal factors affecting the company that might (a) create incentives or pressures for management and others to commit fraud, (b) provide the opportunity for fraud to be perpetrated, and (c) indicate a culture or environment that enables management to rationalize committing fraud;
- A consideration of the risk of management override; and
- A consideration of the potential audit responses to the susceptibility of the company's financial statements to material misstatement due to fraud.

53. The auditor should emphasize the following matters to all engagement team members:

- The need to maintain a questioning mind throughout the audit and to exercise professional skepticism in gathering and evaluating evidence, as described in AU sec. 316;[76]
- The need to be alert for information or other conditions (such as those matters presented in Appendix C of Auditing Standard No. 14) that might affect the assessment of fraud risks; and
- If information or other conditions indicate that a material misstatement due to fraud might have occurred, the need to probe the issues, acquire additional evidence as necessary, and consult with other team members and, if appropriate, others in the firm including specialists.[77]

Inquiring of the Audit Committee, Management, and Others Within the Company About the Risks of Material Misstatement

54. The auditor should inquire of the audit committee, or equivalent (or its chair), management, the internal audit function, and others within the company who might reasonably be expected to have information that is important to the identification and assessment of risks of material misstatement.

Note: The auditor's inquiries about risks of material misstatement should include inquiries regarding fraud risks.

55. The auditor should use his or her knowledge of the company and its environment, as well as information from other risk assessment procedures, to determine the nature of the inquiries about risks of material misstatement.

Inquiries Regarding Fraud Risks

56. The auditor's inquiries regarding fraud risks should include the following:

a. Inquiries of management regarding:

(1) Whether management has knowledge of fraud, alleged fraud, or suspected fraud affecting the company;

(2) Management's process for identifying and responding to fraud risks in the company, including any specific fraud risks the company has identified or account balances or disclosures for which a fraud risk is likely to exist, and the nature, extent, and frequency of management's fraud risk assessment process;

(3) Controls that the company has established to address fraud risks the company has identified, or that otherwise help to prevent and detect fraud, including how management monitors those controls;

(4) For a company with multiple locations (a) the nature and extent of monitoring of operating locations or business segments and (b) whether there

[73] Analytical procedures consist of evaluations of financial information made by a study of plausible relationships among both financial and nonfinancial data.

[74] Paragraphs 52–53 of this standard.

[75] *See also* paragraph 29 of Auditing Standard No. 14, *Evaluating Audit Results.*

[76] AU sec. 316.13.

[77] Paragraphs 20–23 of Auditing Standard No. 14 establish further requirements for evaluating whether misstatements might be indicative of fraud and determining the necessary procedures to be performed in those situations.

are particular operating locations or business segments for which a fraud risk might be more likely to exist;

(5) Whether and how management communicates to employees its views on business practices and ethical behavior;

(6) Whether management has received tips or complaints regarding the company's financial reporting (including those received through the audit committee's internal whistleblower program, if such program exists) and, if so, management's responses to such tips and complaints; and

(7) Whether management has reported to the audit committee on how the company's internal control serves to prevent and detect material misstatements due to fraud.

b. Inquiries of the audit committee, or equivalent, or its chair regarding:

(1) The audit committee's views about fraud risks in the company;

(2) Whether the audit committee has knowledge of fraud, alleged fraud, or suspected fraud affecting the company;

(3) Whether the audit committee is aware of tips or complaints regarding the company's financial reporting (including those received through the audit committee's internal whistleblower program, if such program exists) and, if so, the audit committee's responses to such tips and complaints; and

(4) How the audit committee exercises oversight of the company's assessment of fraud risks and the establishment of controls to address fraud risks.

c. If the company has an internal audit function, inquiries of appropriate internal audit personnel regarding:

(1) The internal auditors' views about fraud risks in the company;

(2) Whether the internal auditors have knowledge of fraud, alleged fraud, or suspected fraud affecting the company;

(3) Whether internal auditors have performed procedures to identify or detect fraud during the year, and whether management has satisfactorily responded to the findings resulting from those procedures; and

(4) Whether internal auditors are aware of instances of management override of controls and the nature and circumstances of such overrides.

57. In addition to the inquiries outlined in the preceding paragraph, the auditor should inquire of others within the company about their views regarding fraud risks, including, in particular, whether they have knowledge of fraud, alleged fraud, or suspected fraud. The auditor should identify other individuals within the company to whom inquiries should be directed and determine the extent of such inquiries by considering whether others in the company might have additional knowledge about fraud, alleged fraud, or suspected fraud or might be able to corroborate fraud risks identified in discussions with management or the audit committee. Examples of other individuals within the company to whom inquiries might be directed include:

- Employees with varying levels of authority within the company, including, e.g., company personnel with whom the auditor comes into contact during the course of the audit (a) in obtaining an understanding of internal control, (b) in observing inventory or performing cutoff procedures, or (c) in obtaining explanations for significant differences identified when performing analytical procedures;
- Operating personnel not directly involved in the financial reporting process;
- Employees involved in initiating, recording, or processing complex or unusual transactions, e.g., a sales transaction with multiple elements or a significant related party transaction; and
- In-house legal counsel.

58. When evaluating management's responses to inquiries about fraud risks and determining when it is necessary to corroborate management's responses, the auditor should take into account the fact that management is often in the best position to commit fraud. Also, the auditor should obtain evidence to address inconsistencies in responses to the inquiries.

Identifying and Assessing the Risks of Material Misstatement

59. The auditor should identify and assess the risks of material misstatement at the financial statement level and the assertion level. In identifying and assessing risks of material misstatement, the auditor should:

a. Identify risks of misstatement using information obtained from performing risk assessment procedures (as discussed in paragraphs 4–58) and considering the characteristics of the accounts and disclosures in the financial statements.

Note: Factors relevant to identifying fraud risks are discussed in paragraphs 65–69 of this standard.

b. Evaluate whether the identified risks relate pervasively to the financial statements as a whole and potentially affect many assertions.

c. Evaluate the types of potential misstatements that could result from the identified risks and the accounts, disclosures, and assertions that could be affected.

Note: In identifying and assessing risks at the assertion level, the auditor should evaluate how risks at the financial statement level could affect risks of misstatement at the assertion level.

d. Assess the likelihood of misstatement, including the possibility of multiple misstatements, and the magnitude of potential misstatement to assess the possibility that the risk could result in material misstatement of the financial statements.

Note: In assessing the likelihood and magnitude of potential misstatement, the auditor may take into account the planned degree of reliance on controls selected to test.[78]

e. Identify significant accounts and disclosures[79] and their relevant assertions[80] (paragraphs 60–64 of this standard).

Note: The determination of whether an account or disclosure is significant or whether an assertion is a relevant assertion is based on inherent risk, without regard to the effect of controls.

f. Determine whether any of the identified and assessed risks of material misstatement are **SIGNIFICANT RISKS** (paragraphs 70–71 of this standard).

Identifying Significant Accounts and Disclosures and Their Relevant Assertions

60. To identify significant accounts and disclosures and their relevant assertions in accordance with paragraph 59.e., the auditor should evaluate the qualitative and quantitative risk factors related to the financial statement line items and disclosures. Risk factors relevant to the identification of significant accounts and disclosures and their relevant assertions include:

- Size and composition of the account;
- Susceptibility to misstatement due to error or fraud;

[78] Paragraphs 16–35 of Auditing Standard No. 13.

[79] Paragraph A10 of Auditing Standard No. 5 states:

An account or disclosure is a significant account or disclosure if there is a reasonable possibility that the account or disclosure could contain a misstatement that, individually or when aggregated with others, has a material effect on the financial statements, considering the risks of both overstatement and understatement. The determination of whether an account or disclosure is significant is based on inherent risk, without regard to the effect of controls.

[80] Paragraph A9 of Auditing Standard No. 5 states:

A relevant assertion is a financial statement assertion that has a reasonable possibility of containing a misstatement or misstatements that would cause the financial statements to be materially misstated. The determination of whether an assertion is a relevant assertion is based on inherent risk, without regard to the effect of controls.

• Volume of activity, complexity, and homogeneity of the individual transactions processed through the account or reflected in the disclosure;
• Nature of the account or disclosure;
• Accounting and reporting complexities associated with the account or disclosure;
• Exposure to losses in the account;
• Possibility of significant contingent liabilities arising from the activities reflected in the account or disclosure;
• Existence of related party transactions in the account; and
• Changes from the prior period in account and disclosure characteristics.

61. As part of identifying significant accounts and disclosures and their relevant assertions, the auditor also should determine the likely sources of potential misstatements that would cause the financial statements to be materially misstated. The auditor might determine the likely sources of potential misstatements by asking himself or herself "what could go wrong?" within a given significant account or disclosure.

62. The risk factors that the auditor should evaluate in the identification of significant accounts and disclosures and their relevant assertions are the same in the audit of internal control over financial reporting as in the audit of the financial statements; accordingly, significant accounts and disclosures and their relevant assertions are the same for both audits.

Note: In the financial statement audit, the auditor might perform substantive auditing procedures on financial statement accounts, disclosures, and assertions that are not determined to be significant accounts and disclosures and relevant assertions.[81]

63. The components of a potential significant account or disclosure might be subject to significantly differing risks.

64. When a company has multiple locations or business units, the auditor should identify significant accounts and disclosures and their relevant assertions based on the consolidated financial statements.

Factors Relevant to Identifying Fraud Risks

65. The auditor should evaluate whether the information gathered from the risk assessment procedures indicates that one or more fraud risk factors are present and should be taken into account in identifying and assessing fraud risks. Fraud risk factors are events or conditions that indicate (1) an incentive or pressure to perpetrate fraud, (2) an opportunity to carry out the fraud, or (3) an attitude or rationalization that justifies the fraudulent action. Fraud risk factors do not necessarily indicate the existence of fraud; however, they often are present in circumstances in which fraud exists. Examples of fraud risk factors related to fraudulent financial reporting and misappropriation of assets are listed in AU sec. 316.85. These illustrative risk factors are classified based on the three conditions discussed in this paragraph, which generally are present when fraud exists.

Note: The factors listed in AU sec. 316.85 cover a broad range of situations and are only examples. Accordingly, the auditor might identify additional or different fraud risk factors.

66. All three conditions discussed in the preceding paragraph are not required to be observed or evident to conclude that a fraud risk exists. The auditor might conclude that a fraud risk exists even when only one of these three conditions is present.

67. *Consideration of the Risk of Omitted, Incomplete, or Inaccurate Disclosures.* The auditor's evaluation of fraud risk factors in accordance with paragraph 65 should include evaluation of how fraud could be perpetrated or concealed by presenting incomplete or inaccurate disclosures or by omitting disclosures that are necessary for the financial statements to be presented fairly in conformity with the applicable financial reporting framework.

68. *Presumption of Fraud Risk Involving Improper Revenue Recognition.* The auditor should presume that there is a fraud risk involving improper revenue recognition and evaluate which types of revenue, revenue transactions, or assertions may give rise to such risks.

69. *Consideration of the Risk of Management Override of Controls.* The auditor's identification of fraud risks should include the risk of management override of controls.

Note: Controls over management override are important to effective internal control over financial reporting for all companies, and may be particularly important at smaller companies because of the increased involvement of senior management in performing controls and in the period-end financial reporting process. For smaller companies, the controls that address the risk of management override might be different from those at a larger company. For example, a smaller company might rely on more detailed oversight by the audit committee that focuses on the risk of management override.

Factors Relevant To Identifying Significant Risks

70. To determine whether an identified and assessed risk is a significant risk, the auditor should evaluate whether the risk requires special audit consideration because of the nature of the risk or the likelihood and potential magnitude of misstatement related to the risk.

Note: The determination of whether a risk of material misstatement is a significant risk is based on inherent risk, without regard to the effect of controls.

71. Factors that should be evaluated in determining which risks are significant risks include:

a. The effect of the quantitative and qualitative risk factors discussed in paragraph 60 on the likelihood and potential magnitude of misstatements;

b. Whether the risk is a fraud risk;

Note: A fraud risk is a significant risk.

c. Whether the risk is related to recent significant economic, accounting, or other developments;

d. The complexity of transactions;

e. Whether the risk involves significant transactions with related parties;

f. The degree of complexity or judgment in the recognition or measurement of financial information related to the risk, especially those measurements involving a wide range of measurement uncertainty; and

g. Whether the risk involves significant transactions that are outside the normal course of business for the company or that otherwise appear to be unusual due to their timing, size, or nature.

Further Consideration of Controls

72. When the auditor has determined that a significant risk, including a fraud risk, exists, the auditor should evaluate the design of the company's controls that are intended to address fraud risks and other significant risks and determine whether those controls have been implemented, if the auditor has not already done so when obtaining an understanding of internal control, as described in paragraphs 18–40 of this standard.[82]

73. Controls that address fraud risks include (a) specific controls designed to

[81] The auditor might perform substantive auditing procedures because his or her assessment of the risk that undetected misstatement would cause the financial statements to be materially misstated is unacceptably high or as a means of introducing unpredictability in the procedures performed. *See* paragraphs 11, 14, and 25 of Auditing Standard No. 14, for further discussion about undetected misstatement. *See* paragraph 61 of Auditing Standard No. 5 and paragraph 5.c. of Auditing Standard No. 13, for further discussion about the unpredictability of auditing procedures.

[82] Auditing Standard No. 13 discusses the auditor's response to fraud risks and other significant risks.

mitigate specific risks of fraud, e.g., controls to address risks of intentional misstatement of specific accounts and (b) controls designed to prevent, deter, and detect fraud, e.g., controls to promote a culture of honesty and ethical behavior.[83] Such controls also include those that address the risk of management override of other controls.

Revision of Risk Assessment

74. The auditor's assessment of the risks of material misstatement, including fraud risks, should continue throughout the audit. When the auditor obtains audit evidence during the course of the audit that contradicts the audit evidence on which the auditor originally based his or her risk assessment, the auditor should revise the risk assessment and modify planned audit procedures or perform additional procedures in response to the revised risk assessments.[84]

APPENDIX A—Definitions

A1. For purposes of this standard, the terms listed below are defined as follows:

A2. Business risks—Risks that result from significant conditions, events, circumstances, actions, or inactions that could adversely affect a company's ability to achieve its objectives and execute its strategies. Business risks also might result from setting inappropriate objectives and strategies or from changes or complexity in the company's operations or management.

A3. Company's objectives and strategies—The overall plans for the company as established by management or the board of directors. Strategies are the approaches by which management intends to achieve its objectives.

A4. Risk assessment procedures—The procedures performed by the auditor to obtain information for identifying and assessing the risks of material misstatement in the financial statements whether due to error or fraud.

Note: Risk assessment procedures by themselves do not provide sufficient appropriate evidence on which to base an audit opinion.

A5. Significant risk—A risk of material misstatement that requires special audit consideration.

APPENDIX B—Consideration of Manual and Automated Systems and Controls

B1. While obtaining an understanding of the company's information system related to financial reporting, the auditor should obtain an understanding of how the company uses information technology ("IT") and how IT affects the financial statements.[85] The auditor also should obtain an understanding of the extent of manual controls and automated controls used by the company, including the IT general controls that are important to the effective operation of the automated controls. That information should be taken into account in assessing the risks of material misstatement.[86]

B2. Controls in a manual system might include procedures such as approvals and reviews of transactions, and reconciliations and follow-up of reconciling items.

B3. Alternatively, a company might use automated procedures to initiate, record, process, and report transactions, in which case records in electronic format would replace paper documents. When IT is used to initiate, record, process, and report transactions, the IT systems and programs may include controls related to the relevant assertions of significant accounts and disclosures or may be critical to the effective functioning of manual controls that depend on IT.

B4. The auditor should obtain an understanding of specific risks to a company's internal control over financial reporting resulting from IT. Examples of such risks include:

- Reliance on systems or programs that are inaccurately processing data, processing inaccurate data, or both;
- Unauthorized access to data that might result in destruction of data or improper changes to data, including the recording of unauthorized or non-existent transactions or inaccurate recording of transactions (particular risks might arise when multiple users access a common database);
- The possibility of IT personnel gaining access privileges beyond those necessary to perform their assigned duties, thereby breaking down segregation of duties;
- Unauthorized changes to data in master files;
- Unauthorized changes to systems or programs;
- Failure to make necessary changes to systems or programs;
- Inappropriate manual intervention; and
- Potential loss of data or inability to access data as required.

B5. In obtaining an understanding of the company's control activities, the auditor should obtain an understanding of how the company has responded to risks arising from IT.

B6. When a company uses manual elements in internal control systems and the auditor plans to rely on, and therefore test, those manual controls, the auditor should design procedures to test the consistency in the application of those manual controls.

Auditing Standard No. 13

The Auditor's Responses to the Risks of Material Misstatement

Introduction

1. This standard establishes requirements regarding designing and implementing appropriate responses to the risks of material misstatement.

Objective

2. The objective of the auditor is to address the risks of material misstatement through appropriate overall audit responses and audit procedures.

Responding to the Risks of Material Misstatement

3. To meet the objective in the preceding paragraph, the auditor must design and implement audit responses that address the risks of material misstatement that are identified and assessed in accordance with Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

4. This standard discusses the following types of audit responses:

a. Responses that have an overall effect on how the audit is conducted ("overall responses"), as described in paragraphs 5–7; and

b. Responses involving the nature, timing, and extent of the audit procedures to be performed, as described in paragraphs 8–46.

Overall Responses

5. The auditor should design and implement overall responses to address the assessed risks of material misstatement as follows:

[83] AU sec. 316.88 and paragraph 14 of Auditing Standard No. 5 present examples of controls that address fraud risks.

[84] *See also* paragraph 46 of Auditing Standard No. 13.

[85] *See also* AU sec. 324, *Service Organizations,* if the company uses a service organization for services that are part of the company's internal control over financial reporting.

[86] *See also* paragraphs 16–17 of Auditing Standard No. 9, *Audit Planning.*

a. *Making appropriate assignments of significant engagement responsibilities.* The knowledge, skill, and ability of engagement team members with significant engagement responsibilities should be commensurate with the assessed risks of material misstatement.[87]

b. *Providing the extent of supervision that is appropriate for the circumstances, including, in particular, the assessed risks of material misstatement.* (See paragraphs 5–6 of Auditing Standard No. 10, *Supervision of the Audit Engagement.*)

c. *Incorporating elements of unpredictability in the selection of audit procedures to be performed.* As part of the auditor's response to the assessed risks of material misstatement, including the assessed risks of material misstatement due to fraud ("fraud risks"), the auditor should incorporate an element of unpredictability in the selection of auditing procedures to be performed from year to year. Examples of ways to incorporate an element of unpredictability include:

(1) Performing audit procedures related to accounts, disclosures, and assertions that would not otherwise be tested based on their amount or the auditor's assessment of risk;

(2) Varying the timing of the audit procedures;

(3) Selecting items for testing that have lower amounts or are otherwise outside customary selection parameters;

(4) Performing audit procedures on an unannounced basis; and

(5) In multi-location audits, varying the location or the nature, timing, and extent of audit procedures at related locations or business units from year to year.[88]

d. *Evaluating the company's selection and application of significant accounting principles.* The auditor should evaluate whether the company's selection and application of significant accounting principles, particularly those related to subjective measurements and complex transactions,[89] are indicative of bias that could lead to material misstatement of the financial statements.

Note: Paragraph .11 of AU sec. 380, *Communication With Audit Committees,* discusses the auditor's judgments about the quality of a company's accounting principles.

6. The auditor also should determine whether it is necessary to make pervasive changes to the nature, timing, or extent of audit procedures to adequately address the assessed risks of material misstatement. Examples of such pervasive changes include modifying the audit strategy to:

a. Increase the substantive testing of the valuation of numerous significant accounts at year end because of significantly deteriorating market conditions, and

b. Obtain more persuasive audit evidence from substantive procedures due to the identification of pervasive weaknesses in the company's control environment.

7. Due professional care requires the auditor to exercise professional skepticism.[90] Professional skepticism is an attitude that includes a questioning mind and a critical assessment of the appropriateness and sufficiency of audit evidence. The auditor's responses to the assessed risks of material misstatement, particularly fraud risks, should involve the application of professional skepticism in gathering and evaluating audit evidence.[91] Examples of the application of professional skepticism in response to the assessed fraud risks are (a) modifying the planned audit procedures to obtain more reliable evidence regarding relevant assertions and (b) obtaining sufficient appropriate evidence to corroborate management's explanations or representations concerning important matters, such as through third-party confirmation, use of a specialist engaged or employed by the auditor, or examination of documentation from independent sources.

Responses Involving the Nature, Timing, and Extent of Audit Procedures

8. The auditor should design and perform audit procedures in a manner that addresses the assessed risks of material misstatement for each relevant assertion of each significant account and disclosure.

9. In designing the audit procedures to be performed, the auditor should:

a. Obtain more persuasive audit evidence the higher the auditor's assessment of risk;

b. Take into account the types of potential misstatements that could result from the identified risks and the likelihood and magnitude of potential misstatement;[92]

c. In an integrated audit, design the testing of controls to accomplish the objectives of both audits simultaneously:

(1) To obtain sufficient evidence to support the auditor's control risk[93] assessments for purposes of the audit of financial statements;[94] and

(2) To obtain sufficient evidence to support the auditor's opinion on internal control over financial reporting as of year-end.

Note: Auditing Standard No. 5 establishes requirements for tests of controls in the audit of internal control over financial reporting.

10. The audit procedures performed in response to the assessed risks of material misstatement can be classified into two categories: (1) tests of controls and (2) substantive procedures.[95] Paragraphs 16–35 of this standard discuss tests of controls, and paragraphs 36–46 discuss substantive procedures.

Note: Paragraphs 16–17 of this standard discuss when tests of controls are necessary in a financial statement audit. Ordinarily, tests of controls are performed for relevant assertions for which the auditor chooses to rely on controls to modify his or her substantive procedures.

Responses to Significant Risks

11. For significant risks, the auditor should perform substantive procedures, including tests of details, that are specifically responsive to the assessed risks.

Note: Auditing Standard No. 12 discusses identification of significant risks[96] and states that fraud risks are significant risks.

Responses to Fraud Risks

12. The audit procedures that are necessary to address the assessed fraud risks depend upon the types of risks and the relevant assertions that might be affected.

[87] *See also* paragraph .06 of AU sec. 230, *Due Professional Care in the Performance of Work.*

[88] For integrated audits, paragraphs 61 and B13 of Auditing Standard No. 5, *An audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* establish requirements for introducing unpredictability in testing of controls from year to year and in multi-location audits.

[89] Paragraphs 12–13 of Auditing Standard No. 12 discuss the auditor's responsibilities regarding obtaining an understanding of the company's selection and application of accounting principles. *See also* paragraphs .66–.67 of AU sec. 316, *Consideration of Fraud in a Financial Statement Audit,* and paragraphs .04 and .06 of AU sec. 411, *The Meaning of Present Fairly in Conformity With Generally Accepted Accounting Principles.*

[90] AU secs. 230.07–.09.

[91] AU sec. 316.13.

[92] For example, potential misstatements regarding disclosures include omission of required disclosures or presentation of inaccurate or incomplete disclosures.

[93] *See* paragraph 7.b. of Auditing Standard No. 8, *Audit Risk,* for a definition of control risk.

[94] For purposes of this standard, the term "audit of financial statements" refers to the financial statement portion of the integrated audit and to the audit of financial statements only.

[95] Substantive procedures consist of (a) tests of details of accounts and disclosures and (b) substantive analytical procedures.

[96] *See* paragraph 71 of Auditing Standard No. 12 for factors that the auditor should evaluate in determining which risks are significant risks.

Note: If the auditor identifies deficiencies in controls that are intended to address assessed fraud risks, the auditor should take into account those deficiencies when designing his or her response to those fraud risks.

Note: Auditing Standard No. 5 establishes requirements for addressing assessed fraud risks in the audit of internal control over financial reporting.[97]

13. *Addressing Fraud Risks in the Audit of Financial Statements.* In the audit of financial statements, the auditor should perform substantive procedures, including tests of details, that are specifically responsive to the assessed fraud risks. If the auditor selects certain controls intended to address the assessed fraud risks for testing in accordance with paragraphs 16–17 of this standard, the auditor should perform tests of those controls.

14. The following are examples of ways in which planned audit procedures may be modified to address assessed fraud risks:

a. Changing the *nature* of audit procedures to obtain evidence that is more reliable or to obtain additional corroborative information;

b. Changing the *timing* of audit procedures to be closer to the end of the period or to the points during the period in which fraudulent transactions are more likely to occur; and

c. Changing the *extent* of the procedures applied to obtain more evidence, e.g., by increasing sample sizes or applying computer-assisted audit techniques to all of the items in an account.

Note: AU secs. 316.54–.67 provide additional examples of responses to assessed fraud risks relating to fraudulent financial reporting (e.g., revenue recognition, inventory quantities, and management estimates) and misappropriation of assets in the audit of financial statements.

15. Also, AU sec. 316 indicates that the auditor should perform audit procedures to specifically address the risk of management override of controls including:

a. Examining journal entries and other adjustments for evidence of possible material misstatement due to fraud (AU secs. 316.58–.62);

b. Reviewing accounting estimates for biases that could result in material misstatement due to fraud (AU secs. 316.63–.65); and

c. Evaluating the business rationale for significant unusual transactions (AU secs. 316.66–.67).

[97] Paragraphs 14–15 of Auditing Standard No. 5.

Testing Controls

Testing Controls in an Audit of Financial Statements

16. *Controls to be Tested.* If the auditor plans to assess control risk at less than the maximum by relying on controls,[98] and the nature, timing, and extent of planned substantive procedures are based on that lower assessment, the auditor must obtain evidence that the controls selected for testing are designed effectively and operated effectively during the entire **period of reliance**.[99] However, the auditor is not required to assess control risk at less than the maximum for *all* relevant assertions and, for a variety of reasons, the auditor may choose not to do so.

17. Also, tests of controls must be performed in the audit of financial statements for each relevant assertion for which substantive procedures alone cannot provide sufficient appropriate audit evidence and when necessary to support the auditor's reliance on the accuracy and completeness of financial information used in performing other audit procedures.[100]

Note: When a significant amount of information supporting one or more relevant assertions is electronically initiated, recorded, processed, or reported, it might be impossible to design effective substantive tests that, by themselves, would provide sufficient appropriate evidence regarding the assertions. For such assertions, significant audit evidence may be available only in electronic form. In such cases, the sufficiency and appropriateness of the audit evidence usually depend on the effectiveness of controls over their accuracy and completeness. Furthermore, the potential for improper initiation or alteration of information to occur and not be detected may be greater if information is initiated, recorded, processed, or reported only in electronic form and appropriate controls are not operating effectively.

18. *Evidence about the Effectiveness of Controls in the Audit of Financial Statements.* In designing and performing tests of controls for the audit of financial statements, the evidence necessary to support the auditor's control risk assessment depends on the degree of reliance the auditor plans to place on the effectiveness of a control. The auditor should obtain more persuasive audit evidence from tests of controls the greater the reliance the auditor places on the effectiveness of a control. The auditor also should obtain more persuasive evidence about the effectiveness of controls for each relevant assertion for which the audit approach consists primarily of tests of controls, including situations in which substantive procedures alone cannot provide sufficient appropriate audit evidence.

Testing Design Effectiveness

19. The auditor should test the design effectiveness of the controls selected for testing by determining whether the company's controls, if they are operated as prescribed by persons possessing the necessary authority and competence to perform the control effectively, satisfy the company's control objectives and can effectively prevent or detect error or fraud that could result in material misstatements in the financial statements.

Note: A smaller, less complex company might achieve its control objectives in a different manner from a larger, more complex organization. For example, a smaller, less complex company might have fewer employees in the accounting function, limiting opportunities to segregate duties and leading the company to implement alternative controls to achieve its control objectives. In such circumstances, the auditor should evaluate whether those alternative controls are effective.

20. Procedures the auditor performs to test design effectiveness include a mix of inquiry of appropriate personnel, observation of the company's operations, and inspection of relevant documentation. Walkthroughs that include these procedures ordinarily are sufficient to evaluate design effectiveness.[101]

Testing Operating Effectiveness

21. The auditor should test the operating effectiveness of a control selected for testing by determining whether the control is operating as designed and whether the person performing the control possesses the necessary authority and competence to perform the control effectively.

22. Procedures the auditor performs to test operating effectiveness include a

[98] Reliance on controls that is supported by sufficient and appropriate audit evidence allows the auditor to assess control risk at less than the maximum, which results in a lower assessed risk of material misstatement. In turn, this allows the auditor to modify the nature, timing, and extent of planned substantive procedures.

[99] Terms defined in Appendix A, *Definitions,* are set in **boldface type** the first time they appear.

[100] Paragraph 10 of Auditing Standard No. 15, *Audit Evidence,* and paragraph .16 of AU sec. 329, *Substantive Analytical Procedures.*

[101] Paragraphs 37–38 of Auditing Standard No. 12 discuss performing a walkthrough.

mix of inquiry of appropriate personnel, observation of the company's operations, inspection of relevant documentation, and re-performance of the control.

Obtaining Evidence From Tests of Controls

23. The evidence provided by the auditor's tests of the effectiveness of controls depends upon the mix of the nature, timing, and extent of the auditor's procedures. Further, for an individual control, different combinations of the nature, timing, and extent of testing might provide sufficient evidence in relation to the degree of reliance in an audit of financial statements.

Note: To obtain evidence about whether a control is effective, the control must be tested directly; the effectiveness of a control cannot be inferred from the absence of misstatements detected by substantive procedures.

Nature of Tests of Controls

24. Some types of tests, by their nature, produce greater evidence of the effectiveness of controls than other tests. The following tests that the auditor might perform are presented in the order of the evidence that they ordinarily would produce, from least to most: inquiry, observation, inspection of relevant documentation, and re-performance of a control.

Note: Inquiry alone does not provide sufficient evidence to support a conclusion about the effectiveness of a control.

25. The nature of the tests of controls that will provide appropriate evidence depends, to a large degree, on the nature of the control to be tested, including whether the operation of the control results in documentary evidence of its operation. Documentary evidence of the operation of some controls, such as management's philosophy and operating style, might not exist.

Note: A smaller, less complex company or unit might have less formal documentation regarding the operation of its controls. In those situations, testing controls through inquiry combined with other procedures, such as observation of activities, inspection of less formal documentation, or re-performance of certain controls, might provide sufficient evidence about whether the control is effective.

Extent of Tests of Controls

26. The more extensively a control is tested, the greater the evidence obtained from that test.

27. Matters that could affect the necessary extent of testing of a control in relation to the degree of reliance on a control include the following:

- The frequency of the performance of the control by the company during the audit period;
- The length of time during the audit period that the auditor is relying on the operating effectiveness of the control;
- The expected rate of deviation from a control;
- The relevance and reliability of the audit evidence to be obtained regarding the operating effectiveness of the control;
- The extent to which audit evidence is obtained from tests of other controls related to the assertion;
- The nature of the control, including, in particular, whether it is a manual control or an automated control; and
- For an automated control, the effectiveness of relevant information technology general controls.

Note: AU sec. 350, *Audit Sampling,* establishes requirements regarding the use of sampling in tests of controls.

Timing of Tests of Controls

28. The timing of tests of controls relates to when the evidence about the operating effectiveness of the controls is obtained and the period of time to which it applies. Paragraph 16 of this standard indicates that the auditor must obtain evidence that the controls selected for testing are designed effectively and operated effectively during the entire period of reliance.

29. *Using Audit Evidence Obtained during an Interim Period.* When the auditor obtains evidence about the operating effectiveness of controls as of or through an interim date, he or she should determine what additional evidence is necessary concerning the operation of the controls for the remaining period of reliance.

30. The additional evidence that is necessary to update the results of testing from an interim date through the remaining period of reliance depends on the following factors:

- The possibility that there have been any significant changes in internal control over financial reporting subsequent to the interim date;

Note: If there have been significant changes to the control since the interim date, the auditor should obtain evidence about the effectiveness of the new or modified control;

- The inherent risk associated with the related account(s) or assertion(s);
- The specific control tested prior to year end, including the nature of the control and the risk that the control is no longer effective during the remaining period, and the results of the tests of the control;
- The planned degree of reliance on the control;
- The sufficiency of the evidence of effectiveness obtained at an interim date; and
- The length of the remaining period.

31. *Using Audit Evidence Obtained in Past Audits.* For audits of financial statements, the auditor should obtain evidence during the current year audit about the design and operating effectiveness of controls upon which the auditor relies. When controls on which the auditor plans to rely have been tested in past audits and the auditor plans to use evidence about the effectiveness of those controls that was obtained in prior years, the auditor should take into account the following factors to determine the evidence needed during the current year audit to support the auditor's control risk assessments:

- The nature and materiality of misstatements that the control is intended to prevent or detect;
- The inherent risk associated with the related account(s) or assertion(s);
- Whether there have been changes in the volume or nature of transactions that might adversely affect control design or operating effectiveness;
- Whether the account has a history of errors;
- The effectiveness of entity-level controls that the auditor has tested, especially controls that monitor other controls;
- The nature of the controls and the frequency with which they operate;
- The degree to which the control relies on the effectiveness of other controls (e.g., the control environment or information technology general controls);
- The competence of the personnel who perform the control or monitor its performance and whether there have been changes in key personnel who perform the control or monitor its performance;
- Whether the control relies on performance by an individual or is automated (i.e., an automated control would generally be expected to be lower risk if relevant information technology general controls are effective);[102]
- The complexity of the control and the significance of the judgments that must be made in connection with its operation;

[102] The auditor also may use a benchmarking strategy, when appropriate, for automated application controls in subsequent years' audits. Benchmarking is described further beginning at paragraph B28 of Auditing Standard No. 5.

• The planned degree of reliance on the control;
• The nature, timing, and extent of procedures performed in past audits;
• The results of the previous years' testing of the control;
• Whether there have been changes in the control or the process in which it operates since the previous audit; and
• For integrated audits, the evidence regarding the effectiveness of the controls obtained during the audit of internal control.

Assessing Control Risk

32. The auditor should assess control risk for relevant assertions by evaluating the evidence obtained from all sources, including the auditor's testing of controls for the audit of internal control and the audit of financial statements, misstatements detected during the financial statement audit, and any identified control deficiencies.

33. Control risk should be assessed at the maximum level for relevant assertions (1) for which controls necessary to sufficiently address the assessed risk of material misstatement in those assertions are missing or ineffective or (2) when the auditor has not obtained sufficient appropriate evidence to support a control risk assessment below the maximum level.

34. When deficiencies affecting the controls on which the auditor intends to rely are detected, the auditor should evaluate the severity of the deficiencies and the effect on the auditor's control risk assessments. If the auditor plans to rely on controls relating to an assertion but the controls that the auditor tests are ineffective because of control deficiencies, the auditor should:

a. Perform tests of other controls related to the same assertion as the ineffective controls, or

b. Revise the control risk assessment and modify the planned substantive procedures as necessary in light of the increased assessment of risk.

Note: Auditing Standard No. 5 establishes requirements for evaluating the severity of a control deficiency and communicating identified control deficiencies to management and the audit committee in an integrated audit. AU sec. 325, *Communications About Control Deficiencies in an Audit of Financial Statements,* establishes requirements for communicating significant deficiencies and material weaknesses in an audit of financial statements only.

Testing Controls in an Audit of Internal Control

35. Auditing Standard No. 5 states that the objective of the tests of controls in an audit of internal control is to obtain evidence about the effectiveness of controls to support the auditor's opinion on the company's internal control over financial reporting. The auditor's opinion relates to the effectiveness of the company's internal control over financial reporting as of a point in time and taken as a whole.[103] Auditing Standard No. 5 establishes requirements regarding the selection of controls to be tested and the necessary nature, timing, and extent of tests of controls in an audit of internal control over financial reporting.

Substantive Procedures

36. The auditor should perform substantive procedures for each relevant assertion of each significant account and disclosure, regardless of the assessed level of control risk.

37. As the assessed risk of material misstatement increases, the evidence from substantive procedures that the auditor should obtain also increases. The evidence provided by the auditor's substantive procedures depends upon the mix of the nature, timing, and extent of those procedures. Further, for an individual assertion, different combinations of the nature, timing, and extent of testing might provide sufficient appropriate evidence to respond to the assessed risk of material misstatement.

38. Internal control over financial reporting has inherent limitations,[104] which, in turn, can affect the evidence that is needed from substantive procedures. For example, more evidence from substantive procedures ordinarily is needed for relevant assertions that have a higher susceptibility to management override or to lapses in judgment or breakdowns resulting from human failures.[105]

Nature of Substantive Procedures

39. Substantive procedures generally provide persuasive evidence when they are designed and performed to obtain evidence that is relevant and reliable. Also, some types of substantive procedures, by their nature, produce more persuasive evidence than others. Inquiry alone does not provide sufficient appropriate evidence to support a conclusion about a relevant assertion.

Note: Auditing Standard No. 15 discusses certain types of substantive procedures and the relevance and reliability of audit evidence.

40. Taking into account the types of potential misstatements in the relevant assertions that could result from identified risks, as required by paragraph 9.b., can help the auditor determine the types and combination of substantive audit procedures that are necessary to detect material misstatements in the respective assertions.

41. *Substantive Procedures Related to the Period-end Financial Reporting Process.* The auditor's substantive procedures must include the following audit procedures related to the period-end financial reporting process:

a. Reconciling the financial statements with the underlying accounting records; and

b. Examining material adjustments made during the course of preparing the financial statements.

Note: AU secs. 316.58–.62 establish requirements for examining journal entries and other adjustments for evidence of possible material misstatement due to fraud.

Extent of Substantive Procedures

42. The more extensively a substantive procedure is performed, the greater the evidence obtained from the procedure. The necessary extent of a substantive audit procedure depends on the materiality of the account or disclosure, the assessed risk of material misstatement, and the necessary degree of assurance from the procedure. However, increasing the extent of an audit procedure cannot adequately address an assessed risk of material misstatement unless the evidence to be obtained from the procedure is reliable and relevant.

Timing of Substantive Procedures

43. Performing certain substantive procedures at interim dates may permit early consideration of matters affecting the year-end financial statements, e.g., testing material transactions involving higher risks of misstatement. However, performing substantive procedures at an interim date without performing procedures at a later date increases the risk that a material misstatement could exist in the year-end financial statements that would not be detected by the auditor. This risk increases as the period between the interim date and year end increases.

44. In determining whether it is appropriate to perform substantive procedures at an interim date, the auditor should take into account the following:

a. The assessed risk of material misstatement, including:

[103] Paragraph B1 of Auditing Standard No. 5.

[104] Paragraph A5 of Auditing Standard No. 5.

[105] *See, e.g.,* paragraph .14 of AU sec. 328, *Auditing Fair Value Measurements and Disclosures.*

(1) The auditor's assessment of control risk, as discussed in paragraphs 32–34;

(2) The existence of conditions or circumstances, if any, that create incentives or pressures on management to misstate the financial statements between the interim test date and the end of the period covered by the financial statements;

(3) The effects of known or expected changes in the company, its environment, or its internal control over financial reporting during the remaining period;

b. The nature of the substantive procedures;

c. The nature of the account or disclosure and relevant assertion; and

d. The ability of the auditor to perform the necessary audit procedures to cover the remaining period.

45. When substantive procedures are performed at an interim date, the auditor should cover the remaining period by performing substantive procedures, or substantive procedures combined with tests of controls, that provide a reasonable basis for extending the audit conclusions from the interim date to the period end. Such procedures should include (a) comparing relevant information about the account balance at the interim date with comparable information at the end of the period to identify amounts that appear unusual and investigating such amounts and (b) performing audit procedures to test the remaining period.

46. If the auditor obtains evidence that contradicts the evidence on which the original risk assessments were based, including evidence of misstatements that he or she did not expect, the auditor should revise the related risk assessments and modify the planned nature, timing, or extent of substantive procedures covering the remaining period as necessary. Examples of such modifications include extending or repeating at the period end the procedures performed at the interim date.

Dual-Purpose Tests

47. In some situations, the auditor might perform a substantive test of a transaction concurrently with a test of a control relevant to that transaction (a "**dual-purpose test**"). In those situations, the auditor should design the dual-purpose test to achieve the objectives of both the test of the control and the substantive test. Also, when performing a dual-purpose test, the auditor should evaluate the results of the test in forming conclusions about both the assertion and the effectiveness of the control being tested.[106]

APPENDIX A—Definitions

A1. For purposes of this standard, the terms listed below are defined as follows:

A2. Dual-purpose test—Substantive test of a transaction and a test of a control relevant to that transaction that are performed concurrently, e.g., a substantive test of sales transactions performed concurrently with a test of controls over those transactions.

A3. Period of reliance—The period being covered by the company's financial statements, or the portion of that period, for which the auditor plans to rely on controls in order to modify the nature, timing, and extent of planned substantive procedures.

Auditing Standard No. 14

Evaluating Audit Results

Introduction

1. This standard establishes requirements regarding the auditor's evaluation of audit results and determination of whether he or she has obtained sufficient appropriate audit evidence.

Objective

2. The objective of the auditor is to evaluate the results of the audit to determine whether the audit evidence obtained is sufficient and appropriate to support the opinion to be expressed in the auditor's report.

Evaluating the Results of the Audit of Financial Statements

3. In forming an opinion on whether the financial statements are presented fairly, in all material respects, in conformity with the applicable financial reporting framework, the auditor should take into account all relevant audit evidence, regardless of whether it appears to corroborate or to contradict the assertions in the financial statements.

4. In the audit of financial statements,[107] the auditor's evaluation of audit results should include evaluation of the following:

a. The results of analytical procedures performed in the overall review of the financial statements ("overall review");

b. **Misstatements** accumulated during the audit, including, in particular, **uncorrected misstatements;**[108]

c. The qualitative aspects of the company's accounting practices;

d. Conditions identified during the audit that relate to the assessment of the risk of material misstatement due to fraud ("fraud risk");

e. The presentation of the financial statements, including the disclosures; and

f. The sufficiency and appropriateness of the audit evidence obtained.

Performing Analytical Procedures in the Overall Review

5. In the overall review, the auditor should read the financial statements and disclosures and perform analytical procedures to (a) evaluate the auditor's conclusions formed regarding significant accounts and disclosures and (b) assist in forming an opinion on whether the financial statements as a whole are free of material misstatement.

6. As part of the overall review, the auditor should evaluate whether:

a. The evidence gathered in response to unusual or unexpected transactions, events, amounts, or relationships previously identified during the audit is sufficient; and

b. Unusual or unexpected transactions, events, amounts, or relationships[109] indicate risks of material misstatement that were not identified previously, including, in particular, fraud risks.

Note: If the auditor discovers a previously unidentified risk of material misstatement or concludes that the evidence gathered is not adequate, he or she should modify his or her audit procedures or perform additional procedures as necessary in accordance with paragraph 36 of this standard.

7. The nature and extent of the analytical procedures performed during the overall review may be similar to the analytical procedures performed as risk assessment procedures. The auditor should perform analytical procedures relating to revenue through the end of the reporting period.[110]

8. The auditor should obtain corroboration for management's explanations regarding significant unusual or unexpected transactions,

[106] Paragraph .44 of AU sec. 350 discusses applying audit sampling in dual-purpose tests.

[107] For purposes of this standard, the term "audit of financial statements" refers to the financial statement portion of the integrated audit and to the audit of financial statements only.

[108] Terms defined in Appendix A, *Definitions,* are set in **boldface type** the first time they appear.

[109] Paragraphs 46–48 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement* and paragraph .03 of AU sec. 329, *Substantive Analytical Procedures.*

[110] Paragraph 47 of Auditing Standard No. 12 contains a requirement to perform analytical procedures relating to revenue as part of the risk assessment procedures.

events, amounts, or relationships. If management's responses to the auditor's inquiries appear to be implausible, inconsistent with other audit evidence, imprecise, or not at a sufficient level of detail to be useful, the auditor should perform procedures to address the matter.

9. *Evaluating Whether Analytical Procedures Indicate a Previously Unrecognized Fraud Risk.* Whether an unusual or unexpected transaction, event, amount, or relationship indicates a fraud risk, as discussed in paragraph 6.b., depends on the relevant facts and circumstances, including the nature of the account or relationship among the data used in the analytical procedures. For example, certain unusual or unexpected transactions, events, amounts, or relationships could indicate a fraud risk if a component of the relationship involves accounts and disclosures that management has incentives or pressures to manipulate, e.g., significant unusual or unexpected relationships involving revenue and income.

Accumulating and Evaluating Identified Misstatements

10. *Accumulating Identified Misstatements.* The auditor should accumulate misstatements identified during the audit, other than those that are clearly trivial.

Note: "Clearly trivial" is not another expression for "not material." Matters that are clearly trivial will be of a smaller order of magnitude than the materiality level established in accordance with Auditing Standard No. 11, *Consideration of Materiality in Planning and Performing an Audit,* and will be inconsequential, whether taken individually or in aggregate and whether judged by any criteria of size, nature, or circumstances. When there is any uncertainty about whether one or more items is clearly trivial, the matter is not considered trivial.

11. The auditor may designate an amount below which misstatements are clearly trivial and do not need to be accumulated. In such cases, the amount should be set so that any misstatements below that amount would not be material to the financial statements, individually or in combination with other misstatements, considering the possibility of undetected misstatement.

12. The auditor's accumulation of misstatements should include the auditor's best estimate of the total misstatement in the accounts and disclosures that he or she has tested, not just the amount of misstatements specifically identified. This includes misstatements related to accounting estimates, as determined in accordance with paragraph 13 of this standard, and projected misstatements from substantive procedures that involve audit sampling, as determined in accordance with AU sec. 350, *Audit Sampling.*[111]

13. *Misstatements Relating to Accounting Estimates.* If the auditor concludes that the amount of an accounting estimate included in the financial statements is unreasonable or was not determined in conformity with the relevant requirements of the applicable financial reporting framework, he or she should treat the difference between that estimate and a reasonable estimate determined in conformity with the applicable accounting principles as a misstatement. If a range of reasonable estimates is supported by sufficient appropriate audit evidence and the recorded estimate is outside of the range of reasonable estimates, the auditor should treat the difference between the recorded accounting estimate and the closest reasonable estimate as a misstatement.

Note: If an accounting estimate is determined in conformity with the relevant requirements of the applicable financial reporting framework and the amount of the estimate is reasonable, a difference between an estimated amount best supported by the audit evidence and the recorded amount of the accounting estimate ordinarily would not be considered to be a misstatement. Paragraph 27 discusses evaluating accounting estimates for bias.

14. *Considerations as the Audit Progresses.* The auditor should determine whether the overall audit strategy and audit plan need to be modified if:

a. The nature of accumulated misstatements and the circumstances of their occurrence indicate that other misstatements might exist that, in combination with accumulated misstatements, could be material; or

b. The aggregate of misstatements accumulated during the audit approaches the materiality level or levels used in planning and performing the audit.[112]

Note: When the aggregate of accumulated misstatements approaches the materiality level or levels used in planning and performing the audit, there likely will be greater than an appropriately low level of risk that possible undetected misstatements, when combined with the aggregate of misstatements accumulated during the audit that remain uncorrected, could be material to the financial statements. If the auditor's assessment of this risk is unacceptably high, he or she should perform additional audit procedures or determine that management has adjusted the financial statements so that the risk that the financial statements are materially misstated has been reduced to an appropriately low level.

15. The auditor should communicate accumulated misstatements to management on a timely basis to provide management with an opportunity to correct them.

16. If management has examined an account or a disclosure in response to misstatements detected by the auditor and has made corrections to the account or disclosure, the auditor should evaluate management's work to determine whether the corrections have been recorded properly and whether uncorrected misstatements remain.

17. *Evaluation of the Effect of Uncorrected Misstatements.* The auditor should evaluate whether uncorrected misstatements are material, individually or in combination with other misstatements. In making this evaluation, the auditor should evaluate the misstatements in relation to the specific accounts and disclosures involved and to the financial statements as a whole, taking into account relevant quantitative and qualitative factors.[113] (See Appendix B.)

Note: In interpreting the federal securities laws, the Supreme Court of the United States has held that a fact is material if there is "a substantial likelihood that the * * * fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[114] As the Supreme Court has noted, determinations of materiality require "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him * * *."[115]

Note: As a result of the interaction of quantitative and qualitative considerations in materiality judgments, uncorrected misstatements of relatively small amounts could have a material effect on the financial statements. For

[111] AU sec. 350.26.

[112] Auditing Standard No. 11.

[113] If the financial statements contain material misstatements, AU sec. 508, *Reports on Audited Financial Statements,* indicates that the auditor should issue a qualified or an adverse opinion on the financial statements. AU sec. 508.35 discusses situations in which the financial statements are materially affected by a departure from the applicable financial reporting framework.

[114] *TSC Industries* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976). *See also Basic, Inc.* v. *Levinson,* 485 U.S. 224 (1988).

[115] *TSC Industries,* 426 U.S. at 450.

example, an illegal payment of an otherwise immaterial amount could be material if there is a reasonable possibility [116] that it could lead to a material contingent liability or a material loss of revenue.[117] Also, a misstatement made intentionally could be material for qualitative reasons, even if relatively small in amount.

Note: If the reevaluation of the established materiality level or levels, as set forth in Auditing Standard No. 11,[118] results in a lower amount for the materiality level or levels, the auditor should take into account that lower materiality level or levels in the evaluation of uncorrected misstatements.

18. The auditor's evaluation of uncorrected misstatements, as described in paragraph 17 of this standard, should include evaluation of the effects of uncorrected misstatements detected in prior years and misstatements detected in the current year that relate to prior years.

19. The auditor cannot assume that an instance of error or fraud is an isolated occurrence. Therefore, the auditor should evaluate the nature and effects of the individual misstatements accumulated during the audit on the assessed risks of material misstatement. This evaluation is important in determining whether the risk assessments remain appropriate, as discussed in paragraph 36 of this standard.

20. *Evaluating Whether Misstatements Might Be Indicative of Fraud.* The auditor should evaluate whether identified misstatements [119] might be indicative of fraud and, in turn, how they affect the auditor's evaluation of materiality and the related audit responses. As indicated in AU sec. 316, *Consideration of Fraud in a Financial Statement Audit,* fraud is an intentional act that results in material misstatement of the financial statements.[120]

21. If the auditor believes that a misstatement is or might be intentional, and if the effect on the financial statements could be material or cannot be readily determined, the auditor should perform procedures to obtain additional audit evidence to determine whether fraud has occurred or is likely to have occurred and, if so, its effect on the financial statements and the auditor's report thereon.

22. For misstatements that the auditor believes are or might be intentional, the auditor should evaluate the implications on the integrity of management or employees and the possible effect on other aspects of the audit. If the misstatement involves higher-level management, it might be indicative of a more pervasive problem, such as an issue with the integrity of management, even if the amount of the misstatement is small. In such circumstances, the auditor should reevaluate the assessment of fraud risk and the effect of that assessment on (a) the nature, timing, and extent of the necessary tests of accounts or disclosures and (b) the assessment of the effectiveness of controls. The auditor also should evaluate whether the circumstances or conditions indicate possible collusion involving employees, management, or external parties and, if so, the effect of the collusion on the reliability of evidence obtained.

23. If the auditor becomes aware of information indicating that fraud or another illegal act has occurred or might have occurred, he or she also must determine his or her responsibilities under AU secs. 316.79–.82A, AU sec. 317, and Section 10A of the Securities Exchange Act of 1934, 15 U.S.C. § 78j–1.

Evaluating the Qualitative Aspects of the Company's Accounting Practices

24. When evaluating whether the financial statements as a whole are free of material misstatement, the auditor should evaluate the qualitative aspects of the company's accounting practices, including potential bias in management's judgments about the amounts and disclosures in the financial statements.

25. The following are examples of forms of management bias:

a. The selective correction of misstatements brought to management's attention during the audit (e.g., correcting misstatements that have the effect of increasing reported earnings but not correcting misstatements that have the effect of decreasing reported earnings).

Note: To evaluate the potential effect of selective correction of misstatements, the auditor should obtain an understanding of the reasons that management decided not to correct misstatements communicated by the auditor in accordance with paragraph 15.

b. The identification by management of additional adjusting entries that offset misstatements accumulated by the auditor. If such adjusting entries are identified, the auditor should perform procedures to determine why the underlying misstatements were not identified previously and evaluate the implications on the integrity of management and the auditor's risk assessments, including fraud risk assessments. The auditor also should perform additional procedures as necessary to address the risk of further undetected misstatement.

c. Bias in the selection and application of accounting principles.[121]

d. Bias in accounting estimates.[122]

26. If the auditor identifies bias in management's judgments about the amounts and disclosures in the financial statements, the auditor should evaluate whether the effect of that bias, together with the effect of uncorrected misstatements, results in material misstatement of the financial statements. Also, the auditor should evaluate whether the auditor's risk assessments, including, in particular, the assessment of fraud risks, and the related audit responses remain appropriate.

27. *Evaluating Bias in Accounting Estimates.* The auditor should evaluate whether the difference between estimates best supported by the audit evidence and estimates included in the financial statements, which are individually reasonable, indicate a possible bias on the part of the company's management. If each accounting estimate included in the financial statements was individually reasonable but the effect of the difference between each estimate and the estimate best supported by the audit evidence was to increase earnings or loss, the auditor should evaluate whether these circumstances indicate potential management bias in the estimates. Bias also can result from the cumulative effect of changes in multiple accounting estimates. If the estimates in the financial statements are grouped at one end of the range of reasonable estimates in the prior year and are grouped at the other end of the range of reasonable estimates in the current year, the auditor should evaluate whether management is using swings in estimates to achieve an expected or desired outcome, e.g., to offset higher or lower than expected earnings.

[116] There is a reasonable possibility of an event, as used in this standard, when the likelihood of the event is either "reasonably possible" or "probable," as those terms are used in the FASB Accounting Standards Codification, Contingencies Topic, paragraph 450–20–25–1.

[117] AU sec. 317, *Illegal Acts by Clients.*

[118] Paragraphs 11–12 of Auditing Standard No. 11.

[119] Misstatements include omission and presentation of inaccurate or incomplete disclosures.

[120] AU sec. 316.05.

[121] Paragraph 5.d. of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*

[122] Paragraph 27 of this standard.

Note: AU secs. 316.64–.65 establish requirements regarding performing a retrospective review of accounting estimates and evaluating the potential for fraud risks.

Evaluating Conditions Relating to the Assessment of Fraud Risks

28. When evaluating the results of the audit, the auditor should evaluate whether the accumulated results of auditing procedures [123] and other observations affect the assessment of the fraud risks made throughout the audit and whether the audit procedures need to be modified to respond to those risks. (See Appendix C.)

29. As part of this evaluation, the engagement partner should determine whether there has been appropriate communication with the other engagement team members throughout the audit regarding information or conditions that are indicative of fraud risks.

Note: To accomplish this communication, the engagement partner might arrange another discussion among the engagement team members about fraud risks. (See paragraphs 49–51 of Auditing Standard No. 12.)

Evaluating the Presentation of the Financial Statements, Including the Disclosures

30. The auditor must evaluate whether the financial statements are presented fairly, in all material respects, in conformity with the applicable financial reporting framework.

Note: AU sec. 411, *The Meaning of Present Fairly in Conformity With Generally Accepted Accounting Principles,* establishes requirements for evaluating the presentation of the financial statements. Auditing Standard No. 6, *Evaluating Consistency of Financial Statements,* establishes requirements regarding evaluating the consistency of the accounting principles used in financial statements.

Note: The auditor should look to the requirements of the Securities and Exchange Commission for the company under audit with respect to the accounting principles applicable to that company.

31. As part of the evaluation of the presentation of the financial statements, the auditor should evaluate whether the financial statements contain the information essential for a fair presentation of the financial statements in conformity with the applicable financial reporting framework. Evaluation of the information disclosed in the financial statements includes consideration of the form, arrangement, and content of the financial statements (including the accompanying notes), encompassing matters such as the terminology used, the amount of detail given, the classification of items in the statements, and the bases of amounts set forth.

Note: According to AU sec. 508, if the financial statements, including the accompanying notes, fail to disclose information that is required by the applicable financial reporting framework, the auditor should express a qualified or adverse opinion and should provide the information in the report, if practicable, unless its omission from the report is recognized as appropriate by a specific auditing standard.[124]

Evaluating the Sufficiency and Appropriateness of Audit Evidence

32. Auditing Standard No. 8, *Audit Risk,* states:

To form an appropriate basis for expressing an opinion on the financial statements, the auditor must plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement due to error or fraud. Reasonable assurance is obtained by reducing audit risk to an appropriately low level through applying due professional care, including obtaining sufficient appropriate audit evidence.[125]

33. As part of evaluating audit results, the auditor must conclude on whether sufficient appropriate audit evidence has been obtained to support his or her opinion on the financial statements.

34. Factors that are relevant to the conclusion on whether sufficient appropriate audit evidence has been obtained include the following:

a. The significance of uncorrected misstatements and the likelihood of their having a material effect, individually or in combination, on the financial statements, considering the possibility of further undetected misstatement (paragraphs 14 and 17–19 of this standard).

b. The results of audit procedures performed in the audit of financial statements, including whether the evidence obtained supports or contradicts management's assertions and whether such audit procedures identified specific instances of fraud (paragraphs 20–23 and 28–29 of this standard).

c. The auditor's risk assessments (paragraph 36 of this standard).

d. The results of audit procedures performed in the audit of internal control over financial reporting, if the audit is an integrated audit.

e. The appropriateness (i.e., the relevance and reliability) of the audit evidence obtained.[126]

35. If the auditor has not obtained sufficient appropriate audit evidence about a relevant assertion or has substantial doubt about a relevant assertion, the auditor should perform procedures to obtain further audit evidence to address the matter. If the auditor is unable to obtain sufficient appropriate audit evidence to have a reasonable basis to conclude about whether the financial statements as a whole are free of material misstatement, AU sec. 508 indicates that the auditor should express a qualified opinion or a disclaimer of opinion.[127]

36. *Evaluating the Appropriateness of Risk Assessments.* As part of the evaluation of whether sufficient appropriate audit evidence has been obtained, the auditor should evaluate whether the assessments of the risks of material misstatement at the assertion level remain appropriate and whether the audit procedures need to be modified or additional procedures need to be performed as a result of any changes in the risk assessments. For example, the re-evaluation of the auditor's risk assessments could result in the identification of relevant assertions or significant risks that were not identified previously and for which the auditor should perform additional audit procedures.

Note: Auditing Standard No. 12 establishes requirements on revising the auditor's risk assessment.[128] Auditing Standard No. 13 discusses the auditor's responsibilities regarding the assessment of control risk and evaluation of control deficiencies in an audit of financial statements.[129]

Evaluating the Results of the Audit of Internal Control Over Financial Reporting

37. Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* indicates

[123] Such auditing procedures include, but are not limited to, procedures in the overall review (paragraph 9 of this standard), the evaluation of identified misstatements (paragraphs 20–23 of this standard), and the evaluation of the qualitative aspects of the company's accounting practices (paragraphs 24–27 of this standard).

[124] AU secs. 508.41–.44.

[125] Paragraph 3 of Auditing Standard No. 8.

[126] Paragraphs 7–9 of Auditing Standard No. 15, *Audit Evidence,* discuss the relevance and reliability of audit evidence.

[127] AU sec. 508.22–.34 contains requirements regarding audit scope limitations.

[128] Paragraph 74 of Auditing Standard No. 12.

[129] Paragraphs 32–34 of Auditing Standard No. 13.

that the auditor should form an opinion on the effectiveness of internal control over financial reporting by evaluating evidence obtained from all sources, including the auditor's testing of controls, misstatements detected during the financial statement audit, and any identified control deficiencies. Auditing Standard No. 5 describes the auditor's responsibilities regarding evaluating the results of the audit, including evaluating the identified control deficiencies.[130]

APPENDIX A—Definitions

A1. For purposes of this standard, the terms listed below are defined as follows:

A2. Misstatement—A misstatement, if material individually or in combination with other misstatements, causes the financial statements not to be presented fairly in conformity with the applicable financial reporting framework.[131] A misstatement may relate to a difference between the amount, classification, presentation, or disclosure of a reported financial statement item and the amount, classification, presentation, or disclosure that should be reported in conformity with the applicable financial reporting framework. Misstatements can arise from error (i.e., unintentional misstatement) or fraud.[132]

A3. Uncorrected misstatements—Misstatements, other than those that are clearly trivial,[133] that management has not corrected.

APPENDIX B—Qualitative Factors Related to the Evaluation of the Materiality of Uncorrected Misstatements

B1. Paragraph 17 of this standard states: The auditor should evaluate whether uncorrected misstatements are material, individually or in combination with other misstatements. In making this evaluation, the auditor should evaluate the misstatements in relation to the specific accounts and disclosures involved and to the financial statements as a whole, taking into account relevant quantitative and qualitative factors.[134]

Note: In interpreting the federal securities laws, the Supreme Court of the United States has held that a fact is material if there is "a substantial likelihood that the * * * fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[135] As the Supreme Court has noted, determinations of materiality require "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him * * *"[136]

Note: As a result of the interaction of quantitative and qualitative considerations in materiality judgments, uncorrected misstatements of relatively small amounts could have a material effect on the financial statements. For example, an illegal payment of an otherwise immaterial amount could be material if there is a reasonable possibility[137] that it could lead to a material contingent liability or a material loss of revenue.[138] Also, a misstatement made intentionally could be material for qualitative reasons, even if relatively small in amount.

B2. Qualitative factors to consider in the auditor's evaluation of the materiality of uncorrected misstatements, if relevant, include the following:

a. The potential effect of the misstatement on trends, especially trends in profitability.

b. A misstatement that changes a loss into income or vice versa.

c. The effect of the misstatement on segment information, for example, the significance of the matter to a particular segment important to the future profitability of the company, the pervasiveness of the matter on the segment information, and the impact of the matter on trends in segment information, all in relation to the financial statements taken as a whole.

d. The potential effect of the misstatement on the company's compliance with loan covenants, other contractual agreements, and regulatory provisions.

e. The existence of statutory or regulatory reporting requirements that affect materiality thresholds.

f. A misstatement that has the effect of increasing management's compensation, for example, by satisfying the requirements for the award of bonuses or other forms of incentive compensation.

g. The sensitivity of the circumstances surrounding the misstatement, for example, the implications of misstatements involving fraud and possible illegal acts, violations of contractual provisions, and conflicts of interest.

h. The significance of the financial statement element affected by the misstatement, for example, a misstatement affecting recurring earnings as contrasted to one involving a non-recurring charge or credit, such as an extraordinary item.

i. The effects of misclassifications, for example, misclassification between operating and non-operating income or recurring and non-recurring income items.

j. The significance of the misstatement or disclosures relative to known user needs, for example:

- The significance of earnings and earnings per share to public company investors.
- The magnifying effects of a misstatement on the calculation of purchase price in a transfer of interests (buy/sell agreement).
- The effect of misstatements of earnings when contrasted with expectations.

k. The definitive character of the misstatement, for example, the precision of an error that is objectively determinable as contrasted with a misstatement that unavoidably involves a degree of subjectivity through estimation, allocation, or uncertainty.

l. The motivation of management with respect to the misstatement, for example, (i) an indication of a possible pattern of bias by management when developing and accumulating accounting estimates or (ii) a misstatement precipitated by management's continued unwillingness to correct weaknesses in the financial reporting process.

[130] Paragraphs 62–70 of Auditing Standard No. 5 discuss evaluating identified control deficiencies, and paragraphs 71–73 of Auditing Standard No. 5 discuss forming an opinion on the effectiveness of internal control over financial reporting.

[131] The auditor should look to the requirements of the Securities and Exchange Commission for the company under audit with respect to the accounting principles applicable to that company.

[132] Paragraph .02 of AU sec. 316, *Consideration of Fraud in a Financial Statement Audit.*

[133] Paragraph 10 of this standard states that, "[t]he auditor should accumulate misstatements identified during the audit, other than those that are clearly trivial."

[134] If the financial statements contain material misstatements, AU sec. 508, *Reports on Audited Financial Statements,* indicates that the auditor should issue a qualified or an adverse opinion on the financial statements. AU sec. 508.35 discusses situations in which the financial statements are materially affected by a departure from the applicable financial reporting framework.

[135] *TSC Industries v. Northway, Inc.,* 426 U.S. 438, 449 (1976). *See also Basic, Inc.* v. *Levinson,* 485 U.S. 224 (1988).

[136] *TSC Industries,* 426 U.S. at 450.

[137] There is a reasonable possibility of an event, as used in this standard, when the likelihood of the event is either "reasonably possible" or "probable," as those terms are used in the FASB Accounting Standards Codification, Contingencies Topic, paragraph 450–20–25–1.

[138] AU sec. 317, *Illegal Acts by Clients.*

m. The existence of offsetting effects of individually significant but different misstatements.
n. The likelihood that a misstatement that is currently immaterial may have a material effect in future periods because of a cumulative effect, for example, that builds over several periods.
o. The cost of making the correction—it may not be cost-beneficial for the client to develop a system to calculate a basis to record the effect of an immaterial misstatement. On the other hand, if management appears to have developed a system to calculate an amount that represents an immaterial misstatement, it may reflect a motivation of management as noted in paragraph B2.l above.
p. The risk that possible additional undetected misstatements would affect the auditor's evaluation.

APPENDIX C—Matters That Might Affect the Assessment of Fraud Risks

C1. If the following matters are identified during the audit, the auditor should take into account these matters in the evaluation of the assessment of fraud risks, as discussed in paragraph 28 of this standard:
a. Discrepancies in the accounting records, including:
(1) Transactions that are not recorded in a complete or timely manner or are improperly recorded as to amount, accounting period, classification, or company policy.
(2) Unsupported or unauthorized balances or transactions.
(3) Last-minute adjustments that significantly affect financial results.
(4) Evidence of employees' access to systems and records that is inconsistent with the access that is necessary to perform their authorized duties.
(5) Tips or complaints to the auditor about alleged fraud.
b. Conflicting or missing evidence, including:
(1) Missing documents.
(2) Documents that appear to have been altered.[139]
(3) Unavailability of other than photocopied or electronically transmitted documents when documents in original form are expected to exist.
(4) Significant unexplained items in reconciliations.
(5) Inconsistent, vague, or implausible responses from management or employees arising from inquiries or analytical procedures.
(6) Unusual discrepancies between the company's records and confirmation responses.
(7) Missing inventory or physical assets of significant magnitude.
(8) Unavailable or missing electronic evidence that is inconsistent with the company's record retention practices or policies.
(9) Inability to produce evidence of key systems development and program change testing and implementation activities for current year system changes and deployments.
(10) Unusual balance sheet changes or changes in trends or important financial statement ratios or relationships, e.g., receivables growing faster than revenues.
(11) Large numbers of credit entries and other adjustments made to accounts receivable records.
(12) Unexplained or inadequately explained differences between the accounts receivable subsidiary ledger and the general ledger control account, or between the customer statement and the accounts receivable subsidiary ledger.
(13) Missing or nonexistent cancelled checks in circumstances in which cancelled checks are ordinarily returned to the company with the bank statement.
(14) Fewer responses to confirmation requests than anticipated or a greater number of responses than anticipated.
c. Problematic or unusual relationships between the auditor and management, including:
(1) Denial of access to records, facilities, certain employees, customers, vendors, or others from whom audit evidence might be sought, including:[140]
a. Unwillingness to facilitate auditor access to key electronic files for testing through the use of computer-assisted audit techniques.
b. Denial of access to key information technology operations staff and facilities, including security, operations, and systems development.
(2) Undue time pressures imposed by management to resolve complex or contentious issues.
(3) Management pressure on engagement team members, particularly in connection with the auditor's critical assessment of audit evidence or in the resolution of potential disagreements with management.
(4) Unusual delays by management in providing requested information.
(5) Management's unwillingness to add or revise disclosures in the financial statements to make them more complete and transparent.
(6) Management's unwillingness to appropriately address significant deficiencies in internal control on a timely basis.
d. Other matters, including:
(1) Objections by management to the auditor meeting privately with the audit committee.
(2) Accounting policies that appear inconsistent with industry practices that are widely recognized and prevalent.
(3) Frequent changes in accounting estimates that do not appear to result from changing circumstances.
(4) Tolerance of violations of the company's code of conduct.

Auditing Standard No. 15

Audit Evidence

Introduction

1. This standard explains what constitutes audit evidence and establishes requirements regarding designing and performing audit procedures to obtain sufficient appropriate audit evidence.

2. Audit evidence is all the information, whether obtained from audit procedures or other sources, that is used by the auditor in arriving at the conclusions on which the auditor's opinion is based. Audit evidence consists of both information that supports and corroborates management's assertions regarding the financial statements or internal control over financial reporting and information that contradicts such assertions.

Objective

3. The objective of the auditor is to plan and perform the audit to obtain appropriate audit evidence that is sufficient to support the opinion expressed in the auditor's report.[141]

[139] Paragraph 9 of Auditing Standard No. 15, *Audit Evidence.*

[140] Denial of access to information might constitute a limitation on the scope of the audit that requires the auditor to qualify or disclaim an opinion. (*See* Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* and AU sec. 508, *Reports on Audited Financial Statements.*)

[141] Auditing Standard No. 14, *Evaluating Audit Results,* establishes requirements regarding evaluating whether sufficient appropriate evidence has been obtained. Auditing Standard No. 3, *Audit Documentation,* establishes requirements regarding documenting the procedures performed, evidence obtained, and conclusions reached in an audit.

Sufficient Appropriate Audit Evidence

4. The auditor must plan and perform audit procedures to obtain sufficient appropriate audit evidence to provide a reasonable basis for his or her opinion.

5. Sufficiency is the measure of the quantity of audit evidence. The quantity of audit evidence needed is affected by the following:

• *Risk of material misstatement (in the audit of financial statements) or the risk associated with the control (in the audit of internal control over financial reporting).* As the risk increases, the amount of evidence that the auditor should obtain also increases. For example, ordinarily more evidence is needed to respond to significant risks.[142]

• *Quality of the audit evidence obtained.* As the quality of the evidence increases, the need for additional corroborating evidence decreases. Obtaining more of the same type of audit evidence, however, cannot compensate for the poor quality of that evidence.

6. Appropriateness is the measure of the quality of audit evidence, i.e., its relevance and reliability. To be appropriate, audit evidence must be both relevant and reliable in providing support for the conclusions on which the auditor's opinion is based.

Relevance and Reliability

7. *Relevance.* The relevance of audit evidence refers to its relationship to the assertion or to the objective of the control being tested. The relevance of audit evidence depends on:

a. The design of the audit procedure used to test the assertion or control, in particular whether it is designed to (1) test the assertion or control directly and (2) test for understatement or overstatement; and

b. The timing of the audit procedure used to test the assertion or control.

8. *Reliability.* The reliability of evidence depends on the nature and source of the evidence and the circumstances under which it is obtained. For example, in general:

• Evidence obtained from a knowledgeable source that is independent of the company is more reliable than evidence obtained only from internal company sources.

• The reliability of information generated internally by the company is increased when the company's controls over that information are effective.

• Evidence obtained directly by the auditor is more reliable than evidence obtained indirectly.

• Evidence provided by original documents is more reliable than evidence provided by photocopies or facsimiles, or documents that have been filmed, digitized, or otherwise converted into electronic form, the reliability of which depends on the controls over the conversion and maintenance of those documents.

9. The auditor is not expected to be an expert in document authentication. However, if conditions indicate that a document may not be authentic or that the terms in a document have been modified but that the modifications have not been disclosed to the auditor, the auditor should modify the planned audit procedures or perform additional audit procedures to respond to those conditions and should evaluate the effect, if any, on the other aspects of the audit.

Using Information Produced by the Company

10. When using information produced by the company as audit evidence, the auditor should evaluate whether the information is sufficient and appropriate for purposes of the audit by performing procedures to:[143]

• Test the accuracy and completeness of the information, or test the controls over the accuracy and completeness of that information; and

• Evaluate whether the information is sufficiently precise and detailed for purposes of the audit.

Financial Statement Assertions

11. In representing that the financial statements are presented fairly in conformity with the applicable financial reporting framework, management implicitly or explicitly makes assertions regarding the recognition, measurement, presentation, and disclosure of the various elements of financial statements and related disclosures. Those assertions can be classified into the following categories:

• *Existence or occurrence*—Assets or liabilities of the company exist at a given date, and recorded transactions have occurred during a given period.

• *Completeness*—All transactions and accounts that should be presented in the financial statements are so included.

• *Valuation or allocation*—Asset, liability, equity, revenue, and expense components have been included in the financial statements at appropriate amounts.

• *Rights and obligations*—The company holds or controls rights to the assets, and liabilities are obligations of the company at a given date.

• *Presentation and disclosure*—The components of the financial statements are properly classified, described, and disclosed.

12. The auditor may base his or her work on financial statement assertions that differ from those in this standard if the assertions are sufficient for the auditor to identify the types of potential misstatements and to respond appropriately to the risks of material misstatement in each significant account and disclosure that has a reasonable possibility[144] of containing misstatements that would cause the financial statements to be materially misstated, individually or in combination with other misstatements.[145]

Audit Procedures for Obtaining Audit Evidence

13. Audit procedures can be classified into the following categories:

a. Risk assessment procedures,[146] and

b. Further audit procedures,[147] which consist of:

(1) Tests of controls, and

(2) Substantive procedures, including tests of details and substantive analytical procedures.

14. Paragraphs 15–21 of this standard describe specific audit procedures. The purpose of an audit procedure determines whether it is a risk assessment procedure, test of controls, or substantive procedure.

Inspection

15. Inspection involves examining records or documents, whether internal or external, in paper form, electronic form, or other media, or physically examining an asset. Inspection of records and documents provides audit evidence of varying degrees of reliability, depending on their nature and source and, in the case of internal records and documents, on the effectiveness of the controls over their

[142] Paragraph A5 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

[143] When using the work of a specialist engaged or employed by management, *see* AU sec. 336, *Using the Work of a Specialist.* When using information produced by a service organization or a service auditor's report as audit evidence, *see* AU sec. 324, *Service Organizations,* and for integrated audits, *see* Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

[144] There is a reasonable possibility of an event, as used in this standard, when the likelihood of the event is either "reasonably possible" or "probable," as those terms are used in the FASB Accounting Standards Codification, Contingencies Topic, paragraph 450–20–25–1.

[145] For an integrated audit, also *see* paragraph 28 of Auditing Standard No. 5.

[146] Auditing Standard No. 12.

[147] Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*

production. An example of inspection used as a test of controls is inspection of records for evidence of authorization.

Observation

16. Observation consists of looking at a process or procedure being performed by others, e.g., the auditor's observation of inventory counting by the company's personnel or the performance of control activities. Observation can provide audit evidence about the performance of a process or procedure, but the evidence is limited to the point in time at which the observation takes place and also is limited by the fact that the act of being observed may affect how the process or procedure is performed.[148]

Inquiry

17. Inquiry consists of seeking information from knowledgeable persons in financial or nonfinancial roles within the company or outside the company. Inquiry may be performed throughout the audit in addition to other audit procedures. Inquiries may range from formal written inquiries to informal oral inquiries. Evaluating responses to inquiries is an integral part of the inquiry process.[149]

Note: Inquiry of company personnel, by itself, does not provide sufficient audit evidence to reduce audit risk to an appropriately low level for a relevant assertion or to support a conclusion about the effectiveness of a control.

Confirmation

18. A confirmation response represents a particular form of audit evidence obtained by the auditor from a third party in accordance with PCAOB standards.[150]

Recalculation

19. Recalculation consists of checking the mathematical accuracy of documents or records. Recalculation may be performed manually or electronically.

Reperformance

20. Reperformance involves the independent execution of procedures or controls that were originally performed by company personnel.

Analytical Procedures

21. Analytical procedures consist of evaluations of financial information made by a study of plausible relationships among both financial and nonfinancial data. Analytical procedures also encompass the investigation of significant differences from expected amounts.[151]

Selecting Items for Testing to Obtain Audit Evidence

22. Designing substantive tests of details and tests of controls includes determining the means of selecting items for testing from among the items included in an account or the occurrences of a control. The auditor should determine the means of selecting items for testing to obtain evidence that, in combination with other relevant evidence, is sufficient to meet the objective of the audit procedure. The alternative means of selecting items for testing are:

- Selecting all items;
- Selecting specific items; and
- Audit sampling.

23. The particular means or combination of means of selecting items for testing that is appropriate depends on the nature of the audit procedure, the characteristics of the control or the items in the account being tested, and the evidence necessary to meet the objective of the audit procedure.

Selecting All Items

24. Selecting all items (100 percent examination) refers to testing the entire population of items in an account or the entire population of occurrences of a control (or an entire stratum within one of those populations). The following are examples of situations in which 100 percent examination might be applied:

- The population constitutes a small number of large value items;
- The audit procedure is designed to respond to a significant risk, and other means of selecting items for testing do not provide sufficient appropriate audit evidence; and
- The audit procedure can be automated effectively and applied to the entire population.

Selecting Specific Items

25. Selecting specific items refers to testing all of the items in a population that have a specified characteristic, such as:

- *Key items.* The auditor may decide to select specific items within a population because they are important to accomplishing the objective of the audit procedure or exhibit some other characteristic, e.g., items that are suspicious, unusual, or particularly risk-prone or items that have a history of error.
- *All items over a certain amount.* The auditor may decide to examine items whose recorded values exceed a certain amount to verify a large proportion of the total amount of the items included in an account.

26. The auditor also might select specific items to obtain an understanding about matters such as the nature of the company or the nature of transactions.

27. The application of audit procedures to items that are selected as described in paragraphs 25–26 of this standard does not constitute audit sampling, and the results of those audit procedures cannot be projected to the entire population.[152]

Audit Sampling

28. Audit sampling is the application of an audit procedure to less than 100 percent of the items within an account balance or class of transactions for the purpose of evaluating some characteristic of the balance or class.[153]

Inconsistency in, or Doubts about the Reliability of, Audit Evidence

29. If audit evidence obtained from one source is inconsistent with that obtained from another, or if the auditor has doubts about the reliability of information to be used as audit evidence, the auditor should perform the audit procedures necessary to resolve the matter and should determine the effect, if any, on other aspects of the audit.

Conforming Amendment to PCAOB Interim Quality Control Standards

Auditing Standards

AU sec. 110, "*Responsibilities and Functions of the Independent Auditor*"

Statement on Auditing Standards ("SAS") No. 1, "Codification of Auditing Standards and Procedures" section 110, "Responsibilities and Functions of the Independent Auditor" (AU sec. 110, "Responsibilities and Functions of the Independent Auditor"), as amended, is amended as follows: Within footnote 1 to paragraph .02, the reference to section 312, *Audit Risk and Materiality in Conducting an Audit,* is replaced with a reference to Auditing Standard No. 11, *Consideration of Materiality in Planning and Performing an Audit.*

AU sec. 150, "*Generally Accepted Auditing Standards*"

[148] AU sec. 331, *Inventories,* establishes requirements regarding observation of the counting of inventory.

[149] AU sec. 333, *Management Representations,* establishes requirements regarding written management representations, including confirmation of management responses to oral inquiries.

[150] AU sec. 330, *The Confirmation Process.*

[151] AU sec. 329, *Substantive Analytical Procedures,* establishes requirements on performing analytical procedures as substantive procedures.

[152] If misstatements are identified in the selected items, *see* paragraphs 12–13 and paragraphs 17–19 of Auditing Standard No. 14.

[153] AU sec. 350, *Audit Sampling,* establishes requirements regarding audit sampling.

SAS No. 95, "Generally Accepted Auditing Standards" (AU sec. 150, "Generally Accepted Auditing Standards"), as amended, is amended as follows:

a. Within paragraph .02, in the third standard of field work, the word "competent" is replaced with the word "appropriate."

b. Footnote 2 to paragraph .04 is deleted.

AU sec. 210, "*Training and Proficiency of the Independent Auditor*"

SAS No. 1, "Codification of Auditing Standards and Procedures" section 210, "Training and Proficiency of the Independent Auditor" (AU sec. 210, "Training and Proficiency of the Independent Auditor"), as amended, is amended as follows:

The last sentence of paragraph .03 is replaced with: The engagement partner must exercise seasoned judgment in the varying degrees of his supervision and review of the work done and judgments exercised by his subordinates, who in turn must meet the responsibilities attaching to the varying gradations and functions of their work.

AU sec. 230, "*Due Professional Care in the Performance of Work*"

SAS No. 1, "Codification of Auditing Standards and Procedures" section 230, "Due Professional Care in the Performance of Work" (AU sec. 230, "Due Professional Care in the Performance of Work"), as amended, is amended as follows:

a. The second and third sentences of paragraph .06 are replaced with: The engagement partner should know, at a minimum, the relevant professional accounting and auditing standards and should be knowledgeable about the client. The engagement partner is responsible for the assignment of tasks to, and supervision of, the members of the engagement team.[fn4]

b. Footnote 3 to paragraph .06 is deleted.

c. Within footnote 4 to paragraph .06, the phrase "See section 311.11" is replaced with, "See Auditing Standard No. 10, *Supervision of the Audit Engagement*."

d. Footnote 6 to paragraph .11 is deleted.

e. In the first sentence of paragraph .11, the word "competent" is replaced with the word "appropriate."

f. At the end of the fifth sentence of paragraph .12, the following parenthetical is added: "(See paragraph 9 of Auditing Standard No. 15, *Audit Evidence.*)"

AU sec. 310, "*Appointment of the Independent Auditor*"

SAS No. 1, "Codification of Auditing Standards and Procedures" section 310, "Appointment of the Independent Auditor" (AU sec. 310, "Appointment of the Independent Auditor"), as amended, is amended as follows:

a. Within footnote ** to the title of the standard, the sentence "(See section 313.)" is deleted.

b. Paragraph .02 is replaced with: Audit planning is discussed in Auditing Standard No. 9, *Audit Planning,* and supervision of engagement team members is discussed in Auditing Standard No. 10, *Supervision of the Audit Engagement.*

c. In paragraph .03, the sentence "(See section 313)" is deleted.

d. Within footnote 3 to paragraph .06, the reference to Section 312, *Audit Risk and Materiality in Conducting an Audit,* paragraph .04, is replaced with a reference to Paragraph A2 of Auditing Standard No. 14, *Evaluating Audit Results.*

AU sec. 311, "*Planning and Supervision*"

SAS No. 22, "Planning and Supervision" (AU sec. 311, "Planning and Supervision"), as amended, is superseded.

AU sec. 9311, "*Planning and Supervision: Auditing Interpretations of Section 311*"

AU sec. 9311, "Planning and Supervision: Auditing Interpretations of Section 311", as amended, is superseded.

AU sec. 312, "*Audit Risk and Materiality in Conducting an Audit*"

SAS No. 47, "Audit Risk and Materiality in Conducting an Audit" (AU sec. 312, "Audit Risk and Materiality in Conducting an Audit"), as amended, is superseded.

AU sec. 9312, "*Audit Risk and Materiality in Conducting an Audit: Auditing Interpretations of Section 312*"

AU sec. 9312, "Audit Risk and Materiality in Conducting an Audit: Auditing Interpretations of Section 312" is superseded.

AU sec. 313, "*Substantive Tests Prior to the Balance Sheet Date*"

SAS No. 45, "Omnibus Statement on Auditing Standards—1983" (AU sec. 313, "Substantive Tests Prior to the Balance Sheet Date"), as amended, is superseded.

AU sec. 315, "*Communications Between Predecessor and Successor Auditors*"

SAS No. 84, "Communications Between Predecessor and Successor Auditors" (AU sec. 315, "Communications Between Predecessor and Successor Auditors"), as amended, is amended as follows:

a. In the first sentence of paragraph .12, the word "competent" is replaced with the word "appropriate."

b. In the first sentence of paragraph .18, the word "competent" is replaced with the word "appropriate."

AU sec. 316, "*Consideration of Fraud in a Financial Statement Audit*"

SAS No. 99, "Consideration of Fraud in a Financial Statement Audit" (AU sec. 316, "Consideration of Fraud in a Financial Statement Audit"), as amended, is amended as follows:

a. The second sentence of paragraph .01 is replaced with: This section establishes requirements and provides direction relevant to fulfilling that responsibility, as it relates to fraud, in an audit of financial statements.[fn2]

b. In footnote 1 to paragraph .01, delete the following information: (see section 312, *Audit Risk and Materiality in Conducting an Audit,*" and the closing parenthesis at the end of that sentence.

c. Footnote 2 to paragraph .01 is replaced with: For purposes of this standard, the term "audit of financial statements" refers to the financial statement portion of the integrated audit and to the audit of financial statements only.

d. The following paragraph .01A is added: Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* establishes requirements regarding the process of identifying and assessing risks of material misstatement of the financial statements. Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement,* establishes requirements regarding designing and implementing appropriate responses to the risks of material misstatement. Auditing Standard No. 14, *Evaluating Audit Results,* establishes requirements regarding the auditor's evaluation of audit results and determination of whether he or she has obtained sufficient appropriate audit evidence.

e. In paragraph .02:

- The third through the sixth bullet points are deleted.
- The seventh bullet point is replaced with: *Responding to fraud risks*

This section discusses certain responses to fraud risks involving the nature, timing, and extent of audit procedures, including:

○ Responses to assessed fraud risks relating to fraudulent financial reporting and misappropriation of assets (see paragraphs .52 through .56).

○ Responses to specifically address the fraud risks arising from management override of internal controls (see paragraphs .57 through .67).

- The eighth bullet point is deleted.

f. Paragraph .03 is deleted.

g. Footnote 5 to paragraph .06 is replaced with: The auditor should look

to the requirements of the Securities and Exchange Commission for the company under audit with respect to accounting principles applicable to that company.

h. In the third sentence of paragraph .13, the term "the risk of material misstatement due to fraud" is replaced with the term "fraud risks."

i. Paragraphs .14 through .45 are deleted, along with the preceding heading, "Discussion Among Engagement Personnel Regarding the Risks of Material Misstatement Due to Fraud."

j. Footnotes 8 through 19 related to paragraphs .14 through .45 are deleted.

k. Paragraphs .46 through .50 are deleted. The heading preceding paragraph .46, "Responding to the Results of the Assessment," is replaced with the heading "Responding to Assessed Fraud Risks."

l. Paragraph .51 is deleted. The heading preceding paragraph .51, "Responses Involving the Nature, Timing, and Extent of Procedures to Be Performed to Address the Identified Risks," is replaced with the heading "Responses Involving the Nature, Timing, and Extent of Procedures to Be Performed."

m. Paragraph .52 is replaced with: Paragraph 8 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement,* states that "[t]he auditor should design and perform audit procedures in a manner that addresses the assessed risks of material misstatement due to error or fraud for each relevant assertion of each significant account and disclosure." Paragraph 12 of Auditing Standard No. 13 states that "the audit procedures that are necessary to address the assessed fraud risks depend upon the types of risks and the relevant assertions that might be affected."

Note: Paragraph 71.b. of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* states that a fraud risk is a significant risk. Accordingly, the requirement for responding to significant risks also applies to fraud risks.

n. In paragraph .53:

- The first sentence is replaced with: The following are examples of responses to assessed fraud risks involving the nature, timing, and extent of audit procedures:
- The fifth bullet point is replaced with: Interviewing personnel involved in activities in areas in which a fraud risk has been identified to obtain their insights about the risk and how controls address the risk. (See paragraph 54 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement*)
- In the sixth bullet point, the term "risk of material misstatement due to fraud" is replaced with the term "fraud risk."

o. Footnote 20 to paragraph .53 is replaced with: AU sec. 329, *Substantive Analytical Procedures,* establishes requirements regarding performing analytical procedures as substantive tests.

p. The heading preceding paragraph .54, "Additional Examples of Responses to Identified Risks of Misstatements Arising From Fraudulent Financial Reporting," is replaced with the heading "Additional Examples of Audit Procedures Performed to Respond to Assessed Fraud Risks Relating to Fraudulent Financial Reporting."

q. The first sentence in paragraph .54 is replaced with: The following are additional examples of audit procedures that might be performed in response to assessed fraud risks relating to fraudulent financial reporting:

r. In paragraph .54:

- In the last sentence of the first bullet point, the term "risk of material misstatement due to fraud" is replaced with the term "fraud risk."
- In the first sentence of the second bullet point, the term "risk of material misstatement due to fraud" is replaced with the term "fraud risk."
- In the first sentence of the third bullet point and the accompanying paragraph to the third bullet point, the term "risk of material misstatement due to fraud" is replaced with the term "fraud risk."

s. Footnotes 21 and 22 to paragraph .54 are amended as follows:

- The text of footnote 21 is replaced with "AU sec. 330, *The Confirmation Process,* establishes requirements regarding the confirmation process in audits of financial statements."
- The text of footnote 22 is replaced with "AU sec. 336, *Using the Work of a Specialist,* establishes requirements for an auditor who uses the work of a specialist in performing an audit of financial statements."

t. The heading preceding paragraph .55, "Examples of Responses to Identified Risks of Misstatements Arising From Misappropriations of Assets," is replaced with the heading "Examples of Audit Procedures Performed to Respond to Fraud Risks Relating to Misappropriations of Assets."

u. In the first sentence of paragraph .55, the term "risk of material misstatement due to fraud" is replaced with the term "fraud risk."

v. In paragraph .56:

- The first and second sentences are replaced with: The audit procedures performed in response to a fraud risk relating to misappropriation of assets usually will be directed toward certain account balances. Although some of the audit procedures noted in paragraphs .53 and .54 and in paragraphs 8 through 15 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement,* may apply in such circumstances, such as the procedures directed at inventory quantities, the scope of the work should be linked to the specific information about the misappropriation risk that has been identified.
- In the third sentence, the words "design and" are added before the words "operating effectiveness."

w. The heading preceding paragraph .57, "Responses to Further Address the Risk of Management Override of Controls," is replaced with the heading "Audit Procedures Performed to Specifically Address the Risk of Management Override of Controls."

x. The third sentence of paragraph .57 is replaced with: Accordingly, as part of the auditor's responses that address fraud risks, the procedures described in paragraphs .58 through .67 should be performed to specifically address the risk of management override of controls.

y. Footnote 23 to paragraph .58 is replaced with: See paragraphs 28 through 32 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

z. In paragraph .61:

- In the first sentence of the first bullet point, the term "the risk of material misstatement due to fraud" is replaced with the term "fraud risk."
- In the second bullet point, the last two sentences are replaced with the following: Effective controls over the preparation and posting of journal entries and adjustments may affect the extent of substantive testing necessary, provided that the auditor has tested the controls. However, even though controls might be implemented and operating effectively, the auditor's substantive procedures for testing journal entries and other adjustments should include the identification and substantive testing of specific items.
- In item (f) of the fifth bullet point, the term "risk of material misstatement due to fraud" is replaced with the term "fraud risk."
- The last sentence of the fifth bullet point is replaced with: In audits of entities that have multiple locations or business units, the auditor should determine whether to select journal entries from locations based on factors set forth in paragraphs 11 through 14 of

Auditing Standard No. 9, *Audit Planning.*

aa. The last sentence of paragraph .63 is replaced with: Paragraphs 24 through 27 of Auditing Standard No. 14, *Evaluating Audit Results,* discuss the auditor's responsibilities for assessing bias in accounting estimates and the effect of bias on the financial statements.

bb. Paragraphs .68 through .78 are deleted, along with the preceding heading "Evaluating Audit Evidence."

cc. Footnotes 26 through 36 related to paragraphs .68 through .78 are deleted.

dd. In the first sentence of paragraph .80, the term "risks of material misstatement due to fraud" is replaced with the term "fraud risks."

ee. The last sentence of paragraph .80 is replaced with: The auditor also should evaluate whether the absence of or deficiencies in controls that address fraud risks or otherwise help prevent, deter, and detect fraud (see paragraphs 72–73 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement*) represent significant deficiencies or material weaknesses that should be communicated to senior management and the audit committee.

ff. The first sentence of paragraph .81 is replaced with: The auditor also should consider communicating other fraud risks, if any, identified by the auditor.

gg. In paragraph .83:

- The reference in the first bullet point to paragraphs .14 through .17 is replaced with a reference to paragraphs 52 and 53 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*
- The term "risks of material misstatement due to fraud" in the first sentence of the second bullet point is replaced with the term "fraud risks." The reference in the second bullet point to paragraphs .19 through .34 is replaced with references to paragraph 47, paragraphs 56 through 58, and paragraphs 65 through 69 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*
- The third bullet point is replaced with: The fraud risks that were identified at the financial statement and assertion levels (see paragraphs 59 through 69 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement*), and the linkage of those risks to the auditor's response (see paragraphs 5 through 15 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement*).
- Within the fourth bullet point, the term "risk of material misstatement due to fraud" in the first sentence is replaced with the term "fraud risk," and the reference to paragraph .41 is replaced with a reference to paragraph 68 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*
- The fifth bullet point is replaced with: The results of the procedures performed to address the assessed fraud risks, including those procedures performed to further address the risk of management override of controls (See paragraph 15 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatements.*)
- The reference in the sixth bullet point to paragraphs .68 through .73 is replaced with a reference to paragraphs 5 through 9 of Auditing Standard No. 14, *Evaluating Audit Results.*

hh. Paragraph .84 and the heading preceding this paragraph, "Effective Date," are deleted.

ii. The first sentence of paragraph .85 is replaced with: This appendix contains examples of risk factors discussed in paragraphs 65 through 69 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

AU sec. 317, "*Illegal Acts by Clients*"

SAS No. 54, "Illegal Acts by Clients" (AU sec. 317, "Illegal Acts by Clients") is amended as follows:

a. The last sentence of paragraph .13 is replaced with: For example, an illegal payment of an otherwise immaterial amount could be material if there is a reasonable possibility that it could lead to a material contingent liability or a material loss of revenue.

b. In paragraph .19, the word "competent" is replaced with the word "appropriate."

AU sec. 319, "*Consideration of Internal Control in a Financial Statement Audit*"

SAS No. 55, "Consideration of Internal Control in a Financial Statement Audit" (AU sec. 319, "Consideration of Internal Control in a Financial Statement Audit"), as amended, is superseded.

AU sec. 322, "*The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements*"

SAS No. 65, "The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements" (AU sec. 322, "The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements"), as amended, is amended as follows:

a. In the first sentence of paragraph .02, the word "competent" is replaced with the word "appropriate."

b. Footnote 3 to paragraph .04, is replaced with: Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* describes the procedures the auditor performs to obtain an understanding of internal control over financial reporting.

c. In the first sentence of paragraph .18, the word "competent" is replaced with the word "appropriate."

d. Within footnote 5 to paragraph .18, the reference to section 326, *Evidential Matter,* paragraph .19c. is replaced with a reference to paragraph 8 of Auditing Standard No. 15, *Audit Evidence.*

e. Within footnote 8 to paragraph .27, the reference to section 311, *Planning and Supervision,* paragraphs .11 through .14 is replaced with a reference to Auditing Standard No. 10, *Supervision of the Audit Engagement.*

AU sec. 324, "*Service Organizations*"

SAS No. 70, "Service Organizations" (AU sec. 324, "Service Organizations"), as amended, is amended as follows:

a. In the first sentence of paragraph .07, the reference to Section 319, *Consideration of Internal Control in a Financial Statement Audit,* is replaced with a reference to Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

b. In the first sentence of paragraph .16, the reference to section 319.90 through .99 is replaced with a reference to paragraph 18 and paragraphs 29 through 31 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*

c. In the second sentence of paragraph .23, the reference to section 312, *Audit Risk and Materiality in Conducting an Audit,* is replaced with a reference to Auditing Standard No. 14, *Evaluating Audit Results.*

AU sec. 326, "*Evidential Matter*"

SAS No. 31, "Evidential Matter" (AU sec. 326, "Evidential Matter"), as amended, is superseded.

AU sec. 9326, "*Evidential Matter: Auditing Interpretations of Section 326*"

AU sec. 9326, "Evidential Matter: Auditing Interpretations of Section 326," as amended, is amended as follows:

a. Paragraphs .01–.05 are deleted, along with the preceding heading "1. Evidential Matter for an Audit of Interim Financial Statements."

b. The reference in paragraph .10 to Section 326, *Evidential Matter,* paragraph .25, is replaced with a reference to Paragraph 35 of Auditing Standard No. 14, *Evaluating Audit Results.*

c. In the first and second sentences of paragraph .10, the word "competent" is replaced with the word "appropriate."

d. In the second sentence of paragraph .12, the word "competent" is replaced with the word "appropriate."

e. The last two sentences of paragraph .12 are deleted.

f. In the first sentence of paragraph .13, the word "competent" is replaced with the word "appropriate."

g. In paragraph .17, the word "competent" is replaced with the word "appropriate."

h. In the second sentence of paragraph .21, the word "competent" is replaced with the word "appropriate."

i. In the fourth sentence of paragraph .22, the word "competent" is replaced with the word "appropriate."

j. In paragraph .23, the word "competent" is replaced with the word "appropriate."

k. Paragraphs .24–.41 are deleted, along with the headings "3. The Auditor's Consideration of the Completeness Assertion" and "4. Applying Auditing Procedures to Segment Disclosures in Financial Statements."

AU sec. 328, "*Auditing Fair Value Measurements and Disclosures*"

SAS No. 101, "Auditing Fair Value Measurements and Disclosures" (AU sec. 328, "Auditing Fair Value Measurements and Disclosures"), as amended, is amended as follows:

a. In the first sentence of paragraph .03, the word "competent" is replaced with the word "appropriate."

b. The phrase in paragraph .11 "Section 319, *Consideration of Internal Control in a Financial Statement Audit,* as amended," is replaced with "Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,*"

c. The reference in paragraph .14 to Section 319 is replaced with a reference to Paragraph A5, second note of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

d. In the second sentence of paragraph .14, the reference "(see section 316, *Consideration of Fraud in a Financial Statement Audit*" is deleted.

e. Within paragraph .25, in the second sentence of the second bullet point and in the first sentence in the third bullet point, the word "competent" is replaced with the word "appropriate."

f. In the second sentence of paragraph .32, the word "competent" is replaced with the word "appropriate."

g. In the first sentence of paragraph .42, the word "competent" is replaced with the word "appropriate."

h. In footnote 8 to paragraph .43, the reference to section 431, *Adequacy of Disclosure in Financial Statements,* is replaced with a reference to "paragraph 31 of Auditing Standard No. 14, *Evaluating Audit Results.*"

i. In the second sentence of paragraph .44, the word "competent" is replaced with the word "appropriate."

j. The reference in paragraph .47 to section 312, *Audit Risk and Materiality in Conducting an Audit,* paragraphs .36 through .41, is replaced with a reference to paragraphs 12 through 18 and 24 through 27 of Auditing Standard No. 14, *Evaluating Audit Results.*

AU sec. 329, "*Analytical Procedures*"

SAS No. 56, "Analytical Procedures" (AU sec. 329, "Analytical Procedures"), as amended, is amended as follows:

a. The title of the standard, "Analytical Procedures," is replaced with the title, "Substantive Analytical Procedures."

b. The text of paragraph .01 is replaced with: This section establishes requirements regarding the use of substantive analytical procedures in an audit.

Note: Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* establishes requirements regarding performing analytical procedures as a risk assessment procedure in identifying and assessing risks of material misstatement.

Note: Auditing Standard No. 14, *Evaluating Audit Results,* establishes requirements regarding performing analytical procedures as part of the overall review stage of the audit.

c. The last sentence of paragraph .03 is deleted.

d. The text of paragraph .04 is replaced with: Analytical procedures are used as a substantive test to obtain evidential matter about particular assertions related to account balances or classes of transactions. In some cases, analytical procedures can be more effective or efficient than tests of details for achieving particular substantive testing objectives.

e. Paragraphs .06–.08 and the preceding heading, "Analytical Procedures in Planning the Audit," are deleted.

f. At the end of paragraph .09, the following new sentence is added: (See paragraph 11 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*)

g. Within footnote 1 to paragraph .09, the reference to section 326, *Evidential Matter,* is replaced with a reference to Auditing Standard No. 15, *Audit Evidence.*

h. Footnote 2 to paragraph .20 is deleted.

i. In paragraph .21:

- In the fourth sentence, the word "likely" is deleted.
- The reference to section 316, *Consideration of Fraud in a Financial Statement Audit,* is replaced with a reference to Auditing Standard No. 14, *Evaluating Audit Results.*

j. Footnote 3 to paragraph .21 is deleted.

k. Paragraph .23 and the preceding heading, "Analytical Procedures Used in the Overall Review," and paragraph .24 and the preceding heading, "Effective Date," are deleted.

AU sec. 330, "*The Confirmation Process*"

SAS No. 67, "The Confirmation Process" (AU sec. 330, "The Confirmation Process"), is amended as follows:

a. The references in paragraph .02 to section 312, *Audit Risk and Materiality in Conducting an Audit,* and section 313, *Substantive Tests Prior to the Balance-Sheet Date,* are replaced with a reference to Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*

b. The reference in paragraph .05 to Section 312 is replaced with a reference to Auditing Standard No. 8, *Audit Risk.*

c. The second sentence of paragraph .06 is replaced with: See paragraph 8 of Auditing Standard No. 15, *Audit Evidence,* which discusses the reliability of audit evidence.

d. In the first sentence of paragraph .11, the word "competent" is replaced with the word "appropriate."

e. In the third sentence of paragraph .11, the reference to Section 326 is replaced with a reference to Auditing Standard No. 15, *Audit Evidence.*

f. In the first sentence of paragraph .24, the word "competence" is replaced with the word "appropriateness."

g. In the last sentence of paragraph .27, the word "competent" is replaced with the word "appropriate."

AU sec. 332, "*Auditing Derivative Instruments, Hedging Activities, and Investments in Securities*"

SAS No. 92, "Auditing Derivative Instruments, Hedging Activities, and Investment in Securities" (AU sec. 332, "Auditing Derivative Instruments, Hedging Activities, and Investments in Securities"), as amended, is amended as follows:

a. The reference in paragraph .01 to section 326, *Evidential Matter,* paragraphs .03–.08, is replaced with a reference to paragraphs 11 and 12 of Auditing Standard No. 15, *Audit Evidence.*

b. Paragraph .06 is replaced with: Auditing Standard No. 9, *Audit Planning,* discusses the auditor's responsibilities for consideration of the use of persons with specialized skill or knowledge. Auditing Standard No. 10,

Supervision of the Audit Engagement, discusses the auditor's responsibilities for supervision of specialists who are employed by the auditor. AU sec. 336, *Using the Work of a Specialist,* discusses the auditor's responsibilities for using the work of a specialist engaged by the auditor.

c. The first and second sentences of paragraph .07 are deleted. The third sentence is replaced with:

The auditor should design and perform audit procedures regarding relevant assertions of derivatives and investments in securities that are based on and that address the risks of material misstatement in those assertions.

d. The reference in paragraph .09 to Section 319, *Consideration of Internal Control in a Financial Statement Audit,* is replaced with a reference to Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

e. The fourth sentence of paragraph .11 is replaced with "Paragraphs 28 through 32 and B1 through B6 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* discuss the information system, including related business processes, relevant to financial reporting."

f. In paragraph .15, the reference to section 319 is replaced with a reference to Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

g. The last sentence of paragraph .35 is replaced with: In addition, paragraphs 24 through 27 of Auditing Standard No. 14, *Evaluating Audit Results,* describe the auditor's responsibilities for assessing bias in accounting estimates.

h. In paragraph .43, subparagraph a., the word "competent" is replaced with the word "appropriate."

i. In paragraph .51, the last sentence is replaced with: (See paragraph 31 of Auditing Standard No. 14, *Evaluating Audit Results.*)

j. In paragraph .57, subparagraph c., the word "competent" is replaced with the word "appropriate."

AU sec. 333, "*Management Representations*"

SAS No. 85, "Management Representations" (AU sec. 333, "Management Representations"), as amended, is amended as follows:

a. Footnote 4 to paragraph .06 is replaced with: Auditing Standard No. 14, *Evaluating Audit Results,* indicates that a misstatement can arise from error or fraud and also discusses the auditor's responsibilities for evaluating accumulated misstatements.

b. Within footnote 6 to paragraph .06, the reference to Section 312 is replaced with a reference to Paragraph 11 of Auditing Standard No. 14, *Evaluating Audit Results.*

c. Within footnote 7 to paragraph .06, the reference to section 316, *Consideration of Fraud in a Financial Statement Audit,* paragraphs .38 through .40, is replaced with a reference to section 316, *Consideration of Fraud in a Financial Statement Audit,* paragraphs .79 through .82.

AU sec. 334, "*Related Parties*"

SAS No. 45, "Related Parties" (AU sec. 334 "Related Parties"), is amended as follows:

a. In the second sentence of paragraph .09, the word "competent" is replaced with the word "appropriate."

b. In the first sentence of paragraph .11, the word "competent" is replaced with the word "appropriate."

c. In footnote 8 to paragraph .11, the reference to section 431, *Adequacy of Disclosure in Financial Statements,* is replaced with a reference to paragraph 31 of Auditing Standard No. 14, *Evaluating Audit Results.*

AU sec. 9334, "*Related Parties: Auditing Interpretations of Section 334*"

AU sec. 9334, "Related Parties: Auditing Interpretations of Section 334," is amended as follows: Within footnote 4 to paragraph .17, the reference to section 312, *Audit Risk and Materiality in Conducting an Audit,* is replaced with a reference to Auditing Standard No. 8, *Audit Risk.*

AU sec. 336, "*Using the Work of a Specialist*"

SAS No. 73, "Using the Work of a Specialist" (AU sec. 336, "Using the Work of a Specialist"), is amended as follows:

a. Footnote 1 to paragraph .01 is replaced with the following: Because income taxes and information technology are specialized areas of accounting and auditing, this section does not apply to situations in which an income tax specialist or information technology specialist participates in the audit. Auditing Standard No. 10, *Supervision of the Audit Engagement,* applies in those situations.

b. Paragraph .05 is replaced with the following: This section does not apply to situations in which a specialist employed by the auditor's firm participates in the audit. Auditing Standard No. 10, *Supervision of the Audit Engagement,* applies in those situations.

c. In the last sentence of paragraph .06, the word "competent" is replaced with the word "appropriate."

d. In the first and last sentences of paragraph .13, the word "competent" is replaced with the word "appropriate."

AU sec. 9336, "*Using the Work of a Specialist: Auditing Interpretations of Section 336*"

AU sec. 9336, "Using the Work of a Specialist: Auditing Interpretations of Section 336," is amended as follows:

a. In the second sentence of paragraph .04, the word "competent" is replaced with the word "appropriate."

b. In paragraph .05, the word "competent" is replaced with the word "appropriate."

c. In the second sentence of paragraph .11, the word "competent" is replaced with the word "appropriate."

d. The penultimate sentence of paragraph .15, is replaced with: Paragraph 6 of Auditing Standard No. 15, *Audit Evidence,* states, "[t]o be appropriate, audit evidence must be both relevant and reliable in providing support for the conclusions on which the auditor's opinion is based."

AU sec. 341, "The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern"

SAS No. 59, "The Auditor's Consideration of an Entity's Ability to Continue as Going Concern" (AU sec. 341, "The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern"), as amended, is amended as follows: The reference in paragraph .02 to section 326, *Evidential Matter,* is replaced with a reference to Auditing Standard No. 15, *Audit Evidence.*

AU sec. 342, "Auditing Accounting Estimates"

SAS No. 57, "Auditing Accounting Estimates" (AU sec. 342, "Auditing Accounting Estimates"), as amended, is amended as follows:

a. In the first sentence of paragraph .01, the word "competent" is replaced with the word "appropriate."

b. In the first sentence of paragraph .07, the word "competent" is replaced with the word "appropriate."

c. The text of footnote 3 to paragraph .07 is replaced with: See paragraph 31 of Auditing Standard No. 14, *Evaluating Audit Results.*

d. The reference in paragraph .08 subparagraph b.1. to section 311, *Planning and Supervision,* is replaced with a reference to Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

e. Paragraph .14, is replaced with: Paragraphs 24 through 27 of Auditing Standard No. 14, *Evaluating Audit Results,* discuss the auditor's responsibilities for assessing bias and evaluating accounting estimates in relationship to the financial statements taken as a whole.

AU sec. 9342, "Auditing Accounting Estimates: Auditing Interpretations of Section 342"

AU sec. 9342, "Auditing Accounting Estimates: Auditing Interpretations of Section 342," is amended as follows: In the second sentence of paragraph .02, the word "competent" is replaced with the word "appropriate."

AU sec. 350, "Audit Sampling"

SAS No. 39, "Audit Sampling" (AU sec. 350, "Audit Sampling"), as amended, is amended as follows:

a. Within footnote 2 to paragraph .02, the reference to section 312, *Audit Risk and Materiality in Conducting an Audit,* is replaced with a reference to Auditing Standard No. 14, *Evaluating Audit Results.*

b. The last sentence of paragraph .03 is replaced with: Either approach to audit sampling can provide sufficient evidential matter when applied properly. This section applies to both nonstatistical and statistical sampling.

c. Paragraph .04 is deleted.

d. In paragraph .06:

• The first sentence is deleted.

• In the last sentence, the word "competence" is replaced with the word "appropriateness."

• The following note is added to the paragraph:

Note: Auditing Standard No. 15, *Audit Evidence,* discusses the appropriateness of audit evidence, and Auditing Standard No. 14, *Evaluating Audit Results,* discusses the auditor's responsibilities for evaluating the sufficiency and appropriateness of audit evidence.

e. Paragraph .08 is deleted.

f. In paragraph .09:

• The sentence in paragraph .09 referring to section 313, which is in parentheses, is deleted.

• The following note is added to the paragraph:

Note: Auditing Standard No. 8, *Audit Risk,* describes audit risk and its components in a financial statement audit—the risk of material misstatement (consisting of inherent risk and control risk) and detection risk.

g. In paragraph .11:

• The phrase "(see section 311, *Planning and Supervision*)" is deleted.

• The sentence "(See section 313.)" is deleted.

h. The second sentence of paragraph .15 is replaced with: See Auditing Standard No. 9, *Audit Planning.*

i. In the first bullet in paragraph .16, the phrase "(see section 326, *Evidential Matter*)" is deleted.

j. In the second bullet of paragraph .16, the phrase "Preliminary judgments about materiality levels" is replaced with the phrase "Tolerable misstatement. (See paragraphs .18–18A.)"

k. Paragraph .18 is replaced with: Evaluation in monetary terms of the results of a sample for a substantive test of details contributes directly to the auditor's purpose, since such an evaluation can be related to his or her judgment of the monetary amount of misstatements that would be material. When planning a sample for a substantive test of details, the auditor should consider how much monetary misstatement in the related account balance or class of transactions may exist, in combination with other misstatements, without causing the financial statements to be materially misstated. This maximum monetary misstatement for the account balance or class of transactions is called *tolerable misstatement.*

l. Paragraph .18A is added: Paragraphs 8–9 of Auditing Standard No. 11, *Consideration of Materiality in Planning and Performing an Audit,* describe the auditor's responsibilities for determining tolerable misstatement at the account or disclosure level. When the population to be sampled constitutes a portion of an account balance or transaction class, the auditor should determine tolerable misstatement for the population to be sampled for purposes of designing the sampling plan. Tolerable misstatement for the population to be sampled ordinarily should be less than tolerable misstatement for the account balance or transaction class to allow for the possibility that misstatement in the portion of the account or transaction class not subject to audit sampling, individually or in combination with other misstatements, would cause the financial statements to be materially misstated.

m. Paragraph .20 is deleted.

n. The first sentence of paragraph .21 is replaced with the following sentence: The sufficiency of tests of details for a particular account balance or class of transactions is related to the individual importance of the items examined as well as to the potential for material misstatement.

o. Paragraph .23 is replaced with: To determine the number of items to be selected in a sample for a particular substantive test of details, the auditor should take into account tolerable misstatement for the population; the allowable risk of incorrect acceptance (based on the assessments of inherent risk, control risk, and the detection risk related to the substantive analytical procedures or other relevant substantive tests); and the characteristics of the population, including the expected size and frequency of misstatements.

p. Paragraph .23A is added: Table 1 of the Appendix describes the effects of the factors discussed in the preceding paragraph on sample sizes in a statistical or nonstatistical sampling approach. When circumstances are similar, the effect on sample size of those factors should be similar regardless of whether a statistical or nonstatistical approach is used. Thus, when a nonstatistical sampling approach is applied properly, the resulting sample size ordinarily will be comparable to, or larger than, the sample size resulting from an efficient and effectively designed statistical sample.

q. The last sentence of paragraph .25 is replaced with: The auditor also should evaluate whether the reasons for his or her inability to examine the items have (a) implications in relation to his or her risk assessments (including the assessment of fraud risk), (b) implications regarding the integrity of management or employees, and (c) possible effects on other aspects of the audit.

r. Footnote 6 to paragraph .26 is replaced with: Paragraphs 10 through 23 of Auditing Standard No. 14, *Evaluating Audit Results,* discuss the auditor's consideration of differences between the accounting records and the underlying facts and circumstances.

s. Within footnote 7 to paragraph .32, the phrase "(see section 319.85)" is deleted. In the first sentence of the footnote, the phrase "often plans" is replaced with the phrase "may plan." The last sentence of the footnote, which is in brackets, is deleted.

t. The last sentence of paragraph .38 is replaced with: When circumstances are similar, the effect on sample size of those factors should be similar regardless of whether a statistical or nonstatistical approach is used. Thus, when a nonstatistical sampling approach is applied properly, the resulting sample size ordinarily will be comparable to, or larger than, the sample size resulting from an efficient and effectively designed statistical sample.

u. The fifth sentence of paragraph .39 is replaced with: Paragraphs 44 through 46 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement,* describe the auditor's responsibilities for performing procedures between the interim date of testing and period end.

v. In paragraph .39, the last sentence, which is in brackets, is deleted.

w. In paragraph .44:

• The first sentence is replaced with: In some circumstances, the auditor may design a sample that will be used for dual purposes: as a test of control and as a substantive test.

• The third sentence is replaced with: For example, an auditor designing a test of a control over entries in the voucher register may design a related substantive test at a risk level that is based on an expectation of reliance on the control.

• The fifth sentence is replaced with: In evaluating such tests, deviations from the control that was tested and monetary misstatements should be evaluated separately using the risk levels applicable for the respective purposes.

• The following Note is added to the paragraph:

Note: Paragraph 47 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement,* provides additional discussion of the auditor's responsibilities for performing dual-purpose tests.

x. The reference in paragraph .45 to paragraph .04 is changed to a reference to paragraph .03.

y. In item 2 of paragraph .48, the last sentence is deleted.

z. Within footnote 1 to item 4 in paragraph .48, the sentence "(See section 313.)" is deleted.

aa. The sentence in item 6 of paragraph .48 "(See section 313.)" is deleted.

AU sec. 9350, "*Audit Sampling: Auditing Interpretations of Section 350*"

AU sec. 9350, "Audit Sampling: Auditing Interpretations of Section 350," is superseded.

AU sec. 380, "*Communication With Audit Committees*"

SAS No. 61, "Communication With Audit Committees" (AU sec. 380, "Communication With Audit Committees"), as amended, is amended as follows:

In footnote 5 to paragraph .10, the reference to section 316A.38–.40 is replaced with a reference to AU secs. 316.79–.82; the reference to section 316A is replaced with a reference to section 316.

AU sec. 411, "*The Meaning of Present Fairly in Conformity With Generally Accepted Accounting Principles*"

SAS No. 69, "The Meaning of Present Fairly in Conformity With Generally Accepted Accounting Principles" (AU sec. 411, "The Meaning of Present Fairly in Conformity with Generally Accepted Accounting Principles"), as amended, is amended as follows:

a. In paragraph .04, the reference in (c) to section 431 is replaced with a reference to paragraph 31 of Auditing Standard No. 14, *Evaluating Audit Results;* in (d), the reference to section 431 is replaced with a reference to paragraph 31 of Auditing Standard No. 14.

b. The reference in footnote 1 to paragraph .04 to 312.10 is replaced with a reference to Auditing Standard No. 11, *Consideration of Materiality in Planning and Performing an Audit.*

AU sec. 431, "*Adequacy of Disclosure in Financial Statements*"

SAS No. 32, "Adequacy of Disclosure in Financial Statements" (AU sec. 431, "Adequacy of Disclosure in Financial Statements"), as amended, is superseded.

AU sec. 508, "*Reports on Audited Financial Statements*"

SAS No. 58, "Reports on Audited Financial Statements" (AU sec. 508, "Reports on Audited Financial Statements"), as amended, is amended as follows:

a. In paragraph 18C, the phrase "and in AU sec. 431" is deleted.

b. In subparagraph .20.a., the word "competent" is replaced with the word "appropriate."

c. In the second sentence of paragraph .22, the word "competent" is replaced with the word "appropriate."

d. In the third sentence of paragraph .24, the word "competent" is replaced with the word "appropriate."

e. In footnote 15 to paragraph .38, the first sentence is replaced with:

In this context, practicable means that the information is reasonably obtainable from management's accounts and records and that providing the information in the report does not require the auditor to assume the position of a preparer of financial information.

f. The references in paragraph .49 to section 312, *Audit Risk and Materiality,* and to section 342, *Auditing Accounting Estimates,* are replaced with a reference to paragraph 13 of Auditing Standard No. 14, *Evaluating Audit Results.*

g. In the first sentence of paragraph .63, the word "competent" is replaced with the word "appropriate."

h. In paragraph .66, the second sentence is replaced with:

(See paragraph 31 of Auditing Standard No. 14, *Evaluating Audit Results.*)

AU sec. 9508, "*Reports on Audited Financial Statements: Auditing Interpretations of Section 508*"

AU sec. 9508, "Reports on Audited Financial Statements: Auditing Interpretations of Section 508," is amended as follows:

In paragraph .02, the word "competent" is replaced with the word "appropriate."

AU sec. 530, "*Dating of the Independent Auditor's Report*"

SAS No. 1, "Codification of Auditing Standards and Procedures," section 530, "Dating of the Independent Auditor's Report" (AU sec. 530, "Dating of the Independent Auditor's Report"), as amended, is amended as follows:

a. In the first sentence of paragraph .01, the word "competent" is replaced with the word "appropriate."

b. In the second note to paragraph .01, the word "competent" is replaced with the word "appropriate."

c. In the first sentence of paragraph .05, the word "competent" is replaced with the word "appropriate."

AU sec. 543, "*Part of Audit Performed by Other Independent Auditors*"

SAS No. 1, "Codification of Auditing Standards and Procedures," section 543 "Part of Audit Performed by Other Independent Auditors" (AU sec. 543, "Part of Audit Performed by Other Independent Auditors"), as amended, is amended as follows:

a. The following note is added as the second note to paragraph .01:

Note: For situations in which the auditor engages an accounting firm or individual accountants to participate in the audit engagement and AU sec. 543 does not apply, the auditor should supervise them in accordance with the requirements of Auditing Standard No. 10, *Supervision of the Audit Engagement.*

b. Within paragraph .12:

• Subparagraph b. is replaced with: A list of significant risks, the auditor's responses, and the results of the auditor's related procedures.

• Subparagraph f. is replaced with: A schedule of accumulated misstatements, including a description of the nature and cause of each accumulated misstatement, and an evaluation of uncorrected misstatements, including the quantitative and qualitative factors the auditor considered to be relevant to the evaluation.

AU sec. 9543, "*Part of Audit Performed by Other Independent Auditors: Auditing Interpretations of Section 543*"

AU sec. 9543, "Part of Audit Performed by Other Independent Auditors: Auditing Interpretations of Section 543," as amended, is amended as follows:

a. *Paragraph .16 is replaced with: Interpretation*—The principal auditor's response should ordinarily be made by the engagement partner. The engagement partner should take those steps that he or she considers reasonable under the circumstances to be informed of known matters pertinent to the other auditor's inquiry. For example, the engagement partner may inquire of engagement team members responsible for various aspects of the engagement or he or she may direct engagement team members to bring to his or her attention

any significant matters of which they become aware during the audit. The principal auditor is not required to perform any procedures directed toward identifying matters that would not affect his or her audit or his or her report.

b. Footnote 4 to paragraph .16 is deleted.

AU sec. 722, "*Interim Financial Information*"

SAS No. 100, "Interim Financial Information" (AU sec. 722, "Interim Financial Information"), as amended, is amended as follows:

a. Within footnote 7 to paragraph .11, the first sentence is replaced with: Paragraphs 10 through 23 of Auditing Standard No. 14, *Evaluating Audit Results,* require the auditor to accumulate and evaluate the misstatements identified during the audit.

b. The reference in paragraph .13 to section 319, *Consideration of Internal Control in a Financial Statement Audit,* is replaced with a reference to Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

c. Within the last sentence of paragraph .16, the title of section 329, "Analytical Procedures," is replaced with the title "Substantive Analytical Procedures."

d. Footnote 20 to paragraph .26 is deleted.

e. The reference in paragraph .56, subparagraph C5, to section 319 is replaced with a reference to section 316.

Auditing Standard No. 3, Audit Documentation

Auditing Standard No. 3, *Audit Documentation,* as amended, is amended as follows:

a. Within paragraph 3, subparagraph b. is replaced with: Supervisory personnel who review documentation prepared by other members of the engagement team.

b. Paragraph 9A is added: Documentation of risk assessment procedures and responses to risks of misstatement should include (1) a summary of the identified risks of misstatement and the auditor's assessment of risks of material misstatement at the financial statement and assertion levels and (2) the auditor's responses to the risks of material misstatement, including linkage of the responses to those risks.

c. Within paragraph 12:

• Within subparagraph a.:, (1) a footnote reference 2A is added at the end of the first sentence: See paragraphs 12–13 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* and paragraphs .66–.67 of AU sec. 316, *Consideration of Fraud in a Financial Statement Audit.* and (2) the second sentence of subparagraph a. is deleted.

• Subparagraph b. is replaced with: Results of auditing procedures that indicate a need for significant modification of planned auditing procedures, the existence of material misstatements (including omissions in the financial statements), and the existence of significant deficiencies or material weaknesses in internal control over financial reporting.

• Subparagraph c. is replaced with: Accumulated misstatements and evaluation of uncorrected misstatements, including the quantitative and qualitative factors the auditor considered to be relevant to the evaluation.

• Footnote 2B is added to subparagraph c.: See paragraphs 10–23 of Auditing Standard No. 14, *Evaluating Audit Results.*

• Subparagraph d. is replaced with: Disagreements among members of the engagement team or with others consulted on the engagement about final conclusions reached on significant accounting or auditing matters, including the basis for the final resolution of those disagreements. If an engagement team member disagrees with the final conclusions reached, he or she should document that disagreement.

• Subparagraph f. is replaced with: Significant changes in the auditor's risk assessments, including risks that were not identified previously, and the modifications to audit procedures or additional audit procedures performed in response to those changes.

• Footnote 2C is added to subparagraph f.: See paragraph 74 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* and paragraph 36 of Auditing Standard No. 14, *Evaluating Audit Results.*

• Subparagraph f–1. is added: Risks of material misstatement that are determined to be significant risks and the results of the auditing procedures performed in response to those risks.

d. Within paragraph 19:

• Subparagraph b. is replaced with: A list of significant risks, the auditor's responses, and the results of the auditor's related procedures.

• Subparagraph f. is replaced with: A schedule of accumulated misstatements, including a description of the nature and cause of each accumulated misstatement, and an evaluation of uncorrected misstatements, including the quantitative and qualitative factors the auditor considered to be relevant to the evaluation.

e. Paragraph 21 and the preceding heading, "Effective Date," are deleted.

Auditing Standard No. 4, Reporting on Whether a Previously Reported Material Weakness Continues to Exist

Auditing Standard No. 4, *Reporting on Whether a Previously Reported Material Weakness Continues to Exist,* as amended, is amended as follows: In the first sentence of paragraph 18, the word "competent" is replaced with the word "appropriate."

Auditing Standard No. 5, An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements

Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* is amended as follows:

a. In the second sentence of paragraph 3, the word "competent" is replaced with the word "appropriate."

b. In the first sentence of paragraph 9, the phrase "any assistants" is replaced with the phrase "the engagement team members."

c. Within footnote 10 to paragraph 14, the reference to paragraphs .19–.42 of AU sec. 316, *Consideration of Fraud in a Financial Statement Audit,* is replaced with a reference to Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

d. The reference in paragraph 15 to AU sec. 316.44 and .45 is replaced with a reference to paragraphs 65–69 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

e. Within footnote 11 to paragraph 20, the reference to AU sec. 312, *Audit Risk and Materiality in Conducting an Audit,* is replaced with a reference to Auditing Standard No. 11, *Consideration of Materiality in Planning and Performing an Audit.*

f. Within footnote 12 to paragraph 28, the reference to AU sec. 326, *Evidential Matter,* is replaced with a reference to Auditing Standard No. 15, *Audit Evidence.*

g. Within footnote 13 to the note to paragraph 31, the reference to AU sec. 312.39 is replaced with a reference to paragraph 14 of Auditing Standard No. 14, *Evaluating Auditing Results.* The reference to AU sec. 316.50 is replaced with a reference to paragraph 5 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*

h. The references in paragraph 36 to paragraphs .16–.20, .30–.32, and .77–.79 of AU sec. 319, *Consideration of Internal Control in a Financial Statement Audit,* are replaced with references to paragraph 29 and

Appendix B of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

i. In the first sentence of paragraph 51, the word "competent" is replaced with the word "appropriate."

j. In the first sentence of paragraph 89, the word "competent" is replaced with the word "appropriate."

k. Within the note to paragraph C6 in Appendix C, the word "competent" is replaced with the word "appropriate."

Auditing Standard No. 6, Evaluating Consistency of Financial Statements

Auditing Standard No. 6, *Evaluating Consistency of Financial Statements,* is amended as follows:

a. Footnote 3 to paragraph 4 is deleted.

b. In paragraph 10, the reference to AU sec. 431, *Adequacy of Disclosure in Financial Statements,* is replaced with a reference to paragraph 31 of Auditing Standard No. 14, *Evaluating Audit Results.*

Auditing Standard No. 7, Engagement Quality Review

Auditing Standard No. 7, *Engagement Quality Review,* is amended as follows:

a. Footnote 3 to paragraph 5 is replaced with: The term "engagement partner" has the same meaning as the "practitioner-in-charge of an engagement" in PCAOB interim quality control standard QC sec. 40, *The Personnel Management Element of a Firm's System of Quality Control-Competencies Required by a Practitioner-in-Charge of an Attest Engagement.* QC sec. 40 describes the competencies required of a practitioner-in-charge of an attest engagement.

b. In paragraph 10, the note following subparagraph b. is replaced with: Note: A *significant risk* is a risk of material misstatement that requires special audit consideration.

Ethics Standards

ET sec. 102, "*Integrity and Objectivity*"

ET sec. 102, "Integrity and Objectivity," is amended as follows: Footnote 1 to paragraph .05 is replaced with: See paragraph 5.b. of Auditing Standard No. 10, *Supervision of the Audit Engagement,* and paragraph 12.d. of Auditing Standard No. 3, *Audit Documentation.*

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

Section 103(a) of the Act directs the Board, by rule, to establish, among other things, "auditing and related attestation standards * * * to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by th[e] Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors." As discussed more fully in Exhibit 3, the Board adopted eight auditing standards and related amendments that benefit investors by establishing requirements that enhance the effectiveness of the auditor's assessment of and response to the risks of material misstatement in an audit.

In an audit performed in accordance with PCAOB standards, risk underlies the entire audit process, including the procedures that the auditor performs to support the opinion expressed in the auditor's report. Most of the Board's interim auditing standards relating to assessing and responding to risk in an audit of financial statements were developed in the 1980s.[154] Those standards described in general terms the auditor's responsibilities for assessing and responding to risk. They directed auditors to vary the amount of audit attention related to particular financial statement accounts based on the risks presented by them. The standards also allowed the auditor to use tests of controls to reduce substantive testing.[155]

A number of factors and events led the Board to reexamine those standards and seek to improve them. These included the widespread use of risk-based audit methodologies; recommendations to the profession on ways in which auditors could improve risk assessment;[156] advice from the Board's Standing Advisory Group ("SAG");[157] adoption of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements;* and observations from the Board's oversight activities.

On October 21, 2008, the Board proposed a set of auditing standards to update the requirements for assessing and responding to risk in an audit ("the original proposed standards").[158] The original proposed standards were intended to improve the auditing standards and to benefit investors by establishing requirements that enhance the effectiveness of auditors' assessment of and response to risk through:

- Performing procedures that provide a reasonable basis for identifying and assessing risks of material misstatement, whether due to error or fraud
- Tailoring the audit to respond appropriately to the risks of material misstatement
- Making a comprehensive evaluation of the evidence obtained during the audit to form the opinion(s) in the auditor's report

The Board also sought to emphasize the auditor's responsibilities for consideration of fraud by incorporating requirements for identifying and responding to the risks of material misstatement due to fraud ("fraud risks") and evaluating audit results from the existing PCAOB standard, AU sec. 316, *Consideration of Fraud in a Financial Statement Audit.*[159] Incorporating these requirements makes clear that the auditor's responsibilities for assessing and responding to fraud risks are an integral part of the audit process rather than a separate, parallel process. It also benefits investors by prompting auditors to make a more thoughtful and thorough assessment of fraud risks and to develop appropriate audit responses.

Improvements in the standards related to risk assessment also should enhance integration of the audit of financial statements with the audit of internal control over financial reporting ("audit of internal control") by articulating a process for identifying and assessing risks of material misstatement that applies to both portions of the

[154] Examples of those standards include AU sec. 312, *Audit Risk and Materiality in Conducting an Audit,* and AU sec. 319, *Consideration of Internal Control in a Financial Statement Audit.*

[155] AU sec. 319.

[156] *See, e.g.,* Public Oversight Board, Panel on Audit Effectiveness ("PAE"), *Report and Recommendations* (August 31, 2000). For a summary of the PAE's recommendations related to risk assessment, *see* PCAOB Standing Advisory Group ("SAG") Meeting Briefing Paper, "Risk Assessment in Financial Statement Audits" (February 16, 2005), Appendix A, available at: *http://www.pcaobus.org/News_and_Events/Events/2005/02-16.aspx.*

[157] Webcasts of SAG meetings are available on the Board's Web site at: *http://www.pcaobus.org/News_and_Events/Webcasts.*

[158] PCAOB Release No. 2008–006, *Proposed Auditing Standards Related to the Auditor's Assessment of and Response to Risk* (October 21, 2008).

[159] Paragraphs .14–.51 and paragraphs .68–.78 of AU sec. 316, *Consideration of Fraud in a Financial Statement Audit.*

integrated audit when the auditor is performing an integrated audit.

The proposed rules also amend the Board's interim standards including superseding the following sections of PCAOB interim auditing standards:

- AU sec. 311, *Planning and Supervision*
- AU sec. 312, *Audit Risk and Materiality in Conducting an Audit*
- AU sec. 313, *Substantive Tests Prior to the Balance Sheet Date*
- AU sec. 319, *Consideration of Internal Control in a Financial Statement Audit*
- AU sec. 326, *Evidential Matter*
- AU sec. 431, *Adequacy of Disclosure in Financial Statements*

Similarly, the auditing interpretations of AU secs. 311, 312, and 350 have been incorporated into the risk assessment standards and thus are superseded. The auditing interpretations of AU sec. 326, except for Interpretation No. 2 (AU secs. 9326.06-.23), also are superseded.[160]

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule changes would apply equally to all registered public accounting firms conducting audits in accordance with PCAOB standards.

C. Board's Statement on Comments on the Proposed Rules Received From Members, Participants or Others

The Board released the proposed rules for public comment in PCAOB Release No. 2008–006 (October 21, 2008). The Board received 33 written comments. The Board considered these comments and made changes to the initial proposed rules. As a result, the Board again sought public comment in PCOAB Release No. 2009–007 (December 21, 2009). The Board received 23 written comment letters relating to its reproposal of the proposed rules. A copy of PCAOB Release Nos. 2008–006 and 2009–007 and the comment letters received in response to the PCAOB's request for comment in both releases are available on the PCAOB's Web site at *http://www.pcaobus.org.*

The Board has carefully considered all comments it has received. In response to the written comments received on both the initial and reproposal of the proposed rules, the Board has clarified and modified certain aspects of the proposed rules, as discussed below.

Overview of the Risk Assessment Standards

Many commenters on the original proposed standards were supportive of the Board's efforts to update its risk assessment requirements and offered numerous suggestions for changing the original proposed standards. After considering all of the comments received on those standards, the Board made numerous refinements to the original proposed standards. Because the standards address many fundamental aspects of the audit process and are expected to serve as a foundation for future standards-setting, the Board reproposed the standards for public comment on December 17, 2009 ("the reproposed standards").[161]

The Board received 23 comment letters on the reproposed standards.[162] The Board discussed the comments received with the SAG on April 8, 2010.[163] Most commenters were generally supportive of the reproposed standards and the improvements made to those standards. Many commenters also offered suggestions to improve the standards, which the Board has carefully analyzed.

After consideration of the comments received, the Board has refined the standards to provide additional clarity. The Board has decided to adopt the following standards for assessing and responding to risk in an audit and the related amendments to PCAOB standards:

- Auditing Standard No. 8, *Audit Risk*
- Auditing Standard No. 9, *Audit Planning*
- Auditing Standard No. 10, *Supervision of the Audit Engagement*
- Auditing Standard No. 11, *Consideration of Materiality in Planning and Performing an Audit*
- Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement*
- Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement*
- Auditing Standard No. 14, *Evaluating Audit Results*
- Auditing Standard No. 15, *Audit Evidence*

1. Notable Areas of Change in the Standards

The changes made to the reproposed standards reflect refinements rather than significant shifts in approach. This section describes the areas of change to the reproposed standards that are most notable, *e.g.,* because they affect multiple standards or multiple sections of an individual standard. This Release discusses these and other changes in more detail.

a. Planning and Supervision Standards

The reproposed standards included a standard covering both audit planning and supervision. Some commenters observed that audit planning and supervision should be covered in separate standards.

Audit planning and supervision, although related in some respects, are distinct activities that should be presented in separate standards. Accordingly, the Board has divided the planning and supervision standard into separate standards for planning and for supervision. Presenting the requirements for planning and supervision in separate standards is a technical change that, by itself, does not affect the auditor's responsibilities for planning the audit or supervision of the work of engagement team members as described in the reproposed standards.

b. Requirements for Multi-Location Audits

The reproposed standard on audit planning and supervision included requirements regarding establishing the scope of testing of individual locations in multi-location engagements. The reproposed standard on consideration of materiality in planning and performing an audit included requirements for determining materiality of individual locations in multi-location audits. Some commenters requested clarification on the Board's expectations regarding how to apply those requirements in audits in which part of the work is performed by other auditors, specifically, auditors of financial statements of individual locations or business units that are included in the consolidated financial statements.

The multi-location requirements have been revised to take into account situations in which part of the work is

[160] Interpretation No. 2 relates in part to AU sec. 336 and AU sec. 337, *Inquiry of a Client's Lawyer Concerning Litigation, Claims, and Assessments,* and it will be evaluated in connection with standards-setting projects related to those standards.

[161] PCAOB Release No. 2009–007, *Proposed Auditing Standards Related to the Auditor's Assessment of and Response to Risk* (December 17, 2009).

[162] Comments on the original proposed standards and the reproposed standards are available on the Board's Web site at: *http://www.pcaobus.org/Rules/Rulemaking/Pages/Docket026.aspx.*

[163] A transcript of the portion of the meeting that related to the reproposed standards is available on the Board's Web site at: http://www.pcaobus.org/Rules/Rulemaking/Pages/Docket026.aspx.

performed by other auditors.[164] This release discusses those revisions in more detail and explains the Board's expectations regarding how to apply the respective requirements in situations involving other auditors.

The reproposed standard on audit planning and supervision also included a statement, similar to a statement in Auditing Standard No. 5, that "The direction in paragraph 5 of Proposed Auditing Standard, *The Auditor's Responses to the Risks of Material Misstatement,* regarding incorporating an element of unpredictability in the auditing procedures means that the auditor should vary the nature, timing, and extent of audit procedures at locations or business units from year to year." Some commenters stated that the statement in the reproposed audit planning and supervision standard was unnecessarily prescriptive. After considering the comments received, the requirement regarding unpredictability was removed from the audit planning standard, and the discussion in Auditing Standard No. 13 regarding incorporating an element of unpredictability was expanded to include varying the testing in the selected locations.[165] However, this does not change the requirements in Auditing Standard No. 5 regarding incorporating unpredictability in testing controls at individual locations in audits of internal control.[166]

c. Requirement for Performing Walkthroughs

In the original proposed standards, the standard on identifying and assessing risks of material misstatement referred auditors to Auditing Standard No. 5 for a discussion of the performance of walkthroughs. Some commenters on the original proposed standards stated that the proposed standard should include a discussion of walkthroughs rather than referring to Auditing Standard No. 5. The reproposed standard on identifying and assessing risks of material misstatement included a discussion of the objectives for understanding likely sources of potential misstatements and of performing walkthroughs, which paralleled a discussion in Auditing Standard No. 5.[167] Some commenters expressed concerns that those new requirements would lead to unnecessary walkthroughs, particularly in audits of financial statements only.

The intention of including the discussion of walkthroughs was to describe how to perform walkthroughs, not to impose additional requirements regarding when to perform walkthroughs. The discussion has been revised to focus on how the auditor should perform walkthroughs, and the discussion of the objectives for understanding likely sources of potential misstatements has been removed.[168] Consequently, the objectives in paragraph 34 of Auditing Standard No. 5 for understanding potential sources of likely misstatement will continue to apply only to integrated audits.

d. Requirements Regarding Financial Statement Disclosures

Because of the importance of disclosures to the fair presentation of financial statements and based on observations from the Board's oversight activities, the reproposed standards included additional requirements intended to increase the auditor's attention on the disclosures in the financial statements. For example, the reproposed standard on identifying and assessing risks of material misstatement included a new requirement related to developing an expectation about the necessary financial statement disclosures as part of obtaining an understanding of the company and its environment. Some commenters stated that the requirements should be clarified as applying to disclosures required by the applicable financial reporting framework. Also, the reproposed standard on evaluating audit results included expanded requirements for the auditor to evaluate whether the financial statements include the required disclosures. Some commenters stated that the standard should clarify that the requirements apply only to material disclosures.

After analyzing the comments, those two requirements have been revised to clarify that they refer to the fair presentation of the financial statements in conformity with the applicable financial reporting framework.[169]

2. Discussion of Comments That Relate to Many of the Reproposed Standards

The following paragraphs discuss matters raised by commenters that relate to many of the reproposed standards. Section II.C.13 of this release contains a discussion of other topics raised by commenters on matters other than the risk assessment standards or the related amendments.

a. Consideration of Fraud in the Audit

Section I of the Board's adopting release discusses the Board's objectives regarding incorporating into its risk assessment standards the requirements for identifying and responding to risks of material misstatement due to fraud ("fraud risks") and evaluating audit results from AU sec. 316, *Consideration of Fraud in a Financial Statement Audit.*[170]

The number of comments received on this approach to incorporate the requirements from AU sec. 316 declined significantly from the original proposed standards.[171] The views of commenters continue to be mixed. One commenter supported the approach, and two commenters expressed concerns about the approach.

The risk assessment standards continue to include relevant requirements from AU sec. 316. The Board has observed from its oversight activities instances in which auditors have performed the procedures required in AU sec. 316 mechanically, without using the procedures to develop insights on fraud risk or to modify the audit plan to address that risk. The Board also has observed instances in which firms have failed to respond appropriately to identified fraud risks.

These observations suggest that some auditors may improperly view the consideration of fraud as an isolated, mechanical process rather than an integral part of audits under PCAOB standards. Integrating the requirements from AU sec. 316 into the risk assessment standards emphasizes to auditors that assessing and responding to fraud risks is an integral part of an audit in accordance with PCAOB standards, rather than a separate consideration. Such integration also should prompt auditors to make a more thoughtful and thorough assessment of the risks affecting the financial

[164] Paragraphs 11–14 of Auditing Standard No. 9, *Audit Planning,* and paragraph 10 of Auditing Standard No. 11, *Consideration of Materiality in Planning and Performing an Audit.*

[165] Paragraph 5 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*

[166] Paragraphs 61 and B13 of Auditing Standard No. 5.

[167] Paragraph 34 of Auditing Standard No. 5.

[168] Paragraphs 37–38 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*

[169] Paragraph 13 of Auditing Standard No. 12 and paragraph 31 of Auditing Standard No. 14, *Evaluating Audit Results.*

[170] The risk assessment standards incorporate paragraphs .14–.51 and .68–.78 of AU sec. 316. Accordingly, those paragraphs are removed from AU sec. 316 by means of a related amendment.

[171] As discussed in Section I, the risk assessment standards were originally proposed on October 21, 2008. *See* PCAOB Release No. 2008–006, *Proposed Auditing Standards Related to the Auditor's Assessment of and Response to Risk.*

statements, including fraud risks, and to develop appropriate audit responses. Furthermore, AU sec. 316, as amended, will continue to provide relevant information on determining the necessary procedures for considering fraud in a financial statement audit. (See section II.C.11.F.(ii). of this release for more discussion about AU sec. 316.)

b. Organization and Style of Standards (Including the Use of Notes and Appendices)

In response to comments on the original proposed standards, the Board presented the reproposed standards using an organization and style that is intended to be a template for future standards of the Board. The organization and style includes an objective for each standard, which provides additional context for understanding the requirements in the standard, and a separate appendix for definitions of terms used in each standard.

Commenters generally supported the organization and style of the reproposed standards, and some commenters suggested that existing PCAOB standards be revised to implement this organization and style. As stated in the release accompanying the reproposed standards, the organization and style used in the reproposed standards draws from previously issued standards of the Board, *e.g.,* Auditing Standard No. 7, *Engagement Quality Review.* Also, the Board will apply this template in the course of its other standards-setting activities.

Commenters expressed concerns about including requirements in appendices and notes to the standard. Consistent with standards previously issued by the Board, the notes and appendices in the risk assessment standards are integral parts of the standards and carry the same authoritative weight as the other portions of the standards.

c. Use of Terms

PCAOB Rule 3101, *Certain Terms Used in Auditing and Related Professional Practice Standards,* sets forth the terminology that the Board uses to describe the degree of responsibility that the auditing and related professional practice standards impose on auditors. The original proposed standards used terms in the requirements in a manner that was consistent with Rule 3101.

Some comments received on the original proposed standards suggested revisions to the terms used in the requirements or asked for clarification about certain terms or phrases, e.g., "take into account." The reproposed standards reflected numerous revisions to the terms used in the standards, and the risk assessment standards reflect further refinements. For example, the standards use "should consider" only when referring to a requirement to consider performing an action or procedure, which is consistent with Rule 3101.

As explained in the release accompanying the reproposed standards, the phrase "take into account" has been used previously in PCAOB standards in reference to information or matters that the auditor should think about or give attention to in performing an audit procedure or reaching a conclusion.[172] Accordingly, the results of the auditor's thinking on the relevant matters should be reflected in the performance and documentation of the respective audit procedure performed or conclusion reached. The accompanying standards continue to use "take into account" in the same way.

Some commenters asked about the meaning of certain terms, e.g., "assess," "evaluate," or "determine." Those commenters also stated that the Board should use those terms consistently throughout its standards. The Board has reviewed the use of each of those terms and has revised the standards as necessary to apply those terms more consistently. Subsequent sections of this release discuss specific revisions to the individual standards.

One commenter expressed concerns about statements that involve the use of present tense in the reproposed standards. As with standards that the Board previously issued, the present tense is used in the risk assessment standards for statements that are factual or definitional, e.g., to provide additional explanation of a required auditing procedure.[173] Subsequent sections of this release discuss specific instances of the use of present tense in the risk assessment standards.

d. Requirements and the Application of Judgment

Some commenters on the original proposed standards stated that the original proposed standards contained requirements that were "too prescriptive," limiting the auditor's ability to "use professional judgment or scale the audit," *e.g.,* because of the number of requirements in the standards and because the standards did not explicitly refer to professional judgment in the requirements. In the release accompanying the reproposed standards, the Board discussed the importance of professional judgment in fulfilling the requirements of the standards. After examining each requirement, the Board revised certain provisions in the reproposed standards to streamline the presentation of those requirements.

Although the Board received fewer comments on the reproposed standard related to this topic, two commenters continue to express concerns about whether the reproposed standards made adequate allowance for the auditor to use professional judgment in assessing and responding to risk in an audit.

PCAOB standards recognize that the auditor uses judgment in planning and performing audit procedures and evaluating the evidence obtained from those procedures.[174] As under other PCAOB standards, auditors need to exercise judgment in fulfilling the requirements of the risk assessment standards in the particular circumstances. Making references to judgment in selected portions of the standards, however, could be misinterpreted as indicating that judgment is required only in certain aspects of the audit. Instead of referring to judgment selectively, the risk assessment standards set forth principles for meeting the requirements of the standards and allow the auditor to determine the most appropriate way to comply with the requirements in the circumstances.

3. Auditing Standard No. 8—Audit Risk

a. Background

Auditing Standard No. 8 discusses audit risk and the relationships among the various components of audit risk in an audit of financial statements. The standard applies to integrated audits and to audits of financial statements only.

b. Objective

The reproposed standard stated that the objective of the auditor is to conduct the audit of financial statements in a manner that reduces audit risk to an appropriately low level. This objective provided important context for understanding how the concept of audit risk is applied in an audit.

One commenter observed that the reproposed standards sometimes used the phrase, "appropriately low level" and occasionally used the phrase "acceptably low level," and that

[172] AU sec. 316.45 and paragraphs 14, 44, 59, and B 12 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

[173] *See, e.g.,* paragraph 21 of Auditing Standard No. 5 for an example of the use of the present tense for this purpose.

[174] *See, e.g.,* paragraph .11 of AU sec. 230, *Due Professional Care in the Performance of Work.*

commenter suggested revising the standards to use "acceptably low level" in each instance. The Board continues to believe the term "appropriately low level" is more suitable because it is aligned more closely with the degree of assurance described in the auditor's opinion, *i.e.,* the auditor conducts the audit to reduce audit risk to an appropriately low level in order to express an opinion with reasonable assurance. In contrast, the term "acceptably low" is less clear and could be misinterpreted. The risk assessment standards have been revised to use the phrase "appropriately low level," as applicable.

c. Due Professional Care and Sufficient Appropriate Audit Evidence

The reproposed standard stated that, to form an appropriate basis for expressing an opinion on the financial statements, the auditor must plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement due to error or fraud. It also stated that reasonable assurance is obtained by reducing audit risk to an appropriately low level through applying due professional care, including obtaining sufficient appropriate audit evidence.[175]

A commenter suggested that due professional care is a responsibility throughout the audit, similar to professional skepticism and judgment, and need not be repeated throughout the Board's standards. The Board agrees that due professional care is a responsibility throughout the audit. On the other hand, existing PCAOB standards state that due professional care allows the auditor to obtain reasonable assurance,[176] and the statement in Auditing Standard No. 8 acknowledges that principle.

d. Audit Risk and Risk of Material Misstatement

Some commenters on the original proposed standard requested more explanation about risks at the overall financial statement level, *e.g.,* by providing examples of such risks. The reproposed standard elaborated further on risks at the financial statement level.[177]

Commenters on the reproposed standard asked for more explanation regarding how financial statement level risks can result in material misstatement of the financial statements. The examples of financial statement level risks in Auditing Standard No. 8 have been expanded to illustrate how those risks can result in material misstatement of the financial statements.[178]

Some individual commenters offered suggestions for refining or clarifying the discussion of the risk of material misstatement and its components. For example, one commenter suggested that the description of the risk of material misstatement should state that the risk exists "prior to the audit" to more clearly indicate that it is the company's risk. The Board agrees that the risk of material misstatement exists irrespective of the audit, while the risk of not detecting material misstatement is the auditor's risk. However, the suggested phrase could be misinterpreted, *e.g.,* as implying that the auditor need not consider the risk of misstatements occurring during the audit.

The reproposed standard included a statement that inherent risk and control risk are the company's risks; they exist independently of the audit. One commenter suggested that the statement was not informative and suggested revising the standard to state that inherent risk and control risk are functions of the company's characteristics, but influence the auditor's actions. The Board agrees that more discussion of the auditor's consideration of inherent risk and control risk is appropriate. Thus, Auditing Standard No. 8 has been expanded to discuss the sources of evidence the auditor uses when assessing inherent risk and control risk.[179] Also, the description of control risk in Auditing Standard No. 8 has been aligned with the discussion of internal control concepts in Auditing Standard No. 5.

One commenter expressed a concern that descriptions of inherent risk, control risk, and detection risk that included the phrase "that could be material, individually or in combination with other misstatements," may be misinterpreted by the auditor as a requirement to consider whether the combination of dissimilar risks will result in a material misstatement. The commenter suggested changing "combination" to "aggregate." However, the standard does not discuss the combination of risks but, rather, the risk of a misstatement that could be material, individually or in combination with other misstatements, which is consistent with the description of the auditor's evaluation of uncorrected misstatements in Auditing Standard No. 14, *Evaluating Audit Results.* Thus, the term "combination" was retained as proposed.

e. Detection Risk

The reproposed standard indicated that detection risk is reduced by performing substantive procedures. Some commenters stated that the discussion of detection risk should be modified to indicate that auditors can reduce detection risk through procedures other than substantive procedures (*e.g.,* risk assessment procedures and tests of controls). A commenter also suggested changing the sentence in the standard to refer to "audit procedures" instead of "substantive procedures."

The Board acknowledges that auditors might obtain evidence of misstatements through procedures other than substantive procedures. However, that does not diminish the auditor's responsibility to plan and perform substantive procedures for significant accounts and disclosures that are sufficient to provide reasonable assurance of detecting misstatements that would result in material misstatement of the financial statements. Changing "substantive procedures" to "audit procedures," as suggested by the commenter, is not consistent with AU sec. 319, *Consideration of Internal Control in a Financial Statement Audit,* and could be misunderstood by auditors, resulting in inadequate substantive procedures.[180] To provide further clarification, Auditing Standard No. 8 has been revised to describe the role of risk assessment procedures and tests of controls in assessing the risk of material misstatement, which, in turn, affects the appropriate level of detection risk.[181]

Some commenters expressed concerns that the reproposed standard did not adequately link the concepts of inherent risk and control risk to detection risk. They stated that a discussion on the relationship of these concepts is necessary for the auditor to determine the acceptable level of detection risk for the financial statement assertions, which, in turn, is used to determine the nature, timing, and extent of substantive procedures. The following discussion, which is adapted from AU sec. 319, was added to paragraph 10 of Auditing

[175] Paragraph 3 of Auditing Standard No. 8.

[176] AU sec. 230.10.

[177] Paragraph 6 of Auditing Standard No. 8.

[178] Ibid.

[179] Paragraph 8 of Auditing Standard No. 8.

[180] AU secs. 319.81–.82. AU sec. 319, along with AU sec. 311, *Planning and Supervision, AU sec. 312, Audit Risk and Materiality in Conducting an Audit,* AU sec. 313, *Substantive Tests Prior to the Balance Sheet Date,* AU sec. 326, *Evidential Matter,* and AU sec. 431, *Adequacy of Disclosure in Financial Statements,* are superseded by the risk assessment standards.

[181] Paragraphs 8–9 of Auditing Standard No. 8.

Standard No. 8: "The auditor uses the assessed risk of material misstatement to determine the appropriate level of detection risk for a financial statement assertion. The higher the risk of material misstatement, the lower the level of detection risk needs to be in order to reduce audit risk to an appropriately low level." [182]

f. Integrated Audit Considerations

Auditing Standard No. 8 applies both to audits of financial statements only and to the financial statement audit portion of integrated audits. Audit risk in the audit of financial statements relates to whether the auditor expresses an inappropriate audit opinion when the financial statements are materially misstated, while audit risk in an audit of internal control over financial reporting ("audit of internal control") relates to whether the auditor expresses an inappropriate audit opinion when one or more material weaknesses exist. The two forms of audit risk are related, however, and Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* indicates that the risk assessment procedures apply to both the audit of financial statements and the audit of internal control.

Some commenters suggested revisions to the first paragraph and the first footnote of the reproposed standard to clarify how the concepts of audit risk in this standard apply to audits of financial statements only and to integrated audits. The first paragraph has been revised to indicate that Auditing Standard No. 8 applies to either an audit of financial statements only or to an integrated audit. The first footnote also has been revised to clarify that, in integrated audits, the risks of material misstatement are the same for both the audit of financial statements and the audit of internal control.

4. Auditing Standard No. 9—Audit Planning

a. Background

Auditing Standard No. 9 describes the auditor's responsibilities for planning an integrated audit or an audit of financial statements only.

b. Planning and Supervision

The original proposed standard and the reproposed standard discussed both audit planning and supervision, similar to AU sec. 311. Some commenters observed that audit planning and supervision should be covered in separate standards.

The Board agrees that audit planning and supervision of engagement team members are distinct activities that should be covered in separate standards. Accordingly, the Board has divided the requirements of the reproposed planning and supervision standard into separate standards. Dividing the requirements for planning and supervision into separate standards does not affect the auditor's responsibilities for planning the audit or supervising the work of engagement team members.

c. Responsibilities of the Engagement Partner

AU sec. 311 stated, "The auditor with final responsibility for the audit may delegate portions of the planning and supervision of the audit to other firm personnel." Auditing Standard No. 9 uses the term "engagement partner" instead of "auditor with final responsibility for the audit" and states more directly that the engagement partner is responsible for properly planning the audit. The standard also allows the engagement partner to seek assistance from appropriate engagement team members in fulfilling his or her planning responsibilities. Because the requirements in Auditing Standard No. 9 apply to the engagement partner and engagement team members who assist the engagement partner in planning the audit, the standard uses the term "auditor," and a footnote was added to clarify that the requirements in the standard apply to the engagement partner and other engagement team members who participate in planning the audit.

d. Preliminary Engagement Activities

The reproposed standard included a note in paragraph 6 stating that the decision regarding continuance of the client relationship and the determination of compliance with independence and ethics requirements were not limited to preliminary engagement activities and should be reevaluated with changes in circumstances. One commenter expressed concern that the note did not describe the changes in circumstances for which it would be appropriate for the auditor to reevaluate these decisions. The acceptance and continuance of the client relationship are discussed in QC sec. 20, *System of Quality Control for a CPA Firm's Accounting and Auditing Practice.* Other PCAOB standards discuss certain circumstances that warrant reevaluating the client relationship.[183] Auditors also may reevaluate their engagement acceptance decision for other reasons. However, because auditors must comply with independence and ethics requirements throughout the audit, the note was moved in Auditing Standard No. 9 to modify paragraph 6.b. and revised to state that determination of compliance with independence and ethics requirements is not limited to preliminary engagement activities and should be reevaluated upon changes in circumstances.

e. Planning Activities

The reproposed standard stated that, as part of establishing the audit strategy and audit plan, the auditor should evaluate whether certain matters specified in the standard are important to the company's financial statements and internal control over financial reporting ("internal control") and, if so, how those matters would affect the auditor's procedures. The requirement in the reproposed standard was the same as in paragraph 9 of Auditing Standard No. 5, thus extending its application to an audit of financial statements.

Evaluation of the matters listed in paragraph 7 of Auditing Standard No. 9 can lead auditors to develop more effective audit strategies and audit plans. For example, evaluation of those matters can highlight areas that might warrant additional attention during the auditor's risk assessment procedures, which, in turn, could affect the audit procedures performed in response to the risks of material misstatement. Also, evaluation of the internal control related matters can help the auditor develop an appropriate audit strategy, *e.g.,* in determining accounts for which reliance on controls might be appropriate in the audit of financial statements.

Some commenters suggested changes to the requirement, including deleting some of the matters discussed in the requirement, moving other matters elsewhere within the standard, or making specific revisions to the language of the standard. Also, some commenters suggested using "should consider" instead of "should evaluate."

The Board considered the suggested changes to the standard and determined that those changes would not substantially improve the standard. Also, it is important for the language in this requirement to be identical to the language in Auditing Standard No. 5 to emphasize that this required procedure is to be performed only once in an integrated audit, with the results of the procedure to be applied in planning both the financial statement audit and the audit of internal control. Also, reframing the requirement from "should evaluate" to "should consider" would

[182] Paragraph 10 of Auditing Standard No. 8.

[183] *See, e.g.,* paragraphs .18–.21 of AU sec. 317, *Illegal Acts by Clients.*

weaken the requirement. Therefore, Auditing Standard No. 9 retains the wording from the reproposed standard.

f. Audit Strategy and Audit Plan

Auditing Standard No. 9 requires the auditor to take into account certain matters when establishing the overall audit strategy, including the reporting objectives of the engagement and the nature of the communications required by PCAOB standards; the factors that are significant in directing the activities of the engagement team; the results of preliminary engagement activities and the auditor's evaluation of certain important matters; and the nature, timing, and extent of resources necessary to perform the engagement.[184] These matters generally relate to information that auditors obtain through other required procedures. One commenter suggested that this requirement should discuss the need for specialists. Auditing Standard No. 9 was revised to include a reference to paragraph 16 regarding the requirement for the auditor to determine whether specialized skill or knowledge is needed to perform the engagement.

The reproposed standard required the auditor to develop and document an audit plan that includes the planned nature, timing, and extent of the risk assessment procedures. One commenter suggested that it was unnecessary to document the timing of the risk assessment procedures because risk assessment is an ongoing process that occurs throughout the execution of the audit. Auditing Standard No. 9 retains the requirement to document the timing of the risk assessment procedures. Identifying and appropriately assessing the risks of material misstatement provide a basis for designing and implementing responses to the risks of material misstatement, so the timing of the risk assessment procedures is important to determine the timing of other audit procedures.

The reproposed standard also required the auditor to develop and document the planned nature, timing, and extent of tests of controls and substantive procedures. One commenter suggested that the requirement should specify that the audit plan include planned tests at the "relevant assertion level." Auditing Standard No. 9 retains the requirement as reproposed. Audit procedures are not performed only at the assertion level, *e.g.,* certain general audit procedures and tests of certain entity-level controls in the audit of internal control over financial reporting. Therefore, it is not appropriate to update the standard with the suggested language.

g. Requirements for Multi-Location Engagements

Auditing Standard No. 9 establishes requirements that apply to audits of companies with operations in multiple locations or business units. Auditing Standard No. 9 requires the auditor to determine the extent to which audit procedures should be performed at selected locations or business units to obtain sufficient appropriate evidence to obtain reasonable assurance about whether the consolidated financial statements are free of material misstatement. This includes determining the locations or business units at which to perform audit procedures, as well as the nature, timing, and extent of the procedures to be performed at those individual locations or business units. The auditor is required to assess the risks of material misstatement to the consolidated financial statements associated with the location or business unit and correlate the amount of audit attention devoted to the location or business unit with the degree of risk of material misstatement associated with that location or business unit. Auditing Standard No. 9 also lists factors that are relevant to the assessment of the risks of material misstatement associated with a particular location or business unit and the determination of the necessary audit procedures. These requirements are risk-focused and aligned with the requirements in Auditing Standard No. 5.

An example was added to one of the factors in Auditing Standard No. 9 to highlight that the auditor's consideration of risks associated with a location or business unit includes whether significant unusual transactions are executed at that location or business unit, e.g., whether certain transactions were conducted at the location or business unit to achieve a particular accounting result. AU sec. 316 already requires the auditor to perform procedures regarding significant unusual transactions.

The reproposed standard included a statement, similar to Auditing Standard No. 5, that "The direction in paragraph 5 of Proposed Auditing Standard, *The Auditor's Responses to the Risks of Material Misstatement,* regarding incorporating an element of unpredictability in the auditing procedures means that the auditor should vary the nature, timing, and extent of audit procedures at locations or business units from year to year." Some commenters stated that the statement in the reproposed standard was unnecessarily prescriptive. After considering the comments received, the requirement regarding unpredictability was removed from the audit planning standard, and the requirements in Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement,* regarding incorporating an element of unpredictability were expanded to include discussion of varying the testing in the selected locations.[185] However, this does not change the requirements in Auditing Standard No. 5 regarding incorporating unpredictability in testing controls at individual locations in audits of internal control.[186]

The reproposed standard included a requirement for the auditor to determine the extent to which auditing procedures should be performed at selected locations or business units to obtain sufficient appropriate evidence to obtain reasonable assurance about whether the consolidated financial statements are free of material misstatements. One commenter was concerned that the use of the term "consolidated financial statements" is inconsistent with the terminology used elsewhere in the standards and that the financial statements of companies with multiple divisions might not meet the definition of consolidated. The use of "consolidated financial statements" is consistent with the term used in Auditing Standard No. 5. The use of the term "consolidated" applies to situations in which the company has multiple locations or business units. Auditing Standard No. 9 retains the language as reproposed.

Some commenters requested clarification on how the requirements are expected to be applied in audits in which part of the work is performed by other auditors of financial statements of individual locations or business units that are included in the consolidated financial statements. A paragraph was added to Auditing Standard No. 9 to clarify that the auditor should apply the requirements in paragraphs 11–13 to determine the locations or business units for testing when the auditor plans to use the work and reports of other independent auditors who have audited the financial statements of one or more of the locations or business units (including subsidiaries, divisions, branches, components, or investments) that are included in the consolidated financial statements. AU sec. 543, *Part of Audit Performed by Other*

[184] Paragraph 9 of Auditing Standard No. 9.

[185] Paragraph 5 of Auditing Standard No. 13.

[186] Paragraphs 61 and B13 of Auditing Standard No. 5.

Independent Auditors, describes the auditor's responsibilities when the auditor uses the work and reports of other independent auditors.[187]

h. Persons With Specialized Skill or Knowledge

Auditing Standard No. 9 indicates that the auditor should determine whether specialized skill or knowledge is needed to perform appropriate risk assessments, plan or perform audit procedures, or evaluate audit results. The responsibility has been extended from a similar requirement in AU sec. 311 regarding considering whether specialized information technology ("IT") skill or knowledge is needed in an audit. The requirement was extended to specialized skill or knowledge in areas besides IT, *e.g.,* valuation specialists, actuarial specialists, income tax specialists, and forensic specialists, because of the prevalent use of such individuals by auditors.

The reproposed standard included a note that described the term "specialized skill or knowledge" as persons engaged or employed by the auditor who have specialized skill or knowledge. Some commenters suggested that this note be removed because paragraph 17 included a similar description. The note was removed from Auditing Standard No. 9 because it was unnecessary and redundant.

One commenter suggested revising the standard to require the auditor to consider using a fraud specialist. The suggested requirement to consider using a fraud specialist was not added to Auditing Standard No. 9 because the requirement in the reproposed standard already covers fraud specialists, and the types of specialized skill or knowledge that might be needed on a particular audit depend on the particular circumstances and the skill and knowledge of the engagement team.

Some commenters suggested that the requirements relating to the involvement of specialists be reframed as "assisting" the auditor. Such a formulation is too narrow to describe the range of involvement of specialists, which could include providing assistance to the auditor or actually performing audit procedures.

Paragraph 17 of Auditing Standard No. 9 describes the required level of knowledge of the subject matter in terms of the general types of procedures that the auditor should be able to perform with regard to the person with specialized skill or knowledge. Paragraph 17, by itself, does not impose procedural requirements for working with persons with specialized skill or knowledge because those responsibilities already are described in either the supervision provisions of Auditing Standard No. 10, *Supervision of the Audit Engagement,* or AU sec. 336, *Using the Work of a Specialist,* as applicable.

5. Auditing Standard No. 10—Supervision of the Audit Engagement

a. Background

Auditing Standard No. 10 sets forth requirements for supervising the audit engagement, including supervising the work of engagement team members.

Auditing Standard No. 10 retains the basic requirements regarding supervision from AU sec. 311, with changes to align the requirements more closely with the other risk assessment standards. Auditing Standard No. 10 does not change the responsibilities for supervision from those in the supervision section of the reproposed standard on audit planning and supervision. However, the language in the standard has been revised in certain respects to describe more directly the supervisory responsibilities of the engagement partner and engagement team members who assist the engagement partner in supervision. As discussed later in this section, the Board has separate standards-setting projects regarding specialists and principal auditors, which will likely result in changes to the auditor's responsibilities regarding the auditor's use of specialists and use of other auditors, and, in turn, may result in changes to Auditing Standard No. 10.

b. Planning and Supervision

As discussed in section II.C.4.b., the original proposed standard and the reproposed standard included requirements for both audit planning and supervision, similar to AU sec. 311. Some commenters observed that audit planning and supervision should be covered in separate standards.

The Board agrees that audit planning and supervision of engagement team members are distinct activities that should be covered in separate standards. Accordingly, the Board has divided the requirements of the planning and supervision standard into separate standards. Dividing the requirements for planning and supervision into separate standards does not affect the auditor's responsibilities for planning the audit or supervising the work of engagement team members.

c. Objective

When the requirements for planning and supervision were divided into separate standards, the objective for supervision of the work of engagement team members was adapted from the elements of proper supervision in the reproposed standard. Auditing Standard No. 10 states, "The objective of the auditor is to supervise the audit engagement, including supervising the work of engagement team members so that the work is performed as directed and supports the conclusions reached." The revised objective does not alter the supervision responsibilities included in the original proposed standard or the reproposed standard.

d. Responsibilities of the Engagement Partner

AU sec. 311 stated, "The auditor with final responsibility for the audit may delegate portions of the planning and supervision of the audit to other firm personnel." Auditing Standard No. 10 uses the term "engagement partner" instead of "auditor with final responsibility for the audit."

Auditing Standard No. 10 states that the engagement partner is responsible for the engagement and its performance. Accordingly, the engagement partner is responsible for proper supervision of the work of engagement team members and for compliance with PCAOB standards, including standards regarding using the work of specialists,[188] other auditors,[189] internal auditors,[190] and others who are involved in testing controls.[191] As discussed previously, as the Board considers changes to the auditor's responsibilities regarding the auditor's use of specialists and use of other auditors, it also may consider changes to Auditing Standard No. 10.

Auditing Standard No. 10 allows the engagement partner to seek assistance from appropriate engagement team members in fulfilling his or her responsibilities pursuant to the standard. Engagement team members who assist the engagement partner in supervision should comply with the relevant requirements of Auditing Standard No. 10. The requirements in PCAOB standards for assignment of responsibilities to engagement team members also apply to assignments that involve assisting the engagement

[187] Paragraph 14 of Auditing Standard No. 9.

[188] *See* Section II.C.5.f.

[189] Ibid.

[190] AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements.*

[191] Paragraphs 16–19 of Auditing Standard No. 5.

partner with his or her responsibilities pursuant to the standard.[192]

e. Supervision of the Work of Engagement Team Members

Previously adopted PCAOB standards use either the term "engagement team members" or the term "assistants." Auditing Standard No. 10 uses "engagement team members," which is consistent with the other risk assessment standards. The Board is amending other PCAOB standards to conform to this terminology.

Auditing Standard No. 10 describes the required supervisory activities that should be performed by the engagement partner and, as applicable, by other engagement team members with supervisory responsibilities.[193] Those activities include informing engagement team members of their responsibilities and information relevant to those responsibilities, directing engagement team members to bring significant accounting and auditing issues arising during the audit to the attention of the engagement partner or other engagement team members performing supervisory activities, and reviewing the work of engagement team members as described in the standard.

Auditing Standard No. 10 describes the factors that should be taken into account in determining the necessary extent of supervision, i.e., the extent of supervision necessary so that the work of engagement team members is performed as directed and appropriate conclusions are formed based on the results of their work.[194] Factors that affect the necessary extent of supervision include the risks of material misstatement, the nature of work assigned to the engagement team member, and the nature of the company, which includes the organizational structure of the company and its size and complexity. The extent of supervision of the work of an individual engagement team member increases or decreases, but cannot be eliminated, based on those factors. For example, the extent of supervision should be commensurate with the risks of material misstatement, which means, among other things, that the higher risk areas of the audit require more supervisory attention from the engagement partner.

One commenter suggested that the standard provide examples of "levels of supervision in relation to review," such as face-to-face review when reviewing higher risk areas. Auditing Standard No. 10 does not prescribe a particular method of review, so the engagement partner can determine the most effective way to comply with the requirements regarding the necessary nature of supervisory activities and necessary extent of supervision.

f. Persons with Specialized Skill or Knowledge and Other Auditors, Accounting Firms, and Individual Accountants

Auditing Standard No. 10 states that the engagement partner is responsible for, among other things, compliance with PCAOB standards regarding using of the work of specialists and refers to AU sec. 336. AU sec. 336 applies to situations in which the auditor engages a specialist in an area other than accounting or auditing and uses the work of that specialist as audit evidence.[195] Paragraphs 5–6 of Auditing Standard No. 10 describe the nature and extent of the supervisory activities necessary for proper supervision of a person with specialized skill or knowledge who participates in the audit and is either (a) employed by the auditor or (b) engaged by the auditor to provide services in a specialized area of accounting or auditing. AU sec. 336 has been amended to clarify when the auditor should look to the supervisory requirements in Auditing Standard No. 10 instead of AU sec. 336.

AU sec. 543 describes the principal auditor's[196] responsibilities for using the work and reports of other independent auditors who have audited the financial statements of one or more subsidiaries, divisions, branches, components, or investments included in the financial statements presented. The principal auditor should look to the requirements in AU sec. 543[197] in those situations. For situations in which the auditor engages an accounting firm or individual accountants to participate in the audit engagement and AU sec. 543 does not apply,[198] the auditor should supervise them in accordance with the requirements of Auditing Standard No. 10. AU sec. 543 has been amended to emphasize those points.

It should be noted, however, that the Board has separate standards-setting projects regarding specialists and principal auditors, which will include comprehensive reviews of AU sec. 336 and AU sec. 543, respectively, in light of, among other things, observations from the Board's inspection activities. Those projects will likely result in changes to the auditor's responsibilities regarding the auditor's use of specialists and use of other auditors, and, in turn, may result in changes to Auditing Standard No. 10.

g. Differences of Opinion Within an Engagement Team

The original proposed standard included a requirement, adapted from AU sec. 311.14, that the engagement partner and other engagement team members should make themselves aware of the procedures to be followed when differences of opinion concerning accounting and auditing issues exist among the engagement team members. Since the intention of including this provision was to require adequate documentation of disagreements, this paragraph was removed from the reproposed standard, and the documentation requirements from the original proposed standard were incorporated into an amendment to Auditing Standard No. 3, *Audit Documentation.*[199] The documentation requirements regarding disagreements among members of the engagement team or with others consulted on the engagement about final conclusions reached on significant accounting or auditing matters include documenting the basis for the final resolution of those disagreements. If an engagement team member disagrees with the final conclusions reached, he or she should document that disagreement.

One commenter indicated concern that the requirement for the engagement partner and other engagement team members to be aware of how disagreements should be handled has been removed. The commenter indicated that disagreements are a sensitive area and that it is important that engagement team members are aware of how disagreements should be handled. In connection with the requirement to direct engagement team members to bring significant accounting and auditing issues to the attention of the engagement partner or other engagement team members performing supervisory activities, Auditing Standard No. 10 also states that each engagement team member has a responsibility to bring to the attention of

[192] *See, e.g.* AU sec. 230.06 and paragraph 5 of Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*

[193] Paragraph 5 of Auditing Standard No. 10.

[194] Paragraph 6 of Auditing Standard No. 10.

[195] AU sec. 336 also applies to situations in which the auditor uses the work of a specialist engaged or employed by management. The discussion in this section of the release focuses on the auditor's use of specialists who are employed or engaged by the auditor.

[196] AU sec. 543 uses the term "principal auditor" to refer to the auditor who issues the audit report on the financial statements presented.

[197] For integrated audits, *see* also paragraphs C8–C11 of Auditing Standard No. 5.

[198] Examples of situations that are not covered by AU sec. 543 include loan staff arrangements.

[199] Paragraph 12.d. of Auditing Standard No. 3.

appropriate persons, disagreements or concerns the engagement team member might have with respect to accounting and auditing issues that he or she believes are of significance to the financial statements or the auditor's report regardless of how those disagreements or concerns may have arisen.[200]

6. Auditing Standard No. 11—Consideration of Materiality in Planning and Performing an Audit

a. Background

Auditing Standard No. 11 discusses the auditor's responsibilities for applying the concept of materiality, as described by the courts in interpreting the federal securities laws, in planning the audit and determining the scope of the audit procedures. The standard applies to integrated audits and audits of financial statements only.

b. Materiality in the Context of an Audit

Auditing Standard No. 11 discusses the concept of materiality that is applicable to audits performed in accordance with PCAOB standards, which is the articulation of materiality used by the courts in interpreting the federal securities laws.[201] The Supreme Court of the United States has held that a fact is material if there is "a substantial likelihood that the * * * fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[202]

Some commenters questioned the use of the court's articulation in the reproposed standard and suggested that this articulation might be difficult for auditors to apply. Also, some commenters asked whether the use of this articulation of materiality, in contrast to the quotation from a FASB Concept Statement[203] used in AU sec. 312 was intended to result in a change in audit practice.

Although the discussion of materiality in the accounting literature might help auditors understand how accounting standards-setters view materiality in the context of preparation and presentation of financial statements, the concept of materiality that is relevant for audits to which PCAOB standards apply is the concept used by the courts in interpreting the Federal securities laws. Because the auditor has a responsibility to plan and perform audit procedures to detect misstatements that, individually or in combination with other misstatements, would result in material misstatement of the financial statements, it is important for the auditor to plan and perform his or her audit procedures based on the applicable concept of materiality. Accordingly, Auditing Standard No. 11 uses the concept of materiality articulated by the courts.

Because the courts' articulation of the concept of materiality is not new, using that articulation in Auditing Standard No. 11 is not intended to result in changes in practice for most auditors. Auditing Standard No. 11 emphasizes that an auditor's consideration of materiality should reflect matters that would affect the judgment of a reasonable investor.

c. Establishing a Materiality Level for the Financial Statements as a Whole

Auditing Standard No. 11 requires the auditor to establish an appropriate materiality level for the financial statements as a whole.[204] This materiality level should be established in light of the particular circumstances based on factors that could influence the judgment of a reasonable investor. The standard states that this requirement includes consideration of the company's earnings and other relevant factors. This statement is intended to emphasize that a company's net earnings are often an important factor in the total mix of information available to a reasonable investor, but Auditing Standard No. 11 does not require the use of earnings as the basis for the established materiality level in all cases. Other factors besides earnings might be more relevant depending on the particular circumstances, *e.g.,* based on a company's industry or situations in which the company's earnings were near zero. Auditors are expected to consider the factors that would be relevant to the judgment of a reasonable investor.

d. Qualitative Considerations

The concept of materiality involves consideration of both quantitative and qualitative factors.[205] Under Auditing Standard No. 11, qualitative considerations can affect the auditor's establishment of materiality levels in the following ways:

- Establishing a materiality level for the financial statements as a whole that is appropriate in light of the particular circumstances. This involves matters such as consideration of the elements of the financial statements that are more important to a reasonable investor and the level of misstatements that would influence the judgment of a reasonable investor.
- Establishing lower levels of materiality for certain accounts or disclosures when, in light of the particular circumstances, there are certain accounts or disclosures for which there is a substantial likelihood that misstatements of lesser amounts than the materiality level established for the financial statements as a whole would influence the judgment of a reasonable investor. The requirement in the standard[206] is consistent with the principle of considering the judgment of a reasonable investor when establishing materiality levels because it recognizes that, in certain circumstances, misstatements in some accounts might have more significant consequences than in other accounts. The following are examples of such circumstances:
  - Laws, regulations, or the applicable financial reporting framework affect investors' expectations about the measurement or disclosure of certain items, *e.g.,* related party transactions and compensation of senior management.
  - Significant attention has been focused on a particular aspect of a company's business that is separately disclosed in the financial statements, *e.g.,* a recent business acquisition.
  - Certain disclosures are particularly important to investors in the industry in which the company operates.

Auditing Standard No. 11 does not allow the auditor to establish a materiality level for an account or disclosure at an amount that exceeds the materiality level for the financial statements as a whole.

The reproposed standard included a statement, adapted from AU sec. 312, that ordinarily it is not practical to design audit procedures to detect misstatements that are material based solely on qualitative factors.[207] One commenter suggested removing the word "ordinarily" from the statement because, in the commenter's view, it is not practical to design audit procedures to detect misstatements that are material based solely on qualitative factors. Auditing Standard No. 11 retains the

[200] Note to paragraph 5.b. of Auditing Standard No. 10.

[201] Paragraph 2 of Auditing Standard No. 11.

[202] *See TSC Industries Northway, Inc.,* 426 U.S. 438, 449 (1976). *See also Basic, Inc.* v. *Levinson,* 485 U.S. 224 (1988).

[203] Financial Accounting Standards Board Statement of Financial Accounting Concepts No. 2, *Qualitative Characteristics of Accounting Information.* FASB Concepts Statements are not included in FASB's Codification of Accounting Standards.

[204] Paragraph 6 of Auditing Standard No. 11.

[205] Paragraph 3 of Auditing Standard No. 11.

[206] Paragraph 7 of Auditing Standard No. 11.

[207] AU sec. 312.20.

statement as proposed. This statement reflects the principle that judgments about whether a particular misstatement is material involve consideration of the particular circumstances, including the nature of the misstatement and its effect on the financial statements. Also, if an auditor is aware of potential misstatements that would be material based on qualitative factors, he or she has a responsibility to design audit procedures to detect such misstatements.

e. Tolerable Misstatement

The reproposed standard required the auditor to determine tolerable misstatement for purposes of assessing risks of material misstatement and planning and performing audit procedures at the account or disclosure level.[208] Tolerable misstatement is a concept used in determining the scope of audit procedures. AU sec. 350, *Audit Sampling,* indicates that tolerable misstatement is the maximum amount of misstatement in an account or a class of transactions that may exist without causing the financial statements to be materially misstated.[209] Tolerable misstatement is required to be set at an amount less than the materiality level for the financial statements as a whole and for particular accounts or disclosures, if lower materiality levels were established for particular accounts or disclosures.

Some commenters suggested replacing the term "tolerable misstatement" in the reproposed standard with the term "performance materiality," which is the term used in the International Standards on Auditing ("ISA").

The Board decided to retain the term "tolerable misstatement" in its standards. The concept of tolerable misstatement is already understood by auditors, and the Board is not seeking to change the concept as described in PCAOB standards. Because the term "performance materiality" uses the word "materiality," it could be misunderstood, *e.g.,* by nonauditors, as having a meaning other than that intended in the standard. The concept of materiality that applies to financial statements of companies that are audited in accordance with PCAOB standards is rooted in case law and reflects a reasonable investor's perspective. In contrast, tolerable misstatement is a concept used in audit scoping decisions at the account level, considering potential uncorrected and undetected misstatement.

[208] Paragraphs 8–9 of Auditing Standard No. 11.

[209] AU sec. 350.18.

One commenter stated that the requirement to establish tolerable misstatement eliminated the need to establish a lower level of materiality for particular accounts or disclosures. However, the two concepts are designed for different purposes. The requirement to establish a lower materiality level is intended to address the need for a lower threshold when, in light of the particular circumstances, misstatements of lesser amounts have a substantial likelihood of influencing the judgment of a reasonable investor. As mentioned previously, tolerable misstatement is a concept used in audit scoping decisions at the account level, considering potential uncorrected and undetected misstatement.

The reproposed standard also required the auditor to take into account the nature, cause (if known), and amount of misstatements that were accumulated in audits of financial statements of prior periods. One commenter suggested that the Board should clarify its intent regarding this requirement and provide additional guidance regarding its application. Tolerable misstatement is affected by the expected level of misstatement in the account or disclosure, and the nature, cause, and amount of misstatements from prior periods are relevant to developing expectations about the level of misstatement. Generally, as the expected level of misstatement increases, the amount of tolerable misstatement decreases.

f. Consideration of Materiality for Multi-location Engagements

The reproposed standard included requirements for establishing materiality levels in multi-location engagements. The reproposed standard stated that when the auditor plans to perform procedures at selected locations or business units, the auditor should establish the materiality level for the individual locations or business units at an amount that reduces to an appropriately low level the probability that the total of uncorrected and undetected misstatements would result in material misstatement of the consolidated financial statements. The reproposed standard also stated that the materiality level for the selected locations or business units generally should be lower than the materiality level for the consolidated financial statements. Those requirements were an application of the fundamental principles to audits of consolidated financial statements of companies with multiple locations or business units.

Some commenters suggested removing the word "generally" as it could be misinterpreted as permitting the use of the materiality level for the consolidated financial statements as a whole for planning and performing audit procedures at the individual location or business unit level. Other commenters questioned how the requirements would be applied when a principal auditor makes reference to the report of another auditor in the auditor's report on consolidated financial statements in accordance with AU sec. 543.

After considering the comments, the Board has made certain clarifying revisions to the requirements for multi-location engagements.[210] First, the language in the standard has been revised to use term "tolerable misstatement" for an individual location to more clearly distinguish that term from the materiality level for the financial statements as a whole. In addition, the requirements were revised to state that tolerable misstatement for a location or business unit should be less than the materiality level for the financial statements as a whole. The word "generally" was removed from the requirements to reduce the risk of misinterpretation of the provision. Also, the phrase "to be used in performing audit procedures" has been removed from the requirement to determine tolerable misstatement for the individual locations or business units to avoid a misinterpretation about the principal auditor's responsibilities for situations in which the principal auditor makes reference to the report of the other auditor in accordance with AU sec. 543. Auditing Standard No. 11 requires the principal auditor to determine tolerable misstatement for the location or business unit audited by the other auditor, but the principal auditor is not expected to impose that determination of tolerable misstatement on the other auditor. Rather, tolerable misstatement for the location or business unit audited by the other auditor would be relevant to certain requirements under AU sec. 543[211] and in determining an appropriate amount of tolerable misstatement for the remaining locations or business units included in the consolidated financial statements.

[210] Paragraph 10 of Auditing Standard No. 11.

[211] For example, AU sec. 543.10 states that the auditor should adopt measures to assure the coordination of the principal auditor's activities with those of the other auditor in order to achieve a proper review of matters affecting the consolidating or combining of accounts in the financial statements.

g. Reevaluating the Materiality Level and Tolerable Misstatement

The reproposed standard stated that the established materiality level and tolerable misstatement should be reevaluated if changes in the particular circumstances or additional information comes to the auditor's attention that are likely to influence the judgment of a reasonable investor. In addition, the reproposed standard provided examples of situations that would require such reevaluation, and additional examples were discussed in the release accompanying the reproposed standards.

Some commenters suggested that the examples in the release should be included in the reproposed standard. The examples in Auditing Standard No. 11 have been revised to clarify the types of situations that would require reevaluation of the established materiality level and tolerable misstatement.

The reevaluation required by Auditing Standard No. 11 is important because if that reevaluation results in a lower materiality level or levels and tolerable misstatement than the auditor's initial determination, the standard states that the auditor should (1) evaluate the effect, if any, of the lower amount or amounts on his or her risk assessments and audit procedures and (2) modify the nature, timing, and extent of audit procedures as necessary to obtain sufficient appropriate audit evidence.[212]

Auditing Standard No. 11 does not allow the auditor to modify the established level or levels of materiality and tolerable misstatement solely because they are approximately equal to or are exceeded by the amount of uncorrected misstatements. Such a practice is inconsistent with the requirement to reevaluate the established materiality level or levels or tolerable misstatement if changes in the particular circumstances or additional information come to the auditor's attention that are likely to affect the judgments of a reasonable investor. Rather, Auditing Standard No. 14 establishes requirements for evaluating uncorrected misstatements[213] and describes the auditor's responsibilities in situations in which uncorrected misstatements approach established materiality level or levels used in planning and performing an audit.[214]

7. Auditing Standard No. 12—Identifying and Assessing Risks of Material Misstatement

a. Background

Auditing Standard No. 12 describes the auditor's responsibilities for the process of identifying and assessing risks of material misstatement in an audit of financial statements only and in an integrated audit. This process includes (1) performing information-gathering procedures, known as risk assessment procedures, and (2) identifying and assessing the risks of material misstatement using information obtained from the risk assessment procedures.

As discussed in the release accompanying the reproposed standards, the requirements in this standard are intended to improve the auditor's risk assessments and ability to focus on areas of increased risk in audits of financial statements only and in integrated audits. The effectiveness of a risk-based audit depends on whether the auditor identifies the risks of material misstatement and has an appropriate basis for assessing those risks. Inappropriate identification or assessment of risks of material misstatements can lead to overlooking relevant risks to the financial statements, e.g., business conditions that affect asset quality or create pressures to manipulate the financial statements, or assessing risks too low without having an appropriate basis for the assessment. In turn, these situations can lead to misdirected or inadequate audit work.

Auditing Standard No. 12 employs a top-down approach to risk assessment. Such an approach begins at the financial statement level and with the auditor's overall understanding of the company and its environment and works down to the significant accounts and disclosures and their relevant assertions. Also, the requirements for performing risk assessment procedures are designed to be scalable to companies of varying size and complexity.

In an integrated audit, the risks of material misstatement affect both the audit of financial statements and the audit of internal control, so the risk assessment process described in Auditing Standard No. 12 is for a single process that applies to both the audit of financial statements and the audit of internal control. Auditing Standard No. 12 seeks to enhance the integration of the audit of financial statements with the audit of internal control by aligning these risk assessment standards with Auditing Standard No. 5. Accordingly, Auditing Standard No. 12 reflects certain foundational risk assessment principles from Auditing Standard No. 5 that also apply to audits of financial statements. On the other hand, the provisions of this standard also are designed to be tailored for audits of financial statements only, *e.g.,* the requirements relating to the understanding of internal control over financial reporting.

b. Objective

Some commenters recommended that the Board revise the objective in the reproposed standard to indicate that the auditor's identification and assessment of risks are through understanding of the company and its environment. The objective in Auditing Standard No. 12 was retained from the reproposed standard. The revision suggested by the commenters is too narrow because Auditing Standard No. 12 requires other risk assessment procedures beyond obtaining an understanding of the company and its environment.

c. Performing Risk Assessment Procedures

The overarching requirement for risk assessment procedures in Auditing Standard No. 12 is that the auditor should perform risk assessment procedures that are sufficient to provide a reasonable basis for the identification and assessment of the risks of material misstatement, whether due to error or fraud, and to design further audit procedures.[215] Auditing Standard No. 12 discusses the auditor's responsibilities for determining and performing the risk assessment procedures necessary to satisfy that overarching requirement.[216]

Risks of material misstatement may exist at the financial statement level or at the assertion level. Risks of material misstatement also can arise from a variety of sources, including external factors, such as conditions in the company's industry and environment, and company-specific factors, such as the nature of the company, its activities, and internal control over financial reporting. Since the risks of material misstatement come from various sources, the auditor's risk assessment procedures need to encompass both external factors and company-specific factors. Auditing Standard No. 12 requires the following risk assessment procedures:

[212] Paragraph 12 of Auditing Standard No. 11.

[213] Paragraphs 17–23 of Auditing Standard No. 14.

[214] Paragraph 14.b. of Auditing Standard No. 14.

[215] Paragraph 4 of Auditing Standard No. 12. The phrase "design further audit procedures" applies to substantive procedures and to tests of controls in the audit of financial statements and the audit of internal control over financial reporting.

[216] Paragraphs 5–58 of Auditing Standard No. 12.

• Obtaining an understanding of the company and its environment;[217]

• Obtaining an understanding of the company's internal control over financial reporting;[218]

• Considering information from the client acceptance and retention evaluation, audit planning activities, past audits, and other engagements performed for the company;[219]

• Performing analytical procedures;[220]

• Conducting a discussion among engagement team members regarding the risks of material misstatement;[221] and

• Inquiring of the audit committee, management, and others within the company about the risks of material misstatement.[222]

The reproposed standard required the auditor to perform risk assessment procedures that are designed to help the auditor identify the areas of greater risk, appropriately assess those risks, and design and perform further audit procedures to address risks of material misstatements in the financial statements, whether due to error or fraud. One commenter suggested adding the phrase "and to design further audit procedures focused on the areas of greatest risk" to the end of the sentence in paragraph 4. The suggested language is not included in Auditing Standard No. 12 because that principle is already addressed in Auditing Standard No. 13.

One commenter on the reproposed standard asked for more discussion of the connection between the components of audit risk and the risk assessment process. That discussion has been added to Auditing Standard No. 8.[223]

d. Obtaining an Understanding of the Company and Its Environment

Like the reproposed standard, Auditing Standard No. 12 requires the auditor to obtain an understanding of the company and its environment to understand the events, conditions, and company activities that might reasonably be expected to have a significant effect on the risks of material misstatement ("obtaining an understanding of the company").[224] These requirements are an expansion of requirements that were in AU sec. 311 regarding obtaining knowledge of matters that relate to the nature of the entity's business, its organization, and its operating characteristics as part of audit planning.[225] The expanded requirements are intended to focus the auditor on the degree of "knowledge of the company" that is necessary for a risk-based audit and to explain how knowledge of the company informs the auditor's identification and assessment of risk.

Auditing Standard No. 12 requires that the understanding of the company and its environment include understanding the following:

• Relevant industry, regulatory, and other external factors;

• The nature of the company;

• The company's selection and application of accounting principles, including related disclosures;

• The company's objectives and strategies and those related business risks that might reasonably be expected to result in risks of material misstatement; and

• The company's measurement and analysis of its financial performance.[226]

Auditing Standard No. 12 requires the auditor to evaluate whether significant changes in the company from prior periods, including changes in its internal control over financial reporting, affect the risks of material misstatement.[227] This requirement builds on the requirement in paragraph 7 of Auditing Standard No. 9 to evaluate whether, among other things, the extent of recent changes, if any, in the company, its operations, or its internal control over financial reporting is important to the company's financial statements and internal control over financial reporting and, if so, how those changes will affect the auditor's procedures. PCAOB standards have recognized that many risks of material misstatement arise due to changes in the company. For example, AU sec. 319 listed the following examples of circumstances that can result in risks or changes to existing risks: changes in operating environment; new personnel; new or revamped information systems; rapid growth; new technology; new business models, products, or activities; corporate restructurings; expanded foreign operations; and new accounting pronouncements.[228]

Paragraphs 9–17 of Auditing Standard No. 12 explain more fully the necessary understanding of the preceding aspects of the company and its environment, e.g., what it means to obtain an understanding of the nature of the company. The discussion of relevant industry, regulatory, and other external factors is adapted from AU sec. 311. The discussion of the nature of the company is also adapted from AU sec. 311 and has been updated to reflect certain changes in business practices since AU sec. 311 was originally issued (e.g., to encompass alternative investments and financing arrangements and to recognize the development of new business models).

One commenter said that the requirement to obtain an understanding of the company and its environment should be revised because none of the aspects of the company and its environment listed in paragraph 7 is an event, condition, or company activity. However, the understanding of those aspects should lead the auditor to obtain an understanding of relevant events, conditions, and company activities. For example, obtaining an understanding of relevant industry, regulatory, and external factors helps an auditor understand the external conditions in which the company operates that represent risks of material misstatement at the financial statement level.

The reproposed standard contained a note about how the size and complexity of the company can affect the risks of misstatement and the controls necessary to address those risks. This note was intended to be a reminder to auditors that both size and complexity affect risks. One commenter stated that complexity rather than size is likely to heighten risk. Auditing Standard No. 12 retains the note as reproposed.[229] The size and complexity of the company can affect the risks of misstatement and the controls necessary to address those risks. Scaling the audit is most effective as a natural extension of the risk-based approach and applies to all audits, and the requirements in Auditing Standard No. 12 are intended to be scalable to companies of varying size and complexity. Auditing Standard No. 12 contains certain notes regarding scaling the audit based on a company's size and complexity.

(i). Additional Procedures to Obtain an Understanding of the Company and its Environment

The reproposed standard presented a list of procedures that the auditor should consider performing as part of obtaining an understanding of the company and its environment. These

[217] Paragraphs 7–17 of Auditing Standard No. 12.

[218] Paragraphs 18–40 of Auditing Standard No. 12.

[219] Paragraphs 41–45 of Auditing Standard No. 12.

[220] Paragraphs 46–48 of Auditing Standard No. 12.

[221] Paragraphs 49–53 of Auditing Standard No. 12.

[222] Paragraphs 54–58 of Auditing Standard No. 12.

[223] Paragraphs 8–11 of Auditing Standard No. 8.

[224] Paragraph 7 of Auditing Standard No. 12.

[225] AU secs. 311.06–.09.

[226] Paragraph 7 of Auditing Standard No. 12.

[227] Paragraph 8 of Auditing Standard No. 12.

[228] AU sec. 319.38.

[229] First note to paragraph 10 of Auditing Standard No. 12.

procedures include reading public information about the company, observing or reading transcripts of earnings calls, obtaining an understanding of compensation arrangements with senior management, and obtaining information about significant unusual developments regarding trading activity in the company's securities. The auditor's decisions about whether to perform one or more of the additional procedures and the extent of those procedures depend on whether the matters addressed in those procedures are important to the company's internal control or financial statements and whether such procedures are necessary to meet the overall requirements for obtaining an understanding of the company and performing risk assessment procedures.

Members of the Board's Standing Advisory Group ("SAG") suggested that these matters could provide valuable information for identifying risks of material misstatement, *e.g.,* to obtain information about business risks relevant to financial reporting or to identify incentives or pressures on management to manipulate financial results.[230] Also, the Public Oversight Board, *Panel on Audit Effectiveness, Report and Recommendations* ("*PAE Report*"), recommended that auditors consider published analysts' reports and forecasts when gaining an understanding of the company's business and industry, assessing risks, and evaluating identified misstatements.[231]

Commenters requested clarification of the Board's expectations regarding these procedures and expressed concern that the broad language used to describe some of the procedures might lead auditors to expend considerable efforts to decide and document whether to perform certain procedures. This requirement is not intended to require auditors to make a specific determination about each bit of data to which a procedure might be applied, e.g., to document each individual item of publicly available information to decide whether it should be reviewed.

Instead, the intention is for auditors to consider whether and to what extent such procedures should be performed to achieve the objectives in paragraphs 4 and 7 of Auditing Standard No. 12. For example, observing the company's earnings calls and other meetings with investors are likely to provide important information about the measurement and review of the company's financial performance, particularly the performance measures monitored by investors and analysts. Likewise, an understanding of compensation arrangements with senior management often can provide important information about incentives or pressures on management to manipulate the financial statements.

Auditing Standard No. 12 was revised to clarify that considering whether to perform the procedures listed in paragraph 11 also includes consideration of the extent of the procedures.

(ii). Selection and Application of Accounting Principles, Including Related Disclosures

PCAOB standards require auditors to obtain an understanding of the accounting practices common to the industry and to evaluate the quality of a company's accounting principles as part of his or her response to fraud risks and in determining matters to be communicated to the audit committee.[232] Auditing Standard No. 12 imposes a responsibility to obtain an understanding of the applicable financial reporting framework and to evaluate whether the company's selection and application of accounting principles are consistent with the applicable accounting framework and the accounting principles used in the relevant industry.[233] Such procedures can provide important information for identifying relevant matters such as (1) accounts that are susceptible to misstatement, e.g., if an account balance is determined using accounting principles that are inconsistent with the applicable financial reporting framework or (2) more general conditions that affect risks of material misstatement, *e.g.,* if the company's selection or application of accounting principles is more aggressive than prevailing practices in the relevant industry.

In connection with obtaining an understanding of the applicable financial reporting framework and evaluating the company's selection and application of accounting principles, including related disclosures, Auditing Standard No. 12 requires the auditor to develop expectations about the disclosures that are necessary for the company's financial statements to be presented fairly in conformity with the applicable financial reporting framework.[234] The language in this requirement was revised to clarify that the auditor should develop an expectation about the disclosures as part of the risk assessment procedures and that the expectations should be based on the disclosures necessary for the fair presentation of the financial statements in conformity with the applicable financial reporting framework.

Auditing Standard No. 12 also presents a list of matters that, if present, are relevant to the necessary understanding of the company's selection and application of accounting principles.[235] The amount of auditor attention devoted to an individual matter would depend on its importance in meeting the overall requirements for obtaining an understanding of the company and performing risk assessment procedures.[236]

(iii). Company Objectives, Strategies, and Related Business Risks

The reproposed standard required the auditor to obtain an understanding of the company's objectives, strategies, and related business risks in order to identify those business risks that could reasonably be expected to result in material misstatement of the financial statements. The *PAE Report* recommended that auditors be required to obtain an understanding of the company's business risks.[237]

Commenters on the reproposed standard requested additional discussion about business risks, including going concern risks, fraud risks, and how business risks can result in misstatements of the financial statements. Additional discussion has been added to Auditing Standard No. 8 and Auditing Standard No. 12.[238]

Auditing Standard No. 12 discusses how business risks can lead to misstatements and provides examples of business risks that may result in a risk of material misstatement of the financial statements.[239] However, the list of examples is meant to be illustrative rather than a checklist of factors to consider. Auditors would need to consider the business risks that are relevant to the particular company and industry. For example, in today's economic environment, business risks

[230] February 16, 2005. Webcasts of SAG meetings are available on the Board's Web site at: *http://www.pcaobus.org/News_and_Events/Webcasts.*

[231] Public Oversight Board, *Panel on Audit Effectiveness, Report and Recommendations* (August 31, 2000), p. 58.

[232] *See* AU sec. 316 and AU sec. 380, *Communication With Audit Committees.*

[233] Paragraph 12 of Auditing Standard No. 12.

[234] *Ibid.*

[235] Paragraph 13 of Auditing Standard No. 12.

[236] Paragraphs 4 and 7 of Auditing Standard No. 12.

[237] *PAE Report,* p. 20.

[238] Paragraph 6 of Auditing Standard No. 8 and the note to paragraph 15 of Auditing Standard No. 12.

[239] Paragraphs 5 and 14–15 of Auditing Standard No. 12.

might include financing risks (*e.g.,* access to necessary financing) or product risks (*e.g.,* investments in certain financial products).

(iv). The Company's Measurement and Analysis of its Financial Performance

The risk assessment procedures in the reproposed standard included obtaining an understanding of the company's performance measures. The purpose of obtaining that understanding is to identify those performance measures, whether external or internal, that affect the risks of material misstatement. For example, understanding performance measures can help the auditor identify accounts or disclosures that might be susceptible to manipulation to achieve certain performance targets (or to conceal failures to achieve those targets) or to understand how management uses performance measures to monitor risks affecting the financial statements.

Commenters requested clarification regarding the examples of performance measures. A note was added to Auditing Standard No. 12 to explain the significance of the individual examples.[240]

e. Obtaining an Understanding of Internal Control Over Financial Reporting

Auditing Standard No. 12 describes the auditor's responsibilities for obtaining an understanding of internal control over financial reporting ("understanding of internal control"). Auditing Standard No. 12 requires the auditor to obtain a sufficient understanding of each component of internal control over financial reporting to (a) identify the types of potential misstatements, (b) assess the factors that affect the risks of material misstatement, and (c) design further audit procedures.[241] These requirements are, in substance, equivalent to those in AU sec. 319, but the formulation in the proposed standard is aligned more clearly with Auditing Standard No. 5. Like the requirements in AU sec. 319, the requirements in Auditing Standard No. 12 indicate that although the auditor's primary focus is on internal control over financial reporting, the auditor may obtain an understanding of controls related to operations or compliance objectives if they pertain to data that the auditor plans to use in applying auditing procedures.[242]

Auditing Standard No. 12 sets forth certain principles regarding the sufficiency of the auditor's understanding of internal control. The size and complexity of the company; the auditor's existing knowledge of the company's internal control; the nature of the company's internal controls, including the company's use of IT; the nature and extent of changes in systems and operations; and the nature of the company's documentation of its internal control over financial reporting affect the nature, timing, and extent of procedures necessary to obtain an understanding of internal control. For example, the auditor's procedures to obtain an understanding of internal control would be more extensive when the auditor plans to test controls more extensively (*e.g.,* in an integrated audit), the company's internal control is more complex, or the company's controls have changed significantly.

The reproposed standard stated that the auditor's understanding of internal control includes evaluating the design of controls and determining whether the controls are implemented. Commenters observed that the reproposed standard stated that walkthroughs that include the necessary procedures ordinarily are sufficient to evaluate design effectiveness, but the reproposed standard did not make a similar statement about the use of walkthroughs to determine whether controls have been implemented. Auditing Standard No. 12 has been revised to include a statement that walkthroughs that include the procedures described in the standard ordinarily are sufficient to determine whether a control has been implemented.[243] Under Auditing Standard No. 12, as under AU sec. 319,[244] the amount of audit attention devoted to design and operating effectiveness will vary based on the auditor's plan for testing controls. For example, if the auditor plans to test controls, more attention should be devoted to controls that the auditor plans to test.

(i). Obtaining an Understanding of Individual Components of Internal Control Over Financial Reporting

To describe the auditor's responsibilities for obtaining an understanding of internal control, it was necessary to describe the components of internal control over financial reporting. The components described in Auditing Standard No. 12 are similar to those in AU sec. 319.[245] Auditing Standard No. 12 also states that auditors may use other suitable, recognized frameworks[246] in accordance with the provisions of the standard. If the auditor uses a suitable, recognized internal control framework with components that differ from those in the standard, the auditor should adapt the requirements in the standard for the components in the framework used.[247]

(ii). Control Environment

Auditing Standard No. 12 requires the auditor to assess the following matters as part of obtaining an understanding of the control environment:

- Whether management's philosophy and operating style promote effective internal control over financial reporting;
- Whether sound integrity and ethical values, particularly of top management, are developed and understood; and
- Whether the board or audit committee understands and exercises oversight responsibility over financial reporting and internal control.[248]

Although this requirement is aligned with a similar requirement in Auditing Standard No. 5 for evaluating the control environment, the auditor's process for assessing the control environment in an audit of financial statements only is not expected to be the same as that required when expressing an opinion on internal control over financial reporting. For audits of financial statements only, Auditing Standard No. 12 allows the auditor to base his or her assessment on evidence obtained as part of obtaining an understanding of the control environment and other relevant knowledge possessed by the auditor.[249]

Because of the importance of an effective control environment to address fraud risks, Auditing Standard No. 12 states that if the auditor identifies a control deficiency in the company's control environment, the auditor should evaluate the extent to which this control deficiency is indicative of a fraud risk factor.[250]

(iii) The Company's Risk Assessment Process

Auditing Standard No. 12 requires the auditor to obtain an understanding of management's risk assessment process for (a) identifying risks relevant to financial reporting objectives, including risks of material misstatement due to fraud, (b) assessing the likelihood and significance of misstatements resulting from those risks, and (c) deciding about

[240] Paragraph 17 of Auditing Standard No 12.

[241] Paragraph 18 of Auditing Standard No. 12.

[242] Paragraph 19 of Auditing Standard No. 12.

[243] Paragraph 20 of Auditing Standard No. 12.

[244] AU sec. 319.58.

[245] Paragraph 21 of Auditing Standard No. 12.

[246] *See* Securities Exchange Act Release No. 34–47986 (June 5, 2003) for a description of the characteristics of a suitable, recognized framework.

[247] Paragraph 22 of Auditing Standard No. 12.

[248] Paragraph 24 of Auditing Standard No. 12.

[249] Ibid.

[250] Paragraph 25 of Auditing Standard No. 12.

actions to address those risks.[251] The standard also requires the auditor to obtain an understanding of the risks of material misstatement identified and assessed by management and the actions taken to address those risks.[252] Compliance with these requirements will help make sure that the auditor's risk assessments are appropriately informed by management's risk assessments and the controls that management put in place to address the risks.

(iv) Information and Communication

The reproposed standard required the auditor to obtain an understanding of the information system, including the related business processes, relevant to financial reporting. One commenter suggested removing the requirement to understand the company's business processes. The requirement was retained as reproposed.[253] Obtaining an understanding of the company's business processes assists the auditor in obtaining an understanding of how transactions are initiated, authorized, processed, and recorded. Also, the requirement to understand business processes is a recommendation in the *PAE Report.*[254] Auditing Standard No. 12 describes the necessary understanding of business processes to help auditors identify those business processes that are relevant to financial reporting.[255]

Auditing Standard No. 12 also contains requirements for understanding the period-end financial reporting process [256] and describes important elements of that process.[257] Because the period-end financial reporting process is a common source of potential misstatements, it is important for the auditor to have an adequate understanding of the aspects of the period-end financial reporting process in all audits, including audits of financial statements only. Auditing Standard No. 12 requires the auditor only to obtain an understanding [258] of the process, as compared to Auditing Standard No. 5, which requires the auditor also to evaluate that process in the audit of internal control.

To appropriately highlight the importance of IT risks in determining the scope of the audit, the standard requires the auditor to obtain an understanding of how IT affects the company's flow of transactions. The standard also contains a note that states that the identification of risks and controls within IT is not a separate evaluation. Instead, it is an integral part of the approach used to identify significant accounts and disclosures and their relevant assertions and, when applicable, to select the controls to test, as well as to assess risk and allocate audit effort.

Regarding the auditor's understanding of communication, one commenter suggested that the standard clarify that the auditor should understand how the company communicates financial reporting roles and responsibilities and significant matters relating to financial reporting. The requirement in Auditing Standard No. 12 has been revised to clarify that point.[259]

(v) Control Activities

The reproposed standard required the auditor to obtain an understanding of control activities that is sufficient to assess the factors that affect the risks of material misstatement and to design further audit procedures. As under AU sec. 319, a more extensive understanding of control activities is needed in areas in which the auditor plans to test controls. Thus, for purposes of evaluating the effectiveness of internal control over financial reporting in an integrated audit, the auditor's understanding of control activities encompasses a broader range of accounts and disclosures than that which is normally obtained in an audit of financial statements only.

Some commenters expressed concern that the language in the requirement could be misinterpreted as requiring the auditor to obtain an understanding of all controls, even in an audit of financial statements only in which the auditor does not plan to test controls. A few commenters suggested framing the requirement in terms of understanding control activities relevant to the audit.

The Board did not intend to expand the auditor's responsibilities for obtaining an understanding of control activities beyond what is required in AU sec. 319. The discussion in Auditing Standard No. 12 on obtaining an understanding of control activities has been revised, primarily using language adapted from AU sec. 319, to clarify that the substance of the requirement has not changed.[260]

(vi). Performing Walkthroughs

The original proposed standard referred auditors to Auditing Standard No. 5 for a discussion of the performance of walkthroughs. Some commenters on the original proposed standard stated that the standard should include a discussion of walkthroughs rather than referring to Auditing Standard No. 5. The reproposed standard included a discussion of performing walkthroughs as part of meeting certain specified objectives, which paralleled a requirement in Auditing Standard No. 5 [261] regarding understanding likely sources of potential misstatements. Some commenters expressed concerns that the discussion would lead to unnecessary walkthroughs, particularly in audits of financial statements only.

The intention of including the discussion of walkthroughs was to explain how to perform walkthroughs rather than to impose requirements regarding when walkthroughs should be performed. The standard has been revised to focus on how the auditor should perform walkthroughs, *e.g.,* in connection with understanding the flow of transactions in the information system relevant to financial reporting, evaluating the design of controls relevant to the audit, and determining whether those controls have been implemented.[262] The discussion of the objectives for understanding likely sources of potential misstatements has been removed from Auditing Standard No. 12, so those objectives would continue to apply only to integrated audits.

(vii). Relationship of Understanding of Internal Control to Tests of Controls

Auditing Standard No. 12, like the reproposed standard, contains a discussion about the relationship between obtaining an understanding of controls and testing controls, including entity-level controls.[263] The requirements in Auditing Standard No. 12 clarify that the objective of obtaining an understanding of internal control as a risk assessment procedure is different from testing controls for the purpose of assessing control risk [264] or for the purpose of expressing an opinion on internal control over financial reporting

[251] Paragraph 26 of Auditing Standard No. 12.

[252] Paragraph 27 of Auditing Standard No. 12.

[253] Paragraph 28 of Auditing Standard No. 12.

[254] *PAE Report,* p. 15.

[255] Paragraphs 28–32 of Auditing Standard No. 12.

[256] AU sec. 319.49 used the term "financial reporting process used to prepare the entity's financial statements," but Auditing Standard No. 12 uses the same term as used in Auditing Standard No. 5.

[257] Paragraphs 28 and 32 of Auditing Standard No. 12.

[258] Paragraph 20 of Auditing Standard No. 12 discusses procedures that the auditor performs to obtain an understanding of internal control.

[259] Paragraph 33 of Auditing Standard No. 12.

[260] AU sec. 319.42 and paragraph 34 of Auditing Standard No. 12.

[261] Paragraph 34 of Auditing Standard No. 5.

[262] Paragraph 37 of Auditing Standard No. 12.

[263] Paragraph 39 of Auditing Standard No. 12.

[264] Paragraphs 16–31 of Auditing Standard No. 13.

in the audit of internal control.[265] The standard allows the auditor the flexibility of obtaining an understanding of internal control concurrently with performing tests of controls if he or she obtains sufficient appropriate evidence to achieve the objectives of both procedures.[266]

f. Information Obtained from Past Audits and Other Engagements

(i). Information from Past Audits

The reproposed standard included a requirement for the auditor to incorporate knowledge obtained during past audits into the auditor's process for identifying risks of material misstatement. One commenter asked for clarification of the meaning of the term "incorporate." Two commenters stated that the most important issue is to determine whether information from past audits is still relevant.

The term "incorporate" is not new and should be familiar to most auditors. For example, it has been used in AU sec. 316 regarding the requirement to incorporate an element of unpredictability in the audit in response to fraud risks. The requirement in the reproposed standard was similar to a requirement in Auditing Standard No. 5 to incorporate knowledge obtained during past audits in subsequent year audits of internal control.[267] Accordingly the term has been retained in Auditing Standard No. 12.

Auditing Standard No. 12 also states that if the auditor plans to limit the nature, timing, or extent of his or her risk assessment procedures by relying on information from past audits, the auditor should evaluate whether the prior-years' information remains relevant and reliable.[268]

(ii). Information from Other Engagements

The reproposed standard included a requirement for the auditor to take into account relevant information obtained through other engagements performed by the auditor for the company.[269] This requirement was intended to focus on the responsibility to take relevant information into account in identifying and assessing risks rather than to prescribe a particular method for obtaining that information.

Some commenters suggested that the requirement should be limited to consideration of other engagements performed by the engagement partner. The suggested change would weaken the standard. Limiting the consideration of information to engagements performed for the company by the engagement partner is too narrow because it omits other important information sources that are available to the engagement team. Also, limiting the consideration to engagements performed by the engagement partner is inconsistent with prior PCAOB standards. For example, AU sec. 311.04 stated that procedures the auditor may consider in planning an audit usually involve discussions with other firm personnel, and includes the following example "Discussing matters that may affect the audit with firm personnel responsible for non-audit services to the entity." Also, paragraph 03 of AU sec. 9311, *Planning and Supervision: Auditing Interpretations of Section 311,* stated:

> The auditor should consider the nature of non-audit services that have been performed. He should assess whether the services involve matters that might be expected to affect the entity's financial statements or the performance of the audit, for example, tax planning or recommendations on a cost accounting system. If the auditor decides that the performance of the non-audit services or the information likely to have been gained from it may have implications for his audit, he should discuss the matter with personnel who rendered the services and consider how the expected conduct and scope of his audit may be affected. In some cases, the auditor may find it useful to review the pertinent portions of the work papers prepared for the non-audit engagement as an aid in determining the nature of the services rendered or the possible audit implications.

Other commenters suggested that the requirement be revised to use more of the language from AU sec. 9311. The requirement in Auditing Standard No. 12[270] has been revised as follows:

> The auditor should obtain an understanding of the nature of the services that have been performed for the company by the auditor or affiliates of the firm[271] and should take into account relevant information obtained from those engagements in identifying risks of material misstatement.[272]

One commenter stated that audit firms will need to develop very costly reporting systems to enable them to convey relevant information about nonassurance engagements to audit engagement teams. Existing PCAOB and SEC rules already require firms to track and report nonaudit services provided to the company. Complying with these requirements would mean that the audit firms have a mechanism in place to track these services. For example, PCAOB Rules 3524[273] and 352[274] require the auditor to describe to the company's audit committee, among other things, the scope of and the potential effect on independence of other services provided by the firm. It is expected that the system used to capture, track, and monitor these services for compliance with these PCAOB independence rules would also be applicable to comply with the requirements of Auditing Standard No. 12.

g. Performing Analytical Procedures

The reproposed standard retained requirements from AU sec. 329, *Analytical Procedures,* to perform analytical procedures during the planning phase of the audit.[275] Such analytical procedures are, in essence, risk assessment procedures, so the respective requirements and direction have been incorporated into Auditing Standard No. 12.[276] One commenter stated that it is unclear whether the PCAOB intends a change in practice regarding the execution of analytical procedures performed as risk assessment procedures, e.g., because the requirements in the reproposed standard discussed developing expectations and comparing them to recorded amounts. AU sec. 329, states that analytical procedures involve developing expectations and comparing those expectations to recorded amounts.[277]

Auditing Standard No. 12 states that analytical procedures performed as risk assessment procedures often use data that is preliminary or data that is aggregated at a high level and that in those instances such analytical procedures are not designed with the level of precision necessary for substantive analytical procedures.[278] In those situations, the auditor's expectations in performing analytical procedures as risk assessment procedures do not require the same

[265] Paragraph B1 of Auditing Standard No. 5.

[266] Paragraph 39 of Auditing Standard No. 12.

[267] Paragraph 57 of Auditing Standard No. 5.

[268] Paragraph 43 of Auditing Standard No. 12.

[269] PCAOB Rule 1001, *Definitions of Terms Employed in Rules,* states that, when used in rules of the PCAOB, unless the context otherwise requires, "[t]he term 'auditor' means both public accounting firms registered with the Public Company Accounting Oversight Board and associated persons thereof."

[270] Paragraph 45 of Auditing Standard No. 12.

[271] *See* PCAOB Rule 3501(a)(i), which defines "affiliate of the accounting firm."

[272] Paragraph 7 of Auditing Standard No. 9.

[273] PCAOB Rule 3524, *Audit Committee Pre-approval of Certain Tax Services.*

[274] PCAOB Rule 3526, *Communication With Audit Committees Concerning Independence.*

[275] AU secs. 329.06–.08.

[276] Paragraphs 46–48 of Auditing Standard No. 12.

[277] AU sec. 329.05.

[278] Paragraph 48 of Auditing Standard No. 12.

degree of precision as substantive analytical procedures.

h. Conducting a Discussion Among Engagement Team Members Regarding Risks of Material Misstatement

Like the reproposed standard, Auditing Standard No. 12 includes a requirement that key engagement team members discuss (1) the company's selection and application of accounting principles, including related disclosure requirements and (2) the susceptibility of the company's financial statements to material misstatement due to error or fraud.[279] The standard explains that key engagement team members include the engagement partner and all engagement team members who have significant engagement responsibilities.[280] The term "significant engagement responsibilities" should be familiar to auditors because it is already used in AU sec. 316 regarding the appropriate assignment of engagement team members in the overall responses to fraud risks.

One commenter stated that the requirement for participation in the discussion among engagement team members on the reproposed standard should be revised to use the language in ISA 315, *Identifying and Assessing the Risks of Material Misstatement through Understanding the Entity and its Environment,* so that the engagement partner makes the determination of what needs to be reported to whom on a "need to know" basis.

The language in Auditing Standard No. 12 was retained as reproposed. The Board believes that the discussion among engagement team members is an important part of the auditor's risk assessment procedures. Through its oversight activities, the Board has observed deficiencies relating to discussions among engagement team members regarding fraud risks, including instances in which key engagement team members did not participate.[281]

(i). *Discussion of the Potential for Material Misstatement Due to Fraud*

A number of comments were received regarding the requirements for discussing the risks of material misstatement due to fraud.

One commenter suggested that the standard should require the auditor to consider using a fraud specialist. The Board believes that this point is already covered by the requirement in Auditing Standard No. 9 to evaluate whether a person with specialized skill or knowledge is needed to assess risks.[282]

One commenter suggested that the requirement to discuss how the financial statements could be materially misstated through omitting or presenting incomplete disclosures also should include the possibility of presenting inaccurate disclosures. The requirement has been revised to include that topic.[283]Another commenter stated that the standard should provide more "guidance" about how fraud risks relate to disclosures. The manner in which management might intentionally omit disclosures or present inaccurate or incomplete disclosures to commit or conceal intentional misstatement of the financial statements necessarily depends on the circumstances, including the incentives or pressures and the opportunities to manipulate the financial statements. The discussion of fraud risks required by the standard should prompt engagement team members to consider ways in which omissions or inaccuracies in disclosures might be involved with fraudulent financial reporting.

Another commenter stated that the requirement for the auditor to emphasize certain matters regarding fraud to the engagement team members during the fraud risk discussion does not assign the responsibility to a specific person. The requirement focuses on the communication of important matters rather than on the person communicating the matters. Since the engagement partner has the overall responsibility for the audit engagement, the engagement partner is likely to be the most appropriate person to make the communications. However, Auditing Standard No. 12 allows the communications to be made by another engagement team member, when appropriate.

(ii) *Communication Among Engagement Team Members*

Auditing Standard No. 12 states that communication among the engagement team members about significant matters affecting the risks of material misstatement should continue throughout the audit, including when conditions change. This requirement carries forward and builds upon a requirement in AU sec. 316.[284]

i. Inquiring of the Audit Committee, Management, and Others Within the Company About the Risks of Material Misstatement

Like the reproposed standard, Auditing Standard No. 12 requires the auditor to make inquiries of the audit committee, or equivalent (or its chair), management, the internal audit function, and others within the company who might reasonably be expected to have information that is important to the identification and assessment of risks of material misstatement.[285] The requirement to inquire of others who "might reasonably be expected to have information" is similar to a requirement in AU sec. 316 for making inquiries of others about the existence or suspicion of fraud, and it establishes a principle to guide the auditor in determining those other persons to whom the inquiries should be addressed.[286]

(i). Inquiries Regarding Fraud Risks

The reproposed standard also required the auditor to make inquiries of the audit committee (or its chair), management, the internal audit function, and others within the company about the risks of fraud. Commenters suggested that the requirements for identifying other individuals within the company to whom inquiries should be directed should include determining the extent of such inquiries. Auditing Standard No. 12 reflects the suggested revision to that requirement because inquiries of other individuals should be designed to obtain information relevant to identifying and assessing fraud risks.[287]

The reproposed standard included a requirement to take into account the fact that management is often in the best position to commit fraud when evaluating management's responses to inquiries about fraud risks and determining when it is necessary to corroborate management's responses. One commenter stated that the requirement was unclear and the use of the term "take into account" did not seem consistent with the Board's explanation in the release accompanying the reproposed standards. This requirement has been revised to clarify the requirement and to use "take into account" in a manner that is consistent with the other PCAOB standards.[288]

Auditing Standard No. 12 requires that the auditor use his or her

[279] Paragraph 49 of Auditing Standard No. 12.

[280] Paragraph 50 of Auditing Standard No. 12.

[281] PCAOB Release 2007–001, *Observations on Auditors' Implementation of PCAOB Standards Relating to Auditors' Responsibilities with Respect to Fraud* (January 22, 2007).

[282] Paragraphs 16–17 of Auditing Standard No. 12.

[283] Paragraph 52 of Auditing Standard No. 12.

[284] AU sec. 316.18.

[285] Paragraph 54 of Auditing Standard No. 12.

[286] AU sec. 316.24.

[287] Paragraph 57 of Auditing Standard No. 12.

[288] Paragraph 58 of Auditing Standard No. 12.

knowledge of the company and its environment, as well as information from other risk assessment procedures, to determine the nature of the inquiries about risks of material misstatement. This requirement carries forward and builds upon a requirement in AU sec. 316.[289]

Auditing Standard No. 12 includes an additional required inquiry of the internal auditor about whether he or she is aware of instances of management override of controls and the nature and circumstances of such overrides. Also, Auditing Standard No. 12 requires the auditor to make inquiries of management and the audit committee, or equivalent regarding tips or complaints about the company's financial reporting.[290] These required inquiries were added in light of research indicating that many incidents of fraud are uncovered through tips.[291] These inquiries can provide important evidence about fraud risks.

Auditing Standard No. 12 requires the auditor, when evaluating management's responses to inquiries about fraud risks and determining when it is necessary to corroborate management's responses, to take into account the fact that management is often in the best position to commit fraud. The standard also requires the auditor to obtain evidence to address inconsistencies in responses to inquiries. This requirement carries forward and builds upon a requirement in AU sec. 316.[292]

j. Identifying and Assessing the Risks of Material Misstatement

Auditing Standard No. 12 sets forth a process for identifying and assessing the risks of material misstatement using the information obtained from the risk assessment procedures and other relevant knowledge possessed by the auditor.[293] This process involves:

- Identifying risks of misstatement using information obtained from risk assessment procedures and considering the characteristics of the accounts and disclosures in the financial statements.
- Evaluating whether the identified risks relate pervasively to the financial statements as a whole and potentially affect many assertions.
- Evaluating the types of potential misstatements that could result from the identified risks and the accounts, disclosures, and assertions that could be affected. This includes evaluating how risks at the financial statement level could affect risks at the assertion level.
- Assessing the likelihood of misstatement, including the possibility of multiple misstatements, and the magnitude of potential misstatement to assess the possibility that the risk could result in material misstatement of the financial statements. In making this assessment, the auditor may take into account the planned degree of reliance on controls that the auditor plans to test, if the auditor performs tests of controls in accordance with PCAOB standards.
- Identifying significant accounts and disclosures and their relevant assertions.
- Determining whether any of the identified and assessed risks of material misstatement are significant risks.[294]

One commenter suggested that the word "material" should be inserted before the word "misstatement" in paragraph 56.a. of the reproposed standard. No change was made to Auditing Standard No. 12 because inserting the word "material" would inappropriately narrow the auditor's focus on only material risks too early in the process of identifying and assessing risks of misstatement, i.e., before assessing the likelihood and magnitude of potential misstatements related to the risks.

Commenters suggested that the standard should clarify that the likelihood and magnitude of potential misstatements should be considered in determining which risks are significant risks. Auditing Standard No. 12 includes an additional requirement that states, "To determine whether an identified and assessed risk is a significant risk, the auditor should evaluate whether the risk requires special audit consideration because of the nature of the risk or the likelihood and potential magnitude of misstatement related to the risk."[295] Also, the list of factors that should be evaluated in determining which risks are significant risks was expanded to include "the effect of the quantitative and qualitative risk factors discussed in paragraph 60 of the standard [on identifying significant accounts and disclosures and their relevant assertions] on the likelihood and potential magnitude of misstatements."[296] Including this new factor highlights the relationship between the identification of significant accounts and disclosures and their relevant assertions and the identification of significant risks. Specifically, risk factors that form the basis for identifying significant accounts and disclosures and their relevant assertions also inform the identification of significant risks, and significant risks affect one or more relevant assertions of significant accounts or disclosures.

Another commenter on the reproposed standard suggested that the term "likelihood" be defined more in terms of reasonable possibility as that term is used in Auditing Standard No. 5. However, that change would be inconsistent with the requirement to assess the likelihood of misstatements, *i.e.,* the possibility that the risk would result in misstatement of the financial statements.

One commenter indicated that the requirement in the note to paragraph 59.c. of the reproposed standard "inappropriately infers that the auditor should, and can, associate the risks at the financial statement level with particular assertions in order to assess risks at the assertion level." Auditing Standard No. 8 states that risks of material misstatement at the financial statement level have a pervasive effect on the financial statements as a whole and potentially affect many assertions, and the standard provides examples of how risks at the financial statement level can result in misstatements.[297] It is important for the auditor to take into account risks of material misstatement at the financial statement level in order to evaluate types of misstatements that could occur.

Under PCAOB standards, significant accounts and disclosures and their relevant assertions are identified based upon their risk characteristics. Thus, the auditor needs to identify and assess the risks in order to identify the relevant assertions of significant accounts and disclosures in accordance with PCAOB standards. For example, Auditing Standard No. 5 requires the auditor to identify significant accounts and disclosures and their relevant assertions in integrated audits.[298] Also, AU sec. 319 required the auditor to perform substantive procedures for the relevant assertions of significant accounts and

[289] AU sec. 316.24.

[290] Paragraph 56 of Auditing Standard No. 12.

[291] *See, e.g.,* Association of Certified Fraud Examiners, *2008 Report to the Nation on Occupational Fraud & Abuse* (2008).

[292] AU sec. 316.27.

[293] Under Auditing Standard No. 12, the auditor has a responsibility to perform risk assessment procedures that provide an appropriate basis for his or her risk assessment. Auditing Standard No. 12 does not include the provision in the prior interim standards that allowed the auditor to assess risk at the maximum solely for efficiency reasons. Rather, the auditor needs to have a sufficient understanding of the company and its environment, including its internal control, in order to determine the risks of material misstatement and, in turn, to design effective tests of controls and substantive procedures.

[294] Paragraph 59 of Auditing Standard No. 12.

[295] Paragraph 70 of Auditing Standard No. 12.

[296] Paragraph 71 of Auditing Standard No. 12.

[297] Paragraph 6 of Auditing Standard No. 8.

[298] Paragraph 28 of Auditing Standard No. 5.

disclosures for all audits of financial statements, which implicitly required the auditor to identify those accounts, disclosures, and assertions.[299] Auditing Standard No. 12 imposes a more explicit requirement on the auditor to identify significant accounts and disclosures and their relevant assertions in all audits.

(i). Factors Relevant To Identifying Fraud Risks

Auditing Standard No. 12 requires that the auditor evaluate whether the information gathered from the risk assessment procedures indicates that one or more fraud risk factors are present and should be taken into account in identifying and assessing fraud risks.[300] The reproposed standard included a paragraph that stated that the auditor should not assume that all of the fraud risk factors discussed in must be observed to conclude that a fraud risk exists. Commenters suggested that the language was not clear as to the action that auditors would need to take to "not assume." The paragraph has been revised to clarify that all of the conditions are not required to be observed or evident to conclude that a fraud risk exists.[301]

(ii). Consideration of the Risk of Omitted or Incomplete Disclosures

The reproposed standard stated that the auditor's evaluation of fraud risk factors should include an evaluation of how fraud could be perpetrated or concealed by omitting required disclosures or by presenting incomplete disclosures. One commenter stated that the requirement should also include consideration of the possibility of presenting inaccurate disclosures. Other commenters stated that the requirement should be revised to refer to disclosures required by the applicable financial reporting framework. The requirement has been revised to encompass inaccurate disclosures and to refer to disclosures required for the fair presentation of the financial statements in conformity with the applicable financial reporting framework.[302]

(iii). Presumption of Fraud Risk Involving Improper Revenue Recognition

Like the reproposed standard, Auditing Standard No. 12 contains a requirement that the auditor should presume that there is a fraud risk involving improper revenue recognition and evaluate which types of revenue, revenue transactions, or assertions may give rise to such risks.[303] One commenter recommended rewording this paragraph to state that while revenue recognition should be presumed to be a higher level of risk, there are exceptions. The requirement was retained as stated in the reproposed standard because a significant number of financial reporting frauds relate to revenue recognition.[304]

k. Definition of Significant Risk

The reproposed standard defined significant risk as a risk of material misstatement that requires special audit consideration. Some commenters stated that the definition of "significant risk" in the reproposed standard should be revised to indicate that significant risks are "identified risks" and that they are determined using the "auditor's judgment" or risks that the auditor "determines." Adding a reference to the auditor's determination or auditor's judgment is unnecessary because those points are inherent in the requirements for identifying significant risks, *e.g.,* in the required evaluation of the likelihood and potential magnitude of misstatements related to the risk. Similarly, the reference to "identified risks" is unnecessary because it is already mentioned in the requirement for determining significant risks. Accordingly, the definition of significant risk included in the reproposed standard is retained.

8. Auditing Standard No. 13—The Auditor's Responses to the Risks of Material Misstatement

a. Background

Auditing Standard No. 13 establishes requirements for responding to the risks of material misstatement, including responses regarding the general conduct of the audit and responses involving audit procedures. Auditing Standard No. 13 applies to integrated audits and audits of financial statements only.

b. Linking Assessed Risks and Auditor's Responses

The reproposed standard included a requirement for the auditor to design and implement appropriate responses to the "assessed risks of material misstatement" to address comments received on the original proposed standard for improving the linkage between the auditor's responses and the identification and assessment of risks of material misstatement. Acknowledging the improvements in the reproposed standard, some commenters continued to suggest that the objective also should state that the auditor is to address the assessed risks of material misstatement.

In the Board's view, obtaining sufficient appropriate evidence to support the auditor's opinion requires the auditor to adequately respond to the risks of material misstatement. Accordingly, the title and objective of the standard continue to refer to responding to the risks of material misstatement. However, the Board recognizes that the appropriate identification and assessment of the risks of material misstatement in accordance with Auditing Standard No. 12 enable the auditor to effectively respond to the risks of material misstatement. Auditing Standard No. 13 continues to impose on auditors an unconditional responsibility to design and implement responses that address the risks of material misstatement identified and assessed in accordance with Auditing Standard No. 12.[305] As with the reproposed standard, noncompliance with the requirements in Auditing Standard No. 12 that leads to a failure to identify or appropriately assess a risk of material misstatement also could result in a failure to appropriately respond to the risk of material misstatement in accordance with this standard.[306]

c. Overall Responses to Risks

The reproposed standard included a requirement for the auditor to respond to the risks of material misstatement through overall responses and responses involving the nature, timing, and extent of audit procedures. Overall responses relate to the general conduct of the audit, e.g., appropriately assigning and properly supervising engagement team members, incorporating an element of unpredictability into the audit, evaluating the company's selection and application of significant accounting principles, and making pervasive changes to the audit. Such responses are required by AU sec. 316 in response to fraud risks, but the reproposed standard extended the requirement to apply to risks of material misstatement due to error or fraud. These responses, by their nature, are appropriate for addressing risks of material misstatement due to error or fraud.

Some commenters expressed concerns regarding the expansion of the requirement for incorporating an

[299] Ibid.

[300] Paragraph 65 of Auditing Standard No. 12.

[301] Paragraph 66 of Auditing Standard No. 12.

[302] Paragraph 67 of Auditing Standard No. 12.

[303] Paragraph 68 of Auditing Standard No. 12.

[304] *See, e.g.,* Committee of Sponsoring Organizations of the Treadway Commission, *Fraudulent Financial Reporting: 1998–2007* (May 2010).

[305] Paragraph 3 of Auditing Standard No. 13.

[306] Failure to address a risk of material misstatement also might indicate a failure to comply with Auditing Standard No. 12.

element of unpredictability to apply to risks of material misstatement other than fraud risks.

In the Board's view, although incorporating an element of unpredictability is intended primarily to address fraud risks, it also can enable the auditor to detect errors or control deficiencies that could otherwise remain undetected. In addition, the requirement to incorporate an element of unpredictability when testing controls already exists in Auditing Standard No. 5. Auditing Standard No. 13 continues to indicate that the auditor should incorporate an element of unpredictability as part of the response to the risks of material misstatement, including fraud risks.[307]

One commenter requested clarification regarding the differences between the first and third examples used to illustrate ways to incorporate an element of unpredictability in paragraph 5.c. of the reproposed standard. The first example in Auditing Standard No. 13 is intended to illustrate that the auditor may decide to perform audit procedures for a particular account, disclosure, or assertion even though the auditor's risk assessment did not identify specific risks associated with those accounts.[308] The third example is intended to illustrate that when sampling a particular financial statement amount, the auditor may consider selecting items with amounts lower than the threshold that the auditor had used in the past, or expanding the selection to other sections of the population that the auditor had not tested in the past.[309]

The reproposed standard required the auditor to evaluate whether it is necessary to make pervasive changes to the audit to adequately address the assessed risks of material misstatement. The reproposed standard did not require that pervasive changes be made in every audit. Instead, it required the auditor to evaluate whether pervasive changes that affect many aspects of the audit are needed to address the assessed risks of material misstatement. Commenters questioned the use of the term "pervasive" in the requirement. Auditing Standard No. 13 provides additional explanation of the types of circumstances in which pervasive changes might be necessary.[310]

Existing PCAOB standards require the auditor to apply professional skepticism as part of due care,[311] and Auditing Standard No. 13 states that the auditor's response to fraud risks involves the application of professional skepticism in gathering and evaluating audit evidence.[312] The requirement is intended to emphasize the importance of professional skepticism in responding to risks of material misstatement without limiting its application to the auditor's responses.

One commenter expressed concern that the reproposed standard did not explicitly require the auditor to implement overall responses to risks at the financial statement level. Such an explicit requirement would inappropriately limit the auditor's overall responses to risks at the financial statement level. Many of the overall responses also apply to risks at the assertion level, *e.g.,* assigning more experienced personnel or applying a greater extent of supervision to accounts or disclosures with higher risk.

d. Responses Involving the Nature, Timing, and Extent of Audit Procedures

The reproposed standard required the auditor to design and perform audit procedures in a manner that addresses the assessed risks of material misstatement for each relevant assertion of each significant account and disclosure. Auditing Standard No. 13 retained this requirement as reproposed. The requirement emphasizes that the auditor should focus on each relevant assertion of each significant account and disclosure and the risks of material misstatement associated with the relevant assertion when designing and performing audit procedures.

The reproposed standard also included requirements for the auditor to design the testing of controls to accomplish the objectives of both the audit of financial statements and the audit of internal control in an integrated audit. This requirement is aligned with Auditing Standard No. 5. One commenter suggested that that the requirement be removed because it relates only to integrated audits. The requirement was retained as reproposed because Auditing Standard No. 13 applies to integrated audits as well as audits of financial statements only, and tests of controls are a necessary response in the audit of internal control.[313]

e. Tests of Controls in an Audit of Internal Control

Auditing Standard No. 13 includes requirements for performing tests of controls in the audit of financial statements.[314]

In an integrated audit, the tests of controls performed in the audit of internal control are part of the auditor's responses to the risks of material misstatement, as indicated in paragraph 9–10 of Auditing Standard No. 13.[315] To help facilitate the integration of tests of controls in an integrated audit, the standard continues to use language similar to that of Auditing Standard No. 5 when describing analogous terms and concepts relating to the testing of controls.

f. Tests of Controls and Control Risk Assessment in the Audit of Financial Statements

(i). Requirements on When to Test Controls

AU sec. 319 required auditors to obtain evidence about the design effectiveness and operating effectiveness of controls (a) when the auditor plans to rely on selected controls to reduce his or her substantive procedures and (b) in those limited circumstances in which the auditor cannot obtain sufficient appropriate evidence through substantive procedures alone.[316] Thus, except in those limited circumstances, AU sec. 319 provided auditors with flexibility to decide when or whether to test controls.

Auditing Standard No. 13 does not change the requirements in AU sec. 319 regarding when testing controls is necessary in audits of financial statements only.[317] In those audits, auditors continue to have the same flexibility in deciding when or whether to test controls to reduce their substantive procedures.[318] Auditing Standard No. 13 includes additional statements that emphasize the flexibility that auditors have in making these decisions and provides additional examples, adapted from AU sec. 319.68, of situations in which auditors cannot obtain sufficient appropriate audit evidence through substantive procedures alone.[319]

[307] Paragraph 5.c. of Auditing Standard No. 13.

[308] Paragraph 5.c. (1) of Auditing Standard No. 13.

[309] Paragraph 5.c. (3) of Auditing Standard No. 13.

[310] Paragraph 6 of Auditing Standard No. 13.

[311] AU secs. 230.07–.09.

[312] Paragraph 7 of Auditing Standard No. 13.

[313] Paragraph 9.c. of Auditing Standard No. 13.

[314] Paragraphs 16–35 of Auditing Standard No. 13.

[315] Paragraph 39 of Auditing Standard No. 5 states, "The auditor should test those controls that are important to the auditor's conclusion about whether the company's controls sufficiently address the assessed risk of misstatement to each relevant assertion."

[316] AU sec. 319.66.

[317] Certain clarifying revisions were made to the discussion of relying on controls to modify the auditor's substantive procedures, in response to comments on the reproposed standard. *See* footnote 12 to paragraph 16 of Auditing Standard No. 13.

[318] Paragraph 16 of Auditing Standard No. 13.

[319] Paragraph 17 of Auditing Standard No. 13.

(ii). Period of Reliance

Auditing Standard No. 13 states that when the auditor relies on controls to assess control risk at less than the maximum, the auditor must obtain evidence that the controls selected for testing are designed effectively and operated effectively during the entire period of reliance.[320] The concept of the period of reliance was introduced in Auditing Standard No. 5 and discussed further in the PCAOB staff guidance, *Staff Views: An Audit of Internal Control Over Financial Reporting That Is Integrated with an Audit of Financial Statements—Guidance for Auditors of Smaller Public Companies.* Auditing Standard No. 13 provides a definition of "period of reliance" that parallels the language in paragraph B4 of Auditing Standard No. 5.[321]

(iii). Evidence About the Effectiveness of Controls

Auditing Standard No. 13 describes the principle, adapted from AU sec. 319,[322] that the evidence necessary to support the auditor's control risk assessment depends on the degree of reliance the auditor plans to place on the effectiveness of a control. In applying that principle, Auditing Standard No. 13 requires the auditor to obtain more persuasive audit evidence from tests of controls the greater the reliance the auditor places on the effectiveness of a control. In addition, Auditing Standard No. 13 requires the auditor to obtain more persuasive evidence about the effectiveness of controls for each relevant assertion for which the audit approach consists primarily of tests of controls, including situations in which substantive procedures alone cannot provide sufficient appropriate audit evidence.[323]

(iv). Testing Operating Effectiveness

Auditing Standard No. 13 requires the auditor to determine, among other things, whether the person performing the control possesses the necessary authority and competence to perform the control effectively.[324] This requirement is intended to call to the auditor's attention that whether he or she possesses the appropriate level of authority and the knowledge and skills necessary to perform the control function is essential to whether a person can effectively perform the control. Thus, the auditor is required to make such determination before he or she can conclude about the effectiveness of the control.

(v). Timing of Tests of Controls—Evidence Obtained During an Interim Period

The reproposed standard stated that the auditor must obtain evidence about the effectiveness of controls selected for testing for the entire period of reliance. When the auditor tests controls during an interim period, additional evidence that is necessary concerning the operation of those controls for the remaining period of reliance depends on a series of factors listed in the reproposed standard, including, among other factors, the possibility of significant changes in internal control over financial reporting occurring subsequent to the interim date.

One commenter suggested adding "control environment" to the list of factors that could affect the auditor's determination of what additional evidence is necessary. The control environment has an important, but indirect, effect on the likelihood that a misstatement will be prevented or detected on a timely basis. Also, unlike monitoring controls, the control environment is not designed to identify possible breakdowns in other controls. Accordingly, the control environment, by itself, does not reduce the amount of evidence needed concerning controls over specific relevant assertions for the remaining period. The control environment is not included in the list of factors in Auditing Standard No. 13.

Another commenter suggested adding a requirement for the auditor to obtain, when applicable, audit evidence about subsequent changes to the controls tested during the interim period. A note has been added to Auditing Standard No. 13 requiring the auditor to obtain evidence about such subsequent changes, if significant.[325]

(vi). Timing of Tests of Controls—Evidence from Past Audits

Auditing Standard No. 13 states that the auditor should obtain evidence during the current year audit about the design and operating effectiveness of controls upon which the auditor relies.[326] This requirement is based on the principle that auditors should support their control risk assessments each year with current evidence. However, when the auditor has tested the controls in the past and plans to rely on the same controls for the current year audit, the amount of evidence needed will vary based on the relevant factors listed in the standard.[327] These additional factors generally relate to the degree of reliance on the control, the risk that the control will fail to operate as designed, and the nature and amount of evidence that the auditor has already obtained regarding the effectiveness of the controls. These requirements are consistent with Auditing Standard No. 5. Also, the standard allows the auditor to use a benchmarking strategy, when appropriate, for automated application controls for subsequent years' audits, as do the provisions of Auditing Standard No. 5. However, the standard does not permit testing controls once every third year because the standard requires evidence regarding the effectiveness of controls to be obtained each year.

Some commenters expressed concern that the requirements in the reproposed standard for determining the amount of evidence needed in the current year could be interpreted as requiring the auditor to consider each factor listed for each of the controls that the auditor tested in the past, regardless of whether or not the auditor plans to rely on those controls for purposes of the current year audit. The requirement was intended to apply when the auditor tested the controls in the past audits and plans to rely on those controls and use evidence about the effectiveness of those controls obtained in prior years for purposes of the current year audit. That requirement is clarified in Auditing Standard No. 13.[328]

(vii). Assessing Control Risk

Auditing Standard No. 13 requires the auditor to assess control risk for relevant assertions.[329] This requirement is not new. AU sec. 319 established requirements for the auditor to assess control risk, and Auditing Standard No. 5 discusses control risk assessment in the financial statement audit portion of the integrated audit.[330]

Auditing Standard No. 13 requires the auditor to assess the control risk at the maximum level for relevant assertions when the controls necessary to sufficiently address the assessed risk of material misstatement in those assertions are missing or ineffective or when the auditor has not obtained sufficient appropriate evidence to support a control risk assessment below the maximum level.[331]

One commenter expressed a concern that the reproposed standard seemed to

[320] Paragraph 16 of Auditing Standard No. 13.

[321] Paragraph A.3 of Auditing Standard No. 13.

[322] AU sec. 319.90.

[323] Paragraph 18 of Auditing Standard No. 13.

[324] Paragraph 21 of Auditing Standard No. 13.

[325] Paragraph 30 of Auditing Standard No. 13.

[326] Paragraph 31 of Auditing Standard No. 13.

[327] Ibid.

[328] Ibid.

[329] Paragraphs 32–34 of Auditing Standard No. 13.

[330] AU secs. 319.70, .83-.90 and paragraphs B4–B5 of Auditing Standards No. 5.

[331] Paragraph 33 of Auditing Standard No. 13.

indicate that no reduction of the control risk assessment should occur based on understanding the design effectiveness of controls. The commenter suggested that a control that does not exist or is not designed effectively should have a different impact on the auditor's testing than a control that is designed effectively but not tested by the auditor.

The risk assessment standards already address the points raised by the commenter regarding the effect of control deficiencies on the auditor's testing. Auditing Standard No. 12 requires the auditor to obtain an understanding of the design of the company's controls as part of his or her risk assessment procedures.[332] If the auditor identifies design deficiencies in the company's controls, the auditor would take that into account in identifying and assessing the risks of material misstatement, and Auditing Standard No. 13 requires the auditor to implement responses to address those risks of material misstatement. When deficiencies are detected during the auditor's testing of controls that the auditor plans to rely on, Auditing Standard No. 13 requires the auditor to (1) perform tests of other controls related to the same assertion as the ineffective controls, or (2) revise the control risk assessment and modify the planned substantive procedures as necessary in light of the increased assessment of risk.[333]

Another commenter suggested that the reproposed standard provide more direction about evaluating control deviations by adding a paragraph from Auditing Standard No. 5 regarding evaluating control deficiencies. The referenced paragraph does not apply specifically to assessing control risk in a financial statement audit, and Auditing Standard No. 13 requires the auditor to evaluate the evidence from all sources, including the results of test of controls, when assessing control risk for relevant assertions.[334]

g. Substantive Procedures

Auditing Standard No. 13 requires the auditor to perform substantive procedures for each relevant assertion of each significant account and disclosure, regardless of the assessed level of control risk.[335] By definition, a relevant assertion of a significant account and disclosure has a reasonable possibility of containing a misstatement or misstatements that would cause the financial statements to be materially misstated.[336] The requirement to obtain evidence from substantive procedures for each relevant assertion of each significant account and disclosure reflects the principle that the auditors need to implement appropriate responses to address the assessed risks of material misstatement.

Existing PCAOB standards indicate that some risks of material misstatement might require more evidence from substantive procedures because of certain inherent limitations of internal control.[337] For example, more evidence from substantive procedures ordinarily is needed for relevant assertions that have a higher susceptibility to management override or to lapses in judgment or breakdowns resulting from human failures. Observations from the Board's oversight activities have underscored the importance of this principle. Auditing Standard No. 13 includes this principle because it is particularly relevant to the determination of the nature, timing, and extent of substantive procedures. It is also consistent with the principles regarding detection risk discussed in Auditing Standard No. 8.

h. Timing of Substantive Procedures

The reproposed standard included a requirement for the auditor to take into account certain factors in determining whether it is appropriate to perform substantive procedures at an interim date. One commenter suggested that another point be added to the standard to require the auditor to review "the internal control changes that have been made to date and the nature and extent of monitoring such changes by the client staff." Auditing Standard No. 13 requires the auditor to consider the effect of known or expected changes in the company, its environment, and its internal control over financial reporting during the remaining period on its risk assessments when determining whether to perform substantive procedures at an interim date.[338] This additional requirement recognizes that both changes in controls and other changes to the company and its environment can affect the risks of material misstatement and, thus, the effectiveness of interim substantive procedures. For example, significant changes in industry or market conditions near year end could increase the risk of material misstatement regarding the valuation of assets at year end, which, in turn, would require significant audit attention during the remaining period.

The reproposed standard stated that when an auditor performs substantive procedures as of an interim date, the auditor should perform substantive procedures, or substantive procedures combined with tests of controls, that provide a reasonable basis for extending the audit conclusions from the interim date to the period end. The reproposed standard also required that the auditor perform certain procedures that were adapted from AU sec. 313.

Some commenters suggested that the Board remove the mandatory procedures in the reproposed standard, arguing that the procedures should be determined by the auditor based on professional judgment. Removing those requirements as suggested by the commenters would weaken PCAOB standards. Observations from the Board's oversight activities have included instances in which inadequate audit work was performed when extending the conclusion reached at the interim date to the end of the period covered by the financial statements. Therefore, retaining the mandatory procedures in this standard continues to be appropriate.[339]

i. Substantive Procedures Responsive to Significant Risks

Like the original proposed standard, the reproposed standard stated that the auditor should perform substantive procedures, including tests of details, that are specifically responsive to the significant risks. AU sec. 329 indicates that tests of details should be performed in response to significant risks.[340]

One commenter continued to express concern about imposing a presumptively mandatory responsibility for auditors to perform tests of details in response to significant risks. Auditing Standard No. 13 retains the requirement as reproposed.[341] The nature and importance of significant risks warrant a high level of assurance from substantive procedures to adequately address the risk. Also, analytical procedures alone are not well suited to detecting certain types of misstatements related to significant risks, including, in particular, fraud risks. For example, when fraud risks are present, management might be able to override controls to allow adjustments that result in artificial changes to the financial statement relationships being analyzed,

[332] Paragraph 20 of Auditing Standard No. 12.

[333] Paragraph 34 of Auditing Standard No. 13.

[334] Paragraph 32 of Auditing Standard No. 13.

[335] Paragraph 36 of Auditing Standard No. 13.

[336] Paragraph A9 of Auditing Standard No. 5.

[337] *See, e.g.,* paragraph .14 of AU sec. 328, *Auditing Fair Value Measurements and Disclosures.*

[338] Paragraph 44.a.(3) of Auditing Standard No. 13.

[339] Paragraph 45 of Auditing Standard No. 13.

[340] AU sec. 329.09.

[341] Paragraph 11 of Auditing Standard No. 13.

causing the auditor to draw erroneous conclusions.

j. Dual-purpose Test

Auditing Standard No. 13 recognized that, in certain situations, the auditor might perform a substantive test of a transaction concurrently with a test of a control relevant to that transaction, *i.e.,* a dual-purpose test. The auditor is required to design the dual-purpose test to achieve the objectives of both the test of the control and the substantive test. In addition, the auditor is required to evaluate the results of the test in forming conclusions about both the assertion and the effectiveness of the control being tested.[342] The standard refers the auditors to the relevant requirements in AU sec. 350, *Audit Sampling,* for determining the proper sample size in a dual-purpose test.

9. Auditing Standard No. 14—Evaluating Audit Results

a. Background

Auditing Standard No. 14 describes the auditor's responsibilities regarding the process of evaluating the results of the audit and determining whether sufficient appropriate audit evidence has been obtained in order to form the opinion to be expressed in the auditor's report. This standard consolidates into one auditing standard the requirements that were previously included in five separate auditing standards.[343] The standard highlights matters that are important to the auditor's conclusions about the financial statements and the effectiveness of internal control.

b. Definition of Misstatement

The reproposed standard defined the term "misstatement" as follows:

A misstatement, if material individually or in combination with other misstatements, causes the financial statements not to be presented fairly in conformity with the applicable financial reporting framework.[344] A misstatement may relate to a difference between the amount, classification, presentation, or disclosure of a reported financial statement item and the amount, classification, presentation, or disclosure that should be reported in conformity with the applicable financial reporting framework. Misstatements can arise from error (i.e., unintentional misstatement) or fraud.

Some commenters indicated that the definition applied to "material misstatement" rather than "misstatement" and suggested revisions to the definition, e.g., moving the second sentence to the beginning of the definition.

Auditing Standard No. 14 carries forward the definition of "misstatement" as reproposed.[345] This definition is not a definition of the term "material misstatement." Rather, the definition emphasizes that misstatements prevent financial statements from being fairly presented in conformity with the applicable financial reporting framework, as discussed in AU sec. 411, *The Meaning of Present Fairly in Conformity With Generally Accepted Accounting Principles.* The phrase used in the definition, "if material individually or in combination with other misstatements," is equivalent to the phrase "In the absence of materiality considerations," which was used in the description of the term "misstatement" in an auditing interpretation of AU sec. 312.[346] The second sentence of the definition in Auditing Standard No. 14 describes the most common types of misstatements.[347]

c. Performing Analytical Procedures in the Overall Review

Auditing Standard No. 14 adapted the requirements that were previously included in AU secs. 316 and 329 to read the financial statements and disclosures and perform analytical procedures in the overall review. The standard imposes on auditors a responsibility to read the financial statements and disclosures and perform analytical procedures to (a) evaluate the auditor's conclusions formed regarding significant accounts and disclosures and (b) assist in forming an opinion on whether the financial statements as a whole are free of material misstatement.[348] In particular, Auditing Standard No. 14 requires the auditor to evaluate whether (a) evidence gathered in response to unusual or unexpected transactions, events, amounts, or relationships previously identified during the audit is sufficient and (b) unusual or unexpected transactions, events, amounts, or relationships indicate risks of material misstatement that were not identified previously.[349] Performing analytical procedures in the overall review assists the auditor in assessing the conclusions reached and in evaluating the overall financial statement presentation.

Auditing Standard No. 14 adapted a requirement, which previously existed in AU sec. 316, for the auditor to perform analytical procedures relating to revenue through the end of the period.[350] These procedures are intended to identify unusual or unexpected relationships involving revenue accounts that might indicate a material misstatement, including a material misstatement due to fraud. Performing analytical procedures relating to revenue is important in light of the generally higher risk of financial statement fraud involving revenue accounts.

Auditing Standard No. 14 requires the auditor to corroborate management's explanations regarding significant unusual or unexpected transactions, events, amounts, or relationships. The standard also states that if management's responses to the auditor's inquiries appear to be implausible, inconsistent with other audit evidence, imprecise, or not at a sufficient level of detail to be useful, the auditor should perform procedures to address the matter.[351] Auditing Standard No. 15, *Audit Evidence,* states that inquiry of company personnel, by itself, does not provide sufficient audit evidence to reduce audit risk to an appropriately low level.[352] Therefore, obtaining corroboration of management's responses is important in obtaining sufficient appropriate audit evidence.

d. Clearly Trivial

Auditing Standard No. 14 requires the auditor to accumulate misstatements identified during the audit, other than those that are clearly trivial.[353] Like AU sec. 312, the standard allows the auditor to set a threshold for accumulating misstatements, provided that the threshold is set at a de minimis level that could not result in material misstatement of the financial statements, individually or in combination with other misstatements, after considering the possibility of

[342] Paragraph 47 of Auditing Standard No. 13.

[343] AU sec. 312, regarding evaluating audit results, including uncorrected misstatements; AU sec. 316, regarding fraud considerations that are relevant to evaluating audit results; AU sec. 329, regarding performing the overall review; AU sec. 326, regarding determining whether sufficient appropriate audit evidence has been obtained; and AU sec. 431, regarding the evaluation of disclosures.

[344] The auditor should look to the requirements of the Securities and Exchange Commission for the company under audit with respect to accounting principles applicable to that company.

[345] Paragraph A2 of Appendix A to Auditing Standard No. 14.

[346] Paragraph .02 of AU sec. 9312, *Audit Risk and Materiality in Conducting an Audit: Auditing Interpretations of Section 312,* which is superseded by the risk assessment standards, stated "In the absence of materiality considerations, a misstatement causes the financial statements not to be in conformity with generally accepted accounting principles."

[347] *See also* paragraph A2 of Auditing Standard No. 14.

[348] Paragraph 5 of Auditing Standard No. 14.

[349] Paragraph 6 of Auditing Standard No. 14.

[350] Paragraph 7 of Auditing Standard No. 14.

[351] Paragraph 8 of Auditing Standard No. 14.

[352] Paragraph 17 of Auditing Standard No. 15.

[353] Paragraph 10 of Auditing Standard No. 14.

further undetected misstatement.[354] The specific limitation on setting a threshold for accumulating misstatements is important to assure a proper evaluation of the effect of uncorrected misstatements on the financial statements.

e. Accumulating Misstatements

The reproposed standard required the auditor to accumulate identified misstatements other than those that are clearly trivial. The reproposed standard also required the auditor to use his or her best estimate of the total misstatement in the accounts and disclosures that the auditor has tested, not just the amount of misstatements specifically identified. This includes misstatements related to accounting estimates and projected misstatements from substantive procedures that involve audit sampling.[355]

Commenters suggested that the standard should use terms such as "known and likely misstatement" or other terms to categorize the misstatements. Auditing Standard No. 14 uses the term "identified misstatement" to refer to misstatements that are identified during the audit and the term "accumulated misstatements" to refer to misstatements that are more than clearly trivial and, thus, should be accumulated by the auditor. Because Auditing Standard No. 14 requires the auditor to use his or her best estimate of the misstatements (which is how AU sec. 312 described "likely misstatements"), it is not necessary to use the term "known and likely misstatements."

f. Correction of Misstatements

Auditing Standard No. 14 requires that if management made corrections to accounts or disclosures in response to misstatements detected by the auditor, the auditor should evaluate management's work to determine whether the corrections have been recorded properly and to determine whether uncorrected misstatements remain.[356] The standard imposes on auditors a responsibility to determine whether misstatements identified by the auditor and communicated to management are correctly recorded in the accounting records.

g. Considerations When Accumulated Misstatements Approach the Materiality Level or Levels Used in Planning and Performing Audit Procedures

Auditing Standard No. 14 requires the auditor to determine whether the overall strategy needs to be revised when the aggregate of misstatements accumulated during the audit approaches the materiality level or levels used in planning and performing the audit. When the aggregate of misstatements approaches the materiality level or levels used in planning and performing an audit, there likely will be greater than an appropriately low level of risk that possible undetected misstatements, combined with uncorrected misstatements accumulated during the audit, could be material to the financial statements. If the auditor assesses this risk to be unacceptably high, he or she should perform additional audit procedures or determine that management has adjusted the financial statements so that the risk that the financial statements are materially misstated has been reduced to an appropriately low level.[357]

The reproposed standard stated that when the aggregate of accumulated misstatements approaches the materiality used in planning and performing the audit, the auditor should perform additional procedures or determine that management has adjusted the financial statements so that the risk of material misstatement has been reduced to an appropriately low level. One commenter suggested that it is not clear what the additional procedures are and that more work is not always the answer. The additional procedures that are necessary depend upon, among other things, the procedures performed by the auditor to date and the nature of the misstatements that were detected.

h. Requirement to Reevaluate the Materiality Level

Auditing Standard No. 11 includes a requirement to reevaluate the established materiality level or levels in certain circumstances. Auditing Standard No. 14 states that if the reevaluation of the materiality level or levels established in accordance with Auditing Standard No. 11 results in a lower amount for the materiality level or levels, the auditor should take into account that lower materiality level in the evaluation of uncorrected misstatements.[358] The requirements are intended to prevent the auditor from incorrectly concluding that uncorrected misstatements are immaterial because he or she used outdated financial statement information. However, the standard does not allow the auditor to establish a higher level or levels of materiality when uncorrected misstatements exceed the initially established level or levels of materiality.

Reevaluating the established materiality level or levels prior to evaluating the effect of uncorrected misstatements will cause audit results to be evaluated based on the latest financial information.

i. Evaluating Uncorrected Misstatements

The reproposed standard stated that the auditor should evaluate the uncorrected misstatements in relation to accounts and disclosures and to the financial statements as a whole, taking into account relevant quantitative and qualitative factors. The reproposed standard retained the provisions regarding qualitative factors that were included in an auditing interpretation to AU sec. 312,[359] with some minor revisions to align the factors more closely to the terminology in the reproposed standard and to omit qualitative factors that apply only to nonissuers. A commenter indicated that the term "profitability," which is included in the qualitative factors in Appendix B, is not defined, and the commenter suggested including examples of profitability in the reproposed standard. Although this term is not explicitly defined in Auditing Standard No. 14, it should be familiar to auditors because the related auditing interpretation was issued in 2000. Auditing Standard No. 14 carries forward the requirements and the related list of qualitative factors that are substantially the same as those in the auditing interpretation.[360]

Auditing Standard No. 14 requires an evaluation of the effects of both uncorrected misstatements detected in prior years and misstatements detected in the current year that relate to prior years.[361] The standard does not address how to evaluate the effects of prior period misstatements because that is an accounting and financial reporting matter. For example, the SEC staff has provided guidance in SEC Staff Accounting Bulletin ("SAB") Topic 1.N, *Considering the Effects of Prior Year Misstatements when Quantifying Misstatements in Current Year Financial Statements,* on the effects of prior year misstatements when quantifying

[354] Paragraph 11 of Auditing Standard No. 14.

[355] Paragraphs 10–12 of Auditing Standard No. 14.

[356] Paragraph 16 of Auditing Standard No. 14.

[357] Paragraph 14 of Auditing Standard No. 14.

[358] Paragraph 17 of Auditing Standard No. 14.

[359] AU sec. 9312.15–17.

[360] AU sec. 9312 and paragraph 17 and Appendix B of Auditing Standard No. 14.

[361] Paragraph 18 of Auditing Standard No. 14.

misstatements in the current year financial statements. This SAB provides the SEC staff's views regarding evaluating the quantitative and qualitative factors regarding the materiality of uncorrected misstatements and evaluating the effects of prior year misstatements.

Auditing Standard No. 14 states that the auditor cannot assume that an instance of error or fraud is an isolated occurrence and that the auditor should evaluate the nature and effects of the individual misstatements accumulated during the audit on the assessed risks of material misstatement.[362] This procedure is important to inform the auditor's conclusions about whether the auditor's risk assessments remain appropriate and whether he or she has obtained sufficient appropriate evidence to support his or her opinion.

The reproposed standard included a requirement to evaluate the nature and effects of the individual misstatements accumulated during the audit on the assessed risks of material misstatement. A commenter suggested that this evaluation should be performed at the time the misstatement is identified. In the Board's view, it is not necessary to prescribe the timing for the evaluation of the nature and effects of misstatements on the risk assessments. However, performing this evaluation during the course of the audit could allow the auditor to make the necessary modifications to his or her planned audit procedures on a more timely basis.

The reproposed standard required the auditor to evaluate whether identified misstatements might be indicative of fraud and, in turn, how they affect the auditor's evaluation of materiality and the related audit responses. This requirement is adapted from AU sec. 316.[363] One commenter suggested that when there is an indicator of fraud, the requirement should make clear that clearly trivial misstatements may need to be evaluated to determine if they should be included in the accumulated misstatements. Like AU sec. 316, the requirement in the reproposed standard was phrased in terms of identified misstatements rather than accumulated misstatements because fraud of relatively small amounts can be material to the financial statements.

Auditing Standard No. 14 retains the requirement as reproposed.[364] If an auditor detects a misstatement, he or she should evaluate whether the misstatement is indicative of fraud when deciding whether a misstatement is clearly trivial and thus does not warrant being included with accumulated misstatements. Additionally, in situations in which the auditor believes that a misstatement is or might be intentional and the effect on the financial statements could be material or cannot be readily determined, Auditing Standard No. 14 requires that the auditor perform procedures to obtain additional audit evidence to determine whether the fraud has occurred or is likely to have occurred. If the fraud has occurred or is likely to have occurred, the auditor is required to determine its effect on the financial statements and the auditor's report thereon.

j. Communication of Accumulated Misstatements to Management

The reproposed standard required the auditor to communicate accumulated misstatements to management on a timely basis to provide management with an opportunity to correct them. The reproposed standard also required the auditor to obtain an understanding of the reasons that management decided not to correct misstatements communicated by the auditor.

Some commenters suggested that the standard should specifically require the auditor to request management to correct the misstatements.

Auditing Standard No. 14 retains the requirement as reproposed.[365] It is not necessary to specifically require the auditor to request that management correct the misstatements because management has its own legal responsibilities in relation to the preparation and maintenance of the company's books, records, and financial statements. Section 13(i) of the Securities and Exchange Act of 1934, 15 U.S.C. 78m(i), requires the financial statements filed with the SEC to reflect all material correcting adjustments identified by the auditor.

k. Communication of Illegal Acts

Auditing Standard No. 14 requires the auditor to determine his or her responsibility under AU secs. 316.79–.82A, AU sec. 317, and Section 10A of the Securities and Exchange Act of 1934, 15 U.S.C. 78j–1, if the auditor becomes aware of information indicating that fraud or another illegal act has occurred or might have occurred.[366]

l. Evaluating the Qualitative Aspects of the Company's Accounting Practices

Auditing Standard No. 14 requires the auditor to evaluate the qualitative aspects of the company's accounting practices, including potential bias in management's judgments regarding the amounts and disclosures in the financial statements.[367]

Auditing Standard No. 14 also states that if the auditor identifies bias in management's judgments about the amounts and disclosures in the financial statements, the auditor should evaluate whether the effect of that bias, together with the effect of uncorrected misstatements, results in material misstatement of the financial statements. Also, the standard states that the auditor should evaluate whether the auditor's risk assessments, including, in particular, the assessment of fraud risks, and the related audit responses remain appropriate.[368]

The reproposed standard included an example of management bias, which was based on observations from the Board's oversight activities. This example indicated that when management identifies adjusting entries that offset misstatements identified by the auditor, the auditor should perform procedures to determine why the underlying misstatement was not identified previously. The auditor also should evaluate the implications on the integrity of management, and the auditor's risk assessments, including fraud risk assessments, and perform additional procedures as necessary to address the risk of further undetected misstatements. A commenter suggested using the phrase "identified misstatements other than those that are * * * clearly trivial" instead of "identified misstatements." The requirement has been revised to refer to misstatements accumulated by the auditor as required by paragraph 10 of Auditing Standard No. 14.[369]

m. Assessment of Fraud Risks

The reproposed standard required the auditor to evaluate whether the accumulated results of auditing procedures and other observations affect the auditor's assessment of fraud risks made throughout the audit and whether the audit procedures need to be modified to respond to those risks.[370] The reproposed standard included a reference to Appendix C, which listed matters that might affect the assessment of fraud risks. Appendix C stated that if

[362] Paragraph 19 of Auditing Standard No. 14.

[363] AU sec. 316.75.

[364] Paragraph 20 of Auditing Standard No. 14.

[365] Paragraphs 15 and 25 of Auditing Standard No. 14.

[366] Paragraph 23 of Auditing Standard No. 14.

[367] Paragraph 24 of Auditing Standard No. 14.

[368] Paragraph 26 of Auditing Standard No. 14.

[369] Paragraph 25 of Auditing Standard No. 14.

[370] Paragraph 28 of Auditing Standard No. 14.

the matters listed in the appendix are identified during the audit, the auditor should determine whether the assessment of fraud risks remains appropriate or needs to be revised. This requirement was included because the evaluation provides additional insight regarding the fraud risks and the potential need to perform additional procedures to support the opinion to be expressed in the auditor's report.

Some commenters indicated that the requirement in Appendix C seems to indicate that the auditor is required to determine if each item identified during the audit individually affects the assessment of fraud risks, which appears to be inconsistent with paragraph 28. Those commenters suggested revisions to the first sentence of Appendix C. After considering these comments, the first sentence of Appendix C has been revised to state that if the matters listed in the appendix are identified during the audit, the auditor should take into account these matters in the evaluation of the assessment of fraud risks, as discussed in paragraph 28.[371]

One commenter suggested including in Appendix C specific procedures that the auditor could perform to evaluate fraud risk, such as evaluating journal entries with round numbers or amounts slightly below a specified threshold. This type of procedure could be appropriate for selecting journal entries for testing, but it is different in nature from the matters listed in Appendix C.

Auditing Standard No. 14 includes a requirement for the engagement partner to determine whether there has been appropriate communication with the other engagement team members throughout the audit regarding information or conditions that are indicative of fraud risks.[372] This requirement is adapted from the existing PCAOB standards.[373]

n. Evaluating Financial Statement Disclosures

The reproposed standard included a requirement, adapted from AU sec. 431, for the auditor to evaluate whether the financial statements contain the required disclosures and, if the required disclosures are not included in the financial statements, to express a qualified or adverse opinion in accordance with AU sec. 508, *Reports on Audited Financial Statements.* The reproposed standard also stated that evaluation of disclosures includes consideration of the form, arrangement, and content of the financial statements (including the accompanying notes), encompassing matters such as the terminology used, the amount of detail given, the classification of items in the statements, and the bases of amounts set forth. These requirements were included in the reproposed standard because of the importance of disclosures to the fair presentation of financial statements.

Some commenters stated that the requirements regarding evaluation of disclosures should be qualified based on materiality considerations. Auditing Standard No. 14 states that the auditor should evaluate whether the financial statements contain the information essential for a fair presentation of the financial statements in conformity with the applicable financial reporting framework, which is aligned with an analogous requirement in AU sec. 508.41.[374] AU sec. 411 discusses the concept of materiality regarding the auditor's opinion that financial statements are presented fairly.[375]

Another commenter questioned whether the statement that "Evaluation of disclosures includes consideration of the form, arrangement, and content of the financial statements (including the accompanying notes), encompassing matters such as the terminology used, the amount of detail given, the classification of items in the statements, and the bases of amounts set forth" is a requirement. The statement in the reproposed standard, which is retained in Auditing Standard No. 14, explains that the scope of the auditor's required evaluation of the information disclosed in the financial statements includes matters such as the form, arrangement, and content of the financial statements.[376]

o. Evaluating the Sufficiency and Appropriateness of Audit Evidence

The reproposed standard required the auditor to conclude whether sufficient appropriate audit evidence has been obtained to support his or her opinion on the financial statements. The reproposed standard also presented a list of factors that are relevant to the auditor's conclusion on whether sufficient appropriate audit evidence has been obtained. Consideration of the listed factors is essential to reaching an informed conclusion about whether sufficient appropriate audit evidence has been obtained. Accordingly, both the requirement and the list of factors contained in the reproposed standard have been retained.[377]

A commenter suggested that corrected adjustments also should be considered in concluding whether sufficient appropriate audit evidence has been obtained. Auditing Standard No. 14 already requires the auditor to evaluate the results of audit procedures in evaluating whether sufficient appropriate evidence has been obtained, and this would include misstatements identified by the auditor, regardless of whether they were corrected by management.[378]

The reproposed standard expanded the requirements regarding situations in which the auditor has not obtained sufficient appropriate audit evidence to include situations in which the auditor has substantial doubt about a relevant assertion. This additional provision was adapted from AU sec. 326. A commenter suggested that the requirement be revised to state that the auditor should attempt to obtain additional evidence if the auditor has not obtained sufficient appropriate evidence about a relevant assertion. The requirement has been retained as stated in the reproposed standard because it covers situations in which the evidence is inadequate and situations in which the auditor has concerns about whether an assertion is misstated.[379]

p. Evaluating the Results of the Audit of Internal Control

The reproposed standard included a section relating to evaluating audit results in the audit of internal control, which references Auditing Standard No. 5 for the requirements on evaluating the results of the audit of internal control.[380] A commenter suggested removing this paragraph from the reproposed standard. Auditing Standard No. 14 retains this paragraph, although it does not impose additional requirements. Including this paragraph emphasizes that, in integrated audits, the evaluation of audit results is an integrated process that affects both audits.

10. Auditing Standard No. 15—Audit Evidence

a. Background

Auditing Standard No. 15 explains what constitutes audit evidence, establishes requirements regarding designing and performing audit procedures to obtain sufficient

[371] Paragraph C1 of Appendix C to Auditing Standard No. 14.

[372] Paragraph 29 of Auditing Standard No. 14.

[373] AU sec. 316.18.

[374] Paragraph 31 of Auditing Standard No. 14.

[375] AU sec. 411.04.

[376] Paragraph 31 of Auditing Standard No. 14.

[377] Paragraphs 33–34 of Auditing Standard No. 14.

[378] Paragraph 34 of Auditing Standard No. 14.

[379] Paragraph 35 of Auditing Standard No. 14.

[380] Paragraph 37 of Auditing Standard No. 14.

appropriate audit evidence to support the opinion in the auditor's report, and discusses methods for selecting items for testing.

b. Nature of Audit Evidence

The reproposed standard stated that audit evidence is all the information, whether obtained from audit procedures or other sources, that is used by the auditor in arriving at the conclusions on which the auditor's opinion is based. Audit evidence consists of both information that supports and corroborates management's assertions regarding the financial statements or internal control over financial reporting and any information that contradicts such assertions.

One commenter indicated that the meaning of the phrase "and any information that contradicts such assertions" was unclear. The commenter suggested that the Board clarify whether the requirement meant the auditor should look for such contradictory information, or if the requirement should apply only when such information comes to the auditor's attention.

PCAOB standards require the auditor to plan and perform the audit to obtain sufficient appropriate evidence to support an opinion about whether the financial statements are free of material misstatement and, in the audit of internal control, whether material weaknesses exist.[381] Thus, the auditor is required to perform the audit procedures necessary to test the accounts and controls, regardless of whether the results of those procedures support or contradict the assertions. The requirement in Auditing Standard No. 15 means that when contradictory evidence is obtained, the auditor should evaluate it when forming a conclusion on the financial statements and, in integrated audits, on internal control over financial reporting. To clarify the requirement, Auditing Standard No. 15 omits the word "any."[382]

c. Objective

The objective in the reproposed standard acknowledged the auditor's responsibility to plan and perform the audit to obtain sufficient appropriate audit evidence to support the opinion expressed in the auditor's report. Commenters suggested revising the wording in paragraph 4 of the reproposed standard to be consistent with the objective in paragraph 3 of the reproposed standard. The requirement in paragraph 4 of Auditing Standard No. 15 has been revised to be consistent with the objective of the standard.

d. Sufficient Appropriate Audit Evidence

The reproposed standard explained the meaning of the words "sufficient" and "appropriate" as used in the phrase "sufficient appropriate audit evidence." Commenters suggested that the Board provide formal definitions for terms like "sufficiency" and "appropriate" so the terms can be easily located within the standards. Adding definitions is unnecessary because Auditing Standard No. 15 already describes the terms "sufficiency" and "appropriateness" and explains the relevant characteristics of each.[383]

Commenters stated that the term "persuasive" was used in the reproposed standard, *The Auditor's Responses to the Risks of Material Misstatement,* and recommended that the Board clarify in the reproposed audit evidence standard the manner in which the persuasiveness of evidence affects the evaluation of audit evidence. The concept of "persuasiveness of evidence" is discussed in Auditing Standard No. 13.[384]

e. Relevance and Reliability

The reproposed standard contained a discussion about the relevance and reliability of audit evidence. The reproposed standard stated that the audit evidence must be both relevant and reliable to support the auditor's conclusions about the subject of the audit procedure. The reproposed standard stated that "[e]vidence provided by original documents is more reliable than evidence provided by photocopies or facsimiles, or documents that have been filmed, digitized, or otherwise converted into electronic form, the reliability of which depends on the controls over the conversion and maintenance of those documents."

One commenter suggested that the standard be revised to indicate that electronic information, subject to proper controls, is in many ways more reliable than physical documentation. The language from the reproposed standard was retained in Auditing Standard No. 15.[385] Although evidence sometimes is available only in electronic form and the reliability of electronic evidence depends on the controls over that information, an authentic original document generally is more reliable than an electronic form of that document.

The reproposed standard stated that the relevance of audit evidence refers to its relationship to the assertion or to the objective of the control being tested. The relevance of audit evidence depends on (a) the design of the audit procedure used to test the assertion or control, and (b) the timing of the audit procedure used to test the assertion or control. One commenter recommended the description of the term "relevance" should be expanded to include the following statements:

> Relevance deals with the logical connection with, or bearing upon, the purpose of the audit procedure and, when appropriate, the assertion under consideration. The relevance of information to be used as audit evidence may be affected by the direction of testing.

Auditing Standard No. 15 retains the description included in the reproposed standard because it is clearer than the suggested revision.[386]

The reproposed standard indicated that "[t]he auditor is not expected to be an expert in document authentication. However, if conditions indicate that a document may not be authentic or that the terms in a document have been modified but that the modifications have not been disclosed to the auditor, the auditor should modify the planned audit procedures or perform additional audit procedures to respond to those conditions and should evaluate the effect, if any, on the other aspects of the audit."

One commenter suggested that the requirement for the auditor to modify the planned audit procedures or perform additional audit procedures in response to concerns about the authenticity of documents should be linked to professional skepticism. The commenter also stated that many modifications are routine. The requirement was not meant to require the auditor to perform unlimited procedures but, rather, to perform the procedures necessary to address the issue in the circumstances. Auditing Standard No. 15 retains this requirement as reproposed.[387] Although professional skepticism is important in these situations, it is not the only factor that determines the procedures necessary to address the matter.

f. Financial Statement Assertions

In representing that the financial statements are presented fairly in conformity with the applicable financial reporting framework, management

[381] Paragraph 3 of Auditing Standard No. 8 and paragraph 3 of Auditing Standard No. 5, respectively.

[382] Paragraph 2 of Auditing Standard No. 15.

[383] Paragraphs 5–6 of Auditing Standard No. 15.

[384] Paragraph 39 of Auditing Standard No. 13.

[385] Paragraph 8 of Auditing Standard No. 15.

[386] Paragraph 7 of Auditing Standard No. 15.

[387] Paragraph 9 of Auditing Standard No. 15.

implicitly or explicitly makes assertions regarding the recognition, measurement, presentation, and disclosure of the various elements of financial statements and related disclosures. Financial statement assertions are an important consideration for audits performed in accordance with PCAOB standards. For example, AU sec. 319 required auditors to perform substantive procedures for relevant assertions in audits of financial statements. Auditing Standard No. 5 requires auditors to obtain evidence about the design and operating effectiveness of controls over relevant assertions in audits of internal control.

The reproposed standard retained the five categories of financial statement assertions in AU sec. 326 and Auditing Standard No. 5. Two commenters suggested that the Board use different descriptions for financial statement assertions. One commenter suggested using other standard-setters' descriptions of financial statement assertions. The other commenter suggested using a different description of assertions. Auditing Standard No. 15 retains the categories of assertions as reproposed.[388] Like Auditing Standard No. 5,[389]Auditing Standard No. 15 allows auditors the flexibility to use categories of assertions that differ from the assertions listed in the standard under specified conditions.[390]

g. Inquiry

The reproposed standard stated that inquiry of company personnel, by itself, does not provide sufficient audit evidence to reduce audit risk to an appropriately low level for a relevant assertion or to support a conclusion about the effectiveness of a control. One commenter suggested that the note to paragraph 17 of the reproposed standard be revised to include "design and operating effectiveness of a control" and that the auditor should perform audit procedures in addition to the use of inquiry to obtain sufficient appropriate audit evidence. Auditing Standard No. 15 retains the language from the reproposed standard. The phrase "effectiveness of a control" encompasses both design and operating effectiveness. It is not considered necessary to add that the auditor should perform additional procedures, since Auditing Standard No. 15 states that inquiry, by itself, does not provide sufficient audit evidence.[391]

h. Confirmation

The reproposed standard stated that a confirmation represents audit evidence obtained by the auditor as a direct response to the auditor from a third party. Some commenters suggested that the reproposed standard clarify that a confirmation be written. Auditing Standard No. 15 has been revised to state that a confirmation response represents a particular form of audit evidence obtained by the auditor from a third party in accordance with PCAOB standards.[392] The Board has a separate standards-setting project on confirmations that, among other things, will address the use of written confirmation or other alternative forms of confirmation.[393]

i. Analytical Procedures

The reproposed standard described analytical procedures as an audit procedure for obtaining evidence. One commenter suggested adding "scanning" as part of analytical procedures. Scanning is a means for selecting items for testing, not a separate audit procedure. The description of analytical procedures in Auditing Standard No. 15 is retained as reproposed.[394]

j. Selecting Items for Testing To Obtain Audit Evidence

Auditing Standard No. 15 contains a section on selecting items for testing that is adapted from an auditing interpretation of AU sec. 350.[395] The standard also states that the auditor should determine the means of selecting items for testing to obtain evidence that, in combination with other relevant evidence, is sufficient to meet the objective of the audit procedure.[396]

The reproposed standard defined audit sampling as the application of an audit procedure to less than 100 percent of the occurrences of a control or items comprising an account for the purpose of evaluating some characteristic of the control or account. One commenter stated that the definition in the standard should be conformed to AU sec. 350. Auditing Standard No. 15 reflects revisions that align the standard with AU sec. 350.

k. Other Changes

As noted in the reproposing release, certain topics that were included in AU sec. 326 were not carried forward to the reproposed standard and Auditing Standard No. 15. AU sec. 326 discussed the use of audit objectives, and an appendix to that standard illustrated how auditors might use assertions to develop audit objectives and substantive tests of inventory. Such a discussion is not necessary because the auditing standards do not require auditors to establish audit objectives to link assertions to substantive procedures. However, omission of this discussion would not preclude auditors from using audit objectives in designing their audit procedures.

11. Amendments to PCAOB Standards

a. Amendments to Auditing Standard No. 3

In the release accompanying the original proposed standards, the Board sought comment on the need for specific documentation requirements regarding the risk assessment procedures. Responses from commenters were mixed. Some commenters supported adding specific documentation requirements, other commenters stated that the requirements in Auditing Standard No. 3, *Audit Documentation,* were adequate, and one commenter was ambivalent.

After consideration of these comments and additional analysis, the amendments accompanying the reproposed standards included certain amendments to Auditing Standard No. 3 to (a) specify certain required documentation regarding the auditor's risk assessments and related responses, (b) align certain terms and provisions of Auditing Standard No. 3 with the risk assessment standards, and (c) incorporate the principles for documentation of disagreements among engagement team members. For example, the amendments indicated that the auditor's documentation should include the following:

- A summary of the identified risks of misstatement and the auditor's assessment of risks of material misstatement at the financial statement and assertion levels; and
- The auditor's responses to the risks of material misstatement, including linkage of the responses to those risks.

Also, the requirements regarding documentation of significant findings or issues and related matters were expanded to require documentation regarding the significant risks identified and the results of the auditing procedures performed in response to those risks.

A commenter indicated that the additional documentation requirement

[388] Paragraph 11 of Auditing Standard No. 15.

[389] *See* the note to paragraph 28 of Auditing Standard No. 5.

[390] Paragraph 12 of Auditing Standard No. 15.

[391] Paragraph 17 of Auditing Standard No. 15.

[392] Paragraph 18 of Auditing Standard No. 15.

[393] PCAOB Release No. 2010–003, *Proposed Auditing Standard Related to Confirmation and Related Amendments to PCAOB Standards* (July 13, 2010).

[394] Paragraph 21 of Auditing Standard No. 15.

[395] AU sec. 9350, *Audit Sampling: Auditing Interpretations of AU sec. 350.*

[396] Paragraph 22 of Auditing Standard No. 15.

will result in "unnecessary linkage" and "a matrix-like mentality" to the audit documentation. The documentation requirements are intended to enhance the auditor's ability to link identified and assessed risks to appropriate responses and could help reviewers understand the areas of greatest risk and the auditor's responses to those risks. In addition to these documentation requirements, the auditor would continue to be responsible for preparing documentation as required by other provisions of Auditing Standard No. 3, e.g., to demonstrate that the engagement complied with the standards of the PCAOB.[397]

Some commenters suggested placing the documentation requirements in the respective risk assessment standards rather than amending Auditing Standard No. 3. The risk assessment standards are foundational standards; therefore, the required documentation related to the risk assessment standards is included in Auditing Standard No. 3.[398] Future decisions about the placement of new documentation requirements will be made during the course of the respective standards-setting projects.

b. Amendments to Auditing Standard No. 4

The amendment to Auditing Standard No. 4, *Reporting on Whether a Previously Reported Material Weakness Continues To Exist,* is limited to changing the word "competent" to "appropriate" when that word is used in reference to audit evidence.

c. Amendments to Auditing Standard No. 5

The amendments to Auditing Standard No. 5 that accompanied the reproposed standards were limited to changing the phrase "any assistants" to "the members of the engagement team," changing the word "competent" to "appropriate" when that word is used in reference to audit evidence, and updating references to auditing standards that are being superseded or amended. These amendments are retained as reproposed.

One commenter suggested a series of additional amendments to Auditing Standard No. 5, which primarily involved removing certain paragraphs from Auditing Standard No. 5 that relate to risk assessment procedures or other requirements that are included in the risk assessment standards. The Board is not removing the requirements regarding risk assessment procedures from Auditing Standard No. 5 because those requirements are important to understanding the other provisions of Auditing Standard No. 5 for performing an audit of internal control.

d. Amendments to Auditing Standard No. 6

The amendments to Auditing Standard No. 6, *Evaluating Consistency of Financial Statements,* are limited to removing a footnote stating that the term "error" as used in Statement of Financial Accounting Standards No. 154, *Accounting Changes and Error Corrections* ("SFAS No. 154"), is equivalent to "misstatement" as used in the auditing standards and updating a reference to a standard that is being superseded. This technical change is made because the footnote regarding misstatements in Auditing Standard No. 6 refers to SFAS No. 154, whereas the definition of "misstatement" in Auditing Standard No. 14 on evaluating audit results is neutral regarding the financial reporting framework. However, this technical change does not alter the fact that an error under accounting standards generally accepted in the United States is a misstatement under Auditing Standard No. 14.

e. Amendments to Auditing Standard No. 7

The amendments to Auditing Standard No. 7, *Engagement Quality Review,* update footnote 3 and the note to paragraph 10 to replace a reference to an interim standard that is superseded and to update the definitions of the terms "engagement partner" and "significant risk" to conform to the definitions in the risk assessment standards.

f. Amendments to Interim Auditing Standards

(i). Superseded Sections

The risk assessment standards supersede the following sections of PCAOB interim auditing standards:

- AU sec. 311, *Planning and Supervision*
- AU sec. 312, *Audit Risk and Materiality in Conducting an Audit*
- AU sec. 313, *Substantive Tests Prior to the Balance Sheet Date*
- AU sec. 319, *Consideration of Internal Control in a Financial Statement Audit*
- AU sec. 326, *Evidential Matter*
- AU sec. 431, *Adequacy of Disclosure in Financial Statements*

Similarly, the auditing interpretations of AU secs. 311, 312, and 350 have been incorporated into the risk assessment standards and thus are superseded. The auditing interpretations of AU sec. 326, except for Interpretation No. 2 (AU secs. 9326.06–.23), also are superseded.[399]

(ii). AU sec. 316, Consideration of Fraud in a Financial Statement Audit

The relevant requirements regarding identifying and assessing fraud risks, principally AU secs. 316.14–.45; responding to fraud risks, principally AU secs. 316.46–.50; and evaluating audit results, principally AU secs. 316.68–.78, have been incorporated into Auditing Standard Nos. 12, 13, and 14, respectively. The remaining portions of AU sec. 316 describe important principles regarding the auditor's responsibility with respect to fraud and more detailed requirements regarding the auditor's responses to fraud risks. Topics covered in the remaining portions of AU sec. 316, as amended, include the following:

- A description of fraud and its characteristics,
- The importance of exercising professional skepticism,
- Examples of fraud risk factors,
- Examples of audit procedures performed to respond to fraud risks involving fraudulent financial reporting and misappropriation of assets, and
- Requirements regarding procedures to further address the risk of material misstatement due to fraud involving management override of controls, including examining journal entries and other adjustments for evidence of possible material misstatement due to fraud; reviewing accounting estimates for biases that could result in material misstatement due to fraud; and evaluating the business rationale for significant unusual transactions.

(iii). AU sec. 329, Analytical Procedures

The discussion in AU sec. 329 regarding analytical procedures performed during audit planning, principally AU secs. 329.03 and 329.06–.08, is incorporated into Auditing Standard No. 12. Similarly, the requirements regarding analytical procedures in the overall review, principally AU secs. 329.23–.24, are incorporated into Auditing Standard No. 14. The remaining portion of AU sec. 329 relates to analytical procedures performed as substantive procedures. Therefore, AU sec. 329 is retitled, *Substantive Analytical Procedures,*

[397] Paragraph 5.a. of Auditing Standard No. 3.

[398] Paragraphs 9, 12, and 19 of Auditing Standard No. 3, as amended.

[399] Interpretation No. 2 relates in part to AU sec. 336 and AU sec. 337, *Inquiry of a Client's Lawyer Concerning Litigation, Claims, and Assessments,* and it will be evaluated in connection with standards-setting projects related to those standards.

which more accurately reflects the content of the amended standard.

A standard that focuses solely on substantive analytical procedures highlights more clearly the requirements that apply to analytical procedures performed for that purpose, including the higher degree of precision in substantive analytical procedures needed to provide the necessary level of assurance. The Board has observed instances in which auditors performed substantive procedures to test accounts without meeting the requirements in AU sec. 329 for substantive analytical procedures.[400]

(iv). AU sec. 336, Using the Work of a Specialist

The text of footnote 1 to paragraph .01 and of paragraph .05 were amended to clarify that AU sec. 336 does not apply to situations in which persons who participate in the audit have specialized skills or knowledge in accounting or auditing (*e.g.,* IT specialists and income tax specialists) and to specialists employed by the firm. Auditing Standard No. 10 applies to those situations. Those clarifications were previously included in the reproposed standard on audit planning and supervision.

(v). AU sec. 350, Audit Sampling

The discussion in AU sec. 350 regarding audit risk and tolerable misstatement has been amended to align more closely with the terminology used in the risk assessment standards.

The reproposed standards included amendments to AU secs. 350.23 and 350.38, which explained more specifically the principles in the standard for determining sample sizes when nonstatistical sampling approaches are used. Some commenters expressed concern that the reproposed amendments would have required auditors who use nonstatistical sampling methods to compute sample sizes under both statistical and nonstatistical methods to demonstrate that the sample size under the nonstatistical method equaled or exceeded the sample size determined using a statistical method.

Commenters suggested that the standard should state that it is not necessary to compute sample sizes using statistical methods. Including such a sentence in the standard might be misunderstood by auditors and weaken the requirement of the amended standard. The reproposed amendments do not require auditors to compute sample sizes using statistical methods in all instances to demonstrate compliance with the requirements. For example, the use of a nonstatistical sampling methodology that is adapted appropriately from a statistical sampling method also could demonstrate compliance. However, calculating a sample size that is not based on the relevant factors in AU sec. 350 is not in compliance with the standard. Accordingly, the amendments are retained as reproposed.

(vi). AU sec. 543, Part of Audit Performed by Other Independent Auditors, and Interpretations

A note was added to paragraph .01 to clarify that Auditing Standard No. 10 applies to situations not covered by AU sec. 543 in which the auditor engages other accounting firms or other accountants to participate in the audit. Paragraph .12 was amended to align AU sec. 543 with related amendments to Auditing Standard No. 3. Footnote 4 to paragraph .16 of AU sec. 9543, *Part of Audit Performed by Other Independent Auditors: Auditing Interpretations of Section 543,* is deleted because it refers to an interim standard that is being superseded.

(vii). Other Amendments to the Interim Auditing Standards

For the following interim auditing standards, the amendments are limited to conforming terminology to the risk assessment standards and updating references to auditing standards that are being superseded or amended:

- AU sec. 110, *Responsibilities and Functions of the Independent Auditor*
- AU sec. 150, *Generally Accepted Auditing Standards*
- AU sec. 210, *Training and Proficiency of the Independent Auditor*
- AU sec. 230, *Due Professional Care in the Performance of Work*
- AU sec. 310, *Appointment of the Independent Auditor*
- AU sec. 315, *Communications Between Predecessor and Successor Auditors*
- AU sec. 317, *Illegal Acts by Clients*
- AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements.*
- AU sec. 324, *Service Organizations*
- AU sec. 328, *Auditing Fair Value Measurements and Disclosures*
- AU sec. 330, *The Confirmation Process*
- AU sec. 332, *Auditing Derivative Instruments, Hedging Activities, and Investments in Securities*
- AU sec. 333, *Management Representations*
- AU sec. 334, *Related Parties,* and AU sec. 9334, *Related Parties: Auditing Interpretations of Section 334*
- AU sec. 9336, *Using the Work of a Specialist: Auditing Interpretations of Section 336*
- AU sec. 341, *The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern*
- AU sec. 342, *Auditing Accounting Estimates,* and AU sec. 9342, *Auditing Accounting Estimates: Auditing Interpretations of Section 342*
- AU sec. 380, *Communication With Audit Committees*
- AU sec. 411, *The Meaning of Present Fairly in Conformity With Generally Accepted Accounting Principles*
- AU sec. 508, *Reports on Audited Financial Statements,* and AU sec. 9508, *Reports on Audited Financial Statements: Auditing Interpretations of Section 508*
- AU sec. 530, *Dating of the Independent Auditor's Report*
- AU sec. 722, *Interim Financial Information*

g. Amendments to Interim Ethics Standards

In the interim ethics standards, ET sec. 102, *Integrity and Objectivity,* the amendments are limited to updating references to auditing standards that are being superseded or amended.

12. Effective Date

In its reproposal of the proposed rules, the Board stated that it expects the standards would be effective for audits of fiscal years beginning on or after December 15, 2010, subject to approval by the Commission, and the Board requested comment on the proposed effective date. Several commenters stated that the Board should establish sufficient time for auditing firms to make changes to their methodologies and train their staff on the new risk assessment standards.

After considering the comments received and the timing of the adoption of the standards, the Board has determined that the accompanying standards and related amendments will be effective, subject to Commission approval, for audits of fiscal periods beginning on or after December 15, 2010. In its determination, the Board considered that many auditors already employ risk-based audit methodologies, which should facilitate the methodology changes and training necessary to implement the standards by the effective date.

[400] *See, e.g.,* PCAOB Release 2007–010, *Report on the PCAOB's 2004, 2005, and 2006 Inspections of Domestic Triennially Inspected Firms* (October 22, 2007).

13. Other Topics Not Related to the Reproposed Standards

The comment letters on the reproposed standards included certain comments that relate to standards-setting matters other than the reproposed standards. The following paragraphs discuss those comments.

a. Standards-setting Process

Some commenters suggested changes to the Board's standards-setting process. These comments primarily relate to the extent to which the Board uses the standards of the IAASB and ASB in its standards-setting and the use of external task forces in drafting standards.

In previous releases on its proposed risk assessment standards, the Board has stated that it has sought to eliminate unnecessary differences with the risk assessment standards and those of other standards-setters. However, because the Board's standards must be consistent with the Board's statutory mandate,[401] differences will continue to exist between the Board's standards and the standards of the IAASB and ASB *e.g.,* when the Board decides to retain an existing requirement in PCAOB standards that is not included in IAASB or ASB standards. Also, certain differences are often necessary for the Board's standards to be consistent with relevant provisions of the federal securities laws or other existing standards or rules of the Board. Also, the Board's standards-setting activities are informed by and developed to some degree, in response to observations from its oversight activities.

The Board has a number of means available to seek additional comments from external parties regarding its standards-setting activities, including meetings with its Standing Advisory Group ("SAG"), issuing concept releases or reproposing standards or rules, and conducting public roundtables. Although these are not the only means available to the Board, they have been used because they offer the Board the ability to obtain comments from a diverse group of interested parties through a public process.

The Board continually endeavors to improve its processes, including its standards-setting process, and considers comments from the public as it does so. For example, the Board has undertaken certain steps to enhance the transparency of its standards-setting process, including maintaining on its Web site its standards-setting agenda and discussing the status of projects in public meetings with the SAG. This release has also been expanded to provide additional discussion of and explanation for the Board's conclusions regarding the risk assessment standards. Some commenters acknowledged the Board's efforts to increase the transparency of its process.

b. Other Standards-Setting Projects

Commenters on the reproposed standards also recommended a number of additional standards-setting or standards-related projects for the Board. Examples of such projects included creating a codification of the Board's standards; creating a glossary of terms used in the Board's standards, issuing a concept release for the review of the Board's interim standards, developing a standard describing the overall objectives of the audit, similar to ISA 200, *Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with International Standards on Auditing,* and developing guidance related to how the Board would evaluate the reasonableness of judgments based on PCAOB auditing standards.

The Board continually assesses its standards-setting and related projects based upon the need for improvements in standards or additional guidance in response to current developments, observations from the Board's oversight activities, comments received from the public, and other factors. As mentioned previously, the Board's standards-setting agenda is maintained on the Board's Web site. The Board is considering these comments as it assesses its agenda.

c. Comparison With and the Standards of the International Auditing and Assurance Standards Board the Auditing Standards Board of the American Institute of Certified Public Accountants

Some commenters on the reproposed standards stated that the Board should provide more information about its requirements, including how the requirements are expected to affect audits. Commenters requested information about how the Board's standards compare to the standards of other standards-setters. Some commenters also requested more explanation for certain requirements in the Board's reproposed standards.

In developing its original proposed standards, the Board took into account, among other things, the risk assessment standards of the International Auditing and Assurance Standards Board ("IAASB") and the Auditing Standards Board of the American Institute of Certified Public Accountants ("ASB"). The release accompanying the reproposed standards included a comparison of the objectives and requirements of the reproposed standards to the analogous standards of the IAASB and ASB.

Some commenters requested additional details about differences between the reproposed standards and the IAASB or ASB standards or clarifications regarding specific requirements in the reproposed standards for which the language was not identical to IAASB or ASB standards.

In analyzing comments on the appendix to the reproposed standards that compared the reproposed standards to the analogous standards of the IAASB and ASB, the Board observed that a number of the explanations sought by commenters, *e.g.,* the reasons for the differences in certain requirements were discussed elsewhere in the release accompanying the reproposed standards, *e.g.,* in Appendix 9 to that release.

The discussion below discusses certain differences between the objectives and requirements of the PCAOB standards and the analogous standards of the IAASB and ASB. When a difference between the Board's standards and the analogous standards of the IAASB and ASB is noted, the discussion contains a reference to the discussion of the Board's requirements in this release. This analysis may not represent the views of the IAASB or ASB regarding their standards.

Auditing Standard No. 8—Audit Risk

Analogous discussions of the components of audit risk are included in the IAASB's International Standard on Auditing ("ISA") 200, *Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with International Standards on Auditing* and the ASB's clarified Statement on Auditing Standards ("SAS"), *Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Generally Accepted Auditing Standards,* respectively.

(i) Audit Risk and Reasonable Assurance

PCAOB

Auditing Standard No. 8 states that to form an appropriate basis for expressing an opinion on the financial statements, the auditor must plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement due to error or fraud. Reasonable assurance is

[401] *E.g.,* Section 101 of the Sarbanes-Oxley Act of 2002 (the "Act"), 15 U.S.C. 7211.

obtained by reducing audit risk to an appropriately low level through applying due professional care, including obtaining sufficient appropriate audit evidence.[402]

Auditing Standard No. 8 uses the phrase "appropriately low level" because the term "appropriately" is aligned more closely with the concept of reasonable assurance whereas "acceptable level" might be misunderstood as allowing auditors to vary the audit efforts based upon their personal tolerance for risk. This release contains additional discussion regarding the use of the phrase "appropriately low level."[403]

Auditing Standard No. 8 also clarifies that obtaining sufficient appropriate audit evidence is part of applying due professional care. This release provides additional discussion regarding due professional care and sufficient appropriate audit evidence.[404]

IAASB and ASB

The ISA states:

To obtain reasonable assurance, the auditor shall obtain sufficient appropriate audit evidence to reduce audit risk to an acceptably low level and thereby enable the auditor to draw reasonable conclusions on which to base the auditor's opinion.

The SAS includes a requirement similar to the ISA's requirement.

(ii) Detection Risk and Substantive Procedures

PCAOB

Auditing Standard No. 8 states that as the appropriate level of detection risk decreases, the evidence from substantive procedures that the auditor should obtain increases. This requirement was adapted from AU sec. 319, *Consideration of Internal Control in a Financial Statement Audit,*[405] and it parallels a requirement in Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement.*[406] This release contains additional discussion regarding detection risk.[407]

IAASB and ASB

The ISA and the SAS do not include an analogous requirement.

Auditing Standard No. 9—Audit Planning

In this section, the analogous IAASB and ASB standards are, unless indicated otherwise, ISA 300, *Planning an Audit of Financial Statements,* and the clarified SAS, *Planning an Audit,* respectively.

(i). Planning an Audit

PCAOB

Auditing Standard No. 9 contains a requirement to properly plan the audit. This requirement is consistent with the first standard of fieldwork in AU sec. 150, *Generally Accepted Auditing Standards.*

IAASB and ASB

The ISA and the SAS do not include an analogous requirement, although planning the audit is referenced in the objectives of the standards.

(ii). Audit Strategy and Audit Plan

PCAOB

Auditing Standard No. 9 requires the auditor to establish an overall audit strategy that sets the scope, timing, and direction of the audit and guides the development of the audit plan. When developing the audit strategy and audit plan, the standard requires the auditor to evaluate whether certain matters specified in the standard are important to the company's financial statements and internal control over financial reporting and, if so, how they will affect the auditor's procedures. As discussed in this release, these matters are adapted from Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* and are important for both the audit of financial statements and an audit of internal control over financial reporting ("audit of internal control").[408]

In establishing the overall audit strategy, Auditing Standard No. 9 also requires the auditor to take into account certain matters, such as the reporting objectives and the factors that are significant in directing the activities of the engagement team, results of preliminary engagement activities and the auditor's evaluation of the important matters in accordance with paragraph 7, and the nature, timing, and extent of resources necessary to perform the engagement. This release discusses this requirement with more detail.[409]

Auditing Standard No. 9 requires the auditor to develop and document an audit plan that includes a description of the planned nature, timing, and extent of risk assessment procedures; tests of controls, substantive procedures, and other audit procedures. The audit plan required by Auditing Standard No. 9 encompasses all of the audit procedures to be performed, *i.e.,* it is not limited to procedures at the assertion level. This release contains additional discussion regarding developing the audit strategy and audit plan.[410]

IAASB and ASB

The ISA and the SAS require the auditor to establish an overall audit strategy that sets the scope, timing, and direction of the audit and guides the development of the audit plan. Those standards do not have a requirement analogous to the Auditing Standard No. 9 requirement to evaluate specific matters in developing the audit strategy and audit plan.

The ISA states:

In establishing the overall audit strategy, the auditor shall:

(a) Identify the characteristics of the engagement that define its scope;

(b) Ascertain the reporting objectives of the engagement to plan the timing of the audit and the nature of the communications required;

(c) Consider the factors that, in the auditor's professional judgment, are significant in directing the engagement team's efforts;

(d) Consider the results of preliminary engagement activities and, where applicable, whether knowledge gained on other engagements performed by the engagement partner for the entity is relevant; and

(e) Ascertain the nature, timing and extent of resources necessary to perform the engagement.

The SAS includes a requirement similar to the ISA's requirement.

Both the ISA and the SAS require the auditor to develop an audit plan that shall include a description of the nature, timing, and extent of planned further auditor procedures at the assertion level.

(iii). Multi-Location Engagements

PCAOB

Auditing Standard No. 9 states that the auditor should determine the extent to which auditing procedures should be performed at selected locations or business units to obtain sufficient appropriate evidence to obtain reasonable assurance about whether the consolidated financial statements are free of material misstatement. This includes determining the locations or business units at which to perform audit procedures, as well as the nature, timing, and extent of the audit

[402] AU sec. 110, *Responsibilities and Functions of the Independent Auditor, and AU sec. 230, Due Professional Care in the Performance of Work,* provide further discussion of reasonable assurance.

[403] Section II.C.3.b.

[404] Section II.C.3.c.

[405] AU sec. 319 is superseded by the risk assessment standards.

[406] Paragraph 37 of Auditing Standard No. 13.

[407] Section II.C.3.e.

[408] Section II.C.4.e.

[409] Section II.C.4.f.

[410] Ibid.

procedures to be performed at those individual locations or business units. The auditor should assess the risks of material misstatement to the consolidated financial statements associated with the location or business unit and correlate the amount of audit attention devoted to the location or business unit with the degree of risk of material misstatement associated with that location or business unit. Auditing Standard No. 9 also provides a list of factors that are relevant to the assessment of the risks of material misstatement associated with a particular location or business unit and the determination of the necessary audit procedures.

The provisions in Auditing Standard No. 9 are applicable to all multi-location audits. This release discusses the basis for the requirements and explains how the requirements should be applied in audits in which part of the work is performed by other auditors of financial statements of individual locations or business units that are included in the consolidated financial statements.[411]

IAASB and ASB

ISA 600, *Special Considerations—Audits of Group Financial Statements (Including the Work of Component Auditors),* and the proposed SAS, *Audits of Group Financial Statements (Including the Work of Component Auditors),* apply to group audits. Under ISA 600, group audits are defined as the audit of group financial statements, which are financial statements that include the financial information of more than one component, and the component auditor is an auditor who, at the request of the group engagement team, performs work on financial information related to a component for the group audit.

ISA 600 and the proposed SAS describe the scope of audit procedures to be performed at individual components, depending upon, among other things, whether the components are significant components as described in the respective standards.

Auditing Standard No. 10—Supervision of the Audit Engagement

In this section, unless indicated otherwise, the analogous IAASB standards are ISA 300, *Planning an Audit of Financial Statements, and ISA 220, Quality Control for an Audit of Financial Statements* (collectively referred to in this section as "the ISAs"); and the analogous ASB standards are the clarified SAS, *Planning an Audit, and the proposed SAS, Quality Control for an Audit of Financial Statements* (collectively referred to in this section as "the SASs").

(i). Supervision

PCAOB

Auditing Standard No. 10 states that the engagement partner is responsible for supervising other engagement team members and may seek assistance from appropriate engagement team members. Auditing Standard No. 10 also requires the engagement partner, and engagement team members who assist the engagement partner in supervision, to properly supervise the members of the engagement team, describes the necessary elements of proper supervision, and describes the factors that affect the necessary extent of supervision. These requirements are adapted from AU sec. 311, *Planning and Supervision.*[412] This release provides additional discussion regarding these requirements.[413]

The requirements in the ISAs and the SASs do not describe the elements of supervision or factors that affect supervision.

IAASB and ASB

The ISAs and the SASs require the auditor to plan the nature, timing, and extent of direction and supervision of engagement team members and review their work. The ISAs and SASs require the engagement partner to "take responsibility for the direction, supervision and performance of the audit engagement in compliance with professional standards and applicable legal and regulatory requirements and for the auditor's report being appropriate in the circumstances."

(ii). Supervision of Engagement Team Members

PCAOB

Auditing Standard No. 10 requires the engagement partner and other engagement team members performing supervisory activities to: (a) Inform engagement team members of their responsibilities, including the objectives of the procedures that they are to perform; the nature, timing and extent of procedures they are to perform; and matters that could affect the procedures to be performed or the evaluation of the results of those procedures, (b) direct engagement team members to bring significant accounting and auditing issues arising during the audit to the attention of the engagement partner or other engagement team members performing supervising activities, and (c) review the work of engagement team members to evaluate whether the work was performed, the objectives of the procedures were achieved, and the results of the work support the conclusions. This release contains additional discussion regarding this requirement.[414]

IAASB

The ISAs state:

The engagement partner shall take responsibility for:

(a) The direction, supervision and performance of the audit engagement in compliance with professional standards and applicable legal and regulatory and legal requirements; and

(b) The auditor's report being appropriate in the circumstances.

The engagement partner shall take responsibility for reviews being performed in accordance with the firm's review policies and procedures.

On or before the date of the auditor's report, the engagement partner shall, through a review of the audit documentation and discussion with the engagement team, be satisfied that sufficient appropriate audit evidence has been obtained to support the conclusions reached and for the auditor's report to be issued.

The auditor shall plan the nature, timing and extent of direction and supervision of engagement team members and the review of their work.

ASB

The SAS includes requirements similar to the ISAs' requirements.

(iii). Extent of Supervision

PCAOB

To determine the extent of supervision necessary for engagement team members to perform their work as directed and form appropriate conclusions, Auditing Standard No. 10 requires the engagement partner and other engagement team members performing supervisory activities to take into account the nature of company, the nature of the assigned work for each team member, the risks of material misstatement, and the knowledge, skill, and ability of each engagement team member. This release contains additional discussion regarding this requirement.[415]

IAASB and ASB

The ISAs and SASs do not have an analogous requirement for the auditor to determine the extent of supervision necessary for engagement team members.

[411] Section II.C.4.g.

[412] AU sec. 311 is superseded by Auditing Standard No. 9 and Auditing Standard No. 10.

[413] Section II.C.5.d.

[414] Section II.C.5.e.

[415] Ibid.

Auditing Standard No. 11—Consideration of Materiality in Planning and Performing an Audit

In this section, the analogous IAASB and ASB standards are ISA 320, *Materiality in Planning and Performing an Audit,* and the clarified SAS, *Materiality in Planning and Performing an Audit,* and the proposed SAS, *Audits of Group Financial Statements (Including the Work of Component Auditors),* respectively.

• Definition of Materiality

PCAOB

Auditing Standard No. 11 requires the auditor to establish a materiality level for the financial statements as a whole that is appropriate in light of the particular circumstances, including consideration of the company's earnings and other relevant factors. The requirement in Auditing Standard No. 11 is based on the concept of materiality that is articulated by the courts in interpreting the federal securities laws. This release discusses the concept of materiality used in Auditing Standard No. 11.[416]

IAASB and ASB

The ISA states, "When establishing the overall audit strategy, the auditor shall determine materiality for the financial statements as a whole."

The SAS has a requirement similar to the ISA's requirement.

• Materiality in the Context of an Audit

PCAOB

Auditing Standard No. 11 requires the auditor to plan and perform audit procedures to detect misstatements that, individually or in combination with other misstatements, would result in material misstatement of the financial statements in order to obtain reasonable assurance about whether the financial statements are free of material misstatement. This release discusses the concept of materiality in the context of an audit.[417]

IAASB

ISA 200 states:

In conducting an audit of financial statements, the overall objectives of the auditor are:

a. To obtain reasonable assurance about whether the financial statements as a whole are free from material misstatement, whether due to fraud or error, thereby enabling the auditor to express an opinion on whether the financial statements are prepared, in all material respects, in accordance with an applicable financial reporting framework; and

b. To report on the financial statements, and communicate as required by the ISAs, in accordance with the auditor's findings.

ASB

The SAS includes an objective similar to the ISA's objective.

• Tolerable Misstatement and Performance Materiality

PCAOB

Auditing Standard No. 11 requires the auditor to determine tolerable misstatement for purposes of assessing risks of material misstatement and planning and performing audit procedures at the account or disclosure level. Auditing Standard No. 11 uses the term "tolerable misstatement," which is also used in other PCAOB standards.[418] This release discusses the use of the term "tolerable misstatement" in more detail.[419]

IAASB and ASB

The ISA and SAS require the auditor to determine "performance materiality" for purposes of assessing the risks of material misstatement and determining the nature, timing, and extent of further audit procedures.

• Determining Tolerable Misstatement

PCAOB

Auditing Standard No. 11 contains a requirement to take into account the nature, cause (if known), and amount of misstatements that were accumulated in audits of the financial statements of prior periods when determining tolerable misstatement and planning and performing audit procedures. This requirement is adapted from AU sec. 312, *Audit Risk and Materiality in Conducting an Audit.* This release contains further discussion regarding this requirement.[420]

IAASB and ASB

The ISA and SAS do not have an analogous requirement.

• Multi-Location Determination of Tolerable Misstatement

PCAOB

In multi-location engagements, Auditing Standard No. 11 requires the auditor to determine tolerable misstatement for the individual locations or business units at an amount that reduces to an appropriately low level the probability that the total of uncorrected and undetected misstatements would result in material misstatement of the consolidated financial statements. The standard also requires the tolerable misstatement at an individual location to be less than the established materiality level for the financial statements as a whole. This release provides further discussion regarding consideration of materiality for multi-location engagements.[421]

IAASB

ISA 600 requires the group engagement team to determine, among other things, component materiality. The ISA states:

> Component materiality for those components where component auditors will perform an audit or a review for purposes of the group audit. To reduce to an appropriately low level the probability that the aggregate of uncorrected and undetected misstatements in the group financial statements exceeds materiality for the group financial statements as a whole, component materiality shall be lower than materiality for the group financial statements as a whole.

ASB

Proposed SAS, *Audits of Group Financial Statements (Including the Work of Component Auditors),* requires the group engagement team to determine among other things, component materiality. The proposed SAS states:

> Component materiality for those components on which an audit or other specified audit procedures will be performed. To reduce the risk that the aggregate of detected and undetected misstatements in the group financial statements exceeds the materiality for the group financial statements as a whole, component materiality should be lower than the materiality for the group financial statements as a whole.

• Reevaluating Materiality and Tolerable Misstatement

PCAOB

Auditing Standard No. 11 requires the auditor to reevaluate the established materiality level or levels and tolerable misstatement when there is a substantial likelihood that misstatements of amounts that differ significantly from the materiality level or levels that were established initially would influence the judgment of a reasonable investor. The requirement reflects the perspective of a reasonable investor, whereas the analogous requirements in the ISA and SAS reflect an auditor's perspective. This release contains additional discussion regarding materiality from

[416] Section II.C.6.b.

[417] Ibid.

[418] Paragraph .18 of AU sec. 350, *Audit Sampling.*

[419] Section II.C.6.e.

[420] *Ibid.*

[421] Section II.C.6.f.

the perspective of a reasonable investor[422] and the reevaluation of materiality.[423]

IAASB and ASB

The ISA and the SAS require the auditor to "revise materiality for the financial statements as a whole (and, if applicable, the materiality level or levels for particular classes of transactions, account balances, or disclosures) in the event of becoming aware of information during the audit that would have caused the auditor to have determined a different amount (or amounts) initially."

Auditing Standard No. 12—Identifying and Assessing Risks of Material Misstatement

In this section, the analogous IAASB standards are ISA 315, *Identifying and Assessing the Risks of Material Misstatement Through Understanding the Entity and Its Environment,* and ISA 240, *The Auditor's Responsibilities Relating to Fraud In An Audit of Financial Statements* (collectively referred to in this section as "the ISAs"). The analogous ASB standards are the clarified SAS, *Understanding the Entity and its Environment and Assessing the Risks of Material Misstatements* (Redrafted) and proposed SAS, *Consideration of Fraud in a Financial Statement Audit* (Redrafted) (collectively referred to in this section as "the SASs").[424]

(i). Objective

PCAOB

The objective of Auditing Standard No. 12 is to identify and appropriately assess the risks of material misstatement, thereby providing a basis for designing and implementing responses to the risks of material misstatement. Auditing Standard No. 12 requires the auditor to perform other risk assessment procedures in addition to obtaining an understanding of the company and its environment. This release contains additional discussion regarding the objective of the standard.[425]

IAASB and ASB

The ISAs state:

The objective of the auditor is to identify and assess the risks of material misstatement, whether due to fraud or error, at the financial statement and assertion levels, through understanding the entity and its environment, including the entity's internal control, thereby providing a basis for designing and implementing responses to the assessed risks of material misstatement.

The SASs include an objective similar to the ISAs' objective.

(ii). Performing Risk Assessment Procedures

PCAOB

Auditing Standard No. 12 states that the auditor should perform risk assessment procedures that are sufficient to provide a reasonable basis for identifying and assessing the risks of material misstatement, whether due to error or fraud, and designing further audit procedures. The requirement establishes a principle for determining the sufficiency of the necessary risk assessment procedures, and it also links the risk assessment procedures to the design of the tests of controls and substantive procedures to be performed to respond to the risks. This release includes additional discussion regarding performing risk assessment procedures.[426]

IAASB and ASB

The ISAs state:

The auditor shall perform risk assessment procedures to provide a basis for the identification and assessment of risks of material misstatement at the financial statement and assertion levels.

The SASs include a requirement similar to the ISAs' requirement.

(iii). Obtaining an Understanding of the Company and Its Environment

PCAOB

Auditing Standard No. 12 includes a requirement to evaluate, while obtaining an understanding of the company, whether significant changes in the company from prior periods, including changes in its internal control over financial reporting, affect the risks of material misstatement. This release includes additional discussion regarding obtaining an understanding of the company and its environment.[427]

IAASB and ASB

The ISAs and SASs do not include an analogous requirement.

(iv). Additional Procedures To Understand the Company

PCAOB

Auditing Standard No. 12 requires the auditor to consider performing certain procedures as part of obtaining an understanding of the company as required by paragraph 7 of the standard. These procedures include reading public information about the company, observing or reading transcripts of earnings calls, obtaining an understanding of compensation arrangements with senior management, and obtaining information about trading activity in the company's securities and holdings in the company's securities by significant holders. This release includes additional discussion regarding this requirement.[428]

IAASB and ASB

The ISAs and SASs do not include an analogous requirement.

(v). Selection and Application of Accounting Principles, Including Related Disclosures

PCAOB

Auditing Standard No. 12 requires the auditor to develop expectations about the disclosures that are necessary for the company's financial statements to be presented fairly in conformity with the applicable financial reporting framework to identify and assess the risks of material misstatement related to omitted, incomplete, or inaccurate disclosures.[429] The standard also requires engagement team members to discuss how fraud might be perpetrated or concealed by omitting or presenting incomplete or inaccurate disclosures.[430] Additionally Auditing Standard No. 12 requires the auditor's evaluation of fraud risk factors to include how fraud could be perpetrated or concealed by presenting incomplete or inaccurate disclosures or by omitting disclosures that are necessary for the financial statements to be presented fairly in conformity with the applicable financial reporting framework.[431] This release includes additional discussion regarding these requirements.[432]

IAASB and ASB

The ISAs and SASs do include analogous requirements regarding the disclosures that are necessary for the company's financial statements to be presented fairly in conformity with the applicable financial reporting framework.

[422] Section II.C.6.b.

[423] Section II.C.6.g.

[424] In June 2010, the ASB adopted as a final standard the SAS, *Consideration of Fraud in a Financial Statement Audit (Redrafted).* However, the ASB has not yet published this standard.

[425] Section II.C.7.b.

[426] Section II.C.7.c.

[427] Section II.C.7.d.

[428] *Ibid.*

[429] Paragraph 12 of Auditing Standard No. 12.

[430] Paragraph 52 of Auditing Standard No. 12.

[431] Paragraph 67 of Auditing Standard No. 12.

[432] Section II.C.7.d., h. and j. respectively.

(vi). Obtaining an Understanding of Internal Control Over Financial Reporting

PCAOB

Auditing Standard No. 12 requires the auditor to obtain a sufficient understanding of each component of internal control over financial reporting to (a) identify the types of potential misstatements; (b) assess the factors that affect the risks of material misstatement; and (c) design further auditor procedures. This requirement relates to the sufficiency of the required understanding of internal control over financial reporting. This release contains additional discussion of this requirement.[433]

IAASB and ASB

The ISAs state:

The auditor shall obtain an understanding of internal control relevant to the audit. Although most controls relevant to the audit are likely to relate to financial reporting, not all controls that relate to financial reporting are relevant to the audit. It is a matter of the auditor's professional judgment whether a control, individually or in combination with others, is relevant to the audit.

The SASs include requirements similar to the ISAs' requirements.

(vii). Control Environment

PCAOB

Auditing Standard No. 12 requires the auditor to assess the following matters as part of obtaining an understanding of the control environment:

- Whether management's philosophy and operating style promote effective internal control over financial reporting;
- Whether sound integrity and ethical values, particularly of top management, are developed and understood; and
- Whether the board or audit committee understands and exercises oversight responsibility over financial reporting and internal control.

This requirement is aligned with a similar requirement in Auditing Standard No. 5. This release includes additional discussion regarding this requirement.[434]

Paragraph 25 of Auditing Standard No. 12 states that "[i]f the auditor identifies a control deficiency in the company's control environment, the auditor should evaluate the extent to which this control deficiency is indicative of a fraud risk factor." This release includes additional discussion regarding the auditor's evaluation of an identified control deficiency in the control environment.[435]

IAASB and ASB

The ISAs state:

The auditor shall obtain an understanding of the control environment. As part of obtaining this understanding, the auditor shall evaluate whether:

(a) Management, with the oversight of those charged with governance, has created and maintained a culture of honesty and ethical behavior; and

(b) The strengths in the control environment elements collectively provide an appropriate foundation for the other components of internal control, and whether those other components are not undermined by deficiencies in the control environment.

The SASs include requirements similar to the ISAs' requirements.

The ISAs and SASs do not have a requirement analogous to paragraph 25 of Auditing Standard No. 12.

(viii). The Company's Risk Assessment Process

PCAOB

Auditing Standard No. 12 states that:

The auditor should obtain an understanding of management's process for:

(a) Identifying risks relevant to financial reporting objectives, including risks of material misstatement due to fraud ("fraud risks"),

(b) Assessing the likelihood and significance of misstatements resulting from those risks, and

(c) Deciding about actions to address those risks.

The standard also states that obtaining an understanding of the company's risk assessment process includes obtaining an understanding of the risks of material misstatement identified and assessed by management and the actions taken to address those risks.

Those requirements focus on the matters that are important to the auditor's understanding of the company's internal control and on the auditor's risk assessments. Although the auditor can be informed by the company's risk assessment process, the auditor is still required to perform risk assessment procedures that are sufficient for identifying and assessing the risks of material misstatement rather than relying on the company's process.

This release includes additional discussion regarding the company's risk assessment process.[436]

IAASB and ASB

The ISAs state:

The auditor shall obtain an understanding of whether the entity has a process for (a) Identifying business risks relevant to financial reporting objectives; (b) Estimating the significance of the risks; (c) Assessing the likelihood of their occurrence; and (d) Deciding about actions to address those risks.

If the entity has established such a process (referred to hereafter as the "entity's risk assessment process"), the auditor shall obtain an understanding of it, and the results thereof. If the auditor identifies risks of material misstatement that management failed to identify, the auditor shall evaluate whether there was an underlying risk of a kind that the auditor expects would have been identified by the entity's risk assessment process. If there is such a risk, the auditor shall obtain an understanding of why that process failed to identify it, and evaluate whether the process is appropriate to its circumstances or determine if there is a significant deficiency in internal control with regard to the entity's risk assessment process.

If the entity has not established such a process or has an ad hoc process, the auditor shall discuss with management whether business risks relevant to financial reporting objectives have been identified and how they have been addressed. The auditor shall evaluate whether the absence of a documented risk assessment process is appropriate in the circumstances, or determine whether it represents a significant deficiency in internal control.

The SASs include requirements similar to the ISAs' requirements.

(ix). Information and Communication

PCAOB

Auditing Standard No. 12 requires the auditor to obtain an understanding of how IT affects the company's flow of transactions. The standard also states that the identification of risks and controls within IT is not a separate evaluation. Instead, it is an integral part of the approach used to identify significant accounts and disclosures and their relevant assertions and, when applicable, to select the controls to test, as well as to assess risk and allocate audit effort. This release contains additional discussion of this requirement.[437]

IAASB and ASB

The ISAs and SASs do not include analogous requirements.

(x). Control Activities

PCAOB

Auditing Standard No. 12 requires the auditor to obtain an understanding of control activities that is sufficient to assess the factors that affect the risks of material misstatement and to design further audit procedures. Auditing Standard No. 12 requires the auditor to use his or her knowledge about the presence or absence of control activities obtained from the understanding of the other components of internal control over financial reporting in determining

[433] Section II.C.7.e.

[434] Section II.C.7.e.(ii).

[435] Ibid.

[436] Section II.C.7.e.(iii).

[437] Section II.C.7.e.(iv).

the extent to which it is necessary to devote additional attention to obtaining an understanding of control activities to assess the factors that affect the risks of material misstatement and to design further audit procedures. This release includes additional discussion of this requirement.[438]

IAASB

The ISAs state:

The auditor shall obtain an understanding of control activities relevant to the audit, being those the auditor judges it necessary to understand in order to assess the risks of material misstatement at the assertion level and design further audit procedures responsive to assessed risks. An audit does not require an understanding of all the control activities related to each significant class of transactions, account balance, and disclosure in the financial statements or to every assertion relevant to them.

ASB

The SASs state:

The auditor should obtain an understanding of control activities relevant to the audit, which are those control activities the auditor judges it necessary to understand in order to assess the risks of material misstatement at the assertion level and design further audit procedures responsive to assessed risks. An audit does not require an understanding of all the control activities related to each significant class of transactions, account balance, and disclosure in the financial statements or to every assertion relevant to them. However, the auditor should obtain an understanding of the process of reconciling detailed records to the general ledger for material account balances.

(xi). Relationship of Understanding of Internal Control to Tests of Controls

PCAOB

Auditing Standard No. 12 requires the auditor to take into account the evidence obtained from understanding internal control when assessing control risk and, in the audit of internal control, forming conclusions about the effectiveness of controls. Auditing Standard No. 12 also requires the auditor to take into account the evidence obtained from understanding internal control when determining the nature, timing, and extent of procedures necessary to support the auditor's conclusions about the effectiveness of entity-level controls in the audit of internal control. This release includes additional discussion of these requirements.[439]

IAASB and ASB

The ISAs and SASs do not include analogous requirements.

(xii). Considering Information From the Client Acceptance and Retention Evaluation, Audit Planning Activities, Past Audits, and Other Engagements

PCAOB

Auditing Standard No. 12 requires the auditor to evaluate whether information obtained during a review of interim financial information in accordance with AU sec. 722, *Interim Financial Information,* is relevant to identifying risks of material misstatement in the year-end audit. The ISAs and SASs do not include an analogous requirement.

Auditing Standard No. 12 also states that the auditor should obtain an understanding of the nature of the services that have been performed for the company by the auditor or affiliates of the firm[440] and should take into account relevant information obtained from those engagements in identifying risks of material misstatement. The requirement in Auditing Standard No. 12 applies to services performed by the firm and affiliates of the firm and is not limited to services performed by the engagement partner. This release contains additional discussion regarding these requirements.[441]

IAASB and ASB

The ISAs state, "[i]f the engagement partner has performed other engagements for the entity, the engagement partner shall consider whether information obtained is relevant to identifying risks of material misstatement."

The SASs include a requirement similar to the ISAs' requirement.

(xiii). Performing Analytical Procedures

PCAOB

Auditing Standard No. 12 contains a series of requirements regarding performing analytical procedures as risk assessment procedures. These requirements were adapted from AU sec. 329, *Analytical Procedures.* Auditing Standard No. 12 requires the auditor to:

- Perform analytical procedures that are designed to (a) enhance the auditor's understanding of the client's business and the significant transactions and events that have occurred since the prior year end; and (b) identify areas that might represent specific risks relevant to the audit, including the existence of unusual transactions and events, and amounts, ratios, and trends that warrant investigation.
- Perform analytical procedures regarding revenue as risk assessment procedures with the objective of identifying unusual or unexpected relationships involving revenue accounts that might indicate a material misstatement, including material misstatement due to fraud.
- Take into account analytical procedures performed in accordance with AU sec. 722 when designing and applying analytical procedures as risk assessment procedures. This requirement is unique to PCAOB standards.
- Use his or her understanding of the company to develop expectations about plausible relationships among the data to be used in the procedure.[442]
- Take into account unusual or unexpected differences from the auditor's expectations that are identified while performing analytical procedures as risk assessment procedures.

This release contains additional discussion of these requirements.[443]

IAASB

The ISAs state:

The risk assessment procedures shall include * * * [a]nalytical procedures * * *

The auditor shall evaluate whether unusual or unexpected relationships that have been identified in performing analytical procedures, including those related to revenue accounts, may indicate risks of material misstatement due to fraud.

ASB

The SASs state:

The risk assessment procedures should include * * * [a]nalytical procedures * * *

Based on analytical procedures performed as part of risk assessment procedures and as part of substantive procedures, the auditor should evaluate whether unusual or unexpected relationships that have been identified indicate risks of material misstatements due to fraud. To the extent not already included, the analytical procedures and evaluation thereof should include procedures relating to revenue accounts.

(xiv). Communication Among Engagement Team Members

PCAOB

Auditing Standard No. 12 requires that the communication among the engagement team members about significant matters affecting the risks of material misstatement should continue throughout the audit, including when

[438] Section II.C.7.e.(v).

[439] Section II.C.7.e.(vii).

[440] *See* PCAOB Rule 3501(a)(i), which defines "affiliate of the accounting firm."

[441] Section II.C.7.f.(ii).

[442] Analytical procedures consist of evaluations of financial information made by a study of plausible relationships among both financial and nonfinancial data.

[443] Section II.C.7.g.

conditions change. This release contains additional discussion of this requirement.[444]

IAASB and ASB

The ISAs and SASs do not include analogous requirements.

(xv). Discussion of the Potential for Material Misstatement Due to Fraud

PCAOB

Auditing Standard No. 12 requires a discussion among the key engagement team members of specified matters regarding fraud, including how and where the company's financial statements might be susceptible to material misstatement due to fraud, known fraud risk factors, the risk of management override of controls, and possible responses to fraud risks.

Auditing Standard No. 12 requires all key engagement team members to participate in the discussion. Auditing Standard No. 12 also states that key engagement team members include the engagement partner and other engagement team members with significant engagement responsibilities.

Auditing Standard No. 12 also includes a requirement to emphasize certain matters to all engagement team members, including the need to maintain a questioning mind throughout the audit and to exercise professional skepticism in gathering and evaluating evidence, to be alert for information or other conditions that might affect the assessment of fraud risks, and actions to be taken if information or other conditions indicate that a material misstatement due to fraud might have occurred.

This release includes additional discussion of these requirements.[445]

IAASB

The ISAs state:

> The engagement partner and other key engagement team members shall discuss the susceptibility of the entity's financial statements to material misstatement, and the application of the applicable financial reporting framework to the entity's facts and circumstances. The engagement partner shall determine which matters are to be communicated to engagement team members not involved in the discussion.
>
> * * * This discussion shall place particular emphasis on how and where the entity's financial statements may be susceptible to material misstatement due to fraud, including how fraud might occur.

ASB

The SASs have requirements similar to the ISAs' requirements. However, the SASs also include a requirement that the discussion regarding fraud include an exchange among engagement team members about how and where the entity's financial statements might be susceptible to material misstatement due to fraud, how management could perpetrate and conceal fraudulent financial reporting, and how assets of the entity could be misappropriated. The SASs also include a requirement to emphasize certain matters to all engagement team members, but those matters identified are less extensive than those required by PCAOB standards.

(xvi). Inquiring of the Audit Committee, Management, and Others Within the Company About the Risks of Material Misstatement

PCAOB

Auditing Standard No. 12 requires the auditor to make specified inquiries of management and the audit committee regarding tips or complaints about the company's financial reporting. This release includes additional discussion of this requirement.[446]

IAASB and ASB

The ISAs and the SASs do not specify the nature of the required inquiries, except for certain inquiries regarding fraud, which are less extensive than those required by PCAOB standards.

(xvii). Nature of Inquiries

PCAOB

Auditing Standard No. 12 requires the auditor to use his or her knowledge of the company and its environment, as well as information from other risk assessment procedures, to determine the nature of inquiries about risks of material misstatement. This release includes additional discussion of this requirement.[447]

IAASB and ASB

The ISAs and SASs do not include analogous requirements.

(xviii). Evaluating Management Responses to Inquiries

PCAOB

Auditing Standard No. 12 requires the auditor to take into account the fact that management is often in the best position to commit fraud when evaluating management's responses to inquiries about fraud risks. Auditing Standard No. 12 also requires the auditor to obtain evidence to address inconsistencies in response to the inquiries. This release includes additional discussion of these requirements.[448]

IAASB and ASB

The ISAs and SASs do not include analogous requirements.

(xix). Identifying and Assessing the Risks of Material Misstatement

PCAOB

Auditing Standard No. 12 requires the auditor to evaluate how risks at the financial statement level could affect risks of material misstatement at the assertion level. This release includes additional discussion of this requirement.[449]

IAASB and ASB

The ISAs and the proposed SAS do not include an analogous requirement.

(xx). Identifying Significant Accounts and Disclosures and Their Relevant Assertions

PCAOB

Auditing Standard No. 12 requires the auditor to identify significant accounts and disclosures and their relevant assertions in identifying and assessing risks of material misstatement. PCAOB standards require auditors to perform substantive procedures for relevant assertions of significant accounts and disclosures in the audit of financial statements and tests of controls over relevant assertions of significant accounts and disclosures in the audit of internal control. This release includes additional discussion regarding identifying significant accounts and disclosures and relevant assertions.[450]

IAASB and ASB

The ISAs and SASs do not have an analogous requirement.

(xxi). Significant Risks

PCAOB

Auditing Standard No. 12 defines significant risk as a "risk of material misstatement that requires special audit consideration." This definition is different from the ISAs' definition because it omits two qualifying phrases, "an identified and assessed" and "in the auditor's judgment." This release includes additional discussion regarding the definition of significant risks.[451]

[444] Section II.C.7.h.(ii).

[445] Section II.C.7.h.

[446] Section II.C.7.i.

[447] Ibid.

[448] Ibid.

[449] Section II.C.7.j.

[450] Ibid.

[451] Section II.C.7.k.

IAASB and ASB

The ISAs and SASs define significant risk as "an identified and assessed risk of material misstatement that, in the auditor's judgment, requires special audit consideration."

Auditing Standard No. 13—The Auditor's Responses to the Risks of Material Misstatement

In this section, the analogous IAASB standards are ISA 330, *The Auditor's Responses to Assessed Risks,* and ISA 240, *The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements* (collectively referred to in this section as "the ISAs"). The analogous ASB standards are the clarified SAS, *Performing Audit Procedures in Response to Assessed Risks and Evaluating the Audit Evidence Obtained* (Redrafted), and the proposed SAS, *Consideration of Fraud in a Financial Statement Audit* (Redrafted) (collectively referred to in this section as "the SASs").

(i). Objective

PCAOB

The objective of the auditor in Auditing Standard No. 13 is "to address the risks of material misstatement through appropriate overall audit responses and audit procedures." The objective in the proposed standard emphasizes the auditor's responsibility for responding to the risks of material misstatements. This release contains additional discussion regarding the objective of the standard.[452]

IAASB and ASB

The objective in the ISAs and the SASs is to obtain sufficient appropriate audit evidence regarding the assessed risks of material misstatement, through designing and implementing appropriate responses to those risks.

(ii). Overall Responses to Risks

PCAOB

Auditing Standard No. 13 requires the auditor to design and implement certain overall responses (*e.g.,* making appropriate assignments of specific engagement responsibilities, providing an appropriate extent of supervision, incorporating elements of unpredictability in selecting auditing procedures, and evaluating the company's selection and application of significant accounting principles) to address risks of material misstatement. These responses are not limited to addressing risks at the financial statement level. They are also intended to address risks at the significant account or disclosure level due to the nature of these specific overall responses. This release contains additional discussion of this requirement.[453]

IAASB and ASB

The ISAs and the SASs include requirements to design and implement overall responses to address the assessed risks of material misstatement at the financial statement level and requirements for particular types of responses to the risks of material misstatement due to fraud at the financial statement level.

(iii). Determination of the Need for Pervasive Changes

PCAOB

Auditing Standard No. 13 requires the auditor to determine whether it is necessary to make pervasive changes to the nature, timing, or extent of audit procedures to adequately address the assessed risk of material misstatement. Examples of such pervasive changes include modifying the audit strategy to increase the substantive testing of the valuation of numerous significant accounts at year end because of significantly deteriorating market conditions and to obtain more pervasive audit evidence from substantive procedures due to the identification of pervasive weaknesses in the company's control environment. This release includes detailed discussions regarding making pervasive changes as an overall response to risks of material misstatement.[454]

IAASB and ASB

The ISAs and SASs do not include analogous requirements.

(iv). Application of Professional Skepticism

PCAOB

Auditing Standard No. 13 states that due professional care requires the auditor to exercise professional skepticism, requires that the auditor apply professional skepticism in gathering and evaluating audit evidence in response to risks of material misstatement, and provides examples of the appropriate application of professional skepticism. This release includes additional discussion regarding application of professional skepticism.[455]

IAASB and ASB

The ISAs state

> * * * the auditor shall maintain an attitude of professional skepticism throughout the audit, recognizing the possibility that a material misstatement due to fraud could exist, notwithstanding the auditor's past experience of the honesty and integrity of the entity's management and those charged with governance.

The SASs include a requirement similar to the ISAs' requirement.

(v). Evidence About the Effectiveness of Controls

PCAOB

In discussing testing controls in an audit of financial statements, Auditing Standard No. 13 establishes the principle that the evidence necessary to support the auditor's control risk assessment depends on the degree of reliance the auditor plans to place on the effectiveness of a control. The greater the reliance on a control, the more persuasive evidence the auditor is required to obtain from the tests of controls.

In addition, the standard requires the auditor to obtain more persuasive evidence about the effectiveness of controls for each relevant assertion for which the audit approach consists primarily of tests of controls. This release includes additional discussions of these requirements.[456]

IAASB and ASB

The ISAs and the SASs include a requirement for the auditor to obtain more persuasive audit evidence the greater the reliance he or she plans to place on the effectiveness of a control, but they do not have an analogous requirement regarding situations in which the audit approach consists primarily of tests of controls.

(vi). Testing the Operating Effectiveness of a Control

PCAOB

Auditing Standard No. 13 requires the auditor to determine whether the control selected for testing is operating as designed and whether the person performing the control possesses the necessary authority and competence to perform the control effectively. The standard also discusses the procedures the auditor performs in testing operating effectiveness. To help facilitate the tests of controls in an integrated audit, the standard continues to use language similar to that of Auditing Standard No. 5 when describing analogous terms and concepts relating to the testing of

[452] Section II.C.8.b.

[453] Section II.C.8.c.

[454] *Ibid.*

[455] *Ibid.*

[456] Section II.C.8.f.(iii).

controls. This release includes additional discussion regarding this requirement.[457]

IAASB

The ISAs do not include an analogous requirement to determine whether the person performing the control possesses the necessary authority and competence to perform the control effectively.

ASB

The SASs state:

> In designing and performing tests of controls, the auditor should: *a.* perform other audit procedures in combination with inquiry to obtain audit evidence about the operating effectiveness of the controls, including * * * by whom or by what means they were applied, including, when applicable, whether the person performing the control possesses the necessary authority and competence to perform the control effectively.

(vii). Tests of Controls in an Integrated Audit

PCAOB

Auditing Standard No. 13 requires the auditor to perform tests of controls in integrated audits to meet the objectives of both the audit of financial statements and the audit of internal control. This release includes additional discussion of this requirement.[458]

IAASB and ASB

The ISAs and the SASs do not include an analogous requirement.

(viii). Rotational Testing of Controls

PCAOB

Auditing Standard No. 13 requires the auditor to obtain evidence during the current year audit about the design and operating effectiveness of controls upon which the auditor relies. This release includes additional discussion of this requirement.[459]

IAASB and ASB

The ISAs and the SASs include requirements that apply to the use of evidence about controls obtained in prior audits and allow rotational testing of controls under certain conditions set forth in those standards.

(ix). Assessing Control Risk

PCAOB

Auditing Standard No. 13 requires the auditor to assess control risk for relevant assertions by evaluating the evidence from all sources, including the auditor's testing of controls for the audit of internal control and the audit of financial statements, misstatements detected during the financial statement audit, and any identified control deficiencies. The standard also requires that control risk be assessed at the maximum level for relevant assertions (1) for which controls necessary to sufficiently address the assessed risk of material misstatement in those assertions are missing or ineffective or (2) when the auditor has not obtained sufficient appropriate audit evidence to support a control risk assessment below the maximum level. This release includes additional discussion of these requirements.[460]

IAASB and ASB

The ISAs and the SASs include requirements regarding evaluating the operating effectiveness of controls and identified control deviations, but those standards do not require a specific assessment of control risk.

(x). Substantive Procedures

PCAOB

Auditing Standard No. 13 requires the auditor to perform substantive procedures for each relevant assertion of each significant account and disclosure, regardless of the assessed level of control risk. This requirement reflects the principle that the auditor needs to implement appropriate responses to address assessed risks of material misstatement. This release contains additional discussion of this requirement.[461]

IAASB

The ISAs state, "Irrespective of the assessed risks of material misstatement, the auditor shall design and perform substantive procedures for each material class of transactions, account balance, and disclosure."

ASB

The SASs state, "Irrespective of the assessed risks of material misstatement, the auditor should design and perform substantive procedures for all relevant assertions related to each material class of transactions, account balance, and disclosure."

The requirements in the ISAs and the SASs focus on the accounts and disclosures that are material, regardless of whether they are associated with identified risks of material misstatement.

(xi). Consideration of Confirmations

PCAOB

Auditing Standard No. 13 requires the auditor to perform substantive procedures for each relevant assertion of each significant account and disclosure. The standard also discusses how to determine the types and combination of substantive audit procedures necessary to detect material misstatements in relevant assertions.

AU sec. 330, *The Confirmation Process,* establishes requirements regarding the use of confirmation procedures.[462] The risk assessment standards discuss the auditor's responsibilities for designing and performing the substantive procedures necessary to address the risks of material misstatement.

IAASB and ASB

ISA 330 specifically requires the auditor to consider whether external confirmation procedures are to be performed as substantive audit procedures. The ASB has proposed to amend the SASs to require the auditor to consider whether external confirmation procedures are to be performed as substantive audit procedures and to require the use of external confirmation procedures for material accounts receivable.

(xii). Determining Whether To Perform Interim Substantive Procedures

PCAOB

Auditing Standard No. 13 requires the auditor to take into account a series of factors when determining whether it is appropriate to perform substantive procedures at an interim date. This release includes provides additional discussion regarding timing of substantive procedures.[463]

IAASB and ASB

The ISAs and the SASs do not include an analogous requirement for the auditor to take into account the factors listed in Auditing Standard No. 13 when determining whether it is appropriate to perform substantive procedures at an interim date.

(xiii). Substantive Procedures Covering the Remaining Period

PCAOB

Auditing Standard No. 13 states, "When substantive procedures are performed at an interim date, the auditor should cover the remaining period by performing substantive

[457] Section II.C.8.f.(iv).

[458] Section II.C.8.d.

[459] Section II.C.8.f.(vi).

[460] Section II.C.8.f.(vii).

[461] Section II.C.8.g.

[462] The Board has a separate standards-setting project on confirmations.

[463] Section II.C.8.h.

procedures, or substantive procedures combined with tests of controls, that provide a reasonable basis for extending the audit conclusions from the interim date to the period end." The standard contains a specific requirement to compare relevant information about the account balance at the interim date with comparable information at the end of the period to identify amounts that appear unusual. This release includes additional discussion of this requirement.[464]

IAASB and ASB

The ISAs and the SASs include requirements to cover the period between the interim testing date and year end by performing substantive procedures, combined with tests of controls for the intervening period, or by performing further substantive procedures only if the auditor determines that doing so would be sufficient. The ISAs and SASs do not include an analogous requirement regarding the specific procedures to be performed.

(xiv). Response to Significant Risks

PCAOB

Auditing Standard No. 13 requires the auditor to perform substantive procedures, including tests of details, that are specifically responsive to significant risks. This release contains additional discussion of this requirement.[465]

IAASB and ASB

The ISAs state:

If the auditor has determined that an assessed risk of material misstatement at the assertion level is a significant risk, the auditor shall perform substantive procedures that are specifically responsive to that risk. When the approach to a significant risk consists only of substantive procedures, those procedures shall include tests of details.

The SASs include requirements similar the ISAs' requirements.

(xv). Dual-purpose Tests

PCAOB

Auditing Standard No. 13 states that, when dual-purpose tests are performed, the auditor should design the dual-purpose test to achieve the objectives of both the test of the control and the substantive test. Also, when performing a dual-purpose test, the auditor should evaluate the results of the test in forming conclusions about both the assertion and the effectiveness of the control being tested. This release contains additional discussion of this requirement.[466]

IAASB and ASB

The ISAs and the SASs do not include analogous requirements.

Auditing Standard No. 14—Evaluating Audit Results

In this section, the analogous IAASB standards are ISA 450, Evaluation of Misstatements Identified During the Audit, ISA 330, The Auditor's Responses to Assessed Risks, ISA 520, Analytical Procedures, ISA 240, The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements, ISA 540, Auditing Accounting Estimates Including Fair Value Accounting Estimates, and Related Disclosures, and ISA 700, Forming an Opinion and Reporting on Financial Statements (collectively referred to in this section as "the ISAs"). The analogous ASB standards are clarified SAS Evaluation of Misstatements Identified During the Audit, Performing Audit Procedures in Response to Assessed Risks and Evaluating the Audit Evidence Obtained (Redrafted), Understanding the Entity and its Environment and Assessing the Risks of Material Misstatement (Redrafted), and proposed SAS Consideration of Fraud in a Financial Statement Audit (Redrafted), Analytical Procedures (Redrafted), and Forming an Opinion and Reporting on Financial Statements (collectively referred to in this section as "the SASs").

(i). Performing Analytical Procedures in the Overall Review

PCAOB

In the overall review, Auditing Standard No. 14 contains specific requirements for the auditor to read the financial statements and disclosures and perform analytical procedures to (a) evaluate the auditor's conclusions formed regarding significant accounts and disclosures and (b) assist in forming an opinion on whether the financial statements as a whole are free of material misstatement. These requirements were adapted from existing requirements in PCAOB standards.[467] The conclusions formed from the results of the overall review of the audit are intended to inform the auditor's conclusions regarding significant accounts and disclosures and the opinion on the financial statements. This release includes additional discussion of these requirements.[468]

IAASB

The ISAs state:

The auditor shall design and perform analytical procedures near the end of the audit that assist the auditor when forming an overall conclusion as to whether the financial statements are consistent with the auditor's understanding of the entity.

ASB

The SASs state:

The auditor should design and perform analytical procedures near the end of the audit that are intended to corroborate audit evidence obtained during the audit of financial statements to assist the auditor in drawing reasonable conclusions on which to base the auditor's opinion.

(ii). Evaluating Evidence From Analytical Procedures

PCAOB

Auditing Standard No. 14 contains a requirement, which was adapted from an existing requirement in PCAOB standards,[469] for the auditor, as part of the overall review to evaluate whether (a) the evidence gathered in response to unusual or unexpected transactions, events, amounts or relationships previously identified during the audit is sufficient and (b) unusual or unexpected transactions, events, amounts, or relationships indicate risks of material misstatement that were not identified previously, including, in particular, fraud risks. Auditing Standard No. 14 also specifically requires the auditor to evaluate whether the evidence gathered during the audit is sufficient as part of the overall review.

Also, the requirements in Auditing Standard No. 14 relate to risks of material misstatement due to error or fraud, whereas the requirements in the ISAs and SASs are limited to fraud risks. This release includes additional discussion of these requirements in Auditing Standard No. 14.[470]

IAASB

The ISAs state:

The auditor shall evaluate whether analytical procedures that are performed near the end of the audit, when forming an overall conclusion as to whether the financial statements as a whole are consistent with the auditor's understanding of the entity and its environment, indicate a previously unrecognized risk of material misstatement due to fraud.

ASB

The SASs state:

The auditor should evaluate whether the accumulated results of auditing procedures,

[464] *Ibid.*

[465] Section II.C.8.i.

[466] Section II.C.8.j.

[467] AU sec. 329.23.

[468] Section II.C.9.c.

[469] AU sec. 329.23.

[470] Section II.C.9.c.

including analytical procedures, that are performed during the audit, in the overall review stage, or in both stages, when forming an overall conclusion concerning whether the financial statements as a whole are consistent with the auditor's understanding of the entity and its environment, indicate a previously unrecognized risk of material misstatement due to fraud.

(iii). Analytical Procedures Regarding Revenue

PCAOB

Auditing Standard No. 14 includes a requirement, adapted from an existing requirement in AU sec. 316, for the auditor to perform analytical procedures relating to revenue through the end of the period. These procedures are intended to identify unusual or unexpected relationships involving revenue accounts that might indicate a material misstatement, including material misstatement due to fraud. This release includes additional discussion of this requirement.[471]

IAASB

The ISAs state:

The auditor shall evaluate whether unusual or unexpected relationships that have been identified in performing analytical procedures, including those related to revenue accounts, may indicate risks of material misstatement due to fraud.

The ISAs do not specifically require the auditor to perform analytical procedures related to revenue through the end of the period.

ASB

The SASs require the auditor to perform analytical procedures related to revenue.

(iv). Corroborating Management Explanations

PCAOB

Auditing Standard No. 14 requires the auditor to corroborate management's explanations regarding significant unusual or unexpected transactions, events, amounts, or relationships. Auditing Standard No. 14 also states that if management's responses to the auditor's inquiries appear to be implausible, inconsistent with other audit evidence, imprecise, or not at a sufficient level of detail to be useful, the auditor should perform procedures to address the matter. Unlike the ISAs, Auditing Standard No. 14 specifically requires the auditor to corroborate management's explanations regarding significant matters. This release includes additional discussion regarding corroborating management's explanations.[472]

IAASB and ASB

The ISAs and the SASs require the auditor to investigate the identified fluctuations or relationships that are inconsistent with other relevant information or that differ from expected values by a significant amount by (a) inquiring of management and obtaining appropriate audit evidence relevant to management's responses and (b) performing other audit procedures as necessary in the circumstances. The ISAs and the SASs also include a requirement to investigate inconsistent responses to inquiries from management and those charged with governance.

(v). Communication of Accumulated Misstatements

PCAOB

Auditing Standard No. 14 requires the auditor to communicate accumulated misstatements to management on a timely basis to provide management with an opportunity to correct them. Unlike the ISAs and the SASs, Auditing Standard No. 14 does not require the auditor to request management to correct the misstatements. Instead, PCAOB standards focus on communicating the misstatements to management, performing procedures to determine whether management corrected them, understanding the reasons why management might not have corrected the misstatements, and evaluating the effect of uncorrected misstatements on the financial statements and the audit. This release includes additional discussion of this requirement.[473]

IAASB and ASB

The ISAs and the SASs include requirements to communicate on a timely basis all misstatements accumulated during the audit to an appropriate level of management and to request that management correct those misstatements.

(vi). Correction of Misstatements

PCAOB

Auditing Standard No. 14 requires that if management has made corrections to accounts or disclosures in response to misstatements detected by the auditor, the auditor should evaluate management's work to determine whether the corrections have been appropriately recorded and determine whether uncorrected misstatements remain. This release includes additional discussion of this requirement.[474]

IAASB and ASB

The ISAs and the SASs contain a requirement to perform additional audit procedures to determine whether misstatements remain, if at the auditor's request management has examined a class of transactions, account balance or disclosure and corrected misstatements that were detected.

The ISAs do not require the auditor to evaluate whether the misstatements that were communicated by the auditor to management have been appropriately corrected by management.

(vii). Evaluating Misstatements—Effect on Risk Assessments

PCAOB

Auditing Standard No. 14 contains a requirement to evaluate the nature and the effects of individual misstatements accumulated during the audit on the assessed risks of material misstatement in determining whether the risk assessments remain appropriate. This release includes additional discussion of this requirement.[475]

IAASB and ASB

The ISAs and the SASs do not include an analogous requirement.

(viii). Evaluating Whether Misstatements Might Be Indicative of Fraud

PCAOB

Auditing Standard No. 14 requires the auditor to perform procedures to obtain additional audit evidence to determine whether fraud has occurred or is likely to have occurred, and, if so, its effect on the financial statements and the auditor's report if the auditor believes that a misstatement is or might be intentional, and if the effect on the financial statement cannot be readily determined. This release includes additional discussions of this requirement.[476]

IAASB and ASB

The ISAs require the auditor to evaluate the implications for the audit if the auditor confirms that or is unable to conclude whether financial statements are materially misstated as a result of fraud. The ISA does not explicitly require the auditor to perform audit procedures to obtain additional audit evidence to determine the effect of the misstatement on the financial statements.

[471] Ibid.

[472] *Ibid.*

[473] Section II.C.9.j.

[474] Section II.C.9.f.

[475] Section II.C.9.i.

[476] Ibid.

The SASs include a requirement similar to the ISAs' requirement.

(ix). Communications Regarding Fraud

PCAOB

Auditing Standard No. 14 requires the auditor to determine his or her responsibility under AU secs. 316.79–.82A, AU sec. 317, *Illegal Acts by Clients,* and Section 10A of the Securities and Exchange Act of 1934, 15 U.S.C. 78j–1, if the auditor becomes aware of information indicating that fraud or another illegal act has occurred or might have occurred. AU sec. 316 requires that whenever the auditor has determined that there is evidence that fraud may exist, the auditor should bring that matter to the attention of an appropriate level of management.[477] This release includes additional discussion of this requirement.[478]

IAASB and ASB

The ISAs state that if the auditor has identified a fraud or has obtained information that indicates that a fraud may exist, the auditor shall communicate these matters on a timely basis to the appropriate level of management.

The SASs include a requirement similar to the ISAs' requirement.

(x). Evaluating the Qualitative Aspects of the Company's Accounting Practices

PCAOB

Auditing Standard No. 14 states that if the auditor identifies bias in management's judgments about the amounts and disclosures in the financial statements, the auditor should evaluate whether the effect of that bias, together with the effect of uncorrected misstatements, results in material misstatement of the financial statements. The standard also contains a requirement for the auditor to evaluate whether the auditor's risk assessments, including the assessment of fraud risks, and the related responses remain appropriate. This release includes additional discussion of these requirements.[479]

IAASB and ASB

The ISAs and the SASs contain a requirement for the auditor to evaluate whether the financial statements are prepared, in all material respects, in accordance with the requirements of the applicable financial reporting framework. This evaluation shall include consideration of the qualitative aspects of the entity's accounting practices, including indicators of possible bias in management's judgments.

(xi). Management's Identification of Offsetting Adjusting Entries

PCAOB

If management identifies adjusting entries that offset misstatements accumulated by the auditor, Auditing Standard No. 14 requires the auditor to perform procedures to determine why the misstatements were not identified previously and to evaluate the implications on the integrity of management and the auditor's risk assessments, including fraud risk assessments. Auditing Standard No. 14 also requires the auditor to perform additional procedures as necessary to address the risk of further undetected misstatements. This release includes additional discussion of these requirements.[480]

IAASB and ASB

The ISAs and SASs do not include analogous requirements.

(xii). Evaluating Conditions Relating to Assessment of Fraud Risks

PCAOB

Auditing Standard No. 14 requires the engagement partner to determine whether there has been appropriate communication with other engagement team members throughout the audit regarding information or conditions that are indicative of fraud risks. This release includes additional discussion of this requirement.[481]

IAASB

The ISAs require a discussion among the engagement team members and a determination by the engagement partner of matters to be communicated to those team members not involved in the discussion.

ASB

The SASs contain a requirement for the engagement partner to ascertain that appropriate communication exists about the need for the discussion of fraud risks among team members throughout the audit.

Auditing Standard No. 15—Audit Evidence

In this section, the analogous IAASB and ASB standards are ISA 500, *Audit Evidence,* and the clarified SAS, *Audit Evidence (Redrafted),* respectively.

(i). Objective and Overarching Requirement

PCAOB

The objective of the auditor in Auditing Standard No. 15 is to plan and perform the audit to obtain appropriate audit evidence that is sufficient to support the opinion expressed in the auditor's report. The objective of the standard, together with the related requirement regarding audit evidence, articulates the linkage between the auditor's responsibility to obtain sufficient appropriate audit evidence and to support his or her opinion. This release includes additional discussion regarding the objective of the standard.[482]

IAASB and ASB

The ISA states:

> The objective of the auditor is to design and perform audit procedures in such a way as to enable the auditor to obtain sufficient appropriate audit evidence to be able to draw reasonable conclusions on which to base the auditor's opinion.

The ISA also states:

> The auditor shall design and perform audit procedures that are appropriate in the circumstances for the purpose of obtaining sufficient appropriate audit evidence.

The SAS includes an objective and a requirement similar to the ISA's objective and requirement.

(ii). Document Authentication

PCAOB

Auditing Standard No. 15 states that the auditor is not expected to be an expert in document authentication. However, if conditions indicate that a document may not be authentic or that the terms in a document have been modified but that the modifications have not been disclosed to the auditor, the auditor is required to modify the planned audit procedures or perform additional audit procedures to respond to those conditions and to evaluate the effect, if any, on the other aspects of the audit. Auditing Standard No. 15 omits protective language, such as "[u]nless the auditor has reason to believe the contrary, the auditor may accept records and document as genuine" that would weaken the requirement. This release includes additional discussion regarding this requirement.[483]

IAASB and ASB

The ISA states:

> Unless the auditor has reason to believe the contrary, the auditor may accept records and

[477] AU sec. 316.79.

[478] Section II.C.9.k.

[479] Section II.C.9.l.

[480] Ibid.

[481] Section II.C.9.m.

[482] Section II.C.10.c.

[483] Section II.C.10.e.

documents as genuine. If conditions identified during the audit cause the auditor to believe that a document may not be authentic or that terms in a document have been modified but not disclosed to the auditor, the auditor shall investigate further.

The SAS includes a requirement similar to the ISA's requirement.

(iii). Selecting Items for Testing To Obtain Audit Evidence

PCAOB

Auditing Standard No. 15 states that the auditor should determine the means of selecting items for testing to obtain evidence that, in combination with other relevant evidence, is sufficient to meet the objective of the audit procedure. This requirement links the selection of items for testing to the sufficiency of the audit evidence. This release includes additional discussion of this requirement.[484]

IAASB and ASB

The ISA states:

When designing tests of controls and tests of details, the auditor shall determine means of selecting items for testing that are effective in meeting the purpose of the audit procedure.

The SAS includes a requirement similar to the ISA's requirement.

III. Date of Effectiveness of the Proposed Rules and Timing for Commission Action

Pursuant to Section 19(b)(2)(A)(ii) of the Securities Exchange Act of 1934 ("Exchange Act"), and based on its determination that an extension of the period set forth in Section 19(b)(2)(A)(i) of the Exchange Act is appropriate in light of the number and complexity of the standards to allow additional time sufficient for notice and comment, and consideration of comments, the Commission has determined to extend to *December 27, 2010* as the date by which the Commission should take action on the proposed rule.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule is consistent with the requirements of Title I of 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/pcaob.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number PCAOB–2010–01 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 PCAOB–2010–01. 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/pcaob/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule 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 such filing will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. PCAOB–2010–01 and should be submitted on or before October 18, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–23456 Filed 9–24–10; 8:45 am]

BILLING CODE 8010–01–P

[484] Section II.C.10.j.

Federal Register

Monday,
September 27, 2010

Part III

Department of Defense

Defense Acquisition Regulations System

48 CFR Parts 212, 227, et al.
Defense Federal Acquisition Regulation Supplement; Patents, Data, and Copyrights (DFARS Case 2010–D001); Proposed Rule

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 227, 246, and 252

RIN 0750–AG62

Defense Federal Acquisition Regulation Supplement; Patents, Data, and Copyrights (DFARS Case 2010–D001)

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

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to update text on patents, data, and copyrights. The proposed rule removes text and clauses that are obsolete or unnecessary; relocates and integrates the coverage for computer software and computer software documentation with the coverage for technical data to eliminate redundant coverage for these subjects while retaining the necessary distinctions; eliminates or combines the clauses associated with technical data and computer software, consistent with the revised and streamlined regulatory coverage; relocates, reorganizes, and clarifies the coverage for rights in works; and relocates to the DFARS companion resource, Procedures, Guidance, and Information (PGI), text that is not regulatory in nature and does not impact the public.

DATES: Comments on the proposed rule should be submitted to the address shown below on or before November 26, 2010, to be considered in the formulation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2010–D001, using any of the following methods:

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

○ *E-mail: dfars@osd.mil.* Include DFARS Case 2010–D001 in the subject line of the message.

○ *Fax:* 703–602–0350.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

To confirm receipt of your comment(s), please check *http://www.regulations.gov* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, 703–602–0328.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule is intended to simplify and clarify DFARS part 227, Patents, Data, and Copyrights, and move to PGI text that does not impact the public. These proposed DFARS changes are discussed in detail, followed by a list of specific issues or topics on which public comment is sought.

1. Subpart 212.2, Special Requirements for the Acquisition of Commercial Items.

Subpart 212.2 is revised to update cross-references to the reorganized subpart 227.71 for technical data and computer software. In addition, a new section 212.270 is added to provide appropriate cross-reference to the DFARS policies and procedures for rights in works at subpart 227.72.

2. Subpart 212.5, Applicability of Certain Laws to the Acquisition of Commercial Items.

Section 212.504 is revised to eliminate the statutory sections 10 U.S.C. 2320 and 2321 from the list of statutes that are inapplicable to subcontracts for commercial items. The Federal Acquisition Streamlining Act (FASA) required the FAR to identify statutes that do not apply to contracts or subcontracts for commercial items (see FAR 12.503 and 12.504, and DFARS 212.503 and 212.504). The current DFARS implementation of this authority makes 10 U.S.C. 2320 and 2321 applicable to prime contracts for commercial items, but not to subcontracts (see 212.504(a)(iii) and (iv)), which results in the DFARS clauses used in prime contracts not being flowed down to subcontracts, pursuant to current 227.7102–3.

However, this approach fails to recognize that intellectual property rights create a direct relationship between the Government and subcontractors. Intellectual property rights are one area in which there is a direct legal relationship created between the Government and subcontractors, at any tier. The Government's license rights are granted directly from the subcontractor, as the owner of the deliverable intellectual property; the Government and subcontractor are allowed to transact business directly with one another; and the higher-tier contractors are prohibited from using their position to acquire rights in subcontractor technology (i.e., other than by mutual agreement in an arms length negotiation). This concept is recognized explicitly in the statutes governing acquisition of intellectual property:

• Inventions and Patents. The Bayh-Dole Act (35 U.S.C. 200–212) explicitly states that its requirements apply to subcontracts. The regulatory implementation specifically addresses this issue at FAR 27.304–4, and in the clauses at FAR 52.227–11(k), 52.227–12, and 52.227–13(i).

• Technical Data. 10 U.S.C. 2320 and 2321 explicitly apply to subcontracts, provide that the subcontractor may transact business directly with one another, and explicitly address rights and procedures applicable for commercial items (*see, e.g.,* 2320(a) & (b)(1), and 2321(f)). These procedures are discussed and implemented at current DFARS 227.7103–13 and –15, and in the current clauses at DFARS 252.227–7013(k), and 252.227–7037(b), (k), and (l).

These proposed revisions, which now apply these statutory requirements to subcontracts for commercial items, also require corresponding changes to the flowdown of the proposed revised clauses at DFARS 252.227–7013, –7015, and –7037.

3. Subpart 227.3, Patent Rights under Government Contracts, and associated clause 252.227–7039, Patents—Reporting of Subject Inventions.

The proposed rule deletes the requirement for DFARS clause 252.227–7034, Patents—Subcontractor. This clause provided for flowdown of the 52.227–12 clause to large business subcontractors. This clause is unnecessary because the original defect in the 1984 clause was fixed in the late 1980s, and that fix was further improved in the FAR part 27 rewrite (FAR Case 1999–402). Under that case, FAR clause 52.227–12 was deleted. The FAR clause was replaced by DFARS clause 252.227–7038, Patent Rights—Ownership by the Contractor (Large Business) (DFARS Case 2001–D015, 72 FR 69159).

4. Subpart 227.4, Rights in Data and Copyrights.

There are no substantive changes in subpart 227.4.

5. Subpart 227.6, Foreign Intellectual Property Exchanges and Licenses.

The language of this subpart has been edited to use plain language when possible. This revision proposes to relocate to PGI—

• Assistance with patent rights and royalty payments in the U.S. European Command; and

• Information on the laws and regulations governing export control of intellectual property.

6. Subpart 227.70, Infringement Claims, Licenses, and Assignments.

• Requirements for filing an infringement claim.

Section 227.7004 (now 227.7002) establishes requirements for a private party to file a valid patent or copyright infringement claim or secrecy order claim against the United States. This subject matter is not necessarily limited to FAR/DFARS-based contracts. However, the DAR Council was unable to identify any other appropriate regulation in which to include this subject matter, and therefore proposes to retain it in the DFARS. This subject matter directly affects the legal rights and remedies of private parties and therefore, must be kept in a regulation.

The proposed rewrite differentiates between the requirements for filing a claim for patent infringement and for filing a claim for copyright infringement. The current DFARS only references copyright infringement claims generically. More specific guidance is required so that the department or agency affected can more appropriately respond to a claim for copyright infringement. Moreover, these sections were revised such that the section concerning indirect notification of a claim submitted to a contractor rather than the Government was revised to state that such notice is defective.

• Guidance for processing and settling claims.

The remaining subject matter in subpart 225.70 provides guidance for investigating and settling any intellectual property infringement claims using a specialized form of acquisition instrument, more commonly referred to as settlement agreements, licenses, or releases. The following information has been moved to PGI:

• Addresses for filing an administrative claim.

• Examples of disposition of trademark infringement claims.

• Sample denial of an administrative claim.

The section on notification and disclosure to claimants (now 227.7004) was completely rewritten to positively state that it is the Government's policy to settle meritorious claims, that the agency making such a determination should coordinate with other agencies on their potential liability, and that if a claim is to be denied, the responsible agency should notify the claimant and provide a basis for the denial.

The DFARS clauses 252.227–7000 through 252.227–7012, currently prescribed in DFARS subpart 227.70, have been eliminated. These clauses were all provided just as examples, which could be modified or omitted. Section 227.7006 now provides a sample settlement agreement for patent infringement. This settlement agreement may be tailored as appropriate for copyright infringement releases, settlement agreements, license agreements, or assignment. Cognizant legal counsel must be consulted in such circumstances.

7. Subpart 227.71, Rights in Technical Data and Computer Software.

The current version of DFARS part 227 was issued in 1995, as the result of a joint Government-industry committee that was formed by section 807 of the National Defense Authorization Act for FY 1991. The section 807 committee revised nearly the entire part 227 and clauses, and established separate coverage for the treatment of technical data at subpart 227.71, and for computer software and computer software documentation at subpart 227.72. In addition, within each of these subparts, the materials were organized to provide separate sections for commercial technologies (227.7102 and 227.7202) and for noncommercial technologies (227.7103 and 227.7203).

As a result of this structure, the current DFARS coverage for computer software at subpart 227.72 is primarily a duplication of the text covering technical data at 227.71. Similarly, the current clause for noncommercial computer software at 252.227–7014 is nearly a duplicate of the clause governing noncommercial technical data at 252.227–7013. With this structure, it can be more difficult to distinguish the actual differences between the treatment of technical data vice computer software because so much of the coverage is identical.

One of the objectives in this proposed rule is to identify and eliminate the redundancy between current subparts 227.71 and 227.72, and associated clauses. After consolidating the technical data and computer software coverage at subpart 227.71, the entire subpart was reorganized and streamlined to improve clarity, eliminate unnecessary or obsolete coverage, and relocate appropriate materials to the PGI. In general, materials were grouped into sections with related purposes or policies, and to the extent possible, discussed sequentially in order to more closely parallel the chronological sequence in which these issues are presented in a typical acquisition (*e.g.,* starting with acquisition planning, specifying delivery requirements and asserting restrictions as early as possible, accepting and validating markings on deliverables, and the use, safeguarding, and handling of those materials).

This subpart is now divided into the following sections:

a. 227.7100 Scope of subpart.

The subpart has been expanded to include computer software and no longer includes rights in works.

b. 227.7101 Definitions.

The definitions in this section and the associated clauses at 252.227–7013, 252.227–7014, and 252.227–7015 are revised to incorporate definitions applicable to computer software (*e.g.,* "restricted rights"), and are further revised as to be consistent with statutory definitions. For example, the definitions of "computer software" and "computer software documentation" were revised to reclassify some types of recorded information as "computer software documentation" rather than "computer software." The items "design details, algorithms, processes, flow charts, formulas, and related material that describe the design, organization, or structure" of computer software had been added to the current definition of "computer software" in the 1995 rewrite, but these types of recorded information are more legitimately characterized as "technical data that pertains to an item" (in this case, the item being computer software). However, another type of recorded information that was retained from the 1995-era redefinition of "computer software" is "source code listings"—the human-readable versions of computer programs for which there is no analog in the world of technical data. Thus, "source code" is more appropriately characterized as "computer software."

c. 227.7102 Policy.

The policy section expands in most cases the statutory requirements for technical data at 10 U.S.C. 2320 and 2321 to cover computer software as well. It combines the policy for both commercial and noncommercial items or processes.

d. 227.7103 Acquisition of technical data and computer software.

Associated clauses:

• 252.227–7026, Deferred Delivery of Technical Data or Computer Software; and

• 252.227–7027, Deferred Ordering of Technical Data or Computer Software.

Proposed subsection 227.7103–1 addresses acquisition planning and provides a pointer to additional guidance in PGI.

Proposed subsections 227.7103–2, Preparation of solicitation, and 227.7103–3, Identification and assessment of Government minimum needs, are primarily the consolidation of

coverage from the following current DFARS sections: 227.7103–2 for noncommercial technical data; and 227.7203–1 for noncommercial computer software. Because these materials focus on the Government's determination of its delivery requirements, and the evaluation of offered deliverables, they are equally applicable to commercial technical data and computer software, subject to the commercial-specific policies at proposed revised 227.7102. Procedures for Government personnel to identify minimum needs have been moved to PGI.

Proposed subsection 227.7103–4 is the consolidation of the coverage for deferred delivery and deferred ordering at delivery at current DFARS 227.7103–8 for noncommercial technical data, and 227.7203–8 for noncommercial computer software. The associated clauses at 252.227–7026 and 252.227–7027 are revised for clarity, with no substantive changes.

e. 227.7104 License rights in technical data and computer software.

Associated clauses:

- 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial.
- 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program. (moved from 252.227–7018)
- 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

This section 227.7104 consolidates all of the existing DFARS coverage of the allocation of rights between the parties (i.e., the Government, contractors, subcontractors, and third parties) for the various categories of technical data and computer software.

(i) Acquisition of rights in technical data and computer software—noncommercial.

Proposed subsection 227.7104–1, General, is based on the consolidation of current 227.7103–4 for noncommercial technical data, and 227.7203–4 for noncommercial computer software. These materials are adapted and clarified as follows:

- Paragraph (a) addresses Grant of license to the Government. Much of this information is moved to PGI.
- Paragraph (b) clarifies the doctrine of segregability, which is used to determine the license rights (or license rights scheme) that is most appropriate for each segregable element of a technical data computer software. This concept is further reinforced later at 227.7104–8, in prescribing multiple rights clauses for contracts that involve multiple types of technical data and computer software (*e.g.,* both commercial and noncommercial).
- Paragraph (c), Activities covered, clarifies the scope of the license that is granted to the Government. At paragraph (c)(1), the term "access" is added to the well-established list of activities that are covered by the standard license grant for noncommercial technical data and computer software, in recognition of the emerging practice of providing the Government with remote (*e.g.,* Internet-based) access to technical data or computer software that is maintained by the contractor, as an alternative to traditional delivery methods (*e.g.,* delivery on static electronic media such as CD–ROM or DVD). Paragraph (c)(2) recognizes and clarifies that commercial licenses involve a wide variety of licensed activities, which may not cover all of the activities covered by the grant of license for noncommercial technical data or computer software.
- Paragraph (d) clarifies the types of intellectual property covered by the license grant.

Proposed 227.7104–2, Rights in technical data and computer software of third parties (including subcontractors), is based on the consolidation of current 227.7103–9 and 227.7103–15 for noncommercial technical data; and 227.7203–9 and 227.7203–15 for noncommercial computer software.

Proposed 227.7104–3, Rights in noncommercial technical data and noncommercial computer software, is a consolidation of current 227.7103–5 for noncommercial technical data, and 227.7203–5 for noncommercial computer software.

The corresponding clause at 252.227–7013 is a consolidation of the current 252.227–7013, which covers only noncommercial technical data, and 252.227–7014, which covers noncommercial computer software and computer software documentation. The new 252.227–7013 clause is a complete replacement for the current 252.227–7013 clause and 252.227–7014, with several key improvements:

In addition to the revised definitions discussed in section A.7.b. of this notice, the proposed 252.227–7013 clause clarifies limitations on the Government's right to release or disclose technical data or computer software in which it has limited rights, restricted rights, or Government-purpose rights. In all cases, such release or disclosure is permitted only under certain conditions (*e.g.,* the recipient of the technical data or computer software is subject to a prohibition on further disclosure of the materials). In the current 252.227–7013 and 252.227–7014 clauses, these limitations are set forth primarily in the definitions of limited rights and restricted rights (with one additional limitation specified within the license grant at paragraph (b) of the clause), but for Government-purpose rights, these restrictions are set forth entirely within the license grant (see current 252.227–7013(b)(2)(iii) and 252.227–7014(b)(2)(iii)). This discrepancy is remedied by listing all such restrictions on the Government's rights within the definition of the license rights; this reformatting also streamlines the grant of license rights at paragraph (b) of the proposed clause.

A nearly identical paragraph regarding limitations on negotiated special licenses was relocated from the current DFARS clause language granting limited rights (see current 252.227–7013(b)(3)(iii)), and restricted rights (see current 252.227–7014(b)(3)(ii)), and integrated in a streamlined format within the grant of negotiated license rights (see proposed 252.227–7013(b)(5)).

At proposed paragraph (f) of the clause, the substance of the requirements governing post-award identification and assertion of restrictions (paragraph (e) of the current 252.227–7013 and 252.227–7014 clauses) was relocated to a new stand-alone clause 252.227–7018, which serves as the post-award complement to the pre-award identification and assertion clause 252.227–7017.

At paragraph (g)(2), the proposed clause establishes a new unlimited rights marking that is optional whenever unlimited rights are applicable, and is required when the unlimited rights apply and the contractor also uses the copyright legend permitted by 17 U.S.C. 401 or 402 (the copyright notice). This new unlimited rights legend will help resolve any ambiguities regarding the Government's rights in materials that are marked with a copyright notice "only." The copyright notice, standing alone, does not qualify as a restrictive marking on noncommercial technical data or computer software, but could serve as restrictive marking on commercial technical data or computer software (*e.g.,* where it is usually accompanied by additional language such as "All rights reserved" and thus may indicate the "standard" commercial license rights or other license more restrictive than unrestricted rights). This new unrestricted rights marking, *required* only for noncommercial technical data or computer software that is both subject to unrestricted rights and which is also marked with a copyright notice, would be distinguishable from other commercial technical data or

computer software with confusingly similar copyright notices.

The clause 252.227–7032, Rights in Technical Data and Computer Software (Foreign), previously prescribed in 227.7103 for optional use in lieu of 252.227–7013 in contracts with foreign contractors, has been eliminated. It is an unnecessary clause that was not frequently used. Furthermore, it predates 10 U.S.C. 2320 and is inconsistent with that statute.

(ii) License rights under the Small Business Innovation Research (SBIR) Program.

Proposed section 227.7104–4 is the revised and updated version of the current 227.7104 and 227.7204. The associated clause at 252.227–7014, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program, is based on the current 252.227–7018 clause and is revised to include several key statutory and policy updates. The SBIR Program Reauthorization Act of 2000, Public Law 106–554, amended section 9 of the Act (codified at 15 U.S.C. 638(j)(3)(A)) to require that the Small Business Administration(SBA) modify the SBIR policy directives to provide that SBIR data rights apply to Phase III SBIR awards, as well as Phase I and II awards. The SBA issued its policy directive on September 24, 2002, and is currently in the process of revising and updating that policy directive, including the treatment of intellectual property rights, which will also be published for public comment under a separate rulemaking action. Thus, the Department of Defense is working with the SBA to harmonize the DFARS sections on SBIR data rights and the SBIR Policy Directive. SBA has advised that it intends to clarify and revise the SBIR Policy Directive regarding these issues soon.

• Definitions. A definition of "SBIR data" was added to the proposed clause. This new definition is based on the definition of "SBIR Technical Data" in section 3(bb) of the SBIR Policy Directive, i.e., all data generated during the performance of an SBIR award. The definition of "SBIR data rights" was revised and simplified to provide the Government with limited rights in SBIR technical data, and restricted rights in SBIR computer software, as the most straightforward mechanism to achieve the objective of allowing the SBIR contractor to assert proprietary data restrictions during the SBIR data protection period. The term "computer software" was added to the definition because SBIR data rights also apply to both technical data and computer software generated under an SBIR award.

• SBIR data rights protection period. Normally, SBIR data rights end upon the date five years after acceptance of the last deliverable. However, any SBIR data that are appropriately referenced and protected in a subsequent SBIR award during the five-year period of this contract remain protected through the protection period of that subsequent SBIR award. This serves to implement the requirement of the Policy Directive that SBIR data rights may be extended throughout multiple future awards if the SBIR data is appropriately referenced and protected in subsequent SBIR awards. In addition, with this new procedure, it may be impossible for the contractor, under any particular award, to know the expiration date of the SBIR data generated under that award. For this reason the proposed clause eliminates any reference to a date-certain expiration of the SBIR data rights period. The SBIR clause continues to provide the Government with unlimited rights upon expiration of the SBIR data protection period. However, the SBA has advised that although its current SBIR Policy Directive provides that after the protection period expires the Government may disclose SBIR data, and may use and authorize others to use SBIR data on behalf of the Government, this does not authorize the Government or third parties to use the data for commercial purposes without the consent of the awardee. SBA has advised that it intends to clarify and revise the SBIR Policy Directive regarding these issues soon. Public comments regarding the merits of the DFARS approach (i.e., unlimited rights after the expiration of the protection period) or the SBA's interpretation of its current policy directive are specifically requested.

• Identification and assertion of SBIR data rights restrictions. To facilitate the identification and assertion of restrictions on all SBIR data being delivered to the Government, including the extension of the SBIR data protection period through subsequent SBIR awards, the revised clause 252.227–7017 and new clause 252.227–7018, have been expanded in scope to cover all deliverable SBIR data.

• Prohibition against requiring negotiated licenses as a condition of award. Paragraph (b)(6)(i) of the proposed 252.227–7014 clause implements the requirements of section (b)(4) of the Policy Directive by prohibiting the contracting officer from negotiating for special license rights as an element of any SBIR Phase I, Phase II, or Phase III award. However, after award, the parties may voluntarily negotiate special license rights, or even the assignment of rights, by mutual agreement.

(iii) License rights for commercial technical data and commercial computer software.

Proposed 227.7104–5 is the consolidation of current 227.7102–2 for commercial technical data, and current 227.7202–3 and –4 for commercial computer software. The associated clause 252.227–7015 is based on the current 252.227–7015 (which covers only commercial technical data), adapted to include the policies governing rights in commercial computer software from current 227.7202–2 and –3, and to include several other key revisions:

• The inclusion of clause language allocating rights in commercial computer software and computer software documentation is a noteworthy change. The current 227.7202 provides no clause for commercial computer software, instead specifying that the Government receives the rights specified in the standard commercial license agreement that is "customarily provided to the public unless such licenses are inconsistent with federal procurement law or do not otherwise meet the agencies needs."

• The proposed rule preserves this policy at 252.227–7015(b)(1), and strengthens and clarifies it by expressly incorporating this requirement into the contract clause.

• In addition, the proposed language resolves a long-standing issue regarding potential inconsistency between the commercial license and Federal procurement law. The proposed 252.227–7015(b)(1) clarifies that the inconsistent language is considered stricken from the license, and the remainder of the license remains in effect—effectively incorporating a "severability" provision equivalent to those contained in most commercial license agreements.

• The clause also encourages the parties to promptly enter into negotiations to resolve any issues raised by striking the inconsistent provisions. Of course, the proposed 252.227–7015(b)(4) also preserves the parties' ability to negotiate specialized license provisions by mutual agreement.

• The proposed clause is revised to remove a specialized definition of "commercial item" that excluded commercial computer software from this statutorily defined term. The statutory definition of commercial item contains no such exclusion, leaving no authority for this regulatory limitation.

Commercial computer software that otherwise meets the definition of commercial item must be treated as a commercial item; which clarifies that commercial computer software documentation is merely a specialized subtype of commercial technical data, which remains subject to statutory mandates of 10 U.S.C. 2320.

• The proposed clause establishes a more consistent policy regarding DoD receiving the same license rights that are customarily provided to the public as long as the license rights are consistent with procurement law. This was already the clear statement of policy as applied to commercial computer software at 227.7202, and is generally consistent with the overall themes and policies governing acquisition of commercial items at FAR part 12. However, the regulatory and clause coverage for technical data pertaining to commercial items contained inconsistent guidance: most of the coverage appears to implement the general policy governing commercial acquisitions (*e.g.,* only the customary commercial deliverables are required except when DoD has special needs), but then rather than granting DoD the standard commercial license rights, the clause specifies a DoD-unique license that provides only the minimum rights in technical data that are required by the statute, 10 U.S.C. 2320. There is no clear rationale for requiring DoD to accept lesser rights than an ordinary consumer would receive in a standard, arms-length, commercial transaction for the same technology. The Government should take the standard commercial terms and conditions except when Government-unique requirements (including Federal procurement law) require specialized treatment. The standard terms and conditions should be tailored only as necessary to meet the Government's needs.

• DoD's minimum license rights were corrected to conform to the statutory minimum rights. More specifically, in addition to the license rights specified in the current clause, 10 U.S.C. 2320 also requires that the DoD have the right to disclose certain technical data to foreign governments for evaluation or information, and that both this type of release, and a release for emergency repair or overhaul of the commercial item, are permitted only when the recipient of the data is subject to a prohibition on further release of the data, and the contractor (i.e., owner of the data) is notified of the release. These statutory requirements are added to the minimum rights required for commercial technical data.

• The proposed clause language now clarifies the requirement that commercial technical data and computer software to be delivered with less than unlimited rights must be marked with an appropriate restrictive legend (proposed 252.227–7015(d)). This requirement is contained expressly in the current 252.227–7015(d) in the form of a release of liability for any Government use or disclosure of technical data that is not restrictively marked. This revision clarifies the rule for commercial technical data, and expressly establishes such a requirement for commercial computer software. Although the current DFARS is silent regarding any mandatory restrictive legends or notices for commercial computer software, best commercial practices always require restrictive markings or notices—and this is a keystone requirement in both copyright and trade secret law. The proposed clause allows any restrictive legend or notice that accurately characterizes the restrictions on the Government's use and is consistent with best commercial practices.

(iv) Prescriptions for primary rights allocation clauses.

The proposed 227.7104–8 combines and clarifies all of the current DFARS language prescribing the primary rights-allocation clauses. In addition, 227.7104–8(d) reinforces the application of the doctrine of segregability to the use of clauses when multiple types of technical data and/or computer software are involved in a single contract.

f. 227.7105, Contractor assertion of restrictions on technical data and computer software—early identification and marking requirements.

Associated provision and clauses at—

• 252.227–7016, Rights in Bid or Proposal Information;

• 252.227–7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software; and

• 252.227–7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software.

Proposed section 227.7105 consolidates coverage from current DFARS 227.7103–3 and 227.7103–10 for noncommercial technical data, and 227.7202–3 and 227.7202–10 for noncommercial computer software. The associated clauses 252.227–7017 (pre-award) and the new clause at 252.227–7018 (post-award) consolidate the current DFARS clause requirements of 252.227–7017, pre-award assertions for technical data and computer software; 252.227–7013(e), post-award assertions for technical data; 252.227–7014(e), post-award assertions for computer software; and 252.227–7028, identification of technical data and computer software previously delivered to the Government.

The proposed clauses create a comprehensive and consistent scheme to enable the contractor to identify and assert restrictions on technical data and computer software. This improved two-clause combination overcomes the shortcomings in the current DFARS by ensuring that these procedures govern all technical data and computer software under the contract (i.e., now including all deliverable SBIR data, commercial technical data, and commercial computer software), and clarifying the instructions for identifying these restrictions—which resulted in widespread confusion and noncompliance with the listing requirement.

Another change to the original 252.227–7017 clause is the removal of the mandatory chart format for reporting the Government's restrictions on use, release, or disclosure of data. This requirement was restrictive and needlessly burdensome for the contractor. Instead, the contractor may now present the required information to the contracting officer in any understandable format, so long as the required information is presented and understandable. Thus, the proposed revisions to the clause and provision aid the contractor by lessening the burden in preparing these documents. Contractors, under this proposed regime, will no longer have to create an entirely different identification system just for Government customers. Rather, the contractor will be able to submit its materials to the Government in the same manner that it does for its commercial customers.

The original 252.227–7017 clause requirements regarding negotiated, commercial, or non-standard licenses place a large burden upon the contractor to (1) identify the requirements of these licenses and (2) describe the terms of these licenses to the satisfaction of the contracting officer. Therefore, in an effort to alleviate a portion of this burden, the contractor is now required to submit copies of the licenses, etc., with its assertion of restrictions.

A further change benefiting both the contractor and the Government is the integration of the requirements of the current 252.227–7028 clause with the requirements of the 252.227–7017 clause, which avoids the unnecessary duplication of information when the contract will involve the delivery of technical data or computer software with restrictions (required to be identified under current 252.227–7017, and 252.227–7013(e) or 252.227–

7014(e)) that have also been previously delivered to the Government (identified again under the 252.227–7028 clause). However, now that the consolidated 252.227–7017 and 252.227–7018 clauses apply also to commercial technical data and computer software, these commercial technical data and computer software are exempted from the requirement to identify previous deliveries to the Government when such technical data or computer software was and is offered with the standard commercial license rights, eliminating the need for 252.227–7028, Technical Data or Computer Software Previously Delivered to the Government.

Additionally, pre-and post-award restriction identifications have been separated into two distinct clauses. In order to streamline this process, the 252.227–7018 clause tracks the language of the 252.227–7017 clause very closely. Thus, both clauses are easy to understand and apply, as they are quite similar in nature.

g. 227.7106, Conformity, acceptance, warranty, and validation of asserted restrictions on technical data and computer software.

And associated clauses at—

- 252.227–7030, Technical Data and Computer Software—Withholding of Payment; and
- 252.227–7037, Validation of Restrictive Markings in Technical Data and Computer Software.

Proposed subsection 227.7106 is the consolidation of coverage from the following current DFARS sections: 227.7103–11, –12, –13, and –14 for noncommercial technical data; and 227.7203–11, –12, –13, and –14 for noncommercial computer software. The associated clause 252.227–7037, Validation of Restrictive Markings on Technical Data and Computer Software, combines the current clauses at 252.227–7037 (applicable to all technical data), and 252.227–7019 (noncommercial computer software).

The two current DFARS clauses: DFARS 252.227–7037 Validation of Restrictive Markings on Technical Data (which governs both commercial and noncommercial technical data and is based on 10 U.S.C. 2321) and DFARS 252.227–7019, Validation of Asserted Restrictions–Computer Software (which governs noncommercial computer software and is not based directly on the technical data statute) have been combined into proposed DFARS 252.227–7037 Validation of Restrictive Markings on Technical Data and Computer Software, hereinafter referred to as the "proposed clause". In addition, coverage for the validation of asserted restrictions on commercial computer software has been added to the proposed clause.

i. Definitions.

The definition of "Contractor" from the current 252.227–7019 computer software clause was retained in the proposed clause. This definition was not present in the current 252.227–7037 technical data clause.

ii. Challenge for commercial computer software.

The proposed clause has added a challenge procedure for "commercial computer software." The current 252–227–7037 technical data clause provided for challenge of technical data relating to a commercial item, component, or process. This "commercial technical data" challenge procedure was extended to cover commercial computer software in the proposed clause, thereby harmonizing the challenge procedures for both commercial computer software and commercial technical data.

iii. Commercial presumption.

The presumption in contracts for commercial items, components, or processes that the asserted use and release restrictions are justified on the basis that the commercial items, components, or processes were developed at private expense remains in the proposed clause. Notwithstanding this presumption, the proposed clause allows the Government to challenge the asserted use and release restrictions on commercial technical data and commercial computer software. However, the Government can only use information the Government provides as a basis for challenging these asserted use and release restrictions. In addition, the Government may request information from the contractor on these asserted use and release restrictions, but the contractor is not required to provide such information. See (d)(1) of the proposed clause. Moreover, as provided in section (e)(2) of the proposed clause, the contractor's failure to provide a timely response or to provide sufficient information to such a request will not constitute reasonable grounds for questioning the validity of the asserted restrictions.

In addition, the record keeping requirements in paragraph (c) of the proposed clause are not required for "contracts for commercial items, components, or processes (including "commercial computer software."

iv. Criteria for Challenge.

The two criteria for a challenge provided in the current 252.227–7037 clause (which governs technical data only) have been extended in the proposed clause to cover computer software. In the current 252.227–7019 clause only the "reasonable grounds" criteria was provided. In the proposed clause the contracting officer may challenge the marking on both technical data and computer software if reasonable grounds exist to question the validity of the marking, and continued adherence to the marking would make impracticable subsequent competitive acquisition of the computer software, item, component, or process.

Note 10 U.S.C. 2321 (d)(1)(A) and (B) require both grounds for technical data. Accordingly, in order to harmonize the criteria for technical data and computer software, the two criteria were extended to cover computer software.

v. Urgent and compelling circumstances.

The proposed clause allows an agency head, at any time after a contracting officer's final decision, to declare that urgent and compelling circumstances exist. This allows the agency to use or release the data "as necessary to address the urgent and compelling circumstances." However, the recipient of this data will be required to sign a non-disclosure agreement at DFARS 227.7103–7 or be performing work under a contract containing the clause at DFARS 252.227–7025, Government-Furnished Information Marked with Restrictive Legends. The urgent and compelling circumstances procedure which currently exists in the current 252.227–7019 clause but not in the current 252.227–7037 clause has been extended to cover technical data in the combined clause, thereby harmonizing the procedures for both technical data and computer software.

The proposed clause allows the agency to use or release the data "as necessary to address the urgent and compelling circumstances". This language replaces language in the current 252.227–7019 clause providing specific rights for specific rights category data. The new language provides more flexibility for the agency and is less confusing than the current language.

vi. Written response considered a claim within the meaning of the Contract Disputes Act.

The proposed clause provides, that for both technical data and computer software, a contractor's (includes subcontractors and suppliers at any tier) written response to a contracting officer's challenge "shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601, *et seq.*), and shall be certified—regardless of dollar amount." This provision is contained in the current 252.227–7037 clause as mandated by 10 U.S.C. 2321(h). Note that the statute

does not prohibit application of this requirement for computer software. Sections (f)(3) through(6) of the current 252.227–7019 clause provide an analogous requirement which was subject to the rigors of a formal rulemaking process. Accordingly, in order to harmonize the requirements for both technical data and computer software in the proposed clause, the language of the current 252.227–7037 clause was extended to cover computer software in the proposed clause.

vii. Flowdown.

The proposed clause provides for flowdown of this clause for both technical data and computer software, commercial as well as noncommercial, to subcontractors, at any tier, or suppliers. This flowdown is mandated by 10 U.S.C. 2321. Note as part of this case that the prohibition against 10 U.S.C. 2321 applying to subcontracts for commercial items will be eliminated.

viii. Privity of contract.

This proposed clause tracks the privity of contract language contained in the new proposed DFARS 252.227–7013 Rights in Technical Data and Computer Software—noncommercial items. Note privity of contract with subcontractors, at any tier, and suppliers is mandated by 10 U.S.C. 2321 for technical data. Further, both the current 252.227–7019 and the current 252.227–7037 clause contain a privity of contract provision for subcontractors, at any tier, and suppliers that were subject to the rigors of a formal rulemaking process.

ix. The related regulatory material.

Current 227.7103–12 and 227.7103–13 have been revised and relocated at 227.7106–4 and –5, respectively. Revisions were made to streamline existing language and to eliminate material that was duplicative of material in the proposed clause at DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data and Computer Software.

h. 227.7107, Safeguarding, use, and handling of technical data and computer software.

Associated clause at 252.227–7025, Government-Furnished Information Marked with Restrictive Legends.

Proposed 227.7107 is the consolidation of coverage from the following current DFARS sections: 227.7103–7, and –16, and 227.7202–16 regarding the safeguarding and release of restricted information outside the Government; and 227.7108 and 227.7208 regarding contractor data repositories.

Perhaps most importantly, this new coverage harmonizes and clarifies the operation of the nondisclosure agreement provided at current 227.7103–7 (see proposed 227.7107–2), and its clause equivalent at 252.227–7025. In both cases, the scope of the nondisclosure agreement/clause was expanded to cover commercial technical data or computer software marked with a restrictive legend. This expansion helps clarify the Government's obligation to protect such restricted and valuable commercial information by applying a consistent protection and release scheme to all forms of technical data and computer software, regardless of whether the material is commercial or noncommercial. In view of the wide variety of potential restrictive legends, and associated license restrictions, for commercial technical data and computer software, these new requirements are modeled after the procedures used to handle negotiated license agreements for noncommercial technical data and computer software: The recipient is expressly limited to those uses authorized by the applicable license, which the Government is required to identify in an attachment prior to release of the information.

8. Subpart 227.72, Rights in Works.

The treatment of special works, existing works, and architect-engineer services was moved out of current 227.71 to entirely replace the material of subpart 227.72. This was done because special works, existing works, and architect-engineer services, are not technical data, which is exclusively covered by 10 U.S.C. 2320 and subpart 227.71, or computer software, also covered by subpart 227.71. To avoid confusion, technical data, computer software documentation, and computer software, are excluded from the coverage of special works and existing works. No exclusion was deemed necessary for architect-engineer services because plans for buildings and other structures, and the structures themselves, are not normally considered to be technical data, i.e., recorded information of a scientific or technical nature. The material was reorganized. Instead of differentiating between special works and existing works, the proposed regulations are differentiated based on whether the contract is for the acquisition of—

- Works and the assignments of rights in works (section 227.7202 and associated clause at 252.227–7020, Rights in Works—Ownership;, or
- Works and license rights in works (section 227.7203 and associated clause at 227.7021, Rights in Works—License.

These clauses replace the current clauses 252.227–7020 and 252.227–7021.

There is also a new section on safeguarding, use, and handling of works, which parallels the section 227.7107 on safeguarding, use, and handling of technical data and computer software. The associated new clause is 252.227–70YY, Government-Furnished Works Marked with Restrictive Legends.

The existing section 227.7107 on Contracts for architect-engineer services has been expanded to cover rights in architectural designs, shop drawings, or similar information related to architect-engineer services and construction. The associated clauses are—

252.227–7022, Government Rights (Unlimited);

252.227–7024, Notice and Approval of Restricted Designs;

252.227–7033, Rights in Shop Drawings.

Of particular note is the inclusion of architectural works in the list of examples of works in the clauses at 252.227–7020 and 252.227–7021. The acquisition of a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic or other special reasons the Government does not want duplicated, is actually a special work which should be included within the coverage of special works and not under the general coverage of contract for architect-engineer services (now at 227.7205).

The clause at 252.227–7023, Drawings and other Data to Become the Property of the Government has been deleted, as the requirement is now covered in the proposed revised Rights in Works—Ownership clause at 252.227–7020.

9. Request for Public Comment on Additional Issues.

In addition to comments on any of the subject matter covered by these proposed revisions, DoD seeks comments on the following additional issues related to this subject matter:

- A new clause containing all definitions relevant to DFARS Part 227 (or subpart 227.71 and/or 227.72).

Paragraph (a) of the primary rights-allocation clauses (252.227–7013, –7014, and –7015) largely duplicate each other, and many of the other clauses repeat these definitions. Combining all definitions into a single clause would significantly shorten these clauses collectively by avoiding duplication. However, the drawback is that one requires the definitions clause in order to interpret the rights-clauses, and many people will not even realize that so many of the terms used in the rights-clause are actually defined, and thus would not be motivated to seek out the additional clause.

- A single prescriptive section covering all clauses in subpart 227.71.

In the proposed rule, the clause prescriptions are distributed throughout the sections. It may be preferred to combine all of the relevant clause prescriptions into a single, all-encompassing prescriptive section (*e.g.,* a new 227.7108).

• *Renumbering the clauses.*

The proposed clauses have retained their current numbering, except for 252.227–7018 (now 252.227–7014) (and in cases where clauses have been merged, the new combined clause uses the number applicable to the current clause that applies to technical data). However, the clauses could be renumbered to coincide with the general order in which the clauses are discussed and prescribed in the regulation, without necessitating any significant changes for the most well-known and critical clauses. For example:

Current/proposed 252.227–	Prescribed at:	Renumbered
7013	227.7104–8(a)	7013
7018/7014	227.7104–8(b)	7014
7015	227.7104–8(c)	7015
7016	227.7105–3(a)	7016
7017	227.7105–3(b)	7017
(new)	227.7105–3(c)	7018
7030	227.7106–5(a)	7023
7037	227.7106–5(b)	7024
7025	227.7107–4	7025
7020	227.7202–3	7030
7021	227.7203–3	7031
7022	227.7205–2(a)	7032
7033	227.7205–2(b)	7033
7024	227.7205–2(c)	7034
7038	227.303(2)	7038
7039	227.303(1)	7039

Would the benefits of a more logical sequence outweigh the administrative difficulty of the number changes?

• *Addition of a "Scope" section to the primary rights-allocation clauses.*

Would this assist with the application of the doctrine of segregability? When more than one rights-allocation clause is used in the contract, issues may arise as to which clause applies to which deliverable-technical data or computer software.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule updates and clarifies DFARS text, but makes no significant change to DoD policy regarding patents, data, and copyrights. However, DoD has performed an initial regulatory flexibility analysis, which is summarized as follows:

The objective of the rule is to clarify and update the coverage on patents, data, and copyrights in DFARS part 227.

Statutes pertaining to administrative claims of infringement in DoD include the following: The Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 181–188; 10 U.S.C. 2386; 28 U.S.C. 1498; and 35 U.S.C. 286.

Subpart 227.71 implements the following laws and Executive order:

(1) 10 U.S.C. 2302(4).

(2) 10 U.S.C. 2305(d)(4).

(3) 10 U.S.C. 2320.

(4) 10 U.S.C. 2321.

(5) 10 U.S.C. 7317.

(6) 17 U.S.C. 1301, et seq.

(7) Executive Order 12591 (paragraph 1(b)(7)).

The SBIR Program Reauthorization Act of 2000 (Pub. L. 106–554) amended section 9 of the Act (codified at 15 U.S.C. 638(j)(3)(A)) to require that the Small Business Administration (SBA) modify the SBIR policy directives to provide that SBIR data rights apply to phase III SBIR awards, as well as phase I and II awards. The SBA issued its policy directive on September 24, 2002, and is currently in the process of revising and updating that policy directive, including the treatment of intellectual property rights, which will also be published for public comment under a separate rulemaking action. Thus, DoD is working with SBA to harmonize the DFARS sections on SBIR data rights and the SBIR policy directive. SBA has advised that it intends to clarify and revise the SBIR policy directive regarding these issues soon.

This rule applies to small businesses awarded contracts—

• That anticipate the delivery of technical data or computer software;

• When technical data or computer software will be generated during performance of contracts under the SBIR program;

• When the Government has a specific need to control the distribution of works first produced, created, or generated in the performance of a contract; or

• For architect-engineer services and for construction involving architect-engineer services.

DoD does not have an overall estimate of the number of small entities receiving awards in these categories, but there are approximately 3,000 awards per year in the SBIR program in recent years.

The clause at 252.227–7038, Patent Rights—Ownership by the Contractor (Large Business) is only used if the contractor is other than a small business or nonprofit organization.

It is not known how many of the respondents are small business concerns. Certainly the respondents to the requirements of DFARS 252.227–7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program are small businesses, but the burdens for that clause have not been separately calculated from the burdens for the other clauses addressing technical data rights.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives that would reduce the burden on small business and still meet the objectives of the rule.

DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2010–D001.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply. The information collection requirements associated with part 227 that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.,* have been extended under OMB Control Number 0704–0369 (55,000 respondents, approximately 1.5 million burden hours). This proposed rule does not change DoD's estimates of the associated information collection requirement. The proposed rule deletes 17 clauses that did not have information collection requirements. Two clauses that had information collection requirements have been incorporated into other clauses (252.225–7014 into 252.225–7013, 252.227–7019 into 252.227–7037), without affecting the associated information collection requirements. The SBIR clause at 252.227–7018 has been renumbered as 252.227–7014.

List of Subjects at 48 CFR Parts 212, 227, 246, and 252.

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 212, 227, 246, and 252 as follows:

1. The authority citation for 48 CFR parts 212, 227, 246, and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Section 212.211 is revised to read as follows:

212.211 Technical data.

The DoD policies and procedures for acquiring technical data related to commercial items are at subpart 227.71.

3. Section 212.212 is revised to read as follows:

212.212 Computer software.

The DoD policies and procedures for acquiring commercial computer software are at subpart 227.71.

4. Section 212.271 is added to subpart 212.2 to read as follows:

212.271 Works.

The DoD policies and procedures for acquiring rights in works, including architectural designs, shop drawings, or other information resulting from or related to architect-engineer services and construction, are at subpart 227.72.

Section 212.504 [Amended]

5. Section 212.504 is amended by removing and reserving paragraphs (a)(iii) and (a)(iv).

6. Revise part 227 to read as follows:

PART 227—PATENTS, DATA, AND COPYRIGHTS

Subpart 227.3—Patent Rights Under Government Contracts

227.303 Contract clauses.
227.304 Procedures.
227.304–1 General.

Subpart 227.4—Rights in Data and Copyrights

227.400 Scope of subpart.

Subpart 227.6—Foreign License and Technical Assistance Agreements

227.670 Foreign intellectual property agreements and licenses.
§ 227.670–1 General.
§ 227.670–2 Policy.
§ 227.670–3 Procedures.
§ 227.670–4 Export control of intellectual property.

Subpart 227.70—Infringement Claims, Licenses, and Assignments

§ 227.7000 Scope.
§ 227.7001 Statutes pertaining to administrative claims of infringement.
§ 227.7002 Requirements for filing an administrative claim for patent or copyright infringement or a secrecy order claim.
§ 227.7003 Investigation and administrative disposition of claims.
§ 227.7004 Notification and disclosure to claimants.
§ 227.7005 Settlement of indemnified claims.
§ 227.7006 Settlement agreements.

Subpart 227.71—Rights in Technical Data and Computer Software

§ 227.7100 Scope of subpart.
§ 227.7101 Definitions.
§ 227.7102 Policy.
§ 227.7103 Acquisition of technical data and computer software.
§ 227.7103–1 Acquisition planning.
§ 227.7103–2 Preparation of solicitation.
§ 227.7103–3 Identification and assessment of Government minimum needs.
§ 227.7103–4 Deferred delivery and deferred ordering of technical data or computer software.
§ 227.7103–5 Contract clauses.
§ 227.7104 License rights in technical data and computer software.
§ 227.7104–1 General.
§ 227.7104–2 Rights in technical data and computer software of third parties (including subcontractors).
§ 227.7104–3 Rights in noncommercial technical data and noncommercial computer software.
§ 227.7104–4 Rights in technical data and computer software—Small Business Innovation Research (SBIR) Program.
§ 227.7104–5 Rights in commercial technical data and computer software.
§ 227.7104–6 Rights in derivative technical data and computer software.
§ 227.7104–7 Retention of rights by offerors, contractors, or third parties.
§ 227.7104–8 Contract clauses.
§ 227.7105 Contractor assertion of restrictions on technical data and computer software—early identification and marking requirements.
§ 227.7105–1 Early identification.
§ 227.7105–2 Marking requirements.
§ 227.7105–3 Solicitation provision and contract clauses.
§ 227.7106 Conformity, acceptance, warranty, and validation of asserted restrictions on technical data and computer software.
§ 227.7106–1 Conformity and acceptance.
§ 227.7106–2 Warranty
§ 227.7106–3 Unjustified and nonconforming markings.
§ 227.7106–4 Government right to review, verify, challenge and validate asserted restrictions.
§ 227.7106–5 Contract clauses.
§ 227.7107 Safeguarding, use, and handling of technical data and computer software.
§ 227.7107–1 Government procedures for protecting technical data and computer software.
§ 227.7107–2 Use and non-disclosure agreement.
2§ 27.7107–3 Contractor technical data or computer software repositories.
§ 227.7107–4 Contract clause.

Subpart 227.72—Rights in Works

§ 227.7200 Scope of subpart.
§ 227.7201 Definitions.
§ 227.7202 Contracts for the acquisition of works and the assignment of rights in works.
§ 227.7202–1 Policy.
§ 227.7202–2 Procedures.
§ 227.7202–3 Contract clause.
§ 227.7203 Contracts for the acquisition of works and license rights in works.
§ 227.7203–1 Policy.
§ 227.7203–2 Procedures.
§ 227.7203–3 Contract clause.
§ 227.7204 Safeguarding, use, and handling of works.
§ 227.7204–1 Procedures.
§ 227.7204–2 Contract clause.
§ 227.7205 Rights in architectural designs, shop drawings, or similar information related to architect-engineer services and construction.
§ 227.7205–1 Scope.
§ 227.7205–2 Contract clauses.

Subpart 227.3—Patent Rights Under Government Contracts

227.303 Contract clauses.

(1) Use the clause at 252.227–7039, Patents—Reporting of Subject Inventions, in solicitations and contracts containing the clause at FAR 52.227–11, Patent Rights—Ownership by the Contractor.

(2)(i) Use the clause at 252.227–7038, Patent Rights—Ownership by the Contractor (Large Business), instead of the clause at FAR 52.227–11, in

solicitations and contracts for experimental, developmental, or research work if—

(A) The contractor is other than a small business concern or nonprofit organization; and

(B) No alternative patent rights clause is used in accordance with FAR 27.303(c) or (e).

(ii) Use the clause with its Alternate I if—

(A) The acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement;

(B) The agency head determines at the time of award that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement; or

(C) Other rights are necessary to effect a treaty or agreement, in which case Alternate I may be appropriately modified.

(iii) Use the clause with its Alternate II in long-term contracts if necessary to effect treaty or agreements to be entered into.

§ 227.304 Procedures.

§ 227.304–1 General.

Interim and final invention reports and notification of all subcontracts for experimental, developmental, or research work (FAR 27.304–1(e)(2)(ii)) may be submitted on DD Form 882, Report of Inventions and Subcontracts. For additional guidance and information on invention reporting, see PGI 227.304–1.

Subpart 227.4—Rights in Data and Copyrights

§ 227.400 Scope of subpart.

DoD activities shall follow the requirements in subparts 227.71 and 227.72 instead of FAR subpart 27.4.

Subpart 227.6—Foreign License and Technical Assistance Agreements

§ 227.670 Foreign intellectual property agreements and licenses.

§ 227.670–1 General.

In furtherance of the national defense, the Government may develop foreign additional sources of defense services or products that may be accomplished through the use of intellectual property rights or technical assistance agreements. Under such agreements, a domestic concern ("domestic source"), agrees to furnish to a foreign concern or government ("foreign source"), intellectual property rights and other foreign technical assistance needed to enable the foreign source to produce particular supplies or perform particular services.

§ 227.670–2 Policy.

(a) It is DoD policy not to pay for rights for intellectual property to which the Government holds a royalty-free license or otherwise has title to use or disclose.

(b) This policy shall be applied by agencies in negotiating consideration for foreign license technical assistance agreements or supply contracts with foreign sources.

(c) The consideration for foreign intellectual property agreements may be in the form of a lump sum payment, payments for each item manufactured by the foreign source, an agreement to exchange intellectual property rights on improvements made to the article or service, capital stock transactions, or any combination of these. The domestic source's bases for computing such consideration may include actual costs; charges for the use of the intellectual property rights and the domestic source's "price" for setting up a foreign source. The compensation to be paid for in such agreements is referred to as a royalty or license fee.

§ 227.670–3 Procedures.

(a) *Negotiation of intellectual property agreements.* When negotiating or reviewing the terms of an intellectual property exchange or license agreement between the Government and a domestic source, between the Government and a foreign source, or between a domestic source and a foreign source—

(i) *Intellectual property agreements between the Government and a domestic source.*

(A) Intellectual property agreements between the Government and a domestic source (a domestic contractor) shall—

(*1*) Specify the intellectual property rights to be supplied to the foreign source (a foreign concern or government);

(*2*) Provide, in connection with any separate agreement between the domestic source and the foreign source, a statement referring to the contract between the Government and the domestic source; and

(*3*) Conform to the requirements of export control laws and regulations. See PGI 227.670–4.

(B) In negotiating the price paid to the domestic source, the actual cost of the intellectual property rights, the extent of the Government's contribution to the development of the supplies and services, and the Government's intellectual property rights shall be considered.

(ii) *Intellectual property agreements between the Government and a foreign source.* In negotiating contract prices with a foreign source, the agency concerned shall obtain from the foreign source a detailed statement (see FAR 27.204–1(a)(2)) of royalties, license fees, and other compensation paid to a domestic source (or any of its subcontractors) for intellectual property rights and other technical assistance provided to the foreign source, including identifications and descriptions. Examples of charges for intellectual property that are not acceptable include any charge or royalty to which the Government already has title or license or has paid for in an agreement with a domestic source.

(iii) *Reviewing intellectual property agreements between a domestic source and a foreign source.*

(A) In reviewing foreign licenses or technical assistance agreements between domestic and foreign sources, the agency concerned shall indicate whether the intellectual property exchange or agreement meets the requirements of 22 CFR sections 124.07–124.10 (of the International Traffic in Arms Regulations).

(B) When the Government anticipates that it will purchase foreign supplies or services involved in the agreement from the foreign source, the following guidance applies:

(*1*) The agency concerned shall evaluate the amount of the reduction in charges necessary to account for the Government's intellectual property rights, and shall determine whether it is fair and reasonable in the circumstances, before indicating its approval.

(*2*) If the agreement does not specify any reduction in charges, however, or otherwise fails to give recognition to the Government's intellectual property rights, the agency concerned shall evaluate the agreement and condition its approval upon amendment of the agreement to reflect a reduction, in accordance with 22 CFR 124.10.

(C) When the Government does not anticipate that it will purchase the foreign supplies or services involved in the agreement from the foreign source, the following guidance applies:

(*1*) If the agreement provides for charges to the foreign source for data or patent rights, it may suffice to fulfill the requirements of 22 CFR 124.10 insofar as the Department of Defense is concerned if—

(*i*) The domestic source and the Government negotiate the appropriate reduction in the domestic source's

charges to the foreign source considering any rights the Government may have in the intellectual property.

(*ii*) The foreign source shall pass any reduction in purchase price on to the Government.

(*2*) Even though no charge is to be made to the foreign source for intellectual property rights, the agency concerned shall—

(*i*) Evaluate the acceptability of the provision before indicating its approval; or

(*ii*) Explicitly condition its approval on the right to evaluate the acceptability of the provision at a later time.

(D) Any agreement between the domestic and foreign sources shall reflect the arrangements contemplated by any technical assistance agreement between the Government and the domestic source.

(E) Every agreement shall provide that any license rights transferred under the agreement are subject to existing rights of the Government.

(F) In connection with every agreement referred to in paragraph (b) of this section, a request shall be made to the domestic source—

(*1*) To identify the intellectual property rights to be provided to the foreign source by the domestic source or any of its subcontractors, and

(*2*) To identify any intellectual property rights of which the domestic source may be aware.

(G) The agency concerned shall notify the domestic source that the approval of any agreement is not an approval of the charges, and is not an approval of any business arrangements in the agreement. However, the agency may approve any charges or business arrangements if it is in the Government's best interests. In any event, a disclaimer should be made to charges or business terms not affecting any purchase made by or for the Government.

(b) For assistance with patent rights and royalty payments in the United States European Command, see PGI 227.670–3(b).

§ 227.670–4 Export control of intellectual property.

The laws and regulations governing the export of intellectual property are numerous. These laws and regulations are referenced at PGI 227.670–4.

Subpart 227.70—Infringement Claims, Licenses, and Assignments

§ 227.7000 Scope.

(a) This subpart prescribes—

(1) The policy regarding patent and copyright infringement and secrecy order claims; and

(2) Provides instructions on how the public must submit these claims.

(b) This subpart 227.70 does not apply to licenses or assignments acquired by the Department of Defense. Moreover, this subpart does not apply to other forms of intellectual property infringement other than patent, copyright, and secrecy order claims.

§ 227.7001 Statutes pertaining to administrative claims of infringement.

Statutes pertaining to administrative claims of infringement in the Department of Defense include the following: The Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 181–188; 10 U.S.C. 2386; 28 U.S.C. 1498; and 35 U.S.C. 286.

§ 227.7002 Requirements for filing an administrative claim for patent or copyright infringement or a secrecy order claim.

(a) A patent or copyright infringement claim or a secrecy order claim, asserted against the United States under any of the applicable statutes cited in 227.7001, must be in writing and actually communicated to and received by an agency, organization, office, or field establishment within the Department of Defense. Claims shall include the following:

(1) An allegation of infringement;

(2) The requested remedy;

(3) An identification of the patent(s), or copyrighted work(s) alleged to be infringed;

(4) An identification of the alleged infringing use, including a statement of the acts allegedly committed by the Government, and the time period during which the alleged acts occurred; or

(5) As an alternative to paragraph (a)(4) of this section, a declaration that the claimant has made a bona fide attempt to determine the alleged infringing use, but was unable to do so, giving reasons, and stating a reasonable basis for its belief that its patent(s) or copyrighted work(s) allegedly are being infringed;

(6) Any additional information that will expedite the resolution of the claim; and

(7) A declaration that the claimant is the owner or exclusive licensee of the patent(s) or copyrighted work(s) alleged to be infringed, or otherwise has standing to sue.

(b) If the correspondence alleging infringement does not meet the requirements set forth in this paragraph, the sender shall be advised in writing—

(1) That the claim for infringement has not been satisfactorily presented, and

(2) What is necessary to establish a claim.

(c) In addition to the information listed in paragraph (a) of this section, the following material and information is generally necessary in the course of processing an infringement claim. Claimants are encouraged to furnish this information at the time of filing a claim to permit the most expeditious processing and settlement of the claim.

(1) For patent infringement claims—

(i) A copy of the allegedly infringed patent(s) and a designation of all claims alleged to be infringed.

(ii) Identification of all alleged infringements known to the claimant that involve the patented item or process, including the identity of the vendor or contractor and the Government procuring activity.

(iii) A detailed identification of the alleged infringement, particularly where the infringement relates to a component or subcomponent of the item procured. This should include an element-by-element comparison of a representative claim(s) with the allegedly infringing product or process. Further, this identification should include documentation and drawings in suitable detail to enable verification of the infringement.

(iv) Names and addresses of all past and present licenses under the patent(s), and copies of all license agreements and releases involving the patent(s).

(v) A brief description of all litigation in which the patent(s) has been or is now involved, and the present status thereof.

(vi) A list of all persons to whom notices of infringement have been sent, including all agencies of the Government, and a statement of the ultimate disposition of each.

(vii) A description of Government employment or military service of the inventor(s).

(viii) A list of all Government contracts or agreements under which the inventor, patent owner, or their agents have performed work relating to the patents.

(ix) A copy of the U.S. Patent and Trademark Office (PTO) file wrapper of each patent if available to claimant.

(x) A list of any corresponding foreign patent applications.

(xi) Pertinent prior art known to claimant, not contained in the PTO file wrapper, such as prior art cited in corresponding foreign patent prosecutions.

(2) For copyright infringement claims—

(i) A copy of the copyrighted work(s) alleged to be infringed.

(ii) A detailed identification of the allegedly infringing work, including a copy, if available.

(iii) Names and addresses of all past and present licensees and assignees under the copyrighted work, and copies of all licenses and assignments involving the copyrighted work(s).

(iv) A brief description of all litigation in which the copyrighted work(s) has been or is now involved, and the present status.

(v) A list of all persons and organizations to whom notices of infringement have been sent, including all agencies of the Government, and a statement of the ultimate disposition of each.

(vi) A description of Government employment or military service of the author.

(vii) A list of all Government contracts under which the work was produced.

(viii) Copies of registration records for the copyrighted works. (Registration of the work with the U.S. copyright office is not required to file an administrative claim).

(d) *Secrecy order claims.* In addition to the information listed in paragraph (a) of this section, the following material or information is generally necessary in the course of processing a secrecy order claim.

(1) An identification of the damages sought from imposition of the secrecy order and/or use of the invention by the Government while the secrecy order was pending.

(2) A copy of the secrecy order, the notice of allowability and any PTO licenses for foreign filing or modifications of the secrecy order.

(3) An identification of the sponsor of the secrecy order.

(4) An identification of the serial number and filing date of the patent application under secrecy order and any corresponding foreign patent application.

(5) Documentation for any claim for damages.

(6) An indication of when and where the Government allegedly used the invention.

(e) Claimants must submit their claims to the appropriate agency at the addresses at PGI 227.7002(e). Any agency receiving an allegation of infringement which meets the requirements of paragraph (a) of this section shall—

(1) Acknowledge the receipt of the allegation; and

(2) Supply the other agencies that may have an interest with a copy of the allegation and the acknowledgement.

(f) A communication making a proffer of a license in which no infringement is alleged shall not be considered as a claim for infringement.

227.7003 Investigation and administrative disposition of claims.

(a) Whenever a claim of infringement of an intellectual property right is asserted against the Department of Defense, or its contractors acting with the authorization and consent of the Government, all necessary steps shall be taken to investigate, and to settle administratively, deny, or otherwise dispose of such claim prior to suit against the United States.

(b) *Agency procedures.* An investigation and administrative determination (denial or settlement) of each claim shall be made in accordance with instructions and procedures established by each agency, subject to the following:

(1) The agency responsible for purchasing the alleged infringing item or process shall have sole responsibility for the disposition of the infringement claim when the funds of that agency alone will be charged. However, when funds of another agency are to be charged, in whole or in part, the agreement of such agency shall be obtained, and each agency concerned shall execute any settlement agreement.

(2) When two or more agencies are responsible for purchasing the alleged infringing item or process, and the funds of both agencies are to be charged in the settlement, the agency with the predominant financial interest in the claim shall be responsible for the disposition of the claim, or as jointly agreed upon by the agencies concerned. The agency responsible for negotiation shall, throughout the negotiation, coordinate with the other agencies concerned and keep them advised of the status of the negotiation. Each agency concerned shall execute any settlement agreement.

(c) *Disposition of trademark infringement claims.* See PGI 227.7003(c) for examples of various ways a trademark infringement claim might be disposed of.

227.7004 Notification and disclosure to claimants.

(a) Before settling any claim—

(1) Contact any other agencies that might have an interest in the settlement of the claim; and

(2) Send the claimant a letter stating the limits of the Government's liability, for patent or copyright infringement, and indicate that any settlement agreement will take the general form found at PGI 227.7006(b).

(b) If a claim is denied, the department or agency responsible for the determination of the claim shall—

(1) Notify the claimant or authorized representative in writing;

(2) Provide a basis for denying the claim; and

(3) Draft the notification to avoid any admissions against the Government's interest. Additionally, the notification should not waive any evidentiary privileges that the Government may have, and it should state that the denial is a final agency action. An example letter of denial of an administrative claim may be found at PGI 227.7004(b)(3).

227.7005 Settlement of indemnified claims.

Settlement of claims involving payment for past infringement should not be made without the consent of, and equitable contribution by, each indemnifying contractor involved, unless such settlement is determined to be in the best interests of the Government.

227.7006 Settlement agreements.

Settlement of claims for intellectual property infringement can take many forms. Sometimes, the appropriate manner in which to settle a claim or litigation is through use of a settlement agreement.

(a) *Required FAR clauses for settlement agreements.* The following FAR clauses shall be included in any settlement agreement:

(1) FAR 52.203–5, Covenant Against Contingent Fees.

(2) FAR 52.203–3, Gratuities.

(3) FAR 52.232–23, Assignment of Claims.

(4) FAR 52.233–1, Disputes.

(b) *Sample settlement agreement for patent infringement.* This patent infringement settlement agreement may be tailored as appropriate for copyright infringement releases, settlement agreements, license agreements, or assignments.

PATENT LICENSE AND RELEASE CONTRACT

THIS CONTRACT is effective as of the ____ day of [month, year,] between the UNITED STATES OF AMERICA (hereinafter called the Government), and _____ (hereinafter called the Contractor), (a corporation organized and existing under the laws of the State of _____), (a partnership consisting of _____), (an individual trading as _____), of the City of _____, in the State of _____.

WHEREAS, the Contractor warrants that it has the right to grant the within license and release, and the Government desires to procure the same, and

WHEREAS, this contract is authorized by law, including 10 U.S.C. 2386.

NOW THEREFORE, in consideration of the grant, release and agreements hereinafter recited, the parties have agreed as follows:

FIRST OPTION FOR ARTICLES 1 AND 2

ARTICLE l. License Grant.*

(a) The Contractor hereby grants to the Government an irrevocable, nonexclusive, nontransferable, and paid-up license, under the following intellectual property rights, to practice by or for the Government, throughout the world, any and all of the inventions hereunder, in the manufacture and use of any article or material, in the use of any method or process, and in the disposition of any article or material in accordance with law:

U.S. Patent No. _____ Date _____

Application Serial No. _____ Filing Date _____

(b) No rights are granted or implied by the agreement under any other patents other than as provided above or by operation of law.

(c) Nothing contained herein shall limit any rights which the Government may have obtained by virtue of prior contracts or by operation of law or otherwise.

ARTICLE 2. License Term.*

ALTERNATE I

The license hereby granted shall remain in full force and effect for the full term of the intellectual property referred to in the "License Grant" clause of this contract and any and all intellectual property hereafter issued.

ALTERNATE II

The license hereby granted shall terminate on the ____ day of _____, ____ provided, however, that termination is without prejudice to the completion of any Government contract entered into prior to termination or to the subsequent use or disposition of any articles or materials manufactured by or for the Government under this license.

SECOND OPTION FOR ARTICLES 1 AND 2

ARTICLE 1. License Grant—Running Royalty.*

(a) The Contractor hereby grants to the Government, as represented by the Secretary of _____, an irrevocable, nonexclusive, nontransferable license, under the following intellectual property rights, to practice by or for [agency], throughout the world, any and all of the inventions hereunder in the manufacture and use of any article or material, in the use of any method or process, and in the disposition of any article or material in accordance with law:

U.S. Patent No. _____ Date _____

Application Serial No. _____ Filing Date _____

(b) No rights are granted or implied by the agreement under any other patents other than as provided above or by operation of law.

(c) Nothing contained herein shall limit any rights which the Government may have obtained by virtue of prior contracts or by operation of law or otherwise.

(d) Computation of Royalties.

Subject to the following conditions, royalties shall accrue to the Contractor under this agreement on all articles or materials embodying, or manufactured by the use of, any or all inventions claimed under any unexpired United States patent licensed herein, upon acceptance thereof by [agency], at the rate of __ percent of the net selling price of such articles or materials (amount) per (name of item) * whether manufactured by the Government or procured under a fixed-price contract, and at the rate of (amount) per (name of item) acquired or manufactured by a Contractor performing under a cost-reimbursement contract. With respect to such articles or materials made by [agency], "net selling price," as used in this paragraph, means the actual cost of direct labor and materials without allowance for overhead and supervision.

(e) Reporting and Payment of Royalties.

(1) The (procuring office) shall, on or before the sixtieth (60th) day following the end of each yearly * period ending _____ deliver to the Contractor a written report furnishing necessary information relative to royalties which have accrued under this contract during stated period.

(2) Royalties which have accrued under this contract during the yearly* period ending _____ shall be paid to the Contractor (if appropriations therefore are available or become available) within sixty (60) days following the receipt of a voucher from the Contractor submitted in accordance with the report referred to above; provided, that the Government shall not be obligated to pay, in respect of any such yearly period, on account of the combined royalties accruing under this contract directly and under any separate licenses granted pursuant to the "License to Other Government Agencies" clause (if any) of this contract, an amount greater than ____ dollars ($____). If such combined royalties exceed the said maximum yearly obligation, each agency shall pay a pro-rata share as determined by the proportion its accrued royalties bear to the combined total of accrued royalties.

(f) License to Other Government Agencies.

The Contractor hereby agrees to grant a separate license under the intellectual property rights referred to in the "License Grant" clause of this contract, on the same terms and conditions as appear in this license contract, to any other agency of the Government at any time on receipt of a written request for such a license; provided, however, that each agency make payments directly to the Contractor for royalties which accrue under the separate licenses. The Contractor shall promptly notify the Licensee upon receipt of any request for a license.

ARTICLE 2. License Term—Running Royalty.*

The license hereby granted shall remain in full force and effect for the full term of each of the intellectual property referred to in the "License Grant" clause of this contract and any and all intellectual property hereafter issued unless terminated sooner, as elsewhere herein provided.

ARTICLE 3. Release of Past Infringement.

The Contractor hereby releases each and every claim and demand which it now has or may hereafter have against the Government for the manufacture or use by or for the Government prior to the effective date of this contract, of any inventions covered by (i) any patents and patent applications identified in this contract, and (ii) any other patents or patent applications owned or hereafter acquired by it, insofar as and only to the extent that such other patents or patent applications cover the manufacture, use, or disposition of (description of subject matter).

ARTICLE 4. Non-Estoppel.

The Government reserves the right at any time to contest the enforceability, validity, scope of, or the title to any intellectual property herein licensed without waiving or forfeiting any right under this contract.

ARTICLE 5. FAR Clauses.

Insert the following FAR clauses:

(a) Covenant Against Contingent Fees, FAR 52.203–5.

(b) Gratuities, FAR 52.203–3.

(c) Assignment of Claims, FAR 52.232–23.

(d) Disputes, FAR 52.233–1.

ARTICLE 6. Termination.

Notwithstanding any other provision of this contract, the Government shall

have the right to terminate the license, in whole or in part, by giving the Contractor at least thirty (30) days written notice of the termination date; provided, however, that the obligation of the Government to pay royalties which have accrued prior to the effective date of termination shall not be affected.

ARTICLE 7. Payment.

The Contractor shall be paid the sum of _____ Dollars ($____) in full compensation for the rights herein granted and agreed to be granted.

ARTICLE 8. Readjustment of Payments.

(a) The Government shall be entitled to the benefit of more favorable terms with respect to all royalties accruing under a contract when any license, under substantially the same intellectual property and authorizing substantially the same acts which are authorized under this contract, has been or shall hereafter be granted within the United States. The Contractor shall promptly notify the Secretary in writing of the granting of such more favorable terms.

(b) In the event any licensed intellectual property is held invalid by decision of a court of competent jurisdiction, the requirement to pay royalties under this contract shall be interpreted in conformity with the court's decision as to the scope of validity of such intellectual property; provided, however, that in the event such decision is modified or reversed on appeal, the requirement to pay royalties under this contract shall be interpreted in conformity with the final decision rendered on such appeal.

ARTICLE 9. Successors and Assignees.

This Agreement shall be binding upon the Contractor, its successors (when the Contractor is an individual, change "successors" to "heirs"; if a partnership, modify appropriately) and assignees, but nothing contained in this Article shall authorize an assignment of any claim against the Government other than as permitted by law.

IN WITNESS WHEREOF, the parties hereto have executed this contract.

THE UNITED STATES OF AMERICA

By _____

Date _____

(Signature and Title of Contractor Representative) _____

By _____

Date _____

(Signature and Title of Government Representative _____

Contract Number ____

* If only a release is procured, delete those articles marked with an *.

(c) Assignment. If an assignment is procured, the following provides sample language that may be used to assign patent rights to the Government.

The Contractor hereby conveys to the Government, as represented by the Secretary of _____, the entire right, title, and interest in and to the following patents (and applications for patent), in and to the inventions thereof, and in and to all claims and demands whatsoever for infringement thereof heretofore accrued, the same to be held and enjoyed by the Government through its duly appointed representatives to the full end of the term of said patents (and to the full end of the terms of all patents which may be granted upon said applications for patent, or upon any division, continuation-in-part or continuation thereof):

U.S. Patent No. _____ Date _____

Name of Inventor _____

U.S. Application Serial No. _____

Filing Date _____

Name of Inventor _____

Subpart 227.71—Rights in Technical Data and Computer Software

227.7100 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures for—

(1) The acquisition of technical data and computer software; and

(2) The rights to use, modify, reproduce, release, perform, display, or disclose technical data and computer software.

(b) It implements requirements of the following laws and Executive order:

(1) 10 U.S.C. 2302(4).

(2) 10 U.S.C. 2305(d)(4).

(3) 10 U.S.C. 2320.

(4) 10 U.S.C. 2321.

(5) 10 U.S.C. 7317.

(6) 17 U.S.C. 1301, et seq.

(7) Executive Order 12591 (paragraph 1(b)(7)).

(c) Does not apply to rights in works (see subpart 227.72).

227.7101 Definitions.

As used in this subpart—

(a) Unless otherwise specifically indicated, the terms *offeror* and *contractor* include an offeror's or contractor's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(b) Other terms are defined in the clauses at—

(1) 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial;

(2) 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program; and

(3) 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

227.7102 Policy.

(a) It is DoD policy to acquire only the technical data and computer software, and the rights in that data and software, that are necessary to satisfy agency needs. Significant elements of the materials discussed in this section are based on 10 U.S.C. 2320 and 2321. Although these statutes apply only to technical data, they are expanded by policy in most cases to cover computer software as well.

(b) To encourage offerors and contractors to offer or use commercial products to satisfy military requirements, offerors and contractors shall not be required to—

(1) Furnish technical information related to commercial items that is not customarily provided to the public except technical data or computer software that—

(i) Are form, fit, or function data (applies only to technical data);

(ii) Are required for repair or maintenance of commercial items or processes, or for the proper installation, operating, or handling of a commercial item, either as a stand-alone unit or as a part of a military system, when such information is not customarily provided to commercial users or the data provided to commercial users is not sufficient for military purposes; or

(iii) Describe the modification of a commercial item made at Government expense to meet the requirements of a Government solicitation; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial technical data or commercial computer software except for a transfer of rights mutually agreed upon.

(c) Commercial technical data and commercial computer software shall be acquired—

(1) Under the licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs; and

(2) Competitively, to the maximum extent practicable, using firm-fixed-price contracts or firm-fixed-priced orders under available pricing schedules.

(d) Solicitations and contracts shall—

(1) Specify the technical data and computer software to be delivered under

a contract and the delivery schedules for that data and software (10 U.S.C. 2320(b)(2)).

(2) Whenever practicable, identify—

(i) The type and quantity of the technical data and computer software (including requirements for multiple users at one site, or multiple site licenses)

(ii) The format and media in which the data or software will be delivered; and

(iii) The place of delivery for each deliverable item of technical data;

(3) Establish or reference procedures for determining the acceptability of technical data and computer software (10 U.S.C. 2320(b)(3));

(4) Establish separate contract line items, to the extent practicable, for the technical data and computer software to be delivered under a contract (10 U.S.C. 2320(b)(4)) (this requirement may be satisfied by listing each deliverable item on an attachment to the contract);

(5) Require offerors and contractors to price separately each deliverable data or software item (10 U.S.C. 2320(b)(4));

(6) Require offerors to identify and assert, to the maximum extent practicable, restrictions on deliverable technical data and computer software as early as possible in the acquisition, and in all cases require the identification and assertion prior to delivery (10 U.S.C. 2320(b)(5)).

(e) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data or computer software related to items, or processes developed at private expense, except for the types of data or software for which the Government receives unlimited rights regardless of the source of funding (10 U.S.C. 2320(a)(2)(F)).

(f) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish items, processes, or computer software developed at private expense solely because the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose technical data pertaining to those items may be restricted. (10 U.S.C. 2320(a)(2)(F)).

(g) Solicitations for major systems development contracts shall not require offerors to submit proposals that would permit the Government to acquire competitively items identical to items developed at private expense unless a determination is made at a level above the contracting officer that—

(1) The offeror will not be able to satisfy program schedule or delivery requirements; or

(2) The offeror's proposal to meet mobilization requirements does not satisfy mobilization needs. (10 U.S.C. 2305)

(h) For acquisitions involving major weapon systems or subsystems of major weapon systems, the acquisition plan shall address acquisition strategies that provide for technical data and computer software, and the associated license rights, in accordance with 207.106(S–70).

(i) The Government's rights in a vessel design, and in any useful article embodying a vessel design, must be consistent with the Government's rights in technical data pertaining to the design (10 U.S.C. 7317; 17 U.S.C. 1301(a)(3)).

(j) Solicitations and contracts establish a limited form of privity between the Government and subcontractors or suppliers regarding technical data and computer software, and rights in that data or software. Subcontractors and suppliers at any tier—

(1) Shall not be required to relinquish rights in technical data or computer software to the prime contractor or a higher-tier subcontractor; and

(2) May transact directly with the Government in matters relating to technical data and computer software. (10 U.S.C. 2320 and 2321)

(k) DoD shall protect technical data and computer software from unauthorized access, use, reproduction, modification, release, performance, display, and disclosure. For additional information on the protection of technical data and computer software from unauthorized activities, see PGI 227.7102(i).

227.7103 Acquisition of technical data and computer software.

227.7103–1 Acquisition planning.

Requirements for technical data and computer software, and rights in that data and software, shall be fully addressed in acquisition planning, including through compliance with 207.106(S–70) for acquisitions of major weapons systems or subsystems thereof. Restrictions on the Government's rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software may have a significant impact on other elements of the acquisition plan, such as the ability to release data or software in connection with the competitive re-procurement of additional quantities of the item or process, or the competitive selection of life cycle support, maintenance, or for future upgrades or technical refresh of the technologies. For additional information on incorporating technical data and computer software considerations into acquisition planning, *see* PGI 227.7103–1.

227.7103–2 Preparation of solicitation.

Contracting officers shall work closely with data managers, software managers, and requirements personnel to ensure that requirements included in solicitations and contracts for technical data and computer software are consistent with the policies at 227.7102.

227.7103–3 Identification and assessment of Government minimum needs.

(a) Data managers, software managers, and other requirements personnel are responsible for identifying the Government's minimum needs for technical data and computer software, and for rights in that data or software. Follow the procedures at PGI 227.7103–3(a) to identify and assess the Government's minimum needs.

(b) When reviewing offers received in response to a solicitation or other request for technical data or computer software, data managers must balance the original assessment of the Government's data and software needs with the associated prices contained in the offer. Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data, consistent with the policies of this subpart.

227.7103–4 Deferred delivery and deferred ordering of technical data or computer software.

(a) *Deferred delivery.* The contracting officer shall—

(1) Specify in the contract which technical data or computer software is subject to deferred delivery; and

(2) Notify the contractor sufficiently in advance of the desired delivery date in order to permit timely delivery of the technical data or computer software.

(b) *Deferred ordering.* When computer software or technical data are to be procured through deferred ordering, the contracting officer shall—

(1) Negotiate the delivery dates with the contractor; and

(2) Compensate the contractor only for—

(i) Converting the data into the prescribed form;

(ii) Reproduction costs; and

(iii) Delivery costs.

227.7103–5 Contract clauses.

(a) Use the clause at 252.227–7026, Deferred Delivery of Technical Data or Computer Software, when it is in the Government's interests to defer the delivery of technical data or computer software.

(b) Use the clause at 252.227–7027, Deferred Ordering of Technical Data or Computer Software, when a firm requirement for a particular data item(s) has not been established prior to contract award but there is a potential need for the data.

227.7104 License rights in technical data and computer software.

227.7104–1 General.

(a) *Grant of license.* The Government obtains rights in technical data and computer software under an irrevocable license granted or obtained for the Government by the contractor. The contractor (or licensor) retains all rights in the data not granted to the Government.

(b) *Doctrine of segregability.* Determinations of the rights in technical data and computer software may be made at the lowest practicable segregable portion of the data or software. *See* PGI 227.7104–1(b) for examples of making this determination on the segregable portion.

(c) *Activities covered.*

(1) *Noncommercial licenses.* The license granted for noncommercial technical data and noncommercial computer software under the clauses covers the following activities:

(i) Access;

(ii) Use;

(iii) Reproduction;

(iv) Modification;

(v) Release;

(vi) Performance;

(vii) Display; and

(viii) Disclosure.

(2) *Commercial licenses.* Due to the wide variety of terms and conditions used in commercial license agreements, some of the licenses customarily offered to the public might not expressly address all of the individual activities listed in paragraph (c)(1) of this subsection. Contracting officers must ensure that the license rights covering commercial technical data or commercial computer software satisfy the Governments minimum needs—including the need to engage in any or all of the activities listed in paragraph (c)(1) of this subsection.

(d) *Scope of the license.*

(1) Except as specified in paragraph (c)(2) of this subsection, the Government's license rights cover all forms of intellectual property interest that, absent the license, would restrict the ability of the Government to engage in any of the activities listed in paragraph (c) of this subsection. The most common examples are copyright and trade secret.

(2) The license does not cover—

(i) Rights in inventions (*see* FAR subpart 27.3 and DFARS subpart 227.3); and

(ii) Rights in trademarks, service marks, collective marks, certification marks, or any other mark.

(e) *Additional information.* For additional information on the nature of the Government's license, *see* PGI 227.7104–1(e).

227.7104–2 Rights in technical data and computer software of third parties (including subcontractors).

(a) *Third parties.*

(1) Under the standard data rights clauses (*e.g.,* 252.227–7013, –7014, –7015), a contractor must grant or obtain for the Government the same license rights in a third party's technical data and computer software delivered under the contract that the contractor must grant the Government under the clauses.

(2) When non-standard license rights in technical data or computer software are negotiated, also negotiate the extent of a third party's intellectual property license commensurate with those non-standard license rights negotiations. An intellectual property license with a third party must provide the Government with at least the minimum rights required by the applicable rights-allocation clause.

(3) Only grant approval to use a third party's intellectual property (excluding patents) in which the Government will not receive a license when the Government's requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the Government which outweigh the lack of a license.

(b) *Subcontractors.*

(1) Subcontractors or suppliers at any tier cannot be required to relinquish any rights in technical data to a contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government under the standard rights clause contained in the contractor's contract with the Government.

(2) The Government may transact directly with a subcontractor on matters relating to the validation of its asserted restrictions on the Government's rights to use or disclose technical data. The clause at 252.227–7037 obtains a contractor's agreement that the direct transaction of validation or challenge matters with subcontractors at any tier does not establish or imply privity of contract for matters not covered by the clause. When a subcontractor or supplier exercises its right to transact validation matters directly with the Government, contracting officers shall deal directly with such persons, as provided at 227.7106–5.

227.7104–3 Rights in noncommercial technical data and noncommercial computer software.

(a) The Government's license rights in noncommercial technical data and noncommercial computer software are governed by the clause at 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial.

(b) For noncommercial technical data and noncommercial computer software, the scope of the license is generally determined by the source of funds used to develop the item, process, or software.

(1) *Technical data pertaining to items or processes.* Contractors or licensors may, with some exceptions (see paragraphs (b)(1)(iii) through (xi) of the clause at 252.227–7013), restrict the Government's rights to use, modify, release, reproduce, perform, display, or disclose technical data pertaining to items or processes developed exclusively at private expense (limited rights). They may not restrict the Government's rights to technical data pertaining to items or processes developed exclusively at Government expense (unlimited rights) without the Government's approval. When an item or process is developed with mixed funding, the Government may use, modify, release, reproduce, perform, display, or disclose the data pertaining to such items or processes within the Government without restriction, but may release or disclose the data outside the Government only for government purposes (government purpose rights).

(2) *Technical data that do not pertain to items or processes.* Technical data may be created during the performance of a contract for a conceptual design or similar effort that does not require the development, manufacture, construction, or production of items or processes. The Government generally obtains unlimited rights in such data when the data were created exclusively with Government funds, government purpose rights when the data were created with mixed funding, and limited rights when the data were created exclusively at private expense.

(c) In unusual situations, the standard rights may not satisfy the Government's

needs or the Government may be willing to accept lesser rights in data in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are enumerated in paragraphs (c)(1) through (c)(4) of this subsection.

(1) *Unlimited rights.* The Government obtains unlimited rights in technical data or computer software when the technical data or computer software, or the items or processes to which the technical data pertain, are developed exclusively with Government funds, or that qualify under certain criteria for which the source of development funding is irrelevant. See paragraph (b)(1) of the clause at 252.227–7013.

(2) *Government purpose rights.*

(i) The Government obtains Government purpose rights in noncommercial technical data and noncommercial computer software when the technical data or computer software, or the items or processes to which the technical data pertain, are developed with mixed funding—except when the Government is entitled to unlimited rights regardless of the source of development funding, as provided in paragraph (c)(1) of this subsection.

(ii) The period during which Government purpose rights are effective is negotiable. The clause at 252.227–7013 provides a nominal five-year period, but either party may request a different period. Changes to the Government purpose rights period may be made by mutual agreement at any time prior to delivery of the technical data or computer software without consideration from either party. Longer periods should be negotiated when a five-year period does not provide sufficient time to apply the data for commercial purposes or when necessary to recognize subcontractors' interests in the data.

(iii) During the Government purpose rights period, the Government may not use, or authorize other persons to use, technical data marked with Government purpose rights legends for commercial purposes. The Government shall not release or disclose data in which it has Government purpose rights to any person, or authorize others to do so, unless—

(A) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.7107–2; or

(B) The intended recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at 252.227–7025, Government-Furnished Information Marked with Restrictive Legends.

(iv) *See* 227.7107–1 for Government procedures for protecting data and computer software.

(v) Upon expiration of the Government purpose rights period, the Government has unlimited rights in the data including the right to authorize others to use the data for commercial purposes.

(3) *Limited rights.* (i) The Government obtains limited rights in noncommercial technical data, when the technical data, or the items or processes to which the technical data pertain, is developed exclusively at private expense—except when the Government is entitled to unlimited rights as provided in paragraphs (b)(1)(iii) through (xi) of the clause at 252.227–7013.

(ii) Data in which the Government has limited rights may not be used, released, or disclosed outside the Government without the permission of the contractor asserting the restriction except for a use, release, or disclosure that is—

(A) Necessary for emergency repair and overhaul; or

(B) To a foreign government, other than detailed manufacturing or process data, when use, release, or disclosure is in the interest of the United States and is required for evaluational or informational purposes.

(iii) The person asserting limited rights must be notified of the Government's intent to release, disclose, or authorize others to use such data prior to release or disclosure of the data except notification of an intended release, disclosure, or use for emergency repair or overhaul, which shall be made as soon as practicable.

(iv) When the person asserting limited rights permits the Government to release, disclose, or have others use the data subject to restrictions on further use, release, or disclosure, or for a release under paragraph (c)(3)(ii)(A) or (B) of this subsection, the intended recipient must complete the use and non-disclosure agreement at 227.7107–2 prior to release or disclosure of the limited rights data.

(4) *Restricted rights.* The Government obtains restricted rights in noncommercial computer software required to be delivered or otherwise provided to the Government under a contract that was developed exclusively at private expense.

(5) *Negotiated license rights.*

(i) *General.*

(A) The standard license rights granted to the Government under paragraphs (c)(1) through (4) of this subsection (including the period during which the Government shall have Government purpose rights) may be modified only by mutual written agreement.

(B) Negotiate specific licenses when the parties agree to modify the standard license rights granted to the Government or when the Government wants to obtain rights in data in which it does not have rights. If either party desires to negotiate specialized license rights in technical data or computer software, the other party agrees to promptly enter into good faith negotiations to determine whether there are acceptable terms for transferring such rights.

(C) In no event may the negotiated license provide the Government lesser rights than limited rights in technical data, or restricted rights in computer software.

(D) The negotiated license rights must stipulate what rights the Government has to release or disclose the technical data or computer software to other persons or to authorize others to use the technical data or computer software.

(E) Identify all negotiated rights in a license agreement made part of the contract.

(ii) *Technical data.*

(A) When negotiating to obtain, relinquish, or increase the Government's rights in technical data, consider the acquisition strategy for the item or process, including logistics support and other factors which may have relevance for a particular procurement.

(B) Generally, if technical data was acquired with Government purpose or limited rights, the contracting officer should negotiate for additional rights only if there is a need to disclose the data outside the Government or if the additional rights are required for competitive reprocurement and the anticipated savings expected to be obtained through competition are estimated to exceed the acquisition cost of the additional rights. Prior to negotiating for additional rights in limited rights data, consider alternatives such as—

(*1*) Using performance specifications and form, fit, and function data to acquire or develop functionally equivalent items or processes;

(*2*) Obtaining a contractor's contractual commitment to qualify additional sources and maintain adequate competition among the sources; or

(*3*) Reverse engineering, or providing items from Government inventories to contractors who request the items to

facilitate the development of equivalent items through reverse engineering.

(6) *Pre-existing license rights.* When the Government has previously obtained license rights in the technical data or computer software, the Government retains those same rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights have expired.

227.7104–4 Rights in technical data and computer software—Small Business Innovation Research (SBIR) Program.

(a) Pursuant to 15 U.S.C. 638(j)(1)(B)(v), (2)(A), (3)(A), and the Small Business Innovation Research Program Policy Directive, small business concerns in the performance of SBIR Phase I, II, and III awards may create technical data and computer software categorized as "SBIR data." SBIR Phase III includes activities that derive from, extend, or logically conclude efforts performed under prior SBIR awards, but are funded by sources other than the SBIR program. SBIR contractors retain proprietary rights to SBIR data for a limited protection period (5 years after acceptance of the last deliverable), but grant specific license rights to the Government (SBIR data rights). This protection period is extended for any SBIR data that is appropriately referenced and protected in any subsequent SBIR award made prior to the expiration of the protection period. SBIR data rights attach to all SBIR data even if the data would otherwise qualify for unlimited rights or government purpose rights based on development exclusively or partially with Government funds (*see* 10 U.S.C. 2320). For additional information on the SBIR program, *see* PGI 227.7104–4.

(b) The contracting officer shall not negotiate for special license rights as an element of any SBIR Phase I, Phase II, or Phase III award. However, after award, the parties may negotiate special license rights by mutual agreement.

227.7104–5 Rights in commercial technical data and commercial computer software.

(a) The clause at 252.227–7015, Rights in Technical Data and Computer Software—Commercial, provides the Government specific license rights in commercial technical data and commercial computer software. The Government takes the same license rights as are customarily offered to the public, to the extent that the commercial license is consistent with Federal procurement law and meets DoD minimum needs (*see* 252.227–7015(b)(1)).

(1) Notwithstanding any terms or conditions to the contrary in the commercial license agreement, the Government shall have—

(i) Unlimited rights in certain types of technical data listed at 252.227–7015(b)(2); and

(ii) At least certain minimum rights (similar to limited rights in noncommercial technical data) in all technical data listed at 252.227–7015(b)(3).

(2) If the commercial license customarily offered to the public is inconsistent with Federal procurement law or does not otherwise meet DoD needs, the contracting officer will negotiate with the contractor as provided for at 252.227–7015(b)(1) and (b)(4).

(b) If additional rights are needed, the contracting officer must negotiate with the contractor to obtain such rights. The specific additional rights granted to the Government shall be enumerated in a license agreement made part of the contract.

(c) *See* PGI 227.7104–5(c) for guidance regarding determining whether a license is consistent with Federal procurement law and meets the agency's needs, including open source software as a special type of commercial computer software, (*see* PGI 227.7104–5(c)).

227.7104–6 Rights in derivative technical data and computer software.

The clauses at 252.227–7013 and 252.227–7014 protect the Government's rights in technical data and computer software, or portions thereof, that the contractor subsequently uses to prepare derivative data or software or subsequently embeds or includes in other data or software. The Government retains the rights it obtained under the development contract in the unmodified portions of the derivative data or software.

227.7104–7 Retention of rights by offerors, contractors, or third parties.

The offeror, contractor, or other third party owner or licensor retains all intellectual property rights (including ownership) in technical data and computer software except those rights granted to the Government.

227.7104–8 Contract clauses.

(a)(1) Use the clause at 252.227–7013, Rights in Technical Data and Computer Software-Noncommercial, in solicitations and contracts when the successful offeror(s) will be required to deliver noncommercial technical data or noncommercial computer software to the Government, except when contracting under the Small Business Innovation Research Program (*see* paragraph (b) of this subsection).

(2) Also use the clause at 252.227–7013 in all solicitations and contracts when the contractor will be required to deliver commercial technical data or commercial computer software (in addition to the clause at 252.227–7015), if the Government will pay any portion of the costs of development or modification of a commercial item, commercial technical data, or commercial computer software.

(3) Use the clause at 252.227–7013 with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(i) In the interest of the Government; and

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(4) Use the clause at 252.227–7013 with its Alternate II in contracts for the development or delivery of a vessel design or any useful article embodying a vessel design.

(b)(1) Use the clause at 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program, when SBIR data will be generated during performance of Phase I, II, or III awards or activities under the SBIR program (227.7104–4).

(2) Use the clause at 252.227–7014 with its Alternate I in research contracts when the contracting officer determines that public dissemination of SBIR data by the contractor would be—

(i) In the interest of the Government; and

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(c)(1) Use the clause at 252.227–7015, Technical Data and Computer Software—Commercial, in all solicitations and contracts when the contractor will be required to deliver commercial technical data or commercial computer software.

(2) Use the clause at 252.227–7015 with its Alternate I in contracts for the development or delivery of a vessel design or any useful article embodying a vessel design.

(d) *Doctrine of segregability and applicability to subcontractors.* To the maximum extent practicable, when the prescriptions at paragraphs (a) through (c) of this subsection require the use of more than one clause, the contract will specify which deliverables are governed by each clause. In addition, the clauses

prescribed at paragraphs (a) through (c) of this subsection require the contractor to use the appropriate clause(s) in subcontracts, and to notify the Government if a clause is used that is not already included in the prime contract. For additional guidance on using the doctrine of segregability to manage the application of multiple rights-determinative clauses under a single contract, *see* PGI 227.7104–8(d).

227.7105 Contractor assertion of restrictions on technical data and computer software—early identification and marking requirements.

227.7105–1 Early identification.

(a) The solicitation provision at 252.227–7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software, requires offerors to identify to the contracting officer, prior to contract award, all technical data and computer software that the offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release, or disclosure. The notification and identification must be submitted as an attachment to the offer.

(1) The contracting officer shall specify that pre-award identification is intended to require the identification of situations in which an offeror or contractor anticipates using a commercial or nondevelopmental technology (or any technology for which restrictions are likely to be asserted), but the specific subcontractor, supplier, or the specific asserted restrictions, have not yet been identified. For example, to ensure that the latest and best technology is used for a particular application, the offeror may propose delaying the selection of the particular technology or source for that technology, until shortly before the technology is required to be integrated into the systems or deliverables—often referred to as "just in time" technology insertion. In this case, the offeror's pre-award list shall identify the technical data or computer software that it anticipates delivering with restrictions, and provide as much information as possible about the nature of the anticipated restrictions, the basis for the asserted restrictions, and the potential source(s) of the technology (*e.g.,* commercial technologies, or noncommercial technologies developed exclusively or partially at private expense).

(2) The pre-identification list of assertions must be consistent with the offeror's proposal regarding the use of commercial or nondevelopmental technologies and the need to develop new technologies, as reflected in the remainder of the technical and cost portions of the proposal. Even such a rudimentary identification will place the contracting officer on notice that rights may be restricted in the technical data or computer software, thereby permitting the Government to more accurately evaluate the offer.

(3) After contract award, the contractor is required to provide the more specific information (*e.g.,* the asserted restrictions, basis for assertion, and entity asserting restrictions) as soon as the information is available, pursuant to 252.227–7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software.

(b) If an offeror fails to submit the attachment or fails to complete the attachment in accordance with the requirements of the solicitation provision, such failure shall constitute a minor informality. The contracting officer shall provide an offeror an opportunity to remedy a minor informality in accordance with the procedures at FAR 14.405 or 15.307. An offeror's failure to correct the informality within the time prescribed by the contracting officer shall render the offer ineligible for award.

(c) The procedures for correcting minor informalities shall not be used to obtain information regarding asserted restrictions or an offeror's suggested asserted rights category. Questions regarding the justification for an asserted restriction or asserted rights category must be pursued in accordance with the procedures at 227.7106–3.

(d) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at 227.7103–13, the parties have agreed that an asserted restriction is not justified.

(e) Subsequent to contract award, the clause at 252.227–7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software, permits the contractor to make additional assertions under certain conditions, in accordance with the procedures and in the format prescribed by that clause.

(f) Neither the pre- or post-award assertions made by the contractor, or the fact that certain assertions are identified in the attachment to the contract, determine the respective rights of the parties. As provided at 227.7106–4, the Government has the right to review, verify, challenge, and validate restrictive markings.

(g) Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data, consistent with the policies of this subpart.

227.7105–2 Marking requirements.

(a) *Contractor marking requirements.* The clause at 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial—

(1) Requires a contractor that desires to restrict the Government's rights in technical data or computer software to place restrictive markings on the data or software, provides instructions for the placement of the restrictive markings, and authorizes the use of certain restrictive markings; and

(2) Requires a contractor to deliver, furnish, or otherwise provide to the Government any technical data or computer software in which the Government has previously obtained rights with the Government's pre-existing rights in that data or software unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired. When restrictions are still applicable, the contractor is permitted to mark the data or software with the appropriate restrictive legend for which the data or software qualifies.

(b) *Unmarked technical data or computer software.*

(1) Technical data or computer software delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (see paragraph (b)(2) of this subsection) to correct an inadvertent omission of markings, do not release or disclose the technical data or computer software pending evaluation of the request.

(2) A contractor may request permission to have appropriate legends placed on unmarked technical data or computer software at its expense. The request must be received by the contracting officer within six months following the furnishing or delivery of such data or software, or any extension of that time approved by the contracting officer. The person making the request must—

(i) Identify the technical data or computer software that should have been marked;

(ii) Demonstrate that the omission of the marking was inadvertent and that the proposed marking is justified and conforms with the requirements for the

marking of technical data and computer software contained in the relevant clause(s); and

(iii) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data or computer software made prior to the addition of the marking or resulting from the omission of the marking.

(3) Contracting officers should grant permission to mark only if the technical data or computer software were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.

227.7105–3 Solicitation provision and contract clauses.

(a) Use the clause 252.227–7016, Rights in Bid or Proposal Information, in all solicitations and contracts that anticipate the delivery of technical data or computer software.

(b) Use the provision 252.227–7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software, in all solicitations that anticipate the delivery of technical data or computer software.

(c) Use the clause 252.227–7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software, in all solicitations and contracts that anticipate the delivery of technical data or computer software.

227.7106 Conformity, acceptance, warranty, and validation of asserted restrictions on technical data and computer software.

227.7106–1 Conformity and acceptance.

(a) Solicitations and contracts requiring the delivery of technical data or computer software shall specify the requirements the data or software must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether technical data and computer software tendered for acceptance conform to the contractual requirements.

(b) The clause at 252.227–7030, Technical Data and Computer Software—Withholding of Payment, provides for withholding up to 10 percent of the contract price pending correction or replacement of the nonconforming technical data or negotiation of an equitable reduction in contract price. The amount subject to withholding may be expressed as a fixed dollar amount or as a percentage of the contract price. In either case, the amount shall be determined giving consideration to the relative value and importance of the data. For examples on the amount subject to withholding, *see* PGI 227.7106–1(b).

(c) Do not accept technical data or computer software that do not conform to the contractual requirements in all respects. Except for nonconforming restrictive markings (*see* paragraph (d) of this subsection), correction or replacement of nonconforming data or software, or an equitable reduction in contract price when correction or replacement of the nonconforming data or software is not practicable or is not in the Government's interests, shall be accomplished in accordance with—

(1) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or

(2) The procedures at FAR 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(d) Follow the procedures at 227.7106–3 if nonconforming markings are the sole reason technical data or computer software fails to conform to contractual requirements. The clause at 252.227–7030, as prescribed at 227.7106–5, may be used to withhold an amount from payment, consistent with the terms of the clause, pending correction of the nonconforming markings.

227.7106–2 Warranty.

(a) *Noncommercial technical data.* The intended use of the technical data and the cost, if any, to obtain the warranty should be considered before deciding to obtain a data warranty (see FAR 46.703). The fact that a particular item or process is or is not warranted shall not be a consideration in determining whether or not to obtain a warranty for the technical data that pertain to the item or process.

(1) A data warranty should be considered if the Government intends to repair or maintain an item and defective repair or maintenance data would impair the Government's effective use of the item or result in increased costs to the Government.

(2) As prescribed in 246.710, use the clause at 252.246–7001, Warranty of Data, and its alternates, or a substantially similar clause when the Government needs a specific warranty of technical data.

(b) *Noncommercial computer software.*

(1) *Weapon systems.* Computer software that is a component of a weapon system or major subsystem shall be addressed as part of the weapon system warranty. Follow the procedures at 246.710.

(2) *Non-weapon systems.* Approval of the chief of the contracting office must be obtained to use a computer software warranty other than a weapon system warranty. Consider the factors at FAR 46.703 in deciding whether to obtain a computer software warranty. When approval for a warranty has been obtained, the clause at 252.246–7001, Warranty of Data, and its alternates, may be appropriately modified for use with computer software or a procurement-specific clause may be developed.

(c) *Commercial technical data and commercial computer software.* Follow FAR part 12 and DFARS part 212 regarding warranties for commercial technical data and commercial computer software.

227.7106–3 Unjustified and nonconforming markings.

(a) *Unjustified markings.* (1) An unjustified marking is an authorized marking that does not accurately depict restrictions applicable to the Government's use, modification, reproduction, release, performance, display, or disclosure of the marked technical data or computer software. For an example, *see* PGI 227–7106–3(b).

(2) The correction of unjustified markings on technical data or computer software is governed by 252.227–7013(i)(1). However, at any time during performance of a contract and notwithstanding existence of a challenge, the contracting officer and the party that has asserted a restrictive marking may agree that the restrictive marking is not justified.

(b) *Nonconforming markings.* (1) A nonconforming marking is a marking that does not comply with the form or content that is authorized by the clause governing the technical data or computer software.

(i) For noncommercial technical data and noncommercial computer software, authorized markings are identified in the clause at 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial. All other noncommercial markings which differ from those identified in 252.227–7013, whether in form or substance, are nonconforming markings.

(ii) For commercial technical data and commercial computer software, the clause at 252.227–7015, Rights in Technical Data and Computer Software—Commercial does not specify the form or content of restrictive legends. However, any restrictive marking that does not accurately describe the Government's license rights shall be considered an unjustified

marking under paragraph (b) of this subsection.

(2) The correction of nonconforming markings on technical data or computer software is governed by 252.227–7013(i)(2). To the extent practicable, the contracting officer should return technical data or computer software bearing nonconforming markings to the person who has placed the nonconforming markings on such technical data or computer software to provide that person an opportunity to correct or strike the nonconforming marking at that person's expense.

227.7106–4 Government right to review, verify, challenge, and validate asserted restrictions.

(a) *General.* All challenges must be made in accordance with the provisions of 252.227–7037, Validation of Restrictive Markings on Technical Data and Computer Software.

(1) The Government has the right to challenge asserted restrictions on technical data (*see* 10 U.S.C. 2321) and computer software when—

(i) There are reasonable grounds to question the validity of the assertion; and

(ii) Continued adherence to the assertion would make it impractical to later procure competitively the item to which the technical data or computer software pertain.

(2) However, there is a mandatory presumption that commercial items are developed at private expense. (*See* 10 U.S.C. 2320(b)(1), and 2321(f)). Therefore, do not challenge a contractor's assertion that a commercial item or process was developed at private expense unless the Government can demonstrate that it contributed to development of the item, component, or process.

(b) *Pre-award considerations.* (1) The challenge procedures may significantly delay awards under competitive procurements. Therefore, avoid challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement.

(2) *Transacting challenge matters directly with subcontractors, at any tier, or suppliers.* The clause at 252.227–7037 includes the contractor's agreement that the Government may transact matters under the clause directly with a subcontractor, at any tier, or supplier without creating or implying privity of contract for matters not covered under the clause. Contracting officers should permit a subcontractor or supplier to transact challenge and validation matters directly with the Government when—

(i) A subcontractor's or supplier's business interests in its technical data would be compromised if the data were disclosed to a higher-tier contractor;

(ii) There is reason to believe that the contractor will not respond in a timely manner to a challenge and an untimely response would jeopardize a subcontractor's or supplier's right to assert restrictions; or

(iii) Requested to do so by a subcontractor or supplier.

227.7106–5 Contract clauses.

Use the following clauses in solicitations and contracts that anticipate the delivery of technical data or computer software:

(a) 252.227–7030, Technical Data and Computer Software—Withholding of Payment; and

(b) 252.227–7037, Validation of Restrictive Markings on Technical Data and Computer Software.

227.7107 Safeguarding, use, and handling of technical data and computer software.

227.7107–1 Government procedures for protecting technical data and computer software.

(a) DoD personnel, including acquisition personnel, are required to protect technical data and computer software from unauthorized or inappropriate access, use, modification, reproduction, release, performance, display, and disclosure. This protection includes—

(1) Restrictions that are based on an offeror's, contractor's, or licensor's intellectual property rights; and

(2) Restrictions based on other laws, policies, or regulations (*e.g.,* export-controlled information or technology, information subject to withholding under the FOIA, privacy information).

(b) Contracting activities shall establish procedures to assure that technical data or computer software marked with restrictive legends are released or disclosed, including a release or disclosure through a Government solicitation, only to authorized persons subject to appropriate use and non-disclosure restrictions. Solicitations or public announcements must provide notice of the use and non-disclosure requirements.

(c)(1) Class use and non-disclosure agreements (*e.g.,* agreements covering all solicitations received by a company within a reasonable period) are authorized for Government purpose rights technical data or computer software, and may be obtained at any time prior to release or disclosure of the technical data or computer software.

(2) Documents transmitting Government purpose rights technical data or computer software to persons under class agreements shall identify the technical data or computer software subject to Government purpose rights and the class agreement under which the technical data or computer software are provided.

227.7107–2 Use and non-disclosure agreement.

(a) Except as provided in paragraph (c) of this subsection, technical data or computer software delivered to the Government with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure may not be provided to third parties unless the intended recipient completes and signs the use and non-disclosure agreement (Agreement) at paragraph (d) of this subsection prior to release or disclosure of the data or software.

(b) An attachment to the Agreement will identify—

(1) The technical data and computer software that the Government intends to furnish to the recipient with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure; and

(2) The specific conditions under which the recipient is authorized to access, use, modify, reproduce, release, perform, display, or disclose the following:

(i) Technical data subject to limited rights;

(ii) Computer software subject to restricted rights;

(iii) SBIR data subject to SBIR data rights; and

(iv) Technical data or computer software subject to—

(A) Negotiated license rights; or

(B) Other license restrictions, including commercial license rights.

(c) The requirement for the Agreement does not apply to Government contractors which require access to a third party's technical data or computer software for the performance of a Government contract that contains the clause at 252.227–7025, Government-Furnished Information Marked with Restrictive Legends.

(d) The prescribed use and non-disclosure agreement is as follows:

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Use and Non-Disclosure Agreement
The undersigned, (Insert Name), an authorized representative of the (Insert Company Name), (hereinafter referred to as the "Recipient") requests the Government to provide the Recipient with technical data or computer software (hereinafter referred to as "Government-furnished information") in which the Government's access, use, modification, reproduction, release, performance, display, or disclosure rights are restricted. That Government-furnished information is identified in an attachment to this Agreement. In consideration for receiving such Government-furnished information, the Recipient agrees to use the Government-furnished information strictly in accordance with this Agreement:
(a) *Definitions*. As used in this Agreement—
(1) *Owner-Licensor* means the person whose name appears in the restrictive legend or is otherwise identified as asserting restrictions on the access, use, modification, reproduction, release, performance, display, or disclosure of technical data or computer software.
(2) Other terms are defined in the following clause(s):
(i) DFARS 252.227-7013, Rights in Technical Data and Computer Software—Noncommercial;

(ii) DFARS 252.227-7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program; or
(iii) DFARS 252.227-7015, Rights in Technical Data and Computer Software—Commercial.
(b) *Attachment*. An attachment to the Agreement will identify—
(1) The technical data and computer software that the Government intends to furnish to the Recipient with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure; and
(2) The specific conditions under which the Recipient is authorized to access, use, modify, reproduce, release, perform, display, or disclose the following:
(i) Technical data subject to limited rights;
(ii) Computer software subject to restricted rights; and
(iii) Technical data or computer software subject to—

(A) Negotiated license rights; or

(B) Other license restrictions, including commercial license rights.

(c) *Government-furnished information provided with restrictions*. Technical data or computer software provided to the Recipient under this Agreement are subject to restrictions on access, use, modification, reproduction, release, performance, display, or disclosure as follows:

(1) *Government-furnished information marked with government purpose rights legends*. The Recipient shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished information marked with government purpose rights legends for government purposes only and shall not do so for any commercial purpose. The Recipient shall not, without the express written permission of the Owner-Licensor, release, perform, display, or disclose the Government-furnished information to, or allow access by, any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require the Government-furnished information to submit offers for, or perform, subcontractor or supplier obligations under contracts with the Recipient for purposes authorized by this paragraph. The Recipient shall ensure compliance with paragraph (d) of this Agreement.

(2) *Technical data marked with limited rights legends or SBIR data rights legends*. The Recipient shall access, use, modify, reproduce, release, perform, display, or disclose technical data marked with limited rights legends or SBIR data rights legends only as specified in the Attachment to this Agreement.

(i) The Recipient shall not, unless expressly authorized in the Attachment to this Agreement or by express written permission of the Owner-Licensor, release or disclose such Government-furnished information to, or allow access by, any other person. The Recipient shall ensure compliance with paragraph (d) of this Agreement.

(ii) The Recipient shall promptly notify the Owner-Licensor of the execution of this Agreement and identify the Owner-Licensor's technical data or computer software that has been or will be provided to the Recipient, the date and place such Government-furnished information were or will be received, and the name and address of the Government office that has provided or will provide the Government-furnished information.

(3) *Computer software marked with restricted rights legends or SBIR data rights legends*. The Recipient shall access, use, modify, reproduce, release, perform, display, or disclose computer software marked with restricted rights legends or SBIR data rights legends only as specified in the Attachment to this Agreement.

(i) The Recipient shall not, unless expressly authorized in the Attachment to this Agreement or by express written permission of the Owner-Licensor, release or disclose such computer software to, or allow access by, any other person. The Recipient shall ensure compliance with paragraph (d) of this Agreement.

(ii) The Recipient shall promptly notify the computer software Owner-Licensor of the execution of this Agreement and identify the computer software that has been or will be provided to the Recipient, the date and place the computer software were or will be received, and the name and address of the Government office that has provided or will provide the computer software.

(4) *Government-furnished information marked with negotiated license rights legends.* The Recipient shall access, use, modify, reproduce, release, perform, or display Government-furnished information marked with negotiated license rights legends only as permitted in the negotiated license, which is specified in the Attachment to this Agreement. The Recipient shall not, unless expressly authorized in the Attachment or by express written permission of the Owner-Licensor, release or disclose such Government-furnished information to, or allow access by, any person. The Recipient shall ensure compliance with paragraph (d) of this Agreement.

(5) *Government-furnished information marked with other restrictive legends, or otherwise subject to restrictions.* The Recipient shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished information that are marked with other restrictive legends, or that are otherwise identified in the Attachment to this Agreement as subject to restrictions, only as specified in the Attachment. The Recipient shall ensure compliance with paragraph (d) of this Agreement.

(d) *Recipient procedures for safeguarding, use, and handling of* Government-furnished information. The Recipient agrees to adopt or establish operating procedures and physical security measures to protect the Government-furnished information from inadvertent release or disclosure to unauthorized third parties. The Recipient shall not release or disclose Government-furnished information to, or allow access by, any person outside the Recipient's organization unless the intended third-party recipient—

(1) Is authorized to access or receive the Government-furnished information; and

(2) Has executed a copy of this use and nondisclosure agreement, which shall incorporate the restrictions contained in the Attachment specified at paragraph (a) of this Agreement, prior to receiving the Government-furnished information.

(e) *Disclaimer of Warranty.* The Recipient agrees to accept the Government-furnished information "as is" without any Government representation as to suitability for intended use or warranty whatsoever. This disclaimer does not affect any obligation the Government may have regarding Government-furnished information specified in a contract for the performance of that contract.

(f) The Recipient may enter into any agreement directly with the Contractor with respect to the use, modification, reproduction, release, performance, display, or disclosure of the Government-furnished information.

(g) *Indemnification.* The Recipient agrees to indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses arising out of, or in any way related to, the unauthorized access, use, modification, reproduction, release, performance, display, or disclosure of the Government-furnished information by the Recipient or any person to whom the Recipient has released or disclosed the Government-furnished information.

(h) *Owner-Licensor as third-party beneficiary.* The Recipient is executing this Agreement for the benefit of the Owner-Licensor. The Owner-Licensor, in addition to any other rights it may have, as a third party beneficiary of this Agreement, has the rights of direct action against the Recipient or any other person to whom the Recipient has released or disclosed the Government-furnished information, to seek damages from any breach of this Agreement or to otherwise enforce this Agreement.

(i) *Disposition of Government-furnished information.* The Recipient agrees to destroy or return the Government-furnished information, and all copies of the Government-furnished information in its possession, no later than 30 days after the date shown in paragraph (j) of this Agreement, to have all persons to whom it released the Government-furnished information do so by that date, and to notify the Contractor that the Government-furnished information has been destroyed.
(j) *Effective date and duration of obligations.* This Agreement shall be effective for the period commencing with the Recipient's execution of this Agreement and ending upon _____(Insert Date)_____. The obligations imposed by this Agreement shall survive the expiration or termination of the Agreement.

Recipient's Business Name

_____

By_____

Authorized Representative

_____

Date

Representative's Typed Name

_____

and Title

_____

(End of use and non-disclosure agreement)

BILLING CODE 5001–08–C

227.7107–3 Contractor technical data or computer software repositories.

(a) Contractor technical data or computer software repositories may be established when permitted by agency procedures. The contractual instrument establishing each repository must require, as a minimum, the repository management contractor to—

(1) Establish and maintain adequate procedures for protecting technical data and computer software delivered to or stored at the repository from unauthorized release or disclosure;

(2) Establish and maintain adequate procedures for controlling the release or disclosure of technical data and computer software from the repository to third parties consistent with the Government's rights in such data;

(3) When required by the contracting officer, deliver technical data or computer software to the Government on paper or in other specified media;

(4) Be responsible for maintaining the currency of technical data and computer software delivered directly by Government contractors or subcontractors to the repository;

(5) Obtain use and non-disclosure agreements (*see* 227.7107–2) from all persons to whom government purpose rights technical data or computer software is released or disclosed; and

(6) Indemnify the Government from any liability to technical data and computer software owners or licensors resulting from, or as a consequence of, a release or disclosure of data or software made by the repository contractor or its officers, employees, agents, or representatives.

(b) If the contractor is or will be the repository manager, the contractor's technical data and computer software management and distribution responsibilities must be identified in the contract or the contract must reference the agreement between the Government and the contractor that establishes those responsibilities.

(c) If the contractor is not and will not be the repository manager, do not require a contractor or subcontractor to deliver technical data marked with limited rights legends, or computer software marked with restricted rights legends, to a repository managed by another contractor unless the contractor or subcontractor who has asserted the limited rights or restricted rights agrees to release the data or software to the repository or has authorized, in writing, the Government to do so.

(d) Repository procedures may provide for the acceptance, delivery, and subsequent distribution of technical data or computer software in storage media other than paper, including direct electronic exchange of data between two computers. The procedures must provide for the identification of any portions of the data provided with restrictive legends, when appropriate. The acceptance criteria must be consistent with the authorized delivery format.

227.7107–4 Contract clause.

(a) Use the clause at 252.227–7025, Government-Furnished Information Marked with Restrictive Legends, in solicitations and contracts when it is anticipated that the Government will provide the contractor, for performance of its contract, technical data or computer software marked with another party's restrictive legend(s).

(b) When technical data marked with Government purpose rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at 252.227–7025, the contract may be modified, prior to release or disclosure, to include that clause in lieu of requiring the contractor to complete a use and non-disclosure agreement.

Subpart 227.72—Rights in Works

227.7200 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures for the acquisition of, and Government rights in—

(1) Copyrightable works;

(2) Other works; and

(3) Architectural designs, shop drawings, or similar information resulting from or related to construction or architect-engineer services; and

(b) Does not apply to technical data (including computer software documentation) or computer software (see subpart 227.71). For additional information concerning the acquisition of works versus the acquisition of technical data and computer software, *see* PGI 227.7200(b).

227.7201 Definitions.

As used in this subpart—

(a) Unless otherwise specifically indicated, the terms *offeror* and *contractor* include an offeror's or contractor's subcontractors or suppliers, or potential subcontractors or potential suppliers, at any tier.

(b) Other terms are defined in the clause at—

(1) 252.227–7020, Rights in Works-Ownership; and

(2) 252.227–7021, Rights in WorksLicense.

227.7202 Contracts for the acquisition of works and the assignment of rights in works.

227.7202–1 Policy.

The Government shall require assignment of the entire right, title, and interest, including the intellectual property rights (other than patent rights), in works first created, developed, generated, originated, prepared, or produced in the performance of a contract where it has a need to control—

(a) The use, modification, reproduction, release, distribution, performance, or display, of the works; and

(b) The preparation of derivative works from the works.

227.7202–2 Procedures.

(a) Solicitations and contracts shall specify—

(1) The works to be first produced, created, or generated;

(2) The intellectual property rights to be assigned; and

(3) The delivery schedule for both the works and the assignment instruments.

(b) Use the procedures at subpart 227.71 if the Government has a need to control technical data (including computer software documentation), computer software, and architectural works that comprise technical data or computer software.

227.7202–3 Contract clause.

(a)(1) Use the clause at 252.227–7020, Rights in Works—Ownership, in solicitations and contracts—

(i) For architect-engineer services, or for construction involving architect-engineer services, when the Government requires the exclusive control of the data pertaining to design for a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic, or other special reasons the Government does not want duplicated; and

(ii) When the successful offeror(s) will be required to assign to the Government the entire right, title, and interest, including the intellectual property rights, to the entirety of works first created, developed, generated, originated, prepared, or produced in the performance of the contract.

(2) The following are examples of copyright assignments.

The assignment instruments should be tailored to the particular work and the rights being assigned.

Copyright Assignment

Title of Work: _____

Contract No.: _____

Assignor's Name: _____

Assignor's Address: _____

For good and valuable consideration, receipt of which is hereby acknowledged, [name of assignor] ("Assignor"), hereby irrevocably transfers and assigns to [name of assignee] ("Assignee"), located at [insert address], its successors and assigns, in perpetuity, all right (whether now known or hereinafter created), title, and interest, throughout the world, including any copyrights and renewal or extensions thereto, in [title and short description of work, created under Contract No.: ____, including, if available, copyright registration number].

IN WITNESS THEREOF, Assignor has duly executed this Agreement.

By: _____

[Authorized signature]

Typed Name: _____

Title: _____

[Assignor's title]

Date: _____

AUTHOR COPYRIGHT ASSIGNMENT AGREEMENT

BETWEEN THE (name of agency)

AND

_____

This Copyright Assignment Agreement, (hereinafter called "AGREEMENT") is made and entered into by and between the United States of America as represented by the Secretary of the (name of agency) (hereinafter called "GOVERNMENT") and (AUTHOR's name), at_____ (AUTHOR's Address) (hereinafter called "AUTHOR") and governs a Work(s) already prepared or to be prepared by the AUTHOR with the intention that the contribution has been or shall be included in a United States Government produced textbook, website, spreadsheet calculator, or other teaching or reference material, titled:

_____

1. The AUTHOR hereby sells, grants, conveys, assigns and transfers to the GOVERNMENT, its entire right, title and interest in and to the Work(s), including, without limitation, copyrights, renewals and/or extensions thereof for all territories of the world, and all derivative works resulting from the Work(s) covered by this Agreement in consideration for payment of the Work(s) made under Contract No._____ and subject to the retained rights set forth in Paragraph 2. Such assigned rights include, but are not limited to, the rights throughout the world to:

(a) Edit, print, publish, republish, and distribute the Work(s) and to prepare, edit, print, publish, republish and distribute derivative works based thereon, in any language and in all media of expression now known or later developed; and

(b) To license and permit others to do so.

2. The AUTHOR retains the rights to:

(a) Reproduce or authorize others to reproduce the Work(s), material extracted verbatim from the Work(s), or create derivative works, for the AUTHOR's business purposes, but shall not use these rights for purposes that directly compete with the GOVERNMENT's use of the Work(s).

(b) Make limited distribution of all or portions of the Work(s) if the AUTHOR informs the GOVERNMENT in advance of the nature and extent of such limited distribution.

(c) First refusal for the creation of any derivative works resulting from the generation of this Work(s).

3. GOVERNMENT agrees:

(a) To abide by accepted academic standards in the use of the Work(s), specifically the Work(s) will be published with the name of the Author(s) attached to the Work(s).

(b) No part of the Work(s) will be used in a subsequent or derivative work without both a citation of the source and, if a large amount of material is used, without the name of the Author(s) attached.

(c) If a portion of the Work(s) is to be modified, updated, changed, or otherwise used in another Work(s), the AUTHOR will be given an opportunity to update the material and will be compensated for this update effort at a fair and reasonable rate. For such updates, the GOVERNMENT agrees to exert reasonable efforts to contact the recipient. If the AUTHOR declines or is unable to update the Work(s) within a reasonable period of time, the GOVERNMENT is authorized to engage an alternate author to update the Work(s). When the Work(s) is being updated by an alternate author, the chapter, section, or material in question will include the original author's name with an appropriate inscription, such as "based on," or "updated from."

4. The AUTHOR represents and warrants that the Work(s):

(a) Is original or has in part been obtained from copyrighted works for which the AUTHOR has obtained written permission from the copyright owner, has not been previously published and is not in the public domain.

(b) Is owned by the AUTHOR who has the right to convey all rights herein conveyed to the GOVERNMENT.

(c) Contains no libelous material or material which may infringe upon or violate the copyright, trademark, trade secret or other right of another.

(d) And that all statements asserted as facts in the Work(s) are either true or based upon generally accepted professional research practices and principles.

5. This Agreement shall commence on the Effective Date and shall continue for the duration of the existing copyright term of the Work(s), and the duration of any renewals or extensions thereof. The Effective Date shall be the latest of the dates after which both parties have signed this Agreement.

6. If any part of this Agreement is held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of any other part or provision of this Agreement, which other part or provision shall remain in full force and effect.

7. This Agreement shall be governed by and construed in accordance with the laws of the United States, as applicable to contracts made and to be performed within the United States, and all disputes had by one party against the other shall be brought in a court of competent jurisdiction in the United States under Federal Acquisition Regulation (FAR) clause 52.233–1, Disputes, which is hereby incorporated into this agreement (found in full at *http://www.farsite.hill.af.mil*).

8. The waiver of any provision of this Agreement by either party, or the failure of either party to require performance of any provision of this Agreement shall not be construed as a waiver of its rights to insist on performance of that same provision, or any other provision, at some other time. Any effective waiver, modification or amendment must be in writing and signed by both parties.

9. This Agreement constitutes the entire agreement between the parties concerning the subject matter hereof, and expressly supersedes any prior written or oral understandings or agreements between them with respect to the subject matter hereof.

SIGNED:

Author:

_____

Date: _____

_____

Printed Name

_____

Street Address

_____

City, State, Zip Code

_____

Phone Number

GOVERNMENT (Contracting Officer):

_____

Date: _____

_____

Printed Name

(b)(1) When the clause at 252.227–7020, Rights in Works-Ownership, is used in accordance with 227.7202–3(a)(1), other appropriate rights in technical data and computer software or rights in works clauses may be required, as prescribed at 227.7104–8(a), 227.7104–8(b), 227.7104–8(c), or 227.7203–3(a), when the successful offeror(s) will be required to deliver to the Government—

(i) Technical data or computer software; or

(ii) Works created, developed, generated, originated, prepared, or produced outside of contract award.

(2) The contracting officer must identify which works and deliverables are subject to which clauses when the clause at 252.227–7020, Rights in Works-Ownership, is used in addition to the clauses at 252.227–7013, Rights in Technical Data and Computer Software-Noncommercial; 252.227–7014, Rights in Technical Data and Computer Software-Small Business Innovation Research (SBIR) Program; 252.227–7015 Rights in Technical Data and Computer Software-Commercial; or 252.227–7021, Rights in Works-License.

227.7203 Contracts for the acquisition of works and license rights in works.

227.7203–1 Policy.

When the Government does not require assignment of ownership in works (*see* 227.7202) and does not require modification to existing works, such works shall be acquired under licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs.

227.7203–2 Procedures.

(a) Solicitations and contracts shall specify the works to be delivered under the contract, and the delivery schedule for the works.

(b) Use the procedures at subpart 227.71 if the Government desires to obtain technical data (including computer software documentation) or computer software.

227.7203–3 Contract clause.

(a) Use the clause at 252.227–7021, Rights in Works-License in solicitations and contracts when the successful offeror(s) will be required to deliver to the Government—

(1) Works first created, developed, generated, originated, prepared, or produced outside of contract award; or

(2) Modifications made by the successful offeror(s) to works first created, developed, generated, originated, prepared, or produced outside of contract award;

(b)(1) When the clause at 252.227–7021, Rights in Works-License, is used in accordance with 227.7203–3(a), other appropriate rights in technical data and computer software or rights in works clauses may be required, as prescribed at 227.7104–8(a), 227.7104–8(b), 227.7104–8(c), or 227.7202–3(a) when the successful offeror(s) will be required to—

(i) Deliver to the Government technical data or computer software; or

(ii) Assign to the Government the entire right, title and interest, including the intellectual property rights, to the entirety of works first created, developed, generated, originated, prepared, or produced in the performance of the contract.

(2) The contracting officer must identify which works and deliverables are subject to which clauses when the clause at 252.227–7021, Rights in Works-License, is used in addition to the clauses at 252.227–7013, Rights in Technical Data and Computer Software-Noncommercial; 252.227–7014, Rights in Technical Data and Computer Software-Small Business Innovation Research (SBIR) Program; 252.227–7015, Rights in Technical Data and Computer Software-Commercial; or 252.227–7020, Rights in Works-Ownership.

227.7204 Safeguarding, use, and handling of works.

227.7204–1 Procedures.

(a) DoD personnel, including acquisition personnel, are required to protect works from unauthorized or inappropriate access, use, modification, reproduction, release, performance, display, and disclosure. This protection includes—

(1) Restrictions that are based on an offeror's, contractor's, or licensor's intellectual property rights; and

(2) Restrictions based on other laws, policies, or regulations (*e.g.,* export—controlled information or technology, information subject to withholding under the FOIA, privacy information).

(b) Contracting activities shall establish procedures to assure that works marked with restrictive legends are released or disclosed, including a release or disclosure through a Government solicitation, only to authorized persons subject to appropriate use and non-disclosure restrictions. Solicitations or public announcements must provide notice of the use and non-disclosure requirements.

(c)(1) Class use and non-disclosure agreements (*e.g.,* agreements covering all solicitations received by a company within a reasonable period) are authorized for Government purpose rights works and may be obtained at any time prior to release or disclosure of the works.

(2) Documents transmitting Government purpose rights works to persons under class agreements shall identify the works subject to Government purpose rights and the class agreement under which the works are provided.

227.7204–2 Contract clause.

(a) Use the clause at 252.227–70YY, Government-Furnished Works Marked with Restrictive Legends, in solicitations and contracts when it is anticipated that the Government will provide the contractor, for performance of its contract, works marked with another party's restrictive legend(s).

(b) When works marked with government license rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at 252.227–70YY, the contract may be modified, prior to release or disclosure, to include that clause, in lieu of requiring the contractor to complete a use and non-disclosure agreement.

227.7205 Rights in architectural designs, shop drawings, or similar information related to architect-engineer services and construction.

227.7205–1 Scope.

(a) This section provides clauses for data, copyrights, and restricted designs unique to the acquisition of architect–engineer services and construction.

(b) It does not apply when the acquisition is limited to supply contracts for the acquisition of construction supplies or materials; or experimental, developmental, or research work, or test and evaluation studies of structures, equipment, processes, or materials for use in construction. For such acquisitions, use the provisions and clauses required by 227.7104–8.

227.7205–2 Contract clauses.

(a) Use the clause at 252.227–7022, Government Rights in Works (Unlimited), except as provided in paragraphs (b) and (d) of this subsection, in solicitations and contracts for architect-engineer services and for construction involving architect–engineer services.

(b) Use the clause at 252.227–7024, Notice and Approval of Restricted Designs, in architect-engineer contracts when necessary for the Government to make informed decisions concerning noncompetitive aspects of the design.

(c) Use the clause at 252.227–7033, Rights in Shop Drawings, in solicitations and contracts calling for delivery of shop drawings.

(d) When the Government requires the exclusive control of the data pertaining to the design of a building, monument, or a construction of a similar nature, *see* 227.7202–2(a)(2).

PART 246—QUALITY ASSURANCE

246.710 Contract clauses.

7. Section 246.710 is amended at paragraph (1) by removing "Rights in Technical Data and Computer Software" and adding in its place "Rights in Technical Data and Computer Software—Noncommercial".

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.227–7000 [Removed and reserved.]

8. Section 252.227–7000 is removed and reserved.

252.227–7001 [Removed and reserved.]

9. Section 252.227–7001 is removed and reserved.

252.227–7002 [Removed and reserved.]

10. Section 252.227–7002 is removed and reserved.

252.227–7003 [Removed and reserved.]

11. Section 252.227–7003 is removed and reserved.

252.227–7004 [Removed and reserved.]

12. Section 252.227–7004 is removed and reserved.

252.227–7005 [Removed and reserved.]

13. Section 252.227–7005 is removed and reserved.

252.227–7006 [Removed and reserved.]

14. Section 252.227–7006 is removed and reserved.

252.227–7007 [Removed and reserved.]

15. Section 252.227–7007 is removed and reserved.

252.227–7008 [Removed and reserved.]

16. Section 252.227–7008 is removed and reserved.

252.227–7009 [Removed and reserved.]

17. Section 252.227–7008 is removed and reserved.

252.227–7010 [Removed and reserved.]

18. Section 252.227–7010 is removed and reserved.

252.227–7011 [Removed and reserved.]

19. Section 252.227–7011 is removed and reserved.

252.227–7012 [Removed and reserved.]

20. Section 252.227–7012 is removed and reserved.

21. Section 252.227–7013 is revised to read as follows:

252.227–7013 Rights in Technical Data and Computer Software—Noncommercial.

As prescribed in 227.7104–8(a), use the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE—NONCOMMERCIAL (DATE)

(a) *Definitions.* As used in this clause—

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be complied to generate a computer program. The term does not include computer database or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *Detailed manufacturing or process data* means technical data that describe the steps, sequences, and conditions of manufacturing, processing, or assembly used by the manufacturer to produce an item or to perform a process.

(8) *Developed* means that—

(i) An item or process exists and is workable. Workability is generally established when the item or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item or process, and the state of the art. To be considered *developed,* the item or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item or process actually be reduced to practice within the meaning of title 35 of the United States Code.

(ii) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(iii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the computer software can reasonably be expected to perform its intended purpose; or

(iv) Computer software user's documentation required to be delivered or otherwise provided under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(9) *Developed exclusively at private expense* means development was accomplished entirely with costs not paid or reimbursed by the Government, or costs paid or reimbursed by the Government through indirect cost pools, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at Government, private, or mixed expense.

(10) *Developed exclusively with Government funds* means development was not accomplished exclusively or partially at private expense.

(11) *Developed with mixed funding* means development was accomplished partially with costs not paid or reimbursed by the Government or costs paid or reimbursed by the Government through indirect cost pools, and partially with costs paid or reimbursed directly by the Government.

(12) *Form, fit, and function data* means technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(13) *Government purpose* means any activity in which the United States Government is a party.

(i) The term includes competitive procurement and any agreements or contracts with, or sales or transfers to, international or multi-national defense organizations or foreign governments.

(ii) The term does not include the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or to authorize others to do so.

(14) *Government purpose rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose that data for Government purposes. However, the Government shall not release or disclose the technical data or computer software outside the Government unless—

(A) Prior to release or disclosure (or in emergency situations, as soon as practicable), the intended recipient has executed the non-disclosure agreement at 227.7107–2 with its required attachments; or

(B) The recipient is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachments required by that clause.

(15) *Limited rights* means the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be accessed or used by another party, unless—

(i) The reproduction, release, disclosure, access, or use is—

(A) Necessary for emergency repair and overhaul;

(B) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or access or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes; or

(C) A release or disclosure of computer software design documentation to, or access by, a contractor or subcontractor performing a service contract (*see* 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use such computer software documentation to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations or for emergency repair or overhaul of items or processes;

(ii) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient—

(A) Has executed the use and non-disclosure agreements at 227.7107–2, with its required attachment(s); or

(B) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(iii) The recipient for emergency repair or overhaul is required to destroy the technical data and all copies in its possession promptly following completion of the emergency repair or overhaul, and to notify the Contractor that

the data or computer software have been destroyed; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, access, or use.

(16) *Noncommercial computer software* means computer software that does not qualify as commercial computer software.

(17) *Noncommercial technical data* means technical data that does not qualify as commercial technical data.

(18) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Install and use computer software on one computer at a time. The computer software may not be time shared or accessed by more than one terminal or central processing unit unless otherwise permitted by this contract;

(ii) Transfer computer software within the Government without further permission of the Contractor so long as the transferred computer software remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified computer software only as provided in paragraphs (a)(18)(i) and (iii) of this clause; and

(B) Not release or disclose the modified computer software except as provided in paragraphs (a)(18)(ii), (v) and (vi) of this clause;

(v) Permit contractors or subcontractors performing service contracts (*see* 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations or for emergency repair or overhaul of items or processes, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors—

(*1*) Have executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(*2*) Are Government contractors receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitation in paragraph (a)(18)(i) of this clause; and

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient—

(*1*) Has executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(*2*) Is a Government contractor receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025, and the attachments required by that clause;

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(C) The Government shall require a recipient of restricted rights computer software for emergency repair or overhaul to destroy any copies of the computer software in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the computer software has been destroyed.

(19) *SBIR data* means all—

(i) Technical data—

(A) Pertaining to items or processes developed under a Small Business Innovation Research (SBIR) award; or

(B) Created under a SBIR award that does not require the development of items or processes; and

(ii) Computer software developed under a SBIR award.

(20) *SBIR data rights* mean the Government's rights during the SBIR data protection period (specified at 252.227–7014(b)(5)(ii)) to access, use, modify, reproduce, release, perform, display, or disclose SBIR data as follows:

(i) Limited rights in SBIR data that is technical data; and

(ii) Restricted rights in SBIR data that is computer software.

(21) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(22) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Government Rights.* The Contractor grants or shall obtain for the Government the following paid-up, world-wide, nonexclusive, irrevocable license rights in technical data and computer software:

(1) Unlimited rights. The Government shall have unlimited rights in—

(i) Technical data (that does not pertain to an item or process) or computer software developed exclusively with Government funds;

(ii) Technical data pertaining to an item or process that has been or will be developed exclusively with Government funds;

(iii) Studies, analyses, test data, or similar data produced for this contract, when the study, analysis, test, or similar work was specified as an element of performance;

(iv) Form, fit, and function data;

(v) Technical data necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(vi) Corrections or changes to technical data or computer software furnished to the Contractor by the Government;

(vii) Technical data or computer software otherwise publicly available or that has been released or disclosed by the Contractor or subcontractor without restrictions;

(viii) Technical data or computer software in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations;

(ix) Technical data or computer software furnished to the Government, under this or any other Government contract or subcontract with restrictive conditions and the restrictive conditions have expired (*e.g.,* Government purpose rights, SBIR data rights, or negotiated license rights);

(x) Computer software user's documentation required to be delivered or otherwise provided under this contract; and

(xi) Technical data or computer software delivered or otherwise provided to the Government without any restrictive markings (see paragraph (g) of this clause).

(2) *Government purpose rights.*

(i) The Government shall have Government purpose rights for a five-year period, or such other period as may be negotiated in—

(A) Technical data (that does not pertain to an item or process) or computer software developed with mixed funding; and

(B) Technical data pertaining to items or processes developed with mixed funding;

(ii) The five-year period, or such other period as may have been negotiated under paragraph (b)(5) of this clause, shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software, development of the items or processes, or creation of the technical data. Upon expiration of the five-year or other negotiated period, the Government shall have unlimited rights in the technical data or computer software.

(3) *Limited rights.* Except as provided in paragraphs (b)(1)(iii) through (b)(1)((xi) of this clause, the Government shall have limited rights in technical data—

(i) Pertaining to items or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (f) of this clause; or

(ii) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items or processes.

(4) *Restricted rights.* The Government shall have restricted rights in noncommercial

computer software that was developed exclusively at private expense and is required to be delivered or otherwise provided to the Government under this contract.

(5) *Negotiated license rights.* (i) The standard license rights granted to the Government under paragraphs (b)(1) through (b)(4) of this clause (including the period during which the Government shall have Government purpose rights) may be modified only by mutual written agreement.

(ii) If either party desires to negotiate specialized license rights in technical data or computer software, the other party agrees to enter into negotiations.

(iii) However, in no event may the negotiated license provide the Government lesser rights than limited rights in technical data, or restricted rights in computer software.

(iv) Any license rights negotiated under this paragraph shall be identified in a license agreement attached to this contract.

(6) *Prior Government rights.* Technical data and computer software that will be delivered or otherwise provided to the Government under this contract, in which the Government has previously obtained rights, shall be delivered or otherwise provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose the technical data or computer software have expired.

(7) *Rights in derivative technical data and computer software.* The Government shall retain its rights in the unchanged portions of any technical data and computer software delivered or otherwise provided under this contract that the Contractor uses to prepare, or includes in, derivative technical data or computer software.

(c) *Contractor rights in technical data or computer software.* The Contractor (or other third party owner or licensor) retains all intellectual property rights for technical data and computer software (including ownership) developed under this contract except those granted to the Government as specified under paragraph (b) of this clause.

(d) *Third party technical data or computer software.* (1) The Contractor shall not incorporate any third party owned or licensed technical data or computer software in the technical data or computer software to be delivered or otherwise provided under this contract unless—

(i) The Contractor has obtained for the Government the license rights necessary to perfect a license in the deliverable technical data or computer software of the appropriate scope set forth in paragraph (b) of this clause; or

(ii) The Contracting Officer has granted specific written approval to do so.

(2) The Contractor shall ensure that any such license rights obtained from third parties and granted to the Government are identified and asserted pursuant to paragraph (f) of this clause, and such technical data and computer software are appropriately marked pursuant to paragraph (g) of this clause.

(e) *Release from liability.* In the event that an authorized recipient of technical data or computer software delivered or otherwise provided to the Government under this contract engages in any unauthorized activities with such technical data or computer software, the Contractor agrees to—

(1) Release the Government from liability for any licensed use of technical data or computer software made in accordance with the Government's license rights granted pursuant to paragraph (b) of this clause; and

(2) Seek relief solely from the party who has improperly accessed, used, modified, reproduced, released, performed, displayed, or disclosed Contractor technical data or computer software marked with restrictive legends.

(f) *Identification and delivery of technical data and computer software to be furnished with restrictions.* The Contractor shall not deliver any technical data or computer software with restrictive markings unless the technical data or computer software are listed on an Attachment to this contract in accordance with—

(1) The provision at DFARS 252.227–7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software; and

(2) The clause at DFARS 252.227–7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software.

(g) *Marking requirements.* The Contractor, and its subcontractors or suppliers, shall assert restrictions on the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software delivered or otherwise provided under this contract only by marking the deliverable that is subject to restriction.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark all technical data or computer software with the appropriate legends.

(i) The authorized legends shall be placed on the transmittal document or storage media, and on each page of the printed material containing technical data or computer software for which restrictions are asserted. If only portions of a page are subject to the asserted restrictions, the Contractor shall identify the restricted portions (*e.g.,* by circling or underscoring with a note or other appropriate identifier).

(ii) Technical data or computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions.

(iii) The Contractor shall not use instructions that interfere with or delay the operation of the computer program in order to display an authorized legend in computer software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such computer software has been obtained prior to delivery.

(iv) Reproductions of technical data or computer software, or any portions thereof, subject to asserted restrictions shall also include the asserted restrictions.

(2) *Unlimited rights markings.* Technical data or computer software that is delivered or otherwise provided to the Government with unlimited rights, and that is marked with a copyright legend prescribed under 17 U.S.C. 401 or 402, shall also be marked as follows:

The U.S. Government has Unlimited Rights in this technical data or computer software pursuant to the clause at DFARS 252.227–7013. Any reproduction of technical data or computer software, or portions thereof, marked with this legend must also reproduce these markings.

(End of legend)

(3) *Government purpose rights markings.* Technical data or computer software delivered or otherwise provided to the Government with Government purpose rights shall be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

Expiration Date _____

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose these technical data or computer software are restricted by paragraph (b)(2) of the Rights in Technical Data and Computer Software—Noncommercial clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or computer software or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(4) *Limited rights markings.* Technical data delivered or otherwise provided to the Government with limited rights shall be marked with the following legend:

LIMITED RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose these technical data or computer software are restricted by paragraph (b)(3) of the Rights in Technical Data and Computer Software—Noncommercial clause contained in the above identified contract. Any reproduction of technical data or computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such technical data or computer software shall promptly notify the above named Contractor.

(End of legend)

(5) *Restricted rights markings.* Computer software delivered or otherwise provided to the Government with restricted rights shall be marked with the following legend:

RESTRICTED RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

The Government's rights to access, use, modify, reproduce, release, perform, display,

or disclose this computer software are restricted by paragraph (b)(4) of the Rights in Technical Data and Computer Software—Noncommercial clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such computer software shall promptly notify the above named Contractor.

(End of legend)

(6) *Negotiated license rights markings.*

(i) Except as noted in paragraph (g)(6)(ii) of this clause, technical data and computer software in which the Government's rights stem from a negotiated license shall be marked with the following legend:

NEGOTIATED LICENSE RIGHTS

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose these technical data or computer software are restricted by Contract No. (Insert contract number), License No. (Insert license identifier). Any reproduction of technical data or computer software or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of marking, negotiated licenses do not include Government purpose rights for which a different restrictive period has been negotiated (see paragraph (g)(3) of this clause), or Government purpose license rights acquired under a prior contract (see paragraph (g)(7) of this clause).

(7) *Pre-existing technical data or computer software markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights in technical data or computer software, the Contractor may mark such technical data or computer software with the appropriate restrictive legend in accordance with the marking procedures in paragraph (g)(1) of this clause.

(8) *Authorized markings.* Except as provided in paragraph (g)(7) of this clause, only the following legends are authorized under this contract:

(i) The unlimited rights legend at paragraph (g)(2) of this clause.

(ii) The Government purpose rights legend at paragraph (g)(3) of this clause.

(iii) The limited rights legend at paragraph (g)(4) of this clause.

(iv) The restricted rights legend at paragraph (g)(5) of this clause.

(v) The negotiated license rights legend at paragraph (g)(6) of this clause.

(vi) The notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(h) *Contractor procedures and records.* Throughout performance of this contract, the Contractor and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, shall—

(1) Assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(i) *Removal of unjustified and nonconforming markings.*

(1) Unjustified technical data or computer software markings. The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software provided or to be provided under this contract are contained in the clause at 252.227–7037. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if a restrictive marking is determined to be unjustified.

(2) Nonconforming technical data or computer software markings. A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise provided to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the clause at 252.227–7037. If the Contracting Officer notifies the Contractor of a nonconforming marking and the Contractor fails to remove or correct such marking within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming marking.

(j) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(k) *Applicability to subcontractors or suppliers.*

(1) The Contractor shall recognize and protect the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes of paragraph (e) of this clause.

(2)(i) Whenever any technical data or computer software will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause (or other appropriate clause(s) prescribed at DFARS 227.7104–8), in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(A) References to the Government are not changed.

(B) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(ii) No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software except by mutual agreement of the parties whose rights are affected.

(iii) If the clause used with a subcontractor or supplier is not a clause that is used in the prime contract (or higher-tier subcontract), the Contractor shall notify the Government of the use of the clause and, if appropriate pursuant to DFARS 227.7104–8(d), the Contracting Officer will modify the prime contract to include the new clause.

(3) Technical data or computer software required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher-tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for technical data or computer software to be submitted with other than unlimited rights, then a subcontractor or supplier may fulfill its requirement by submitting the technical data or computer software directly to the Government.

(4) The Contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data or computer software from their subcontractors or suppliers.

(5) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data or computer software as an excuse for failing to satisfy its contractual obligation to the Government.

(End of clause)

ALTERNATE I (DATE)

As prescribed in 227.7104–8(a)(3), add the following paragraph (l) to the basic clause:

(l) *Publication for sale.*

(1) This paragraph only applies to technical data or computer software in which the Government has obtained unlimited rights or a license to make an unrestricted release of technical data or computer software.

(2) The Government shall not publish, or authorize others to publish on its behalf, deliverable technical data or computer software if the Contractor publishes the technical data or computer software for sale prior to the Government's intended publication. Before the Contractor publishes any technical data or computer software, the Contractor shall promptly notify the Contracting Officer of such publication(s). The Government's publication restrictions shall not apply after twenty-four (24) months following the delivery date specified in this contract, or the removal of any national security or export control restrictions, whichever is later.

(3) This limitation on the Government's right to publish for sale shall continue as long as the data are reasonably available to the public for purchase.

ALTERNATE II (DATE)

As prescribed in 227.7104–8(a)(4), add the following paragraphs (a)(23) and (b)(8) to the basic clause:

(a)(23) *Vessel design* means the design of a vessel, boat, or craft, and its components, including the hull, decks, superstructure, and the exterior surface shape of all external shipboard equipment and systems. The term includes designs covered by 10 U.S.C. 7317, and designs protectable under 17 U.S.C. 1301, *et seq.*

(b)(8) *Vessel designs.* For a vessel design (including a vessel design embodied in a useful article) that is developed or delivered under this contract, the Government shall have the right to make and have made any useful article that embodies the vessel design, to import the article, to sell the

article, and to distribute the article for sale or to use the article in trade, to the same extent that the Government is granted rights in the technical data pertaining to the vessel design.

22. Section 252.227–7014 is revised to read as follows:

252.227–7014 Rights in technical data and computer software—small business innovation research (SBIR) program.

As prescribed in 227.7104–8(b), use the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE—SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM (DATE)

(a) *Definitions.* As used in this clause—

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, object code listings, and similar human-readable, recorded information, that can be compiled to generate a computer program. The term does not include computer databases or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation such as user's or owner's manuals, users, manuals, installation instructions, operating instructions, and other similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *Detailed manufacturing or process data* means technical data that describe the steps, sequences, and conditions of manufacturing, processing, or assembly used by the manufacturer to produce an item or to perform a process.

(8) *Developed* means that—

(i) An item or process exists and is workable. Workability is generally established when the item or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item or process, and the state of the art. To be considered *developed,* the item or process need not be at the stage where it could be offered for sale or sold on the commercial market, or must the item or process actually be reduced to practice within the meaning of title 35 of the United States Code;

(ii) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(iii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the computer software can reasonably be expected to perform its intended purpose; or

(iv) Computer software user's documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(9) *Developed exclusively at private expense* means development was accomplished entirely with costs not paid or reimbursed by the Government, or costs paid or reimbursed by the Government through indirect cost pools, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at Government, private, or mixed expense.

(10) *Form, fit, and function data* means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(11) *Government purpose* means any activity in which the United States Government is a party.

(i) The term includes the competitive procurement and any agreements or contracts with, or sales or transfers to, international or multi-national defense organizations or foreign governments.

(ii) The term does not include the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize others to do so.

(12) *Government purpose rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose that data for Government purposes. However, the Government shall not release or disclose the technical data or computer software outside the Government unless—

(A) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient has executed the non-disclosure agreement at 227.7107–2 with its required attachments; or

(B) The recipient is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachments required by that clause.

(13) *Limited rights* means the rights to access, use, modify, reproduce, release, perform, display, or disclose noncommercial technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be accessed or used by another party, unless—

(i) The reproduction, release, disclosure, access, or use is—

(A) Necessary for emergency repair and overhaul;

(B) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes; or

(C) A release or disclosure of computer software documentation to a contractor or subcontractor performing a service contract (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use such computer software documentation to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations or for emergency repair or overhaul of items or processes;

(ii) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient—

(A) Has executed the use and non-disclosure agreements at 227.7101–2, with its required attachment(s); or

(B) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(iii) The recipient of limited rights data for emergency repair or overhaul is required to destroy the technical data and all copies in its possession promptly following completion of the emergency repair or overhaul and to notify the Contractor that the data have been destroyed; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such

reproduction, release, disclosure, access, or use.

(14) *Noncommercial computer software* means computer software that does not qualify as commercial computer software.

(15) *Noncommercial technical data* means technical data that does not qualify as commercial technical data.

(16) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Install and use computer software on one computer at a time. The computer software may not be shared or accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer computer software within the Government without further permission of the Contractor so as long as the transferred computer software remains subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified computer software only as provided in paragraphs (a)(13)(i) and (iii) of this clause; and

(B) Not release or disclose the modified computer software except as provided in paragraphs (a)(13)(ii), (v) and (vi) of this clause;

(v) Permit contractors or subcontractors performing service contracts (*see* 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors—

(*1*) Have executed the use and non-disclosure agreement at 227.7107–2, with its required attachment(s); or

(*2*) Are Government contractors receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(16)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitation in paragraph (a)(16)(i) of this clause.

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient—

(*1*) Has executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachment(s); or

(*2*) Is a Government contractor receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the required attachment(s);

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(16)(iv) of this clause, for any other purpose; and

(C) The Government shall require a recipient of restricted rights computer software for emergency repair or overhaul is required to destroy any copies of the computer software in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the computer software has been destroyed.

(17) *SBIR data* means all—

(i) Technical data—

(A) Pertaining to items or processes developed under a SBIR award; or

(B) Created under a SBIR award that does not require the development of items or processes; and

(ii) Computer software developed under a SBIR award.

(18) *SBIR data rights* mean the Government's rights during the SBIR data protection period (specified at paragraph (b)(5)(ii) of this clause) to access, use, modify, reproduce, release, perform, display, or disclose SBIR data as follows:

(i) Limited rights in SBIR data that is technical data; and

(ii) Restricted rights in SBIR data that is computer software.

(19) *Technical data* means recorded information, (regardless of the form or method of the recording), of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(20) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Government Rights.* The Contractor grants or shall obtain for the Government the following paid-up, world-wide, nonexclusive, irrevocable license rights in technical data and noncommercial computer software.

(1) *Unlimited rights.* The Government shall have unlimited rights in—

(i) Form, fit, and function data;

(ii) Technical data necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(iii) Corrections or changes to technical data or computer software furnished to the Contractor by the Government;

(iv) Technical data or computer software otherwise publicly available or have been released or disclosed by the Contractor or a subcontractor without restrictions;

(v) Technical data or computer software in which the Government has obtained unlimited rights under another Government contract or a result of negotiations;

(vi) SBIR data upon expiration of the SBIR data rights Technical data or computer software delivered or otherwise provided to the Government, under this or any other Government contract or subcontract in which the restrictive condition(s) has or have expired;

(vii) Computer software user's documentation required to be delivered or otherwise provided under this contract; and

(viii) Technical data or computer software delivered or otherwise provided to the Government without any restrictive markings.

(2) *Limited rights.* Except as provided in paragraphs (b)(1) of this clause, the Government shall have limited rights in technical data—

(i) Pertaining to items or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (g)(4) of this clause; or

(ii) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items or processes.

(3) *Restricted rights in computer software.* The Government shall have restricted rights in noncommercial computer software required to be delivered or otherwise provided to the Government under this contract that were developed exclusively at private expense and were not created or developed under this contract.

(4) *Rights in commercial technical data and computer software.* The Government shall have the rights specified by the clause at 252.227–7015 in commercial technical data and commercial computer software required to be delivered or otherwise provided to the Government under this contract.

(5) *SBIR data rights.*

(i) Except as provided in paragraph (b)(1) of this clause, the Government shall have SBIR data rights in—

(A) All SBIR data created or developed under this contract; and

(B) All relevant SBIR data created or developed under other SBIR contracts where such SBIR data is specifically referenced and protected under the 252.227–7017 and –7018 clauses of this contract.

(ii) *Protection Period.* The Government's SBIR data rights commence with contract award and end upon the date five years after acceptance of the last deliverable under this contract. However, any SBIR data that is appropriately referenced and protected in a subsequent SBIR award during the five year period of this contract shall remain protected through the protection period of that subsequent SBIR award. After the expiration

of the applicable protection period, the Government shall have unlimited rights pursuant to paragraph (b)(1)(vi) of this clause.

(6) *Negotiated license rights.*

(i) *SBIR Data.* The SBIR Data rights license granted to the Government under paragraph (b)(5) of this clause may, after award, be modified or transferred by mutual agreement only in writing under a separate agreement.

(ii) *Technical Data and Computer Software other than SBIR Data.*

(A) The standard license rights granted to the Government under paragraphs (b)(1) through (b)(3) and (b)(5) of this clause (including the period during which the Government shall have Government purpose rights) may be modified only by mutual written agreement.

(B) If either party desires to negotiate specialized license rights in technical data or computer software, the other party agrees to enter into negotiations for transferring such rights.

(iii) However, in no event may the negotiated license provide the Government lesser rights than limited rights in technical data, or restricted rights in computer software.

(iv) Any license rights negotiated under this paragraph shall be identified in a license agreement attached to this contract.

(7) *Prior Government rights.* Technical data, including computer software documentation, or computer software that will be delivered or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to access, use, modify, release, perform, display, or disclose the technical data or computer software have expired or no longer apply.

(8) *Rights in derivative computer software or computer software documentation.* The Government shall retain its rights in the unchanged portions of any technical data and computer software delivered or otherwise provided under this contract that the Contractor uses to prepare, or includes in, derivative technical data or computer software.

(c) *Contractor rights in technical data or computer software.* The Contractor retains all intellectual property rights for technical data and computer software (including ownership) developed under this contract except those granted to the Government as specified under paragraph (b) of this clause.

(d) *Third party copyrighted technical data and computer software.* (1) The Contractor shall not incorporate any third party copyrighted technical data or computer software in the technical data or computer software to be delivered or otherwise provided under this contract unless—

(i) The Contractor has obtained, for the Government the license rights necessary to perfect a license or licenses in the deliverable technical data or computer software of the appropriate scope set forth in paragraph (b) of this clause; or

(ii) The Contracting Officer has granted specific written approval to do so.

(2) The Contractor shall ensure that any such license rights obtained from third parties and granted to the Government are identified and asserted pursuant to paragraph (f) of this clause, and such technical data and computer software are appropriately marked pursuant to paragraph (g) of this clause.

(e) *Release from liability.*

(1) The Contractor agrees that the Government, and other persons to whom the Government may have released or disclosed technical data or computer software delivered or otherwise provided under this contract, shall have no liability for any release or disclosure of technical data or computer software that are not marked to indicate that these technical data or computer software are licensed data subject to access, use, modification, reproduction, release, performance, display, or disclosure restrictions.

(2) In the event that an authorized recipient of technical data or computer software delivered or otherwise provided to the Government under this contract engages in any unauthorized activities with such technical data or computer software, the Contractor agrees to—

(i) Release the Government from liability for any release or disclosure of technical data or computer software made in accordance with the Government's license rights granted pursuant to paragraph (b) of this clause; and

(ii) Seek relief solely from the party who has improperly accessed, used, modified, reproduced, released, performed, displayed, or disclosed Contractor data marked with restrictive legends.

(f) *Identification and delivery of technical data or computer software to be provided with restrictions.* The Contractor shall not deliver or otherwise provide any technical data or computer software with restrictive markings unless the technical data or computer software are listed in an Attachment to this contract in accordance with—

(1) The provision at DFARS 252.227–7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software; and

(2) The clause at DFARS 252.227–7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software.

(g) *Marking requirements.* The Contractor, and its subcontractors or suppliers, shall assert restrictions on the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software to be delivered or otherwise provided under this contract only by marking the deliverable that is subject to restriction.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark all technical data and computer software with the appropriate legends.

(i) The authorized legends shall be placed on each page of the printed material or media containing the computer software or the transmittal document or storage container to which the restrictions apply. If only portions of a page are subject to the asserted restrictions, the Contractor shall identify the restricted portions (*e.g.,* by circling or underscoring with a note or other appropriate identifier).

(ii) Technical data or computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions.

(iii) The Contractor shall not use instructions that interfere with or delay the operation of the computer program in order to display an authorized legend in computer software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such computer software has been obtained prior to delivery.

(iv) Reproductions of technical data or computer software, or any portions thereof, subject to asserted restrictions shall also include the asserted restrictions.

(2) *Unlimited rights markings.* Technical data or computer software that is delivered or otherwise provided to the Government with unlimited rights, and that is marked with a copyright legend prescribed under 17 U.S.C. 401 or 402, shall also be marked as follows:

The U.S. Government has Unlimited Rights in this technical data or computer software pursuant to the clause at DFARS 252.227–7018. Any reproduction of technical data or computer software, or portions thereof, marked with this legend must also reproduce these markings.
(End of legend)

(3) *SBIR data rights markings.* Technical data or computer software that is delivered or otherwise provided to the Government with SBIR data rights shall be marked with the following legend:

SBIR DATA RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the protection period described at paragraph (b)(5) of the Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause contained in the above identified contract. The Government has unlimited rights after the expiration of the protection period. Any reproduction of technical data, computer software or portions thereof marked with this legend must also reproduce the markings.
(End of legend)

(4) *Limited rights markings.* Technical data delivered or otherwise provided to the Government with limited rights shall be marked with the following legend:

LIMITED RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

_____

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the Rights in Technical

Data and Computer Software—Small Business Innovative Research (SBIR) Program clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such technical data shall promptly notify the above named Contractor.
(End of legend)

(5) *Restricted rights markings.* Computer software delivered or otherwise provided to the Government with restricted rights shall be marked with the following legend:

RESTRICTED RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

(End of legend)

(6) *Negotiated license rights markings.*

(i) Except as provided in paragraph (g)(6)(ii) of this clause, technical data or computer software in which the Government's rights stem from a negotiated license shall be marked with the following legend:

NEGOTIATED LICENSE RIGHTS

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose this technical data or computer software are restricted by Contract No. _____(Insert contract number)____, License No. ____(Insert license identifier)____. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.
(End of legend)

(ii) For purposes of marking, negotiated licenses do not include Government purpose license rights acquired under a prior contract (see paragraph (b)(7) of this clause).

(7) *Pre-existing data markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights in technical data or computer software, the Contractor may mark such technical data or computer software with the appropriate restrictive legend in accordance with the marking procedures in paragraph (g)(1) of this clause.

(8) Except as provided in paragraph (g)(7) of this clause, only the following legends are authorized under this contract:

(i) The SBIR data rights legend at paragraph (g)(3) of this clause.

(ii) The limited rights legend at paragraph (g)(4) of this clause.

(iii) The restricted rights legend at paragraph (g)(5) of this clause, or the negotiated license rights legend at paragraph (g)(6) of this clause.

(iv) A notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(h) *Contractor procedures and records.* Throughout performance of this contract, the Contractor, and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, shall—

(1) Assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(i) *Removal of unjustified and nonconforming markings.*

(1) Unjustified technical data or computer software markings. The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software provided or to be provided under this contract are contained in the clause at 252.227–7037. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if a restrictive marking is determined to be unjustified.

(2) Nonconforming technical data or computer software markings. A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise provided to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the clause at 252.227–7037. If the Contracting Officer notifies the Contractor of a nonconforming marking and the Contractor fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(j) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(k) *Applicability to subcontractors or suppliers.*

(1) The Contractor shall assure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, 15 U.S.C. 638, and the identification, assertion, and delivery processes required by paragraph (f) of this clause are recognized and protected.

(2) Whenever any technical data or computer software is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall—

(i) Use—

(A) This same clause in the subcontract or other contractual instrument with a small business concern for SBIR data; or

(B) The appropriate clause prescribed at DFARS 227.7104–8 with other than a small business concern, or for commercial or other non SBIR data; and

(ii) Require its subcontractors or suppliers to do so at all tiers, without alteration, except to identify the parties as follows:

(A) References to the Government are not changed.

(B) The subcontractor or supplier has all rights and obligations of the contractor in the clause; and

(iii) If the clause used with a subcontractor or supplier is not a clause that is used in the prime contract (or higher-tier subcontract), the Contractor shall notify the Government of the use of the clause and, if appropriate pursuant to DFARS 227.7104–8(d), the Contracting Officer will modify the prime contract to include the new clause.

(3) No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software.

(4) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher-tier Contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for technical data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such technical data directly to the Government, rather than through a higher-tier contractor, subcontractor, or supplier.

(5) The Contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data or computer software from their subcontractors or suppliers.

(6) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data or computer software as an excuse for failing to satisfy its contractual obligation to the Government.

(End of clause)

ALTERNATE I (DATE)

As prescribed in 227.7104–8(b)(2), add the following paragraph (l) to the basic clause:

(l) *Publication for sale.*

(1) This paragraph applies only to technical data or computer software delivered to the Government with SBIR data rights.

(2) Upon expiration of the SBIR data rights, the Government will not exercise its right to publish or authorize others to publish an item of technical data or computer software identified in this contract as being subject to paragraph (l) of this clause if the Contractor, prior to the expiration of the SBIR data rights, or within two years following delivery of the technical data or computer software, or within two years following the removal of any national security or export control restrictions, whichever is later, publishes such technical data or computer software and promptly notifies the Contracting Officer in writing of such publication(s). Any such publication(s) shall include a notice identifying the number of this contract and the Government's rights in the published data.

(3) This limitation on the Government's right to publish for sale shall continue as long as the technical data or computer software are reasonably available to the public for purchase.

23. Section 252.227–7015 is revised to read as follows:

252.227–7015 Rights in technical data and computer software—commercial.

As prescribed in 227.7104–8(c), use the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE—COMMERCIAL (DATE)

(a) *Definitions.* As used in this clause—

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer databases or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *Form, fit, and function data* means technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(8) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data. (See 10 U.S.C. 2302(4)).

(9) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Government rights.* The Government shall have the following license rights in commercial computer software, commercial computer software documentation, and technical data relating to a commercial item that is delivered under this contract:

(1) *Standard commercial license rights.* Except as provided in paragraphs (b)(2) through (b)(4) of this clause, the Government shall have the same rights as those in the standard commercial license customarily provided to the public unless such rights are inconsistent with Federal procurement law. Any portions of the standard commercial license that are inconsistent with Federal procurement law shall be considered stricken from the license and the remaining portions of the license shall remain in effect. The parties will promptly enter into negotiations to resolve any issues raised by the elimination of license terms or conditions that are inconsistent with Federal procurement law. The resulting license shall be attached to the contract.

(2) *Government right to require up to unlimited rights in certain types of technical data.* Notwithstanding paragraph (b)(1) of this clause, the Government shall have the right to require the Contractor to grant additional rights (up to and including unlimited rights) pursuant to paragraph (b)(4) of this clause, in technical data that—

(i) Have been provided to the Government or others without restrictions on—

(A) Further disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party; or

(B) The sale or transfer of some or all of a business entity or its assets to another party;

(ii) Are form, fit, and function data;

(iii) Are a correction or change to technical data furnished to the Contractor by the Government;

(iv) Are necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or

(v) Have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired the rights to access, use, modify, reproduce, release, perform, display, or disclose the data without restrictions.

(3) *Government's minimum rights in technical data.* Notwithstanding any limitations in the standard commercial license granted by paragraph (b)(1) of this clause, the Government may access, use, modify, reproduce, release, perform, display, or disclose commercial technical data (including computer software documentation) within the Government. However, unless specifically authorized by the commercial license granted under paragraph (b)(1) of this clause or a negotiated license under paragraph (b)(4) of this clause, the Government shall not—

(i) Use the technical data to manufacture additional quantities of the commercial items; or

(ii) Release, perform, display, disclose, or authorize access or use of the technical data outside the Government without the Contractor's written permission unless—

(A) The release, disclosure or permitted access or use is—

(*1*) Necessary for emergency repair or overhaul of the commercial items delivered or otherwise provided under this contract; or

(*2*) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or access or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes;

(B) Prior to the release or disclosure, the intended recipient—

(*1*) Has executed the use and non-disclosure agreement at 227.7107–2, with its required attachment(s); or

(*2*) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause; and

(C) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, access, or use.

(4) *Negotiated license rights.*

(i) Except as permitted by paragraph (b)(4)(ii) of this clause, the standard license rights granted to the Government under paragraphs (b)(1) through (b)(3) of this clause may be modified only by mutual written agreement.

(ii) For the types of data covered by paragraph (b)(2) of this clause, the Government may require the Contractor to grant the Government license rights up to and including unlimited rights; however, if the Government requires such additional rights under this paragraph, the Contractor shall be entitled to reasonable compensation for granting any rights in addition to those provided in the Contractor's standard commercial license. In all other cases, if either party desires to negotiate specialized license rights in technical data or computer software, the other party agrees to enter into negotiations.

(iii) However, in no event may the negotiated license provide the Government lesser rights than specified at paragraph (b)(3) of this clause.

(iv) Any license rights negotiated under this paragraph of the clause shall be identified in a license agreement attached to this contract.

(c) *Contractor Rights.* The Contractor retains all intellectual property rights (including ownership) not granted to the Government in paragraph (b) of this clause.

(d) *Restrictive Markings and Notices Required.* All commercial technical data and commercial computer software to be delivered or otherwise provided to the Government with restrictions are—

(1) Identified in an attachment to this contract, in accordance with—

(i) The provision at DFARS 252.227–7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software; and

(ii) The clause at DFARS 252.227–7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software; and

(2) Marked to indicate that these technical data or computer software are licensed

subject to access, use, modification, reproduction, release, performance, display, or disclosure restrictions. The form of the marking or notice must be consistent with best commercial practices, and must accurately describe the Government's rights. Validation of the marking is governed by DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data and Computer Software.

(e) *Release from liability.*

(1) The Contractor agrees that the Government, and other persons to whom the Government may have released or disclosed technical data or computer software delivered or otherwise furnished under this contract, shall have no liability for any release or disclosure of technical data or computer software that are not marked to indicate that these technical data or computer software are licensed data subject to use, modification, reproduction, release, performance, display, or disclosure restrictions.

(2) In the event that an authorized recipient of technical data or computer software delivered or otherwise provided to the Government under this contract engages in any unauthorized activities with such technical data or computer software, the Contractor agrees to—

(i) Release the Government from liability for any release or disclosure of technical data or computer software made in accordance with the Government's license rights granted pursuant to paragraph (b) of this clause; and

(ii) Seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor data marked with restrictive legends.

(f) *Applicability to subcontractors or suppliers.*

(1) The Contractor shall recognize and protect the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes of paragraph (d) of this clause.

(2) Whenever any technical data or computer software will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause (or other appropriate clause(s) prescribed at DFARS 227.7104–8) in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(i) References to the Government are not changed.

(ii) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(3) If the clause used with a subcontractor or supplier is not a clause that is used in the prime contract (or higher-tier subcontract), the Contractor shall notify the Government of the use of the clause and, if appropriate pursuant to DFARS 227.7104–8(d), the Contracting Officer will modify the prime contract to include the new clause.

(End of clause)

ALTERNATE I (DATE)

As prescribed in 227.7104–8(c)(2), add the following paragraphs (a)(10) and (b)(5) to the basic clause:

(a)(10) *Vessel design* means the design of a vessel, boat, or craft, and its components, including the hull, decks, superstructure, and the exterior surface shape of all external shipboard equipment and systems. The term includes designs covered by 10 U.S.C. 7317, and designs protectable under 17 U.S.C. 1301, *et seq.*

(b)(5) *Vessel designs.* For a vessel design (including a vessel design embodied in a useful article) that is developed or delivered under this contract, the Government shall have the right to make and have made any useful article that embodies the vessel design, to import the article, to sell the article, and to distribute the article for sale or to use the article in trade, to the same extent that the Government is granted rights in the technical data pertaining to the vessel design.

24. Section 252.227–7016 is revised to read as follows:

252.227–7016 Rights in bid or proposal information.

As prescribed in 227.7105–3(a), use the following clause:

RIGHTS IN BID OR PROPOSAL INFORMATION (DATE)

(a) *Definitions.* As used in this clause—

(1) *Offeror* includes an offeror's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(2) *Computer software* and *technical data* are defined in the following clause(s) contained in this solicitation:

(i) 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial;

(ii) 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program; or

(iii) 252.227–7015, Rights in Technical Data and Computer Software—Commercial

(b) *Government rights prior to contract award.* By submission of its offer, the offeror agrees that the Government—

(1) May reproduce the bid or proposal, or any portions thereof, to the extent necessary to evaluate the offer.

(2) Except as provided in paragraph (d) of this clause, shall use information contained in the bid or proposal only for evaluational purposes and shall not disclose, directly or indirectly, such information to any person including potential evaluators, unless that person has been authorized by the head of the agency, his or her designee, or the Contracting Officer to receive such information.

(c) *Government rights subsequent to contract award.* The Contractor agrees—

(1) Except as provided in paragraphs (c)(2), (d), and (e) of this clause, the Government shall have the rights to access, use, modify, reproduce, release, perform, display, or disclose information contained in the Contractor's bid or proposal within the Government. The Government shall not release, perform, display, or disclose such information outside the Government without the Contractor's written permission.

(2) The Government's right to access, use, modify, reproduce, release, perform, display, or disclose information that is technical data or computer software required to be delivered under this contract are determined by the Rights in Technical Data and Computer Software—Noncommercial, Rights in Technical Data and Computer—Commercial, or Rights in Technical Data and Computer Software–Small Business Innovative Research (SBIR) Program clause(s) of this contract.

(d) *Government-furnished information.* The Government's rights with respect to technical data or computer software contained in the Contractor's bid or proposal that were provided to the Contractor by the Government are subject only to restrictions on access, use, modification, reproduction, release, performance, display, or disclosure, if any, imposed by the developer or licensor of such technical data or computer software.

(e) *Information available without restrictions.* The Government's rights to access, use, modify, reproduce, release, perform, display, or, disclose information contained in a bid or proposal, including technical data or computer software, and to permit others to do so, shall not be restricted in any manner if such information has been released or disclosed to the Government or to other persons without restrictions other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the information to another party or the sale or transfer of some or all of a business entity or its assets to another party.

(f) *Flowdown.* The Contractor shall include this clause in all subcontracts or similar contractual instruments and require its subcontractors or suppliers to do so without alteration, except to identify the parties as follows:

(1) References to the Government are not changed; and

(2) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(End of clause)

25. Section 252.227–7017 is revised to read as follows:

252.227–7017 Pre-award identification and assertion of license restrictions—technical data and computer software.

As prescribed in 227.7105–3(b), use the following provision:

PRE-AWARD IDENTIFICATION AND ASSERTION OF LICENSE RESTRICTIONS—TECHNICAL DATA AND COMPUTER SOFTWARE (DATE)

(a) *Definitions.* As used in this provision—

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or database means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be complied to generate a computer program. The term does not include computer database or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *Developed* means that—

(i) An item or process exists and is workable. Workability is generally established when the item or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item or process, and the state of the art. To be considered "developed," the item or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

(ii) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(iii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the computer software can reasonably be expected to perform its intended purpose; or

(iv) Computer software user's documentation required to be delivered or otherwise provided under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(8) *Developed exclusively at private expense* means development was accomplished entirely with costs not paid or reimbursed by the Government, or costs paid or reimbursed by the Government through indirect cost pools, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at Government, private, or mixed expense.

(9) *Government purpose* means any activity in which the United States Government is a party.

(i) The term includes competitive procurement and any agreements or contracts with, or sales or transfers to, international or multi-national defense organizations or foreign governments.

(ii) The term does not include the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or to authorize others to do so.

(10) *Government purpose rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose that data for Government purposes. However, the Government shall not release or disclose the technical data or computer software outside the Government unless—

(A) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient has executed the non-disclosure agreement at 227.7107–2 with its required attachments; or

(B) The recipient is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachments required by that clause.

(11) *Limited rights* means the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be accessed or used by another party, unless—

(i) The reproduction, release, disclosure, access, or use is—

(A) Necessary for emergency repair and overhaul;

(B) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or access or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes; or

(C) A release or disclosure of computer software design documentation to, or access by, a contractor or subcontractor performing a service contract (*see* 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use such computer software documentation to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations or for emergency repair or overhaul of items or processes;

(ii) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient—

(A) Has executed the use and non-disclosure agreements at 227.7107–2, with its required attachment(s); or

(B) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(iii) The recipient for emergency repair or overhaul is required to destroy the technical data and all copies in its possession promptly following completion of the emergency repair or overhaul, and to notify the Contractor that the data or computer software have been destroyed; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, access, or use.

(12) *Noncommercial computer software* means computer software that does not qualify as commercial computer software.

(13) *Noncommercial technical data* means technical data that does not qualify as commercial technical data.

(14) *Offeror* includes an offeror's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(15) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Install and use computer software on one computer at a time. The computer software may not be time shared or accessed by more than one terminal or central processing unit unless otherwise permitted by this contract;

(ii) Transfer computer software within the Government without further permission of the Contractor so long as the transferred computer software remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified computer software only as provided in paragraphs (a)(18)(i) and (iii) of this clause; and

(B) Not release or disclose the modified computer software except as provided in paragraphs (a)(18)(ii), (v), and (vi) of this clause;

(v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with,

adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations or for emergency repair or overhaul of items or processes, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors—

(*1*) Have executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(*2*) Are Government contractors receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitation in paragraph (a)(18)(i) of this clause; and

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient—

(*1*) Has executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(*2*) Is a Government contractor receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025, and the attachments required by that clause;

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(C) The Government shall require a recipient of restricted rights computer software for emergency repair or overhaul to destroy any copies of the computer software in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the computer software has been destroyed.

(16) *SBIR data* means all—

(i) Technical data—

(A) Pertaining to items or processes developed under a Small Business Innovation Research (SBIR) award; or

(B) Created under a SBIR award that does not require the development of items or processes; and

(ii) Computer software developed under a SBIR award.

(17) *SBIR data rights* mean the Government's rights during the SBIR data protection period (specified at 252.227–7014(b)(5)(ii)) to access, use, modify, reproduce, release, perform, display, or disclose SBIR data as follows:

(i) Limited rights in SBIR data that is technical data; and

(ii) Restricted rights in SBIR data that is computer software.

(18) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(19) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Scope.* The identification and assertion requirements in this provision apply only to technical data and computer software to be delivered or otherwise provided with other than unlimited rights.

(c) *Pre-award identification.* Offers submitted in response to this solicitation shall identify—all technical data or computer software that the offeror asserts will be delivered or otherwise provided to the Government with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure. The offeror's pre-award identification shall be submitted as an attachment to its offer and shall contain the following information:

(1) *Title.* Place the following title at the top of the first page of the attachment: "PRE–AWARD IDENTIFICATION AND ASSERTION OF LICENSE RESTRICTIONS—TECHNICAL DATA AND COMPUTER SOFTWARE."

(2) *Statement of Assertion.* Include the following statement: "The offeror asserts for itself, or the persons identified in paragraph (4)(iv) of this attachment, that the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose only the following technical data or computer software should be restricted:"

(3) *Identification of the technical data or computer software to be delivered or otherwise provided with restrictions.* For technical data (other than computer software documentation) pertaining to items or processes, identify both the deliverable technical data and each such item or process as specifically as possible (*e.g.,* by referencing specific sections of the proposal, data item numbers or item numbers, or specific technology or components). For computer software or computer software documentation, identify the software or documentation by specific name or module or item number. The offeror must identify all technical data or computer software that it asserts or anticipates will be delivered or otherwise provided with restrictions, including cases in which the offeror is unable to provide a complete listing of the detailed information required by paragraph (c)(4) of this provision (*e.g.,* when the specific restrictions or identity of the entity asserting restrictions is not yet known).

(4) *Detailed description of the asserted restrictions.* For each of the technical data or computer software identified above in paragraph (c)(3) of this provision, identify the following information:

(i) Asserted rights. Identify the asserted rights category for the technical data or computer software as specified in paragraph (b) of the applicable clauses.

(A) For noncommercial technical data or noncommercial computer software, the applicable clause(s) are at DFARS 252.227–7013, Rights in Technical Data and Computer Software–Noncommercial, or DFARS 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program (*e.g.,* Government purpose rights; limited rights; restricted rights; negotiated licenses; or rights under prior Government contracts, including SBIR data rights for which the protection period has not expired); and

(B) For commercial technical data or computer software, the applicable clause is at 252.227–7015, Rights in Technical Data and Computer Software—Commercial. (*e.g.,* a standard commercial license, a negotiated license, or the Government's minimum rights in or technical data).

(ii) *Copies of negotiated, commercial, and other non-standard licenses.* The offeror shall attach to its offer for each listed item copies of all proposed negotiated license(s), the offeror's standard commercial license(s), and any other asserted restrictions other than Government purpose rights; limited rights; restricted rights; rights under prior Government contracts, including SBIR data rights for which the protection period has not expired; or Government's minimum rights as specified in the clause at 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

(iii) *Specific basis for assertion.* Identify the specific basis for the assertion. For example:

(A) Development at private expense, either exclusively or partially. For technical data, development refers to development of the item or process to which the data pertains (see paragraphs (a)(8) through (a)(11) of the clause at DFARS 252.227–7013). For computer software, development refers to the development of the computer software (see paragraphs (a)(8) through (a)(11) of the clause at DFARS 252.227–7013). Indicate whether development was accomplished exclusively or partially at private expense.

(B) Rights under a prior Government contract, including SBIR data rights for which the protection period has not expired (see paragraphs (a)(7) through (a)(8) of the clause at DFARS 252.227–7014 and paragraph (c)(4)(v) of this provision).

(C) Standard commercial license customarily provided to the public (see paragraph (b)(1) of the clause at DFARS 252.227–7015).

(D) Negotiated license rights (see paragraph (c)(4)(ii) of this provision).

(iv) *Entity asserting restrictions.* Identify the corporation, partnership, individual, or other person, as appropriate, asserting the restrictions.

(v) *Previously delivered technical data or computer software.* The offeror shall identify the technical data or computer software that are identical or substantially similar to

technical data or computer software that the offeror has produced for, delivered to, or is obligated to deliver or otherwise provide to the Government under any other contract or subcontract. The offeror need not identify commercial technical data or computer software that were, or will be, delivered or otherwise provided subject to a standard commercial license.

(5) *Signature(s).* The attachment must—

(i) Be signed and dated by—

(A) An official authorized to contractually obligate the offeror; and

(B) An official authorized to obligate each entity or person identified above in paragraph (4)(iv) of this attachment, except that no signature is required under this paragraph (B) when the item being provided is commercial technical data or commercial computer software and is being offered with the standard commercial license rights.

(ii) Include the printed name and title of each official.

(d) *Supplemental information.* When requested by the Contracting Officer, the offeror shall provide sufficient information to enable the Contracting Officer to evaluate the offeror's assertions. Sufficient information should include, but is not limited to, the following:

(1) The contract number under which the technical data or computer software were produced;

(2) The contract number under which, and the name and address of the organization to whom, the technical data or computer software were most recently delivered or will be delivered; and

(3) Identification of the expiration date for any limitations on the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose the technical data or computer software, when applicable.

(e) *Ineligibility for award.* An offeror's failure to submit, complete, or sign the identifications and assertions required by paragraph (c) of this provision with its offer may render the offer ineligible for award.

(f) *Award.* If the offeror is awarded the contract, the Contracting Officer will attach the offeror's list of assertions to the resulting contract.

(g) *Post-award amendment of assertions.* After contract award, amendments to the offeror's assertions may only be accomplished in accordance with the clause at 252.227–7018 Post-Award Identification and Assertion of License Restrictions–Technical Data and Computer Software. Alternatively, a modified list of assertions may be included by mutual agreement.

(h) *Applicability to subcontractors and suppliers.* Whenever any technical data or computer software will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the offeror shall use this same provision in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(1) References to the Government are not changed; and

(2) The subcontractor or supplier has all rights and obligations of the offeror in the provision.

(End of provision)

26. Section 252.227–7018 is revised to read as follows:

252.227–7018 Post-award identification and assertion of license restrictions—technical data and computer software.

As prescribed in 227.7105–3(c), use the following clause:

POST-AWARD IDENTIFICATION AND ASSERTION OF LICENSE RESTRICTIONS—TECHNICAL DATA AND COMPUTER SOFTWARE (DATE)

(a) *Definitions.* As used in this clause—

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be complied to generate a computer program. The term does not include computer database or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *Contractor* includes the Contractor's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(8) *Developed* means that—

(i) An item or process exists and is workable. Workability is generally established when the item or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item or process, and the state of the art. To be considered *developed,* the item or process need not be at the stage where it could be offered for sale or sold on the commercial market, or must the item or process be actually reduced to practice within the meaning of title 35 of the United States Code.

(ii) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(iii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the computer software can reasonably be expected to perform its intended purpose; or

(iv) Computer software user's documentation required to be delivered or otherwise provided under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(9) *Developed exclusively at private expense* means development was accomplished entirely with costs not paid or reimbursed by the Government, or costs paid or reimbursed by the Government through indirect cost pools, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at Government, private, or mixed expense.

(10) *Government purpose* means any activity in which the United States Government is a party.

(i) The term includes competitive procurement and any agreements or contracts with, or sales or transfers to, international or multi-national defense organizations or foreign governments.

(ii) The term does not include the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or to authorize others to do so.

(11) *Government purpose rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose that data for Government purposes. However, the Government shall not release or disclose the technical data or computer software outside the Government unless—

(A) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient has executed the non-disclosure agreement at 227.7107–2 with its required attachments; or

(B) The recipient is a Government contractor receiving access to the technical

data or computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachments required by that clause.

(12) *Limited rights* means the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be accessed or used by another party, unless—

(i) The reproduction, release, disclosure, access, or use is—

(A) Necessary for emergency repair and overhaul;

(B) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or access or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes; or

(C) A release or disclosure of computer software design documentation to, or access by, a contractor or subcontractor performing a service contract (*see* 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use such computer software documentation to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations or for emergency repair or overhaul of items or processes;

(ii) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient—

(A) Has executed the use and non-disclosure agreements at 227.7107–2, with its required attachment(s); or

(B) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(iii) The recipient for emergency repair or overhaul is required to destroy the technical data and all copies in its possession promptly following completion of the emergency repair or overhaul, and to notify the Contractor that the data or computer software have been destroyed; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, access, or use.

(13) *Noncommercial computer software* means computer software that does not qualify as commercial computer software.

(14) *Noncommercial technical data* means technical data that does not qualify as commercial technical data.

(15) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Install and use computer software on one computer at a time. The computer software may not be time shared or accessed by more than one terminal or central processing unit unless otherwise permitted by this contract;

(ii) Transfer computer software within the Government without further permission of the Contractor so long as the transferred computer software remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified computer software only as provided in paragraphs (a)(18)(i) and (iii) of this clause; and

(B) Not release or disclose the modified computer software except as provided in paragraphs (a)(18)(ii), (v), and (vi) of this clause;

(v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations or for emergency repair or overhaul of items or processes, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors—

(*1*) Have executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(*2*) Are Government contractors receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitation in paragraph (a)(18)(i) of this clause; and

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient—

(*1*) Has executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(*2*) Is a Government contractor receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025, and the attachments required by that clause;

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(C) The Government shall require a recipient of restricted rights computer software for emergency repair or overhaul to destroy any copies of the computer software in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the computer software has been destroyed.

(16) *SBIR data* means all—

(i) Technical data—

(A) Pertaining to items or processes developed under a Small Business Innovation Research (SBIR) award; or

(B) Created under a SBIR award that does not require the development of items or processes; and

(ii) Computer software developed under a SBIR award.

(17) *SBIR data rights* mean the Government's rights during the SBIR data protection period (specified at 252.227–7014(b)(5)(ii)) to access, use, modify, reproduce, release, perform, display, or disclose SBIR data as follows:

(i) Limited rights in SBIR data that is technical data; and

(ii) Restricted rights in SBIR data that is computer software.

(18) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(19) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Scope.* The identification and assertion requirements in this clause apply only to technical data and computer software to be delivered with other than unlimited rights.

(c) *Pre-award assertion list.* This contract contains the list of all deliverable technical data or computer software that the Contractor asserted should be delivered or otherwise provided to the Government with restrictions pursuant to the provision at *252.227–7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software.*

(d) *Restrictions on delivery.* Except as permitted by paragraph (e) of this clause, Contractors shall not deliver or otherwise provide any technical data or computer software with restrictive markings unless the technical data or computer software is identified in the list of assertions referenced in paragraph (c) of this clause.

(e) *Post-award assertions.*

(1) Post-award assertions may be identified after award only when based on—

(i) New information; or

(ii) Inadvertent omissions, unless the inadvertent omissions would have materially affected the source selection decision.

(2) The post-award identification and assertion shall be submitted to the

Contracting Officer as soon as practicable and shall be prior to the scheduled date for delivery of the technical data or computer software.

(f) *Form of contractor's post-award assertions.* Contractor's post-award assertions shall be submitted as identifications in a separate attachment. A pre-award identification may be submitted as a post-award identification only if the pre-award identification is being amended. Contractor's post-award identification shall contain the following information:

(1) *Title.* Place the following title at the top of the first page of the attachment: "POST-AWARD IDENTIFICATION AND ASSERTION OF LICENSE RESTRICTIONS—TECHNICAL DATA AND COMPUTER SOFTWARE."

(2) *Statement of Assertion.* Include the following statement(s): "The Contractor asserts for itself, or the persons identified in paragraph (4)(iv) of this clause, that the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose only the following technical data or computer software should be restricted:"

(3) *Identification of the technical data or computer software to be delivered or otherwise provided with restrictions.* For technical data (other than computer software documentation) pertaining to items or processes, identify both the deliverable technical data and each such item or process as specifically as possible (*e.g.,* by referencing specific sections of the proposal, data item numbers or item numbers, or specific technology or components). For computer software or computer software documentation, identify the computer software or computer software documentation by specific name or module or item number. The Contractor must identify all technical data or computer software that it asserts or anticipates will be delivered or otherwise provided with restrictions, including cases in which the Contractor is unable to provide a complete listing of the detailed information required by paragraph (f)(4) of this clause (*e.g.,* when the specific restrictions or identity of the entity asserting restrictions is not yet known).

(4) *Detailed description of the asserted restrictions.* For each of the technical data or computer software identified above in paragraph (3) of this clause, identify the following information:

(i) *Asserted rights.* Identify the asserted rights category for the technical data or computer software as specified in paragraph (b) of the applicable clauses.

(A) For noncommercial technical data or noncommercial computer software, the applicable clause(s) are at DFARS 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial, or DFARS 252.227–7014, Rights in Technical Data and Computer Software–Small Business Innovation Research (SBIR) Program (*e.g.,* Government purpose rights; limited rights; restricted rights; negotiated licenses; or rights under prior Government contracts, including SBIR data rights for which the protection period has not expired); and

(B) For commercial technical data or computer software, the applicable clause is at 252.227–7015, Rights in Technical Data and Computer Software—Commercial (*e.g.,* a standard commercial license, a negotiated license, or the Government's minimum rights in technical data).

(ii) *Copies of negotiated, commercial, and other non-standard licenses.* Contractor shall provide copies of all proposed negotiated license(s), Contractor's standard commercial license(s), and any other asserted restrictions other than Government purpose rights; limited rights; restricted rights; rights under prior Government contracts, including SBIR data rights for which the protection period has not expired; or Government's minimum rights as specified in the clause at 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

(iii) *Specific basis for assertion.* Identify the specific basis for the assertion. For example:

(A) Development at private expense, either exclusively or partially. For technical data, development refers to development of the item or process to which the data pertains (see paragraphs (a)(8) through (a)(11) of the clause at DFARS 252.227–7013). For computer software, development refers to the development of the computer software (see paragraphs (a)(8) through (a)(11) of the clause at DFARS 252.227–7013). Indicate whether development was accomplished exclusively or partially at private expense.

(B) Rights under a prior Government contract, including SBIR data rights for which the protection period has not expired (see paragraphs (a)(7) through (a)(8) of the clause at DFARS 252.227–7014 and paragraph (4)(v) of this clause)

(C) Standard commercial license customarily provided to the public (see paragraph (b)(1) of the clause at DFARS 252.227–7015).

(D) Negotiated license rights (see paragraph (4)(ii) of this clause).

(iv) *Entity asserting restrictions.* Identify the corporation, partnership, individual, or other person, as appropriate, asserting the restrictions.

(v) *Previously delivered technical data or computer software.*

(A) *Identification requirements.* The Contractor shall indicate the technical data or computer software that are identical or substantially similar to technical data or computer software that the Contractor has produced for, delivered to, or is obligated to deliver or otherwise provide to the Government, under any other contract or subcontract.

(B) *Scope.* This requirement applies to—

(*1*) All noncommercial technical data and noncommercial computer software; and

(*2*) Only those commercial technical data and commercial computer software that were, or will be, delivered or otherwise provided are subject to a negotiated license.

(vi) *Amendment or modification of pre-award assertions.* Indicate whether the asserted restrictions amend or affect any of the pre-award assertions on the list specified in paragraph (c) of this clause. If so, specifically identify what information contained within the pre-award assertions is superseded by the amendments or modifications.

(5) *Signature(s).* The list of assertions must—

(i) Be signed and dated by—

(A) An official authorized to contractually obligate the Contractor; and

(B) An official authorized to obligate each entity or person identified in paragraph (4)(iv) of this clause except that no signature is required under this paragraph (B) when the item being provided is commercial technical data or commercial computer software and is being offered with the standard commercial license rights.

(ii) Include the printed name and title of each official.

(g) *Supplemental information.* When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate the Contractor's original and additional assertions. Sufficient information should include, but is not limited to, the following:

(1) The contract number under which the technical data or computer software were produced;

(2) The contract number under which, and the name and address of the organization to whom, the technical data or computer software were most recently delivered or will be delivered; and

(3) Any limitations on the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose the technical data or computer software, including, when applicable, identification of the earliest date the limitations expire.

(h) *Withholding of payment.* A Contractor's failure to submit, complete, or sign the identifications and assertions required by paragraphs (c) and (e) of this clause with its performance may result in a withholding of payment under the clause at 252.227–7030, Technical Data and Computer Software—Withholding of Payment.

(i) *Applicability to subcontractors and suppliers.* Whenever any technical data or computer software will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(1) References to the Government are not changed; and

(2) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(End of clause)

252.227–7019 [Removed and reserved]

27. Section 252.227–7019 is removed and reserved.

28. Section 252.227–7020 is revised to read as follows:

252.227–7020 Rights in works—ownership.

As prescribed in 227.7202–3, use the following clause:

RIGHTS IN WORKS—OWNERSHIP (DATE)

(a) *Definitions.* As used in this clause—

(1) *Architectural works* means the design of a building, a monument, or construction of similar nature as embodied in any tangible medium of expression, including all architectural plans, models, drawings, notes, specifications, and other data pertaining to the design as well as the building, monument, or construction of similar nature.

(2) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(3) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer database or computer software documentation.

(4) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(5) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(6) The term *works*—

(i) Includes the following:

(A) Databases.

(B) Literary works.

(C) Musical works, including any accompanying words.

(D) Dramatic works, including any accompanying music.

(E) Pantomimes and choreographic works.

(F) Pictorial, graphic, and sculptural works.

(G) Motion pictures and other audiovisual works.

(H) Sound recordings.

(I) Architectural works.

(J) Mask works.

(K) Original designs.

(ii) Does not include technical data (including computer software documentation) and computer software.

(b) *Government rights.* The Contractor shall assign to the Government the entire right, title, and interest, including the intellectual property rights (other than patent rights) in—

(1) Works first produced, created, generated, or delivered under this contract to the Government; and

(2) Works not first produced, created, or generated under this contract that are incorporated into a contract deliverable.

(c) *Contractor rights.* The Contractor shall not retain any rights in works first produced, created, generated, or delivered under this contract unless specified in an agreement negotiated in accordance with paragraph (g) of this clause.

(d) *Third party works.* The Contractor shall not incorporate, without the written approval of the Contracting Officer, any third party works, in whole or in part, into the works that are produced, created, generated, or delivered under this contract, unless the Contractor has obtained for the Government the rights set forth in paragraph (b) of this clause.

(e) *Indemnification.* The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents, and employees acting for the Government, against any liability, including costs and expenses:

(1) For violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, access, use, modification, reproduction, release, performance, display, or disclosure of any works first produced, created, generated, or delivered under this contract, or

(2) Based upon any libelous or other unlawful matter contained in such works.

(f) *Marking.* The Contractor, unless directed to the contrary by the Contracting Officer, shall place on works first produced, created, generated, or delivered under this contract the following notice: "(designator(s)) (year of creation) United States Government, as represented by the Secretary of (department). All rights reserved." The designator element of the notice shall indicate all designators appropriate to the work, such as "C" for a copyright work, a "P" for phonorecords, or a "D" for original designs.

(g) *Negotiated rights.* The rights granted to the Government under paragraph (b) of this clause, the Contractor rights under paragraph (c) of this clause, and the requirement for indemnification under paragraph (e) of this clause, may be modified by mutual agreement. Any rights so negotiated shall be identified in a separate license agreement made part of this contract.

(h) *Contractor retention of architectural works.* Unless otherwise specified, for a period of three (3) years after completion of the project, the Contractor shall retain all architectural works and furnish them upon the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of all architectural works beyond this period.

(i) *Applicability to subcontractors or suppliers.* Whenever any works will be first produced, created, generated, or delivered, in whole or in part, by a subcontractor or supplier under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(1) References to the Government are not changed.

(2) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(End of clause)

28. Section 252.227–7021 is revised to read as follows:

252.227–7021 Rights in works license.

As prescribed at 227.7203-3, use the following clause:

RIGHTS IN WORKS-LICENSE (DATE)

(a) *Definitions.* As used in this clause—

(1) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(2) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer database or computer software documentation.

(3) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(4) *Developed* means produced, created, or generated.

(5) *Government purposes* means any activities to which the United States Government is a party.

(6) *Government license rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose works within the Government without restriction; and

(ii) Release or disclose works outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose those works for Government purposes. However, the Government shall not release or disclose works outside the Government unless the recipient is a Government contractor receiving access to the works for performance of a Government contract that contains the clause at DFARS 252.227–70YY.

(7) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration.

Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(8) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose a work in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(9) The term *works*—

(i) Includes the following:

(A) Databases.

(B) Literary works.

(C) Musical works, including any accompanying words.

(D) Dramatic works, including any accompanying music.

(E) Pantomimes and choreographic works.

(F) Pictorial, graphic, and sculptural works.

(G) Motion pictures and other audiovisual works.

(H) Sound recordings.

(I) Architectural works.

(J) Mask works.

(K) Original designs.

(ii) Does not include technical data (including computer software documentation) and computer software.

(b) *Government rights.* The Government shall have the following license rights in a work that is delivered or developed under this contract:

(1) Except as provided in paragraphs (b)(2) and (b)(3) of this clause, the Government shall have the same rights as those in the standard commercial license customarily provided to the public unless such rights are inconsistent with Federal procurement law. Any portions of the standard commercial license that are inconsistent with Federal procurement law shall be considered stricken from the license and the remaining portions of the license shall remain in effect. The parties will promptly enter into negotiations to resolve any issues raised by the elimination of license terms or conditions that are inconsistent with Federal procurement law. The resulting license shall be attached to the contract.

(2) Unlimited rights in all portions of a work that are first developed under the contract that are segregable from any sections of the work developed prior to contract award.

(3) Government license rights in all portions of the work first developed under the contract and that are not segregable from sections of the work that were developed prior to contract award.

(4) Negotiated license rights.

(i) The license rights granted to the Government under paragraphs (b)(1), (b)(2), or (b)(3) of this clause may be modified only by mutual written agreement.

(ii) If the Government desires to obtain rights in a work in addition to those specified in paragraph (b)(1), (b)(2), or (b)(3), the Contractor agrees to enter into good faith negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights.

(iii) Any work in which the Contractor has granted the Government rights under paragraph (b)(3)(ii) of this clause shall be listed or described in a separate license agreement made part of this contract. The license shall enumerate the rights granted the Government.

(c) *Contractor rights.* The Contractor retains all intellectual property rights (including ownership) not granted to the Government in paragraph (b) of this clause.

(d) *Restrictive markings and notices required.* (1) The Contractor shall ensure that any works to be delivered or otherwise provided to the Government with restrictions are marked to indicate that the works are licensed subject to access, use, modification, reproduction, release, performance, display, or disclosure restrictions. The form of the marking or notice must be consistent with best commercial practices, and must accurately describe the Government's rights.

(2) *Government license rights markings.* Works delivered or otherwise furnished to the Government with Government license rights shall be marked as follows:

GOVERNMENT LICENSE RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

_____

Expiration Date _____

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose these works are restricted by paragraph (b)(3) of the Rights in Works—License clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of works or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(e) *Release from liability.*

(1) The Contractor agrees that the Government, and other persons to whom the Government may have released or disclosed a work delivered or otherwise furnished under this contract, shall have no liability for any release or disclosure of the work that is not marked to indicate that the work is licensed subject to access, use, modification, reproduction, release, performance, display, or disclosure restrictions.

(2) In the event that an authorized recipient of a work delivered or otherwise provided to the Government under this contract engages in any unauthorized activities with respect to the work, the Contractor agrees to—

(i) Release the Government from liability for any release or disclosure of the work made in accordance with the Government's license rights granted pursuant to paragraph (b) of this clause; and

(ii) Seek relief solely from the party who has improperly accessed, used, modified, reproduced, released, performed, displayed, or disclosed the work marked with restrictive legends.

(f) *Indemnification.*

(1) The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents and employees acting for the Government, against any liability, including costs and expenses,

(i) For violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, access, use, modification, reproduction, release, performance, display, or disclosure of any works first produced, created or generated under this contract, or

(ii) Based upon any libelous or other unlawful matter contained in such works.

(2) The requirement for indemnification may be modified by mutual agreement. Any rights so negotiated shall be identified in a separate agreement made part of this contract.

(g) *Applicability to subcontractors or suppliers.* Whenever any works will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(1) References to the Government are not changed.

(2) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(End of clause)

30. Section 252.227–7022 is revised to read as follows:

252.227–7022 Government rights in works (unlimited).

As prescribed at 227.7205–2(a), use the following clause:

GOVERNMENT RIGHTS IN WORKS (UNLIMITED) (DATE)

The Government shall have unlimited rights, in all drawings, designs, specifications, notes, and other works developed in the performance of this contract, including the right to use same on any other Government design or construction without additional compensation to the Contractor. The Contractor hereby grants to the Government a paid-up license throughout the world to all such works to which he may assert or establish any claim under copyright laws. The Contractor for a period of three (3) years after completion of the project, agrees to furnish the original or copies of all such works on the request of the Contracting Officer.

(End of clause)

252.227–7023 [Removed and reserved]

31. Section 252.227–7023 is removed and reserved.

32. Section 252.227–7024 is amended by revising the introductory text of the clause to read as follows:

252.227–7024 Notice and approval of restricted designs.

As prescribed at 227.7205–2(b), use the following clause:

* * * * *

33. Section 252.227–7025 is revised to read as follows:

252.227–7025 Government-furnished information marked with restrictive legends.

As prescribed in 227.7107–4, use the following clause:

GOVERNMENT-FURNISHED INFORMATION MARKED WITH RESTRICTIVE LEGENDS (DATE)

(a) *Definitions.* As used in this clause—

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer database or computer software documentation.

(6) *Computer software* documentation means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *Contractor* includes the Contractor's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(8) *Government purpose* means any activity in which the United States Government is a party.

(i) The term includes competitive procurement and any agreements or contracts with, or sales or transfers to, international or multi-national defense organizations or foreign governments.

(ii) The term does not include the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or to authorize others to do so.

(9) *Government purpose rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose that data for Government purposes. However, the Government shall not release or disclose the technical data or computer software outside the Government unless—

(A) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient has executed the non-disclosure agreement at 227.7107–2 with its required attachments; or

(B) The recipient is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachments required by that clause.

(10) *Limited rights* means the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be accessed or used by another party, unless—

(i) The reproduction, release, disclosure, access, or use is—

(A) Necessary for emergency repair and overhaul;

(B) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or access or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes; or

(C) A release or disclosure of computer software design documentation to, or access by, a contractor or subcontractor performing a service contract (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use such computer software documentation to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations or for emergency repair or overhaul of items or processes;

(ii) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient—

(A) Has executed the use and non-disclosure agreements at 227.7107–2, with its required attachment(s); or

(B) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(iii) The recipient for emergency repair or overhaul is required to destroy the technical data and all copies in its possession promptly following completion of the emergency repair or overhaul, and to notify the Contractor that the data or computer software have been destroyed; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, access, or use.

(11) *Noncommercial computer software* means computer software that does not qualify as commercial computer software.

(12) *Noncommercial technical data* means technical data that does not qualify as commercial technical data.

(13) *Owner-Licensor* means the person whose name appears in the restrictive legend or is otherwise identified as asserting restrictions on the access, use, modification, reproduction, release, performance, display, or disclosure of technical data or computer software.

(14) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Install and use computer software on one computer at a time. The computer software may not be time shared or accessed by more than one terminal or central processing unit unless otherwise permitted by this contract;

(ii) Transfer computer software within the Government without further permission of the Contractor so long as the transferred computer software remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified computer software only as provided in paragraphs (a)(18)(i) and (iii) of this clause; and

(B) Not release or disclose the modified computer software except as provided in paragraphs (a)(18)(ii), (v), and (vi) of this clause;

(v) Permit contractors or subcontractors performing service contracts (*see* 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations or for emergency repair or overhaul of items or processes, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors—

(*1*) Have executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(*2*) Are Government contractors receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitation in paragraph (a)(18)(i) of this clause; and

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer

software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient—

(*1*) Has executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(*2*) Is a Government contractor receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025, and the attachments required by that clause;

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(C) The Government shall require a recipient of restricted rights computer software for emergency repair or overhaul to destroy any copies of the computer software in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the computer software has been destroyed.

(15) *SBIR data* means all—

(i) Technical data—

(A) Pertaining to items or processes developed under a Small Business Innovation Research (SBIR) award; or

(B) Created under a SBIR award that does not require the development of items or processes; and

(ii) Computer software developed under a SBIR award.

(16) *SBIR data rights* mean the Government's rights during the SBIR data protection period (specified at 252.227–7014(b)(5)(ii)) to access, use, modify, reproduce, release, perform, display, or disclose SBIR data as follows:

(i) Limited rights in SBIR data that is technical data; and

(ii) Restricted rights in SBIR data that is computer software.

(17) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(18) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Attachment.* An attachment to the contract will identify—

(1) The technical data and computer software that the Government intends to furnish to the Contractor with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure; and

(2) The specific conditions under which the Contractor is authorized to access, use, modify, reproduce, release, perform, display, or disclose the following:

(i) Technical data subject to limited rights;

(ii) Computer software subject to restricted rights;

(iii) SBIR data subject to SBIR data rights; and

(iv) Technical data or computer software subject to—

(A) Negotiated license rights; or

(B) Other license restrictions, including commercial license rights.

(c) *Government-furnished information provided with restrictions.* Technical data or computer software provided to the Contractor as Government-furnished information, under this contract are subject to restrictions on access, use, modification, reproduction, release, performance, display, or disclosure as follows:

(1) *Government-furnished information marked with Government purpose rights legends.* The Contractor shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished information marked with Government purpose rights legends for Government purposes only and shall not do so for any commercial purpose. The Contractor shall not, without the express written permission of the Owner-Licensor, release, perform, display, or disclose such Government-furnished information to, or allow access by, a person other than its subcontractors, suppliers, or prospective subcontractors or suppliers, who require the Government-furnished information to submit offers for, or perform, subcontracts or supplier obligations under this contract. The Contractor shall ensure compliance with paragraph (j) of this clause.

(2) *Government-furnished information (technical data) marked with limited rights legends or SBIR data rights legends.* The Contractor shall access, use, modify, reproduce, release, perform, or display Government-furnished information (technical data) marked with limited rights legends only in the performance of this contract, as specified in the Attachment to this contract.

(i) The Contractor shall not, unless expressly authorized in the Attachment to this contract or by express written permission of the Owner-Licensor, release or disclose such technical data to, or allow access by, any other person. The Contractor shall ensure compliance with paragraph (j) of this clause.

(ii) The Contractor shall promptly notify the Owner-Licensor of the execution of this contract and identify the Owner-Licensor's technical data or computer software that has been or will be provided to the Contractor, the date and place the Government-furnished information were or will be received, and the name and address of the Government office that has provided or will provide the Government-furnished information.

(3) *Government-furnished information (computer software) marked with restricted rights legends or SBIR data rights legends.* The Contractor shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished information (computer software) marked with restricted rights legends only in the performance of this contract, as specified in the Attachment to this contract.

(i) The Contractor shall not, unless expressly authorized in the Attachment to this contract or by express written permission of the Owner-Licensor, release or disclose such Government-furnished information to, or allow access by, any person. The Contractor shall ensure compliance with paragraph (j) of this clause.

(ii) The Recipient shall promptly notify the software Owner-Licensor of the execution of this Agreement and identify the software that has been or will be provided to the Recipient, the date and place the software were or will be received, and the name and address of the Government office that has provided or will provide the software.

(4) *Government-furnished information marked with negotiated license rights legends.* The Contractor shall access, use, modify, reproduce, release, perform, or display Government-furnished information marked with negotiated license rights legends only as permitted in the negotiated license, which is specified in the Attachment to this contract. The Contractor shall not, unless expressly authorized in the Attachment or by express written permission of the Owner-Licensor, release or disclose such Government-furnished information to, or allow access by, any person. The Contractor shall ensure compliance with paragraph (j) of this clause.

(5) *Government-furnished information marked with other restrictive legends, or otherwise subject to restrictions.* The Contractor shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished information that are marked with other restrictive legends, or that are otherwise identified in the Attachment as subject to restrictions, only as specified in the Attachment to this contract. The Contractor shall ensure compliance with paragraph (j) of this clause.

(d) *Contractor procedures for safeguarding, use, and handling of Government-furnished information.* Contractor shall adopt operating procedures and physical security measures sufficient to protect the Government-furnished information from unauthorized access, use, modification, reproduction, release, performance, display, or further disclosure; including through compliance with the requirements of paragraph (j) of this clause.

(e) *Disclaimer of warranty.* Unless specifically stated elsewhere in this contract, the Government is providing the requested technical data and computer software to the recipient "as is" and free of all warranties and representations, including suitability for intended purpose.

(f) The Contractor may enter into any agreement directly with the Owner-Licensor with respect to the access, use, modification, reproduction, release, performance, display, or disclosure of these technical data or computer software.

(g) *Indemnification and creation of third party beneficiary rights.* The Contractor agrees—

(1) To indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys

fees, court costs, and expenses, arising out of, or in any way related to, the unauthorized access, use, modification, reproduction, release, performance, display, or disclosure of the Government-furnished information by the Contractor or any person to whom the Contractor has released or disclosed such data or software; and

(2) The Owner-Licensor, in addition to any other rights it may have, is a third party beneficiary of this clause and has the right of direct action against the Contractor, or any person to whom the Contractor has released or disclosed the Government-furnished information, for the unauthorized access, use, modification, reproduction, release, performance, display, or disclosure of Government-furnished information subject to restrictive legends.

(h) *Disposition of Government-furnished information.* Recipient agrees to destroy or return the original and all copies of the Government-furnished information released to the recipient within 30 days following the expiration of the use and non-disclosure agreement.

(i) *Survival of obligations.* The obligations imposed by this clause shall survive the expiration or termination of this contract.

(j) *Subcontractor flowdown and release or disclosure outside the Contractor's organization.* (1) The Contractor shall not release or disclose Government-furnished information to, or allow access by, any person outside the Contractor's organization unless the intended recipient is—

(i) Authorized to access or receive the Government-furnished information; and

(ii) Subject to appropriate prohibitions on unauthorized access, use, modification, reproduction, release, performance, display, or disclosure, in accordance with paragraph (j)(2) of this clause.

(2) The Contractor shall either—

(i) Use this same clause (including the restrictions contained in the Attachment specified at paragraph (b) of this clause) in the subcontract or other contractual instrument with an intended recipient who is a subcontractor or supplier, and require that subcontractor or supplier to do so, without alteration except to identify the parties, as follows:

(A) References to the Government are not changed; and

(B) The intended recipient (subcontractor or supplier) has all rights and obligations of the Contractor in the clause; or

(ii) Require the intended recipient to execute the standard use and nondisclosure agreement in accordance with DFARS 227.7107–2, which shall incorporate the restrictions contained in the Attachment specified at paragraph (b) of this clause.

(End of clause)

34. Section 252.227–7026 is revised to read as follows:

252.227–7026 Deferred delivery of technical data or computer software.

As prescribed at 227.7103–5(a), use the following clause:

DEFERRED DELIVERY OF TECHNICAL DATA OR COMPUTER SOFTWARE (DATE)

The Government shall have the right to require, at any time during the performance of this contract, within two (2) years after either acceptance of all items (other than technical data or computer software) to be delivered or otherwise provided under this contract or termination of this contract, whichever is later, delivery of any technical data or computer software item identified in this contract as "deferred delivery" data or computer software. The obligation to furnish such technical data required to be prepared by a subcontractor and pertaining to an item obtained from him shall expire two (2) years after the date Contractor accepts the last delivery of that item from that subcontractor for use in performing this contract.

(End of clause)

35. Section 252.227–7027 is revised to read as follows:

252.227–7027 Deferred ordering of technical data or computer software.

As prescribed at 227.7103–5(b), use the following clause:

DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE (DATE)

(a) In addition to technical data or computer software specified elsewhere in this contract to be delivered, the Government may order any technical data or computer software created or developed in the performance of this contract or any subcontract hereunder.

(b) The Government's deferred ordering rights under paragraph (a) of this clause shall expire three (3) years after acceptance of all items (other than technical data or computer software) to be delivered or otherwise provided under this contract, or the termination of this contract, whichever is later. However, the obligation to deliver technical data or computer software created or developed by a subcontractor shall expire three (3) years after the date the Contractor accepts the last delivery of that computer software, or the item to which the technical data pertains, from that subcontractor.

(c) When the technical data or computer software is ordered, the Contractor shall be compensated for converting the technical data or computer software into the prescribed form for reproduction and delivery.

(d) The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose the delivered technical data or computer software shall be determined pursuant to the appropriate data rights clause:

(1) DFARS 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial;

(2) DFARS 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR); or

(3) DFARS 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

(End of clause)

252.227–7028 [Removed and reserved]

36. Section 252.227–7028 is removed and reserved.

37. Section 252.227–7030 is revised to read as follows:

252.227–7030 Technical data and computer software—withholding of payment.

As prescribed at 227.7106–5(a), use the following clause:

TECHNICAL DATA AND COMPUTER SOFTWARE—WITHHOLDING OF PAYMENT (DATE)

(a) If technical data or computer software specified to be delivered under this contract are not delivered within the time specified by this contract or are deficient upon delivery (including having restrictive markings not identified in the list described in the clause at 252.227–7013(f) or 252.227–7014(f) of this contract), the Contracting Officer may, until such data or software is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the contract. Payments shall not be withheld or any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data or software without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract.

(End of clause)

252.227–7032 [Removed and reserved]

38. Section 252.227–7032 is removed and reserved.

39. Section 252.227–7033 is revised to read as follows:

252.227–7033 Rights in shop drawings.

As prescribed at 227.7205–2(c), use the following clause:

RIGHTS IN SHOP DRAWINGS (DATE)

(a) Shop drawings for construction means drawings, submitted to the Government by the Construction Contractor, subcontractor or any lower-tier subcontractor pursuant to a construction contract, showing in detail (i) the proposed fabrication and assembly of structural elements and (ii) the installation (i.e., form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(b) The Contractor shall include this clause, including this paragraph (b), in all subcontracts hereunder.

(End of clause)

252.227–7034 [Removed]

40. Reserved section 252.227–7034 is removed.

41. Section 252.227–7037 is revised to read as follows:

252.227–7037 Validation of restrictive markings on technical data and computer software.

As prescribed in 227.7106–5(b), use the following clause:

VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA AND COMPUTER SOFTWARE (DATE)

(a) *Definitions.*

(1) As used in this clause, unless otherwise specifically indicated, the term *Contractor* means the Contractor and its subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(2) The other terms used in this clause are defined in the Rights in Technical Data and Computer Software—Noncommercial clause of this contract.

(b) *Contracts for commercial items—presumption of development at private expense.* Under a contract for a commercial item (including commercial computer software), the Department of Defense shall presume that a Contractor's asserted use or release restrictions are justified on the basis that the commercial item was developed exclusively at private expense. The Department shall not challenge such assertions unless information the Department provides demonstrates that the commercial item was not developed exclusively at private expense.

(c) *Justification.* Except under contracts for commercial items (including commercial computer software), the Contractor shall—

(1) Maintain records sufficient to justify the validity of any markings that assert restrictions on the Government's and others' right to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software delivered or required to be delivered under the contract or subcontract; and

(2) Be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a challenge under paragraph (d) of this clause or in response to a request for information under paragraph (e) of this clause.

(d) Notwithstanding any provision of this contract concerning inspection and acceptance, the Contracting Officer may challenge the Contractor's assertion of restrictions if the Contracting Officer determines that—

(1) Reasonable grounds exist to question the current validity of the marking; and

(2) Continued adherence to the marking would make impracticable subsequent competitive acquisition of the computer software or item or process.

(e) *Challenge process.*

(1) For other than commercial items, the Contracting Officer may request the Contractor to provide a written explanation for any asserted restriction sufficient to enable the Contracting Officer to evaluate the Contractor's asserted restrictions and determine whether a challenge is warranted. Such written explanation shall be based upon the records required by this clause or other information reasonably available to the Contractor.

(2) The Contractor's failure to provide a timely response to a Contracting Officer's request for information or failure to provide sufficient information to enable the Contracting Officer to evaluate an asserted restriction shall constitute reasonable grounds for questioning the validity of an asserted restriction.

(3) The Contracting Officer will review the explanation submitted and—

(i) Request the Contractor to furnish additional information within the time required or such longer period as may be mutually agreed upon;

(ii) Determine that the asserted marking is valid and so notify the Contractor in writing; or

(iii) Challenge that the asserted marking is not valid.

(4) When the Contracting Officer challenges that the asserted marking is not valid, and the Contractor notifies the Contracting Officer that it agrees with that determination, the Contracting Officer may—

(i) Strike or correct the unjustified marking at the Contractor's expense; or

(ii) Return the computer software or technical data to the Contractor for correction at the Contractor's expense. If the Contractor fails to correct or strike the unjustified restriction and return the corrected computer software or technical data to the Contracting Officer within sixty (60) days following receipt of the computer software or technical data, the Contracting Officer may correct or strike the markings at the Contractor's expense.

(5) When the Contracting Officer challenges that the asserted marking is not valid, and the Contractor does not notify the contracting officer that it agrees with this determination, the Contracting Officer will send a written challenge notice to the Contractor asserting the restrictive markings. Such challenge shall—

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require a response within sixty (60) days justifying and providing sufficient evidence as to the current validity of the asserted restriction;

(iii) State that it is a justification of the asserted restriction if—

(A) A DoD Contracting Officer's final decision issued pursuant to paragraph (e)(9) of this clause, or action of a court of competent jurisdiction or Board of Contract Appeals, has sustained the validity of a restrictive marking identical to the asserted restriction;

(B) Such decision or action occurred within the three-year period preceding the challenge; and

(C) The validated restriction was asserted by the same Contractor (or any licensee of such Contractor) to which such notice is being provided; and

(iv) State that failure to respond to the challenge notice may result in issuance of a final decision pursuant to paragraph (e)(8) of this clause.

(6) In response to the written challenge notice, the Contractor shall—

(i) Submit a written request showing the need for additional time to respond to the challenge notice. In such cases, the Contracting Officer will grant sufficient additional time to permit the response; or

(ii) Submit a written response that seeks to justify an asserted restriction on technical data and computer software. This written response shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601, *et seq.*), and shall be certified in the form prescribed at 33.207 of the Federal Acquisition Regulation, regardless of dollar amount.

(7) A Contractor receiving challenges to the same asserted restrictions from more than one Contracting Officer will notify each Contracting Officer of the other challenges and identify which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer initiating the first in time unanswered challenge after consultation with the Contractor and the other Contracting Officers, shall formulate and distribute a schedule that provides the Contractor a reasonable opportunity for responding to each challenge.

(8) If the Contractor fails to respond to the Contracting Officer's challenge notice, the Contracting Officer will issue a final decision pertaining to the validity of the asserted restriction. This final decision shall be issued as soon as possible after the expiration of the time period of paragraph (e)(5)(ii) of this clause. Following issuance of the final decision, the Contracting Officer will comply with the procedures in paragraph (f) of this clause.

(9) After receipt of the Contractor's written response that seeks to justify the asserted restriction, the Contracting Officer will—

(i) Request additional supporting documentation if, in the Contracting Officer's opinion, the Contractor's explanation does not provide sufficient evidence to justify the validity of the asserted restrictions. The Contractor shall promptly respond to the Contracting Officer's request for additional supporting documentation; or

(ii) Issue a final decision validating the asserted restriction. The decision shall state that the Government will continue to be bound by the restrictive marking; or

(iii) Issue a final decision denying the validity of the asserted restriction and follow the procedures in paragraph (f) of this clause.

(f) *Contractor appeal.*

(1) The Government agrees that, notwithstanding a Contracting Officer's final decision denying the validity of an asserted restriction and except as provided in paragraph (f)(3) of this clause, it will honor the asserted restriction—

(i) For a period of ninety (90) days from the date of the Contracting Officer's final decision to allow the Contractor to appeal to the appropriate Board of Contract Appeals or to file suit in an appropriate court;

(ii) For a period of one year from the date of the Contracting Officer's final decision if, within the first ninety (90) days following the Contracting Officer's final decision, the Contractor has provided notice to the Contracting Officer of an intent to file suit in an appropriate court; or

(iii) Until final disposition by the appropriate Board of Contract Appeals or court of competent jurisdiction, if the Contractor has—

(A) Appealed to the Board of Contract Appeals or filed suit an appropriate court within ninety (90) days; or

(B) Submitted, within ninety (90) days, a notice of intent to file suit in an appropriate court and filed suit within one year.

(2) The Contractor agrees that the Government may strike, correct, or ignore the restrictive markings if the Contractor fails to—

(i) Appeal to a Board of Contract Appeals within ninety (90) days from the date of the Contracting Officer's final decision;

(ii) File suit in an appropriate court within ninety (90) days from such date; or

(iii) File suit within one year after the date of the Contracting Officer's final decision if the Contractor had provided notice of intent to file suit within ninety (90) days following the date of the Contracting Officer's final decision.

(3) *Exception for urgent and compelling circumstances.*

(i) The agency head, on a nondelegable basis, may determine that urgent or compelling circumstances do not permit awaiting the filing of suit in an appropriate court, or the rendering of a decision by a court of competent jurisdiction or Board of Contract Appeals. In that event, the agency head shall notify the Contractor of the urgent or compelling circumstances. The agency head's determination may be made at any time after the date of the Contracting Officer's final decision and shall not affect the Contractor's right to damages against the United States, or other relief provided by law, if its asserted restrictions are ultimately upheld.

(ii) Notwithstanding paragraph (f)(1) of this clause, the Contractor agrees that the agency may access, use, modify, reproduce, release, perform, display, or disclose computer software or technical data as necessary to address the urgent and compelling circumstances.

(iii) The Government agrees not to release or disclose Contractor's restrictively marked technical data or computer software unless, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.7107–2 of the Defense Federal Acquisition Regulation Supplement (DFARS), or is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Government-Furnished Information Marked with Restrictive Legends.

(g) *Final disposition of appeal or suit.* If the Contractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is—

(1) Sustained—

(i) Any restrictive marking on the technical data or computer software shall be cancelled, corrected or ignored; and

(ii) If the restrictive markings are found not to be substantially justified, the Contractor shall be liable to the Government for payment of the cost to the Government of reviewing the restrictive markings and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the marking, unless special circumstances would make such payment unjust; or

(2) Not sustained—

(i) The Government shall continue to be bound by the restrictive markings; and

(ii) The Government shall be liable to the Contractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Contractor in defending the marking, if the challenge by the Government is found not to have been made in good faith.

(h) *Duration of right to challenge.* The Government has the right to challenge the validity of any Contractor asserted restrictions on technical data or computer software delivered or to be delivered under a contract or otherwise provided to the Government in the performance of this contract. The Contracting Officer may exercise this right during the period within three (3) years of final payment on a contract or within three (3) years of delivery of the technical data or computer software to the Government, whichever is later. The Government may, however, challenge a restriction on the release, disclosure or use of technical data and computer software at any time if such technical data or computer software—

(1) Is publicly available;

(2) Has been furnished to the United States without restriction; or

(3) Has been otherwise made available without restriction.

(i) *Decision not to challenge.* A decision by the Government, or a determination by the Contracting Officer, to not challenge the restrictive marking or asserted restriction shall not constitute "validation." Only a Contracting Officer's final decision or an action of an agency Board of Contract Appeals or a court of competent jurisdiction that sustains the validity of an asserted restriction constitutes validation of the restriction.

(j) *Privity of contract.* The Contractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors or suppliers at any tier that assert restrictive markings. However, neither this clause, nor any action taken by the Government under this clause, creates or implies privity of contract between the Government and subcontractors or suppliers for matters not covered by this clause.

(k) *Flowdown.* The Contractor shall insert this clause, including this paragraph (k), in contractual instruments with its subcontractors requiring the delivery of technical data or computer software.

(End of clause)

42. Section 252.227–70YY is added to read as follows:

252.227–70YY Government-furnished works marked with restrictive legends.

As prescribed in 227.7204–2, use the following clause:

GOVERNMENT-FURNISHED WORKS MARKED WITH RESTRICTIVE LEGENDS (DATE)

(a) *Definitions.* As used in this clause—

(1) Contractor includes the Contractor's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(2) *Owner-Licensor* means the person whose name appears in the restrictive legend or is otherwise identified as asserting restrictions on the access, use, modification, reproduction, release, performance, display, or disclosure of works.

(3) Other terms are defined in the clause at DFARS 252.227–7021, Rights in Works—License.

(b) *Attachment.* An attachment to the contract will identify—

(1) The works that the Government intends to furnish to the Contractor with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure; and

(2) The specific conditions under which the Contractor is authorized to access, use, modify, reproduce, release, perform, display, or disclose the works.

(c) *Government-furnished works provided with restrictions.* If the Government furnishes Government-furnished works, such works are subject to restrictions on access, use, modification, reproduction, release, performance, display, or disclosure as follows:

(1) *Government-furnished works marked with Government purpose rights legends.* The Contractor shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished works marked with Government license rights legends for Government purposes only and shall not do so for any commercial purpose. The Contractor shall not, without the express written permission of the Owner-Licensor, release or disclose such Government-furnished works to, or allow access by, a person other than its subcontractors, suppliers, or prospective subcontractors or suppliers, who require the Government-furnished works to submit offers for, or perform, subcontracts or supplier obligations under this contract. The Contractor shall ensure compliance with paragraph (j) of this clause.

(2) *Government-furnished works marked with other restrictive legends, or otherwise subject to restrictions.* The Contractor shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished works that are marked with other restrictive legends, or that are otherwise identified in the attachment as subject to restrictions, only as specified in the attachment to this contract. The Contractor shall ensure compliance with paragraph (j) of this clause.

(d) *Contractor procedures for safeguarding, use, and handling of Government-furnished works.* Contractor shall adopt operating procedures and physical security measures sufficient to protect the Government-furnished works from unauthorized access, use, modification, reproduction, release, performance, display, or further disclosure.

(e) *Disclaimer of warranty.* Unless specifically stated elsewhere in this contract,

the Government is providing the identified works to the recipient "as is" and free of all warranties and representations, including suitability for intended purpose.

(f) The Contractor may enter into any agreement directly with the Owner-Licensor with respect to the access, use, modification, reproduction, release, performance, display, or disclosure of these works.

(g) *Indemnification and creation of third party beneficiary rights.* The Contractor agrees—

(1) To indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses, arising out of, or in any way related to, the unauthorized access, use, modification, reproduction, release, performance, display, or disclosure of works received from the Government with restrictive legends by the Contractor or any person to whom the Contractor has released or disclosed such works; and

(2) That the party whose name appears on the restrictive legend, in addition to any other rights it may have, is a third party beneficiary who has the right of direct action against the Contractor, or any person to whom the Contractor has released or disclosed the Government-furnished works, for the unauthorized access, use, modification, reproduction, release, performance, display, or disclosure of Government-furnished works subject to restrictive legends.

(h) *Disposition of Government-furnished works.* Recipient agrees to destroy or return of all copies of the works released to the recipient within 30 days following the expiration of the use and non-disclosure agreement.

(i) *Survival of obligations.* The obligations imposed by this clause shall survive the expiration or termination of this contract.

(j) *Applicability to subcontractors and suppliers and release or disclosure outside the Contractor's organization.*

(1) The Contractor shall not release or disclose Government-furnished works to, or allow access by, any person outside the Contractor's organization unless the intended recipient is—

(i) Authorized to access or receive the Government-furnished works; and

(ii) Subject to appropriate prohibitions on unauthorized access, use, modification, reproduction, release, performance, display, or disclosure, in accordance with paragraph (2) of this clause.

(2) The Contractor shall use this same clause (including the restrictions contained in the Attachment specified at paragraph (b) of this clause) in the subcontract or other contractual instrument with an intended recipient who is a subcontractor or supplier, and require that subcontractor or supplier to do so, without alteration except to identify the parties, as follows:

(i) References to the Government are not changed; and

(ii) The intended recipient (subcontractor or supplier) has all rights and obligations of the Contractor in the clause.

(End of clause)

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Federal Register

Monday,
September 27, 2010

Part IV

Department of Energy

10 CFR Part 430

Energy Conservation Program: Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket Number EE–2008–BT–STD–0012]

RIN 1904–AB79

Energy Conservation Program: Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers

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

ACTION: Notice of proposed rulemaking (NOPR) and public meeting.

SUMMARY: The Energy Policy and Conservation Act (EPCA) prescribes energy conservation standards for various consumer products and commercial and industrial equipment, including residential refrigerators, refrigerator-freezers, and freezers. EPCA also requires the U.S. Department of Energy (DOE) to determine whether more stringent, amended standards for these products are technologically feasible and economically justified, and would save a significant amount of energy. In this NOPR, DOE proposes amended energy conservation standards for residential refrigerators, refrigerator-freezers, and freezers. The NOPR also announces a public meeting to receive comment on these proposed standards and associated analyses and results.

DATES: DOE will hold a public meeting on Thursday, October 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., Thursday, September 30, 2010. Additionally, DOE plans to conduct the public meeting via webinar. To participate via webinar, DOE must be notified by no later than Thursday, October 7, 2010. Participants seeking to present statements in person during the meeting must submit to DOE a signed original and an electronic copy of statements to be given at the public meeting before 4 p.m., Thursday, October 7, 2010.

DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) before and after the public meeting, but no later than November 26, 2010. *See* section VII, "Public Participation," 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. To attend, please notify Ms. Brenda Edwards at (202) 586–2945. Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures, requiring a 30-day advance notice. Any foreign national wishing to participate in the meeting should advise DOE as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 to initiate the necessary procedures.

Any comments submitted must identify the NOPR for Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers, and provide docket number EE–2008–BT–STD–0012 and/or regulatory information number (RIN) number 1904–AB79. 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: ResRefFreez-2008-STD-0012@hq.doe.gov.* Include the docket number and/or RIN 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 original paper copy.

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 original paper copy.

For detailed instructions on submitting comments and additional information on the rulemaking process, *see* section VII of this document (Public Participation).

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, (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 regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Subid Wagley, 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, 202–287–1414, *e-mail: Subid.Wagley@ee.doe.gov* or Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9507, e-mail: *Michael.Kido@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. Summary of the Proposed Rule

The Energy Policy and Conservation Act (42 U.S.C. 6291 *et seq.;* EPCA or the Act), as amended, provides that any new or amended energy conservation standard DOE prescribes for certain consumer products, such as residential refrigerators, refrigerator-freezers, and freezers (collectively referred to in this document as "refrigeration products"), shall be designed to "achieve the maximum improvement in energy efficiency * * * which the Secretary determines is technologically feasible and economically justified." (42 U.S.C. 6295(o)(2)(A)) The new or amended standard must "result in significant conservation of energy." (42 U.S.C. 6295(o)(3)(B)) In accordance with these and other statutory provisions discussed in this notice, DOE proposes amended energy conservation standards for refrigeration products. The proposed standards, which are the maximum allowable energy use expressed as a function of the calculated adjusted volume of a given product, are shown in Table I.1. These proposed standards, if adopted, would apply to all products listed in Table I.1 and manufactured in, or imported into, the United States on or after January 1, 2014.

TABLE I.1—PROPOSED REFRIGERATION PRODUCT ENERGY CONSERVATION STANDARDS

[Effective starting 1/1/2014]

Product class	Equations for maximum energy use (kWh/yr)	
	based on AV (ft^3)	based on av (L)
1. Refrigerators and refrigerator-freezers with manual defrost	7.99AV + 225.0	0.282av + 225.0
1A. All-refrigerators—manual defrost	6.79AV + 193.6	0.240av + 193.6
2. Refrigerator-freezers—partial automatic defrost	7.99AV + 225.0	0.282av + 225.0
3. Refrigerator-freezers—automatic defrost with top-mounted freezer without an automatic icemaker	8.04AV + 232.7	0.284av + 232.7
3–BI. Built-in refrigerator-freezer—automatic defrost with top-mounted freezer without an automatic icemaker.	8.57AV + 248.2	0.303av + 248.2

TABLE I.1—PROPOSED REFRIGERATION PRODUCT ENERGY CONSERVATION STANDARDS—Continued

[Effective starting 1/1/2014]

Product class	Equations for maximum energy use (kWh/yr)	
	based on AV (ft³)	based on av (L)
3I. Refrigerator-freezers—automatic defrost with top-mounted freezer with an automatic icemaker without through-the-door ice service.	8.04AV + 316.7	0.284av + 316.7
3I–BI. Built-in refrigerator-freezers—automatic defrost with top-mounted freezer with an automatic icemaker without through-the-door ice service.	8.57AV + 332.2	0.303av + 332.2
3A. All-refrigerators—automatic defrost	7.07AV + 201.6	0.250av + 201.6
3A–BI. Built-in All-refrigerators—automatic defrost	7.55AV + 215.1	0.266av + 215.1
4. Refrigerator-freezers—automatic defrost with side-mounted freezer without an automatic icemaker.	8.48AV + 296.5	0.299av + 296.5
4–BI. Built-In Refrigerator-freezers—automatic defrost with side-mounted freezer without an automatic icemaker.	9.04AV + 316.2	0.319av + 316.2
4I. Refrigerator-freezers—automatic defrost with side-mounted freezer with an automatic icemaker without through-the-door ice service.	8.48AV + 380.5	0.299av + 380.5
4I–BI. Built-In Refrigerator-freezers—automatic defrost with side-mounted freezer with an automatic icemaker without through-the-door ice service.	9.04AV + 400.2	0.319av + 400.2
5. Refrigerator-freezers—automatic defrost with bottom-mounted freezer without an automatic icemaker.	8.80AV + 315.4	0.311av + 315.4
5–BI. Built-In Refrigerator-freezers—automatic defrost with bottom-mounted freezer without an automatic icemaker.	9.35AV + 335.1	0.330av + 335.1
5I. Refrigerator-freezers—automatic defrost with bottom-mounted freezer with an automatic icemaker without through-the-door ice service.	8.80AV + 399.4	0.311av + 399.4
5I–BI. Built-In Refrigerator-freezers—automatic defrost with bottom-mounted freezer with an automatic icemaker without through-the-door ice service.	9.35AV + 419.1	0.330av + 419.1
5A. Refrigerator-freezer—automatic defrost with bottom-mounted freezer with through-the-door ice service.	9.15AV + 471.3	0.323av + 471.3
5A–BI. Built-in refrigerator-freezer—automatic defrost with bottom-mounted freezer with through-the-door ice service.	9.72AV + 4955.	0.343av + 495.5
6. Refrigerator-freezers—automatic defrost with top-mounted freezer with through-the-door ice service.	8.36AV + 384.1	0.295av + 384.1
7. Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.	8.50AV + 431.1	0.300av + 431.1
7–BI. Built-In Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.	9.07AV + 454.3	0.320av + 454.3
8. Upright freezers with manual defrost	5.57AV + 193.7	0.197av + 193.7
9. Upright freezers with automatic defrost without an automatic icemaker	8.62AV + 228.3	0.305av + 228.3
9–BI. Built-In Upright freezers with automatic defrost without an automatic icemaker	9.24AV + 244.6	0.326av + 244.6
10. Chest freezers and all other freezers except compact freezers	7.29AV + 107.8	0.257av + 107.8
10A. Chest freezers with automatic defrost	10.24AV + 148.1	0.362av + 148.1
11. Compact refrigerators and refrigerator-freezers with manual defrost	9.03AV + 252.3	0.319av + 252.3
11A.Compact refrigerators and refrigerator-freezers with manual defrost	7.84AV + 219.1	0.277av + 219.1
12. Compact refrigerator-freezers—partial automatic defrost	5.91AV + 335.8	0.209av + 335.8
13. Compact refrigerator-freezers—automatic defrost with top-mounted freezer	11.80AV + 339.2	0.417av + 339.2
13A. Compact all-refrigerator—automatic defrost	9.17AV + 259.3	0.324av + 259.3
14. Compact refrigerator-freezers—automatic defrost with side-mounted freezer	6.82AV + 456.9	0.241av + 456.9
15. Compact refrigerator-freezers—automatic defrost with bottom-mounted freezer	12.88AV + 368.7	0.455av + 368.7
16. Compact upright freezers with manual defrost	8.65AV + 225.7	0.306av + 225.7
17. Compact upright freezers with automatic defrost	10.17AV + 351.9	0.359av + 351.9
18. Compact chest freezers	9.25AV + 136.8	0.327av + 136.8

AV = adjusted volume in cubic feet; av = adjusted volume in liters.

DOE's analyses indicate that the proposed standards would save a significant amount of energy—an estimated 4.48 quads of cumulative energy over 30 years (2014 through 2043). This amount is equivalent to three times the total energy used annually for refrigeration and freezers in U.S. homes.

The cumulative national net present value (NPV) of total consumer costs and savings of the proposed standards for products shipped in 2014–2043, in 2009$, ranges from $2.44 billion (at a 7-percent discount rate) to $18.57 billion (at a 3-percent discount rate).[1] The net present value (NPV) is the estimated total value of future operating-cost savings during the analysis period, minus the estimated increased product costs, discounted to 2010. The industry net present value (INPV) is the sum of the discounted cash flows to the industry from the base year through the end of the analysis period (2010 to 2043). Using a real discount rate of 7.2 percent, DOE estimates that INPV for manufacturers of all refrigeration products in the base case is $4.434 billion in 2009$. If DOE adopts the proposed standards, it expects that manufacturers may lose 11 to 22 percent of their INPV, or approximately $0.495 to $0.995 billion. Using a 7-percent discount rate, the NPV of consumer costs and savings from today's proposed standards would amount to 2.5 to 4.9 times the total estimated industry losses. Using a 3-percent discount rate, the NPV would

[1] DOE uses discount rates of 7 and 3 percent based on guidance from the Office of Management and Budget. See section IV.G for further information.

amount to 19 to 38 times the total estimated industry losses.

The projected economic impacts of the proposed standards on individual consumers are generally positive. For example, the estimated average life-cycle cost (LCC) savings are $22 for top-mount refrigerator-freezers, $19 for bottom-mount refrigerator-freezers, $37 for side-by-side refrigerator-freezers, $148 for upright freezers, $56 for chest freezers, $10 for compact refrigerators, $11 for compact freezers, and from $0 to $116 for built-in refrigeration products, depending on the product class.[2]

In addition, the proposed standards would have significant environmental benefits. The energy saved is in the form of electricity and DOE expects the energy savings from the proposed standards to eliminate the need for approximately 4.2 gigawatts (GW) of generating capacity by 2043. The savings would result in cumulative greenhouse gas emission reductions of 305 million metric tons (Mt [3]) of carbon dioxide (CO_2) in 2014–2043. During this period, the proposed standards would result in emissions reductions of 245 kilotons (kt) of nitrogen oxides (NO_X) and 1.55 tons (t) of mercury (Hg). DOE estimates the net present monetary value of the CO_2 emissions reduction is between $1.04 and $16.22 billion, expressed in 2009$ and discounted to 2010. DOE also estimates the net present monetary value of the NO_X emissions reduction, expressed in 2009$ and discounted to 2010, is between $22 and $229 million at a 7-percent discount rate, and between $53 and $546 million at a 3-percent discount rate.

DOE estimates emissions reduction benefits according to a multi-step approach. First, DOE analyzes monetized emissions benefits separately from the NPV of consumer benefits. Second, DOE calculates emissions relative to an "existing regulations" baseline determined by the most recent version of the Annual Energy Outlook forecast. The base case emissions scenario is described at *http://www.eia.doe.gov/oiaf/aeo/pdf/trend_6.pdf.* Finally, any emissions reductions are in addition to the regulatory emissions reductions modeled in AEO. DOE calculates this value by doing a perturbation of the base case AEO forecast as described in the TSD chapter 15 at section 15.2.4. As noted in section 15.2.4 of TSD chapter 15, the baseline accounts for regulatory emissions reductions through 2008, including CAIR but not CAMR. Subsequent regulations, including the currently proposed CAIR replacement rule, the Clean Air Transport Rule, do not appear in the baseline. DOE requests comment on its baseline treatment of regulatory emissions reductions. *See* Issue 1 under "Issues on Which DOE Seeks Comment" in section VII.E.

The benefits and costs of today's proposed standards can also be expressed in terms of annualized values over the 2014–2043 period. Estimates of annualized values are shown in Table I.2. The annualized monetary values are the sum of (1) the annualized national economic value, expressed in 2009$, of the benefits from operating products that meet the proposed standards (consisting primarily of operating cost savings from using less energy, minus increases in equipment purchase costs, which is another way of representing consumer NPV), and (2) the monetary value of the benefits of emission reductions, including CO_2 emission reductions.[4] The value of the CO_2 reductions, otherwise known as the Social Cost of Carbon (SCC), is calculated using a range of values per metric ton of CO_2 developed by a recent interagency process. The monetary costs and benefits of cumulative emissions reductions are reported in 2009$ to permit comparisons with the other costs and benefits in the same dollar units. The derivation of the SCC values is discussed in section IV.M.

Although combining the values of operating savings and CO_2 reductions provides a useful perspective, two issues should be considered. First, the national operating savings are domestic U.S. consumer monetary savings that occur as a result of market transactions while the value of CO_2 reductions is based on a global value. Second, the assessments of operating cost savings and CO_2 savings are performed with different methods that use quite different time frames for analysis. The national operating cost savings is measured for the lifetime of refrigeration products shipped in 2014–2043. The SCC values, on the other hand, reflect the present value of all future climate-related impacts resulting from the emission of one ton of carbon dioxide in each year. These impacts go well beyond 2100.

Using a 7-percent discount rate and the SCC value of $21.40/ton in 2010 (in 2007$), which is discounted at 3 percent (*see* note below in Table I.2), the cost of the standards proposed in today's rule is $1,841 million per year in increased equipment costs, while the annualized benefits are $2,112 million per year in reduced equipment operating costs, $316 million in CO_2 reductions, and $7 million in reduced NO_X emissions. In this case, the net benefit amounts to $594 million per year. Using a 3-percent discount rate and the SCC value of $21.40/ton in 2010 (in 2007$), the cost of the standards proposed in today's rule is $1,849 million per year in increased equipment costs, while the benefits are $2,929 million per year in reduced operating costs, $316 million in CO_2 reductions, and $33 million in reduced NO_X emissions. At a 3-percent discount rate, the net benefit amounts to $1,429 million per year.

TABLE I.2—ANNUALIZED BENEFITS AND COSTS OF PROPOSED STANDARDS FOR REFRIGERATION PRODUCTS FOR 2014–2043 PERIOD

	Discount rate	Monetized (million 2009$/year)		
		Primary estimate*	Low estimate*	High estimate*
Benefits				
Operating Cost Savings	7%	2,112	1,852	2,377

[2] The LCC is the total consumer expense over the life of a product, consisting of purchase and installation costs plus operating costs (expenses for energy use, maintenance and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product.

[3] A metric ton is equivalent to 1.1 short tons. Results for NO_X and Hg are given in short tons.

[4] DOE used a two-step calculation process to convert the time-series of costs and benefits into annualized values. First, DOE calculated a present value for the time-series of costs and benefits using a discount rate of either three or seven percent. From the present value, DOE then calculated the fixed annual payment over the analysis time period (2014 through 2043) that yielded the same present value. The fixed annual payment is the annualized value. Although DOE calculated annualized values, this does not imply that the time-series of cost and benefits from which the annualized values were determined is a steady stream of payments.

TABLE I.2—ANNUALIZED BENEFITS AND COSTS OF PROPOSED STANDARDS FOR REFRIGERATION PRODUCTS FOR 2014–2043 PERIOD—Continued

	Discount rate	Monetized (million 2009$/year)		
		Primary estimate*	Low estimate*	High estimate*
	3%	2,929	2,520	3,335
CO_2 Reduction at $4.7/th **	5%	85	85	85
CO_2 Reduction at $21.4/th **	3%	316	316	316
CO_2 Reduction at $35.1/th **	2.5%	492	492	492
CO_2 Reduction at $64.9/th **	3%	963	963	963
NO_X Reduction at $2,519/th **	7%	7	7	7
	3%	33%	33	33
Total (Operating Cost Savings, CO_2 Reduction and NO_X Reduction) †.	7% plus CO_2 range	2,204–3,082	1,944–2,822	2,469–3,348
	7%	2,435	2,175	2,700
	3%	3,278	2,869	3,684
	3% plus CO_2 range	3,047–3,925	2,638–3,516	3,453–4,331
Costs				
Incremental Product Costs	7%	1,841	1,733	1,950
	3%	1,849	1,729	1,969
Net Benefits/Costs				
Total (Operating Cost Savings, CO_2 Reduction and NO_X Reduction, minus Incremental Product Costs) †.	7% plus CO_2 range	363–1,241	211–1,089	519–1,397
	7%	594	442	750
	3%	1,429	1,140	1,714
	3% plus CO_2 range	1,198–2,076	909–1,787	1,483–2,362

* The Primary, Low, and High Estimates utilize forecasts of energy prices and housing starts from the AEO2010 Reference case, Low Economic Growth case, and Low Economic Growth case, respectively.

** The CO_2 values represent global monetized values (in 2007$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.70, $21.40, and $35.10 per ton are the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The value of $64.90 per ton represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The value for NO_X (in 2009$) is the average of the low and high values used in DOE's analysis. NO_X savings are in addition to the regulatory emissions reductions modeled in the Annual Energy Outlook forecast.

† Total Benefits for both the 3% and 7% cases are derived using the SCC value calculated at a 3% discount rate, which is $21.40/ton in 2010 (in 2007$). In the rows labeled as "7% plus CO_2 range" and "3% plus CO_2 range," the operating cost and NO_X benefits are calculated using the labeled discount rate, and those values are added to the full range of CO_2 values with the $4.70/ton value at the low end, and the $64.90/ton value at the high end.

DOE has tentatively concluded that the proposed standards represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy. DOE further notes that products achieving these standard levels are already commercially available for at least some, if not most, product classes covered by today's proposal. Based on the analyses described above, DOE found the benefits of the proposed standards to the Nation (energy savings, positive NPV of consumer benefits, consumer LCC savings, and emission reductions) outweigh the burdens (loss of INPV for manufacturers and LCC increases for some consumers).

DOE also considered lower energy use levels as trial standard levels, and is still considering them in this rulemaking. However, DOE has tentatively concluded that the potential burdens of the lower energy use levels would outweigh the projected benefits. Based on consideration of the public comments DOE receives in response to this notice and related information collected and analyzed during the course of this rulemaking effort, DOE may adopt energy use levels presented in this notice that are either higher or lower than the proposed standards, or some combination of level(s) that incorporate the proposed standards in part.

II. Introduction

The following section briefly discusses the statutory authority underlying today's proposal as well as some of the relevant historical background related to the establishment of standards for refrigeration products.

A. Authority

Title III of EPCA sets forth a variety of provisions designed to improve energy efficiency. Part A of title III (42 U.S.C. 6291–6309) provides for the Energy Conservation Program for Consumer Products Other than Automobiles.[5] EPCA covers consumer products and certain commercial equipment (referred to collectively hereafter as "covered products"), including the types of refrigeration products that are the subject of this rulemaking. (42 U.S.C. 6292(a)(1)) EPCA prescribed energy conservation standards for these products (42 U.S.C. 6295(b)(1)–(2)), and directed DOE to conduct three cycles of rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(b)(3)(A)(i), (b)(3)(B)–(C), and (b)(4)) As explained in further detail in section II.B, this rulemaking represents the third round of amendments to the standards for refrigeration products under 42 U.S.C. 6295(b). (DOE notes that under 42 U.S.C. 6295(m), the agency must periodically review its already established energy conservation standards for a covered product. Under this requirement, the next review that

[5] This part was titled Part B in EPCA, but was subsequently codified as Part A in the U.S. Code for editorial reasons.

DOE would need to conduct would occur no later than six years from the issuance of a final rule establishing or amending a standard for a covered product.)

Under the Act, DOE's energy conservation program for covered products consists essentially of four parts: (1) Testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. The Federal Trade Commission (FTC) is responsible for labeling, and DOE implements the remainder of the program. Section 323 of the Act authorizes DOE, subject to certain criteria and conditions, to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6293) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use of efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted under EPCA. *Id.* The test procedures for refrigeration products currently appear at title 10, Code of Federal Regulations (CFR), part 430, subpart B, appendices A1 and B1, respectively. (These procedures are undergoing possible amendments and may ultimately be recodified as part of new appendices A and B. See 75 FR 29824 (May 27, 2010) (discussing possible amendments to the test procedures for refrigeration products).

EPCA provides criteria for prescribing amended standards for covered products. As indicated above, any amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, EPCA precludes DOE from adopting any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)) Moreover, DOE may not prescribe a standard: (1) For certain products, including refrigeration products, if no test procedure has been established for the product, or (2) if DOE determines by rule that the proposed standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) The Act also provides that, in deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must do so after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven factors:

1. The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

2. The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the imposition of the standard;

3. The total projected amount of energy savings likely to result directly from the imposition of the standard;

4. Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

6. The need for national energy conservation; and

7. Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

EPCA also contains what is known as an "anti-backsliding" provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe a new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States of any covered product type (or class) with performance characteristics, features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

Further, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. *See* 42 U.S.C. 6295(o)(2)(B)(iii).

Additionally, 42 U.S.C. 6295(q)(1) specifies requirements when promulgating a standard for a type or class of covered product that has two or more subcategories. DOE must specify a different standard level than that which applies generally to such type or class of products "for any group of covered products which have the same function or intended use, if * * * products within such group—(A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard" than applies or will apply to the other products within that type or class. *Id.* In determining whether a performance-related feature justifies a different standard for a group of products, DOE must "consider such factors as the utility to the consumer of such a feature" and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2)).

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE can, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of section 327(d) of the Act. (42 U.S.C. 6297(d))

Finally, Section 310(3) of the Energy Independence and Security Act of 2007 (EISA 2007; Pub. L. 110–140 (codified at 42 U.S.C. 6295(gg))) amended EPCA to require that energy conservation standards address standby mode and off mode energy use. Specifically, when DOE adopts a standard for a covered product after July 1, 2010, it must, if justified by the criteria for adoption of standards in section 325(o) of EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into the standard, if feasible, or adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE's current test procedures and standards for refrigeration products address standby and off mode energy use. In this rulemaking, DOE intends to incorporate such energy use into any amended standard it adopts in the final rule, which is scheduled to be issued by December 31, 2010.

B. Background

1. Current Standards

In a final rule published on April 28, 1997 (1997 Final Rule), DOE prescribed the current energy conservation standards for refrigeration products manufactured on or after July 1, 2001. 62 FR 23102. This final rule completed the second round of rulemaking to amend the standards for refrigeration products, required under 42 U.S.C. 6295(b)(3)(B)–(C). The standards consist of separate equations for each product class. Each equation provides a means to calculate the maximum levels of energy use permitted under the regulations. These levels vary based on the storage volume of the refrigeration product and on the particular characteristics and features included in a given product (*i.e.,* based on product class). 10 CFR 430.32(a). The current standards are set forth in Table II.1. DOE notes that the standard levels denoted in the proposed product classes listed as 5A and 10A were established by the Office of Hearings and Appeals through that Office's exception relief process.

TABLE II.1—FEDERAL ENERGY EFFICIENCY STANDARDS FOR REFRIGERATORS, REFRIGERATOR-FREEZERS, AND FREEZERS

Product class	Energy standard equations for maximum energy use (kWh/yr)
	Made effective by the 1997 final rule
1. Refrigerators and refrigerator-freezers with manual defrost	8.82AV+248.4 0.31av+248.4
2. Refrigerator-freezers—partial automatic defrost	8.82AV+248.4 0.31av+248.4
3. Refrigerator-freezers—automatic defrost with top-mounted freezer without through-the-door ice service and all-refrigerator—automatic defrost.	9.80AV+276.0 0.35av+276.0
4. Refrigerator-freezers—automatic defrost with side-mounted freezer without through-the-door ice service	4.91AV+507.5 0.17av+507.5
5. Refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service	4.60AV+459.0 0.16av+459.0
6. Refrigerator-freezers—automatic defrost with top-mounted freezer with through-the-door ice service	10.20AV+356.0 0.36av+356.0
7. Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service	10.10AV+406.0 0.36av+406.0
8. Upright freezers with manual defrost	7.55AV+258.3 0.27av+258.3
9. Upright freezers with automatic defrost	12.43AV+326.1 0.44av+326.1
10. Chest freezers and all other freezers except compact freezers	9.88AV+143.7 0.35av+143.7
11. Compact refrigerators and refrigerator-freezers with manual defrost	10.70AV+299.0 0.38av+299.0
12. Compact refrigerator-freezer—partial automatic defrost	7.00AV+398.0 0.25av+398.0
13. Compact refrigerator-freezers—automatic defrost with top-mounted freezer and compact all-refrigerator—automatic defrost.	12.70AV+355.0 0.45av+355.0
14. Compact refrigerator-freezers—automatic defrost with side-mounted freezer	7.60AV+501.0 0.27av+501.0
15. Compact refrigerator-freezers—automatic defrost with bottom-mounted freezer	13.10AV+367.0 0.46av+367.0
16. Compact upright freezers with manual defrost	9.78AV+250.8 0.35av+250.8
17. Compact upright freezers with automatic defrost	11.40AV+391.0 0.40av+391.0
18. Compact chest freezers	10.45AV+152.0 0.37av+152.0
Product class	**Made effective through OHA exception relief**
5A. Refrigerator-freezer—automatic defrost with bottom-mounted freezer with through-the-door ice service	5.0AV+539.0 0.18av+539.0
10A. Chest freezers with automatic defrost	14.76AV+211.5 0.52av+211.5

AV: Adjusted Volume in ft^3; av: Adjusted Volume in liters (L).

2. History of Standards Rulemaking for Refrigerators, Refrigerator-Freezers, and Freezers

The amendments made to EPCA by the National Appliance Energy Conservation Act of 1987 (NAECA; Pub. L. 100–12) included mandatory energy conservation standards for refrigeration products and requirements that DOE conduct two cycles of rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(b)(1), (2), (3)(A)(i), and (3)(B)–(C)) DOE completed the first of these rulemaking cycles in 1989 and 1990 by adopting amended performance standards for all refrigeration products manufactured on or after January 1, 1993. 54 FR 47916 (November 17, 1989); 55 FR 42845 (October 24, 1990). As indicated above, DOE completed a second rulemaking cycle to amend the standards for refrigeration products by issuing a final rule in 1997, which adopted the current standards for these products. 62 FR 23102 (April 28, 1997).

In 2005, DOE granted a petition, submitted by a coalition of state governments, utility companies, consumer and low-income advocacy groups, and environmental and energy efficiency organizations, requesting that it conduct a rulemaking to amend the standards for residential refrigerator-freezers.[6] DOE then conducted limited analyses to examine the technological and economic feasibility of amended standards at the ENERGY STAR levels that were in effect for 2005 for the two most popular product classes of refrigerator-freezers. These analyses identified potential energy savings and other potential benefits and burdens from such standards, and assessed other issues associated with such standards. Most recently, DOE has undertaken this rulemaking to satisfy the statutory requirement that DOE publish a final rule no later than December 31, 2010, to determine whether to amend the standards for refrigeration products manufactured on or after January 1, 2014. (42 U.S.C. 6295(b)(4))

DOE initiated this rulemaking on September 18, 2008, by publishing on its Web site its "Rulemaking Framework Document for Refrigerators, Refrigerator-Freezers, and Freezers." (A PDF of the framework document is available at *http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/refrigerator_freezer_framework.pdf*). DOE also published a notice announcing the availability of the framework document and a public meeting to discuss the document. It also requested public comment on the document. 73 FR 54089 (September 18, 2008). The framework document described the procedural and analytical approaches that DOE anticipated using to evaluate energy conservation standards for refrigeration products and identified various issues to be resolved in conducting the rulemaking.

On September 29, 2008, DOE held the framework document public meeting. At that meeting, DOE discussed the issues detailed in the framework document and described the analyses the agency planned to conduct during the rulemaking. Through the public meeting, DOE sought feedback from interested parties on these subjects and provided information regarding the rulemaking process that DOE would follow. Interested parties discussed the following major issues at the public meeting: Test procedure revisions; product classes; technology options; approaches to the engineering, life-cycle cost, and payback period analyses; efficiency levels analyzed in the engineering analysis; and the approach for estimating typical energy consumption. At the meeting, and during the related comment period, DOE received many comments that helped it identify and resolve issues involved in this rulemaking.

DOE then gathered additional information and performed preliminary analyses for the purpose of developing potential amended energy conservation standards for refrigeration products. This process culminated in DOE's announcement of the preliminary analysis public meeting, at which DOE would discuss and receive comments on the following matters: The product classes DOE analyzed; the analytical framework, models, and tools that DOE was using to evaluate standards; the results of the preliminary analyses performed by DOE; and potential standard levels that DOE could consider. 74 FR 58915 (November 16, 2009) (the November 2009 notice). DOE also invited written comments on these subjects and announced the availability on its Web site of a preliminary technical support document (preliminary TSD) it had prepared to inform interested parties and enable them to provide comments. *Id.* (The preliminary TSD is available at *http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/ref_frz_prenopr_prelim_tsd.pdf.*) Finally, DOE stated its interest in receiving views concerning other relevant issues that participants believed would affect energy conservation standards for refrigeration products, or that DOE should address in this NOPR. *Id.* at 58917–18.

The preliminary TSD provided an overview of the activities DOE undertook in developing standards for the refrigeration products, and discussed the comments DOE received in response to the framework document. It also described the analytical framework that DOE used (and continues to use) in this rulemaking, including a description of the methodology, the analytical tools, and the relationships among the various analyses that are part of the rulemaking. The preliminary TSD presented and described in detail each analysis DOE had performed up to that point, including descriptions of inputs, sources, methodologies, and results. These analyses were as follows:

- A *market and technology assessment* addressed the scope of this rulemaking, identified the potential classes for refrigeration products, characterized the markets for these products, and reviewed techniques and approaches for improving their efficiency;
- A *screening analysis* reviewed technology options to improve the efficiency of refrigeration products, and weighed these options against DOE's four prescribed screening criteria: (1) Technological feasibility, (2) practicability to manufacture, install, and service, (3) impacts on equipment utility or equipment availability, (4) adverse impacts on health or safety;
- An *engineering analysis* estimated the increases in manufacturer selling prices (MSPs) associated with more energy-efficient refrigeration products;
- An *energy use analysis* estimated the annual energy use in the field of refrigeration products as a function of efficiency levels;
- A *markups analysis* converted estimated manufacturer selling price (MSP) increases derived from the engineering analysis to consumer prices;
- A *life-cycle cost analysis* calculated, at the consumer level, the discounted savings in operating costs throughout the estimated average life of the product, compared to any increase in installed costs likely to result directly from the imposition of a given standard;
- A *payback period (PBP) analysis* estimated the amount of time it would take consumers to recover the higher expense of purchasing more energy efficient products through lower operating costs;
- A *shipments analysis* estimated shipments of the refrigeration products over the 30-year analysis period (2014–

[6] The petition, submitted June 1, 2004, can be viewed at *http://www.standardsasap.org/documents/rfdoe.pdf* (last accessed August 18, 2010).

2043), which were used in performing the national impact analysis (NIA);

- A *national impact analysis* assessed the national energy savings, and the national net present value of total consumer costs and savings, expected to result from specific, potential energy conservation standards for refrigeration products;
- A *preliminary manufacturer impact analysis* took the initial steps in evaluating the effects new efficiency standards may have on manufacturers.

In the November 2009 notice, DOE summarized the nature and function of the following analyses: (1) Engineering, (2) energy use characterization, (3) markups to determine installed prices, (4) LCC and PBP analyses, and (5) national impact analysis. *Id.* at 58917.

The preliminary analysis public meeting announced in the November 2009 notice took place on December 10, 2009. At this meeting, DOE presented the methodologies and results of the analyses set forth in the preliminary TSD. Major topics discussed at the meeting included test procedure revisions, product classes (including wine coolers, all-refrigerators,[7] and built-in refrigeration products), the use of alternative foam blowing agents and refrigerants, engineering analysis tools, the use of VIPs, mark-ups, field energy consumption, life-cycle cost inputs, efficiency distribution forecasts, and trial standard level selection criteria. DOE also discussed plans for conducting the NOPR analyses. The comments received since publication of the November 2009 notice, including those received at the preliminary analysis public meeting, have contributed to DOE's proposed resolution of the issues in this rulemaking. This NOPR quotes and summarizes many of these comments, and responds to the issues they raised. A parenthetical reference at the end of a quotation or paraphrase provides the location of the item in the public record.

In response to the preliminary analysis, DOE also received a comment submitted by groups representing manufacturers (Association of Home Appliance Manufacturers, Whirlpool, General Electric Company (GE), Electrolux, LG Electronics, BSH, Alliance Laundry, Viking Range, Sub-Zero Wolf, Friedrich A/C, U-Line, Samsung, Sharp Electronics, Miele, Heat Controller, AGA Marvel, Brown Stove, Haier, Fagor America, Airwell Group, Arcelik, Fisher & Paykel, Scotsman Ice, Indesit, Kuppersbusch, Kelon, DeLonghi); energy and environmental advocates (American Council for an Energy Efficient Economy, Appliance Standards Awareness Project, Natural Resources Defense Council, Alliance to Save Energy, Alliance for Water Efficiency, Northwest Power and Conservation Council, Northeast Energy Efficiency Partnerships); and consumer groups (Consumer Federation of America, National Consumer Law Center). This collective set of comments, which DOE refers to in this notice as the "Joint Comments"[8] recommends specific energy conservation standards for refrigeration products that, in the commenters' view, would satisfy the requirements under EPCA. DOE neither organized nor was a member of the group but sent staff to observe some meetings and made its contractors available to perform data processing. Consistent with its legal obligations when developing an energy conservation standard, DOE is providing the public with the opportunity to comment on the proposed levels that DOE is considering adopting for refrigeration products, which mirror those recommended in the Joint Comments. As DOE has not yet reached a final decision on the levels it should prescribe, DOE invites comment on these proposed levels, possible alternative levels, and all other aspects presented in today's NOPR.

III. General Discussion

The following section discusses various technical aspects related to this proposed rulemaking. In particular, it addresses aspects involving the test procedures for refrigeration products, the technological feasibility of potential standards to assign to these products, and the potential energy savings and economic justification for prescribing the proposed amended standards for refrigeration products.

A. Test Procedures

As noted above, DOE's current test procedures for refrigeration products appear at 10 CFR part 430, subpart B, appendices A1 (for refrigerators and refrigerator-freezers) and B1 (for freezers). DOE recently issued a NOPR in which it proposed to amend these appendices, and to create new Appendices A and B, applicable to refrigerators/refrigerator-freezers and freezers, respectively, for products covered by today's proposed standards, (*i.e.,* those manufactured on or after January 1, 2014). 75 FR 29824 (May 27, 2010). While the proposed test procedures would retain or revise many of the provisions currently in appendices A1 and B1, they would also add some new procedures. Most of the revisions and additions would apply to all refrigeration products, and would be reflected in both new appendices, as follows: Updating references to the Association of Home Appliance Manufacturers (AHAM) HRF–1 test standard; incorporating icemaking energy use into the energy use metric for products with automatic icemakers; clarifying the procedures for test sample preparation; modifying the test methods for convertible compartments and special-purpose compartments; modifying the anti-sweat heater definition to include those heaters that prevent sweat (*i.e.,* moisture condensation) on interior surfaces; establishing new compartment temperatures and volume calculation methods; modifying the test methods for advanced defrost systems; eliminating the optional third part of the test method for products with variable defrost systems; and adjusting and correcting the various energy use equations included in the test procedure regulatory text. *Id.*

DOE also proposed to adopt language in a new appendix A to incorporate test methods for products equipped with variable anti-sweat heater control systems that are currently addressed in waivers. These waivers apply only to refrigerators and refrigerator-freezers. *Id.* at 29835–37.

Finally, DOE proposed to amend certain other provisions to clarify that combination freezer-wine storage products are not subject to the standards for refrigerator-freezers and to require manufacturers and private labelers to include additional information when they certify to DOE the compliance of refrigeration products that use advanced controls. *Id.* at 29829 and 29841–42.

The test procedure NOPR public meeting was held June 22, 2010. DOE received numerous comments from stakeholders at this meeting, addressing all aspects of the proposed test procedure amendments. The comment period for the test procedure rulemaking ended on August 10, 2010. *Id.* at 29824.

1. Test Procedure Rulemaking Schedule

The preliminary analysis documents were published, and the preliminary analysis public meeting was held, prior to publication of the test procedure

[7] An "all-refrigerator" is defined as "an electric refrigerator which does not include a compartment for the freezing and long time storage of food at temperatures below 32 °F (0.0 °C). It may include a compartment of 0.50 cubic feet capacity (14.2 liters) or less for the freezing and storage of ice." (10 CFR part 430, subpart B, appendix A1, section 1.4).

[8] DOE Docket No. EERE–2008–BT–STD–0012, Comment 49. DOE considered the Joint Comments to supersede earlier comments by the listed parties regarding issues subsequently discussed in the Joint Comments.

NOPR describing the amended test procedure on which the preliminary analysis was based. Because of this situation, AHAM commented that it was difficult for it to comment fully on the preliminary analysis because the specific test procedure changes were not yet known. (AHAM, Public Meeting Transcript, No. 28 at p. 17) [9] Edison Electric Institute (EEI) expressed concern about completion of the energy standards rulemaking, since the test procedure NOPR had not yet been published. (EEI, Public Meeting Transcript, No. 28 at p. 25) The Appliance Standards Awareness Project (ASAP) commented that test procedure rulemakings have been completed by the time of the energy standards NOPR in the past, and that this is a reasonable approach. (ASAP, Public Meeting Transcript, No. 28 at p. 26)

While DOE acknowledges the advantages of publishing the test procedure rulemaking prior to discussing the preliminary analysis, the agency is working diligently to complete all of the rulemakings related to refrigeration products within the statutorily mandated schedule. DOE notes that under EPCA, an amended or new energy conservation standard may not be prescribed unless a test procedure for the regulated product has been prescribed. See 42 U.S.C. 6295(o)(3). DOE has every intention of complying with this requirement.

2. Icemaking

DOE received numerous comments regarding energy use attributable to icemaking during the preliminary analysis phase of this rulemaking.

Stakeholders generally agreed that icemaking energy use should be incorporated into the energy use metric for refrigeration products. American Council for an Energy Efficient Economy (ACEEE) and ASAP submitted a joint comment (hereafter referred to as ACEEE/ASAP) urging that icemaker energy use and losses associated with through-the-door ice and water service be incorporated into the test method and rulemaking. (ACEEE/ASAP, No. 43 at p. 1) [10] These commenters added that water service as well as ice service should be included in the refrigeration product energy use metric. (*Id.* at 1–2) A group of California utilities consisting of Pacific Gas and Electric, San Diego Gas and Electric, Southern California Gas Company, and Southern California Edison, collectively organized as the California Investor Owned Utilities (IOU), commented that the energy associated with operating automatic ice makers should be addressed, because operational automatic ice makers contribute significantly to the refrigerator energy consumption. (IOU, No. 36 at p. 2) IOU also commented that energy use associated with water dispensing should be considered in the test procedure. (IOU, No. 36 at p. 6) The Natural Resources Defense Council (NRDC) agreed with the guidance DOE developed on how to treat icemakers during testing (75 FR 2122 (January 14, 2010)), and commented that the guidance will be adequate for use in this rulemaking. NRDC added that it is imperative that DOE revise the test procedure to include ice maker energy usage in the next standard. (NRDC, No. 39 at p. 2) Support for incorporating icemaking energy use explicitly in the energy metric was also expressed by LG Electronics U.S.A. (LG), Northeast Energy Efficiency Partnerships (NEEP), Northwest Power and Conservation Council (NPCC), ASAP, and in unpaginated comments submitted by Sub Zero-Wolf, Inc. (Sub Zero). (LG, No. 41 at p. 1; NEEP, No. 38 at p. 1; NPCC, No. 33 at p. 1; ASAP, Public Meeting Transcript, No. 28 at p. 28; Sub Zero, No. 40 at p. 2)

Regarding the inclusion of a method in the test procedure for measuring the energy use attributable to water dispensing, DOE is unaware of any publicly available information about the daily water usage by consumers using water dispenser-equipped refrigeration products. DOE developed a preliminary estimate for this energy use as follows. Assuming an average consumption of 0.63 gallons per standard size refrigerator per day,[11] a water temperature of 70 °F when entering the system (typical household ambient temperature to which the water in the refrigerator supply tubing would equilibrate between icemaking cycles) and a dispensed temperature of 39 °F (the standardized temperature for the fresh food compartment in the HRF–1–2008 test procedure), and a refrigeration system EER [12] of 5 Btu/hr-W, this energy use is equal to 12 kWh per year, roughly 2.5 percent of the average energy use of a typical refrigerator-freezer. Based on these data, there appears to be limited potential for savings from increasing the efficiency of the cooling and processing of the dispensed water. Although solenoid valves are energized while water is dispersed, the duration of valve actuation is so short that the valves do not contribute significantly to energy use. The only significant energy use attributable to water dispensation by the refrigeration system is for cooling the water. Unlike with the case of automatic icemaking, in which electric heaters are typically used to free ice from an ice mold, there is no obvious portion of the energy use that can be reduced or eliminated by improving component efficiency. Based on the limited amount of available data, DOE currently lacks sufficient information regarding the level of water consumption associated with water dispenser-equipped refrigeration equipment to either develop a test procedure or set a standard within the context of the agency's current rulemaking activities. DOE may consider the adoption of such a method in a future rulemaking to amend its test procedures.

Several stakeholders highlighted the challenges involved in the development of a test procedure for icemaking energy use. AHAM commented that developing a procedure to determine automatic icemaking energy consumption would be complex, and that any such procedure must be robust and repeatable. (AHAM, No. 34 at p. 2) GE commented that it is critical that DOE insist on a robust, repeatable procedure that minimizes variability for calculating icemaker energy prior to inclusion in any standards. (GE, No. 37 at p. 1) LG commented on the complexity of such a procedure and also emphasized that any such procedure that DOE adopts be verifiable, repeatable, and reliable. (LG, No. 41 at p. 3) Other stakeholders commenting on the complexity of development of an icemaking test procedure include Sub Zero and AHAM. (Sub Zero, No. 40 at p. 3; Sub Zero, Public Meeting Transcript, No. 28 at p. 29; AHAM, Public Meeting Transcript, at pp. 30, 31)

AHAM's ongoing work to develop a test procedure to measure icemaking energy use was mentioned at the public

[9] Comments made during the public meeting are cited as (Commenter acronym, Public Meeting Transcript, No. 28 at [pages in the transcript at which the comment appears]).

[10] Written comments are cited as (Commenter acronym, No. [assigned comment number in the docket] at p. [page number at which the comment appears]).

[11] Based on 0.22 gallons of drinking water per person per day (Am J Physiol Regul Integr Comp Physiol 283: R993–R1004, 2002.) and 2.89 people per household with a standard sized refrigerator (2005 RECS data for standard-size refrigerators with TTD ice.).

[12] EER, the energy efficiency ratio, is a measure of the efficiency of a compressor or a refrigeration system, being equal to the delivered cooling in British Thermal Units per hour (Btu/hr) divided by the compressor or system power input in Watts (W). The value 5 Btu/hr-W is based on a typical EER of 5.5 Btu/hr-W for the compressor of a baseline standard-size refrigerator (See NOPR TSD Chapter 5, Engineering Analysis, section 5.8.4), with some reduction of this efficiency associated with the additional power input of the evaporator and condenser fans.

meeting. (Public Meeting Transcript, No. 28 at pp. 28–33) AHAM noted that there was significant variation in the initial measurements made by AHAM members to assess a preliminary icemaking energy use test procedure and that additional work is required to better understand the reasons for this variation. (See "AHAM Update to DOE on Status of Ice Maker Energy Test Procedure," 11/19/2009, No. 46) AHAM further commented that the next step is to complete round robin evaluation, which is expected to take 3 to 4 months. The initial measurements made by AHAM members did not explore the potential impact of volume or product type on automatic ice maker energy use and provided no indication of how icemaker energy might be incorporated into the baseline energy efficiency curves. Additional testing to provide this information is expected to take another 4 months. (AHAM, No. 34 at p. 2) The projected date of completion of this process, based on the January 15 date of the comments, was at best the middle of August 2010.

Given the complexity of this test procedure development work, many stakeholders suggested that finalizing a standard in 2010 based on a test procedure which includes a measurement of icemaking energy use is not critical for purposes of setting appropriate energy efficiency levels. Stakeholders who held this view included ACEEE/ASAP, GE, NRDC, and Sub Zero. (ACEEE/ASAP, No. 43 at p. 1–2; GE, No. 37 at p. 1; NRDC, No. 39 at p. 2; Sub Zero, No. 40 at p. 3) NEEP disagreed with this viewpoint and commented that DOE should consider imposing a deadline for the industry-led process to finalize an updated test procedure that incorporates icemaking energy use, after which DOE should quickly finalize a procedure to incorporate into its regulations. NEEP also suggested that a test procedure update prior to promulgation of standards was a more ideal solution. (NEEP, No. 38 at p. 1) Sub Zero and NEEP commented that a short delay in publication of the final rule for this rulemaking would be acceptable if necessary to allow sufficient time to develop the icemaking test procedure. (Sub Zero, No. 40 at p. 3; NEEP, No. 38 at p. 2)

Several stakeholder comments addressed details associated with an icemaking test procedure. AHAM commented that the energy use metric should be expressed in annual kWh per year. (AHAM, Public Meeting Transcript, No. 28 at p. 32) The AHAM draft proposal is based on converting a measurement of the energy required to produce one pound of ice by a production quantity of 1.8 pounds per day to determine annual icemaking energy use. (AHAM, No. 34 at p. 2) IOU recommended consideration of either a "kWh per pound of ice" metric or a "kWh per year" metric. (IOU, No. 36 at pp. 2–3) In light of these comments, DOE proposes to establish an annual energy use for ice that will be added to the energy use measured using the current test procedure (or an amended version of the current procedure) to provide a total annual energy use metric that includes the energy associated with icemaking.

Additionally, AHAM commented that "the test procedure may need to allow manufacturers to subtract the thermodynamic energy required to convert water to ice, so that this energy is not targeted for energy efficiency improvements." (AHAM, No. 34 at p. 2) However, AHAM acknowledged that the theoretical efficiency depends on the Coefficient of Performance (COP) [13] of the particular refrigerator-freezer, which can vary. (*Id.*) Consideration of the COP in this context is important, because the AHAM comment implication is that the thermodynamic energy required to convert water to ice is independent of refrigerator design. On the contrary, this energy use is indirectly proportional to the COP, which is a characteristic of the refrigerator's design. However, EPCA requires that test procedures "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 * * *" (42 U.S.C. 6293(b)(3)). This statutory provision calls for measuring energy use, and does not single out for incorporation into the test procedure only that portion of the energy use that could be eliminated or reduced through design modifications. DOE tentatively interpreted this requirement to mean that the test procedure must measure all of the energy use associated with a given product function.

LG commented that an icemaking test procedure should consider the potential overlap of icemaking and defrost periods. (LG, No. 41 at p. 3) DOE interprets this comment as addressing the fact that achieving steady state operation during icemaking may take a long time to achieve—possibly longer than the elapsed time between defrosts. Hence, the energy use increment associated with icemaking is difficult to distinguish from the energy use increment associated with defrost. DOE is not at this time considering this level of detail regarding a potential icemaking test.

Both AHAM and Sub Zero mentioned the need to consider manual as well as automatic icemaking. (AHAM, Public Meeting Transcript, No. 28 at p. 32; Sub Zero, No. 40 at p. 3) DOE notes that there is limited information available regarding the energy use of automatic icemakers, while there is no publicly available information regarding the energy use involved in manual icemaking. Hence, DOE is examining the possibility of incorporating the energy use of automatic icemakers into the energy use metric while leaving open for the time being the treatment of energy use related to manual icemaking.

DOE plans to incorporate icemaking energy use into the energy use metric for refrigeration products. However, DOE acknowledges the challenges in developing an accurate and repeatable test procedure and the need to avoid uncontrolled variability in energy test results associated with adopting a premature procedure. DOE also seeks to address this aspect of energy consumption and to improve the accuracy of representations of energy use (*i.e.,* on the EnergyGuide label used to inform consumers regarding product energy use) and has attempted to lay the initial foundations for an improved measurement by proposing a fixed placeholder representing icemaking energy use in kWh per year for all products equipped with an automatic icemaker. 75 FR 29846–47 (May 27, 2010). The proposed placeholder value is equal to the average reported by AHAM of measurements made using a draft icemaking energy use test procedure. ("AHAM Update to DOE on Status of Ice Maker Energy Test Procedure," No. 46 at p. 11) DOE intends to closely monitor industry efforts in developing a method of measuring icemaking energy use and may propose the incorporation of such a measurement into the test procedure and energy conservation standard at the appropriate time.

Stakeholders also commented regarding the approach used to set standards for icemaking energy use or to adjustment of energy standards to include icemaking energy use. DOE sought input regarding an appropriate method to establish maximum icemaking energy use as a function of product class and adjusted volume, as well as the available technology options to reduce icemaking energy use.

[13] Coefficient of Performance, equal to cooling energy delivered by the refrigeration product divided by energy input. This is related to EER, explained above, by the conversion of the units of energy input from British Thermal Units (Btu) to Watt-Hours (W-h).

(Preliminary Analysis Public Meeting Presentation, No. 26 at p. 19) EEI commented that maximum icemaking energy is more a function of the number and characteristics of occupants/users than it is a function of volume. (EEI, Public Meeting Transcript, No. 28 at p. 34) DOE agrees with this comment, but notes that energy conservation standards, defined by EPCA as "a performance standard which prescribes a minimum level of energy efficiency or a maximum quantity of energy use * * * for a covered product * * *" (42 U.S.C. 6291(6)(A)), do not address characteristics of the product purchasers or users. IOU commented that ice maker efficiency is directly affected by refrigeration system efficiency, ice maker component efficiency, allowable sub freezing temperature, and ice maker type. (IOU, No. 36 at p. 6) Stakeholders including AHAM, GE, and Whirlpool commented that it is premature to evaluate design options for reducing icemaking energy use and/or to set standards for icemaking at other than current baseline levels. (AHAM, No. 34 at p. 3; AHAM, Public Meeting Transcript, No. 28 at pp. 32, 33; GE, No. 37 at p. 1; Whirlpool, No. 31 at p. 5) AHAM further elaborated that a necessary first step before setting standards for icemaking would be to develop a robust test procedure and to establish that function's baseline energy use. In AHAM's view, the evaluation of design options and the potential for energy use reduction should be considered for a future rulemaking after fully demonstrating the validity of the test procedure (AHAM, No. 34 at p. 3)

DOE agrees that proposing a standard level for icemaking energy use is premature prior to the development of a test procedure that can be used to evaluate baseline icemaking energy use. EPCA prohibits the establishment of energy conservation standards for refrigeration products if no test procedure has been prescribed. See 42 U.S.C. 6295(o)(3)(A). DOE's proposed approach of assigning a fixed quantity of energy to icemaking in the test procedure in lieu of a test that measures each product's icemaking efficiency for comparison with a standard would provide information to consumers regarding the additional energy use associated with icemaking, since the energy use measurement reported on EnergyGuide labels will include this component. This proposed method would also give the industry additional time in which to perfect its test procedure to address this particular energy-consuming component.

The test procedure, which is the basis for the engineering analysis, does not consider variation of icemaking energy use as a function of product characteristics (other than the presence of an automatic icemaker). For that reason, DOE stated during the preliminary analysis public meeting that the engineering analysis does not consider icemaking. (Public Meeting Transcript, No. 28 at p. 27) NPCC pointed out that DOE's energy use analysis (see chapter 7 of the preliminary TSD) does address icemaking energy use through application in the calculations of the Usage Adjustment Factor (UAF) that converts energy test measurements to field energy use. (NPCC, Public Meeting Transcript, No. 28 at p. 27) DOE agrees that the usage adjustment factors (UAF) incorporate an adjustment to include icemaking energy use. (See Preliminary TSD, No. 22 at p. 7–6.) In the preliminary LCC analysis, DOE calculated energy savings by multiplying the energy use reduction under consideration (*e.g.,* 20-percent energy use reduction) by multiplying this percentage reduction by all of the calculated baseline field energy use, including icemaking energy use for products having automatic icemakers. In contrast, the NOPR analysis separated icemaking energy use from consideration of energy use reduction as much as possible, which is consistent with the proposal DOE is currently considering to incorporate icemaking energy use into the test procedure. This process is described more fully in the NOPR TSD.

3. Circumvention

Consumers Union submitted comments that specifically addressed circumvention. Key points made in its submittal included the following:

- Test procedures need to keep up with product development and must be continually updated and strengthened. Test procedures must be updated more frequently. (Consumers Union, No. 44 at pp. 5, 6)
- Regulations should explicitly provide a procedure for DOE to quickly close testing loopholes and to hold manufacturers accountable for any intentional manipulation of test procedures. (Consumers Union, No. 44 at pp. 5, 6)
- The test procedure should require compartment temperatures to be within a smaller range of acceptable values, such as within +/−2° F of ideal storage values. (Consumers Union, No. 44 at p. 5)
- The test procedure should reflect typical consumer conditions by explicitly forbidding any special energy savings at test temperatures, settings, or conditions that consumers are unlikely to experience. (Consumers Union, No. 44 at p. 5)

DOE acknowledges the need to update test procedures more frequently. DOE also acknowledges that enforcement and verification activities are needed to ensure that manufacturers cannot circumvent the test procedure. To this end, DOE is examining a variety of options to address these concerns and notes that its concurrent test procedure rulemaking would likely deal with these issues. Additionally, by statute, the agency is obligated to update its test procedure at least once every seven years, which DOE has every intention to fulfill. *See* 42 U.S.C. 6293(b).

4. Variable Anti-Sweat Heater Control

Anti-sweat heaters are used to prevent the condensation of moisture on refrigeration product surfaces. Such accumulation of moisture as liquid droplets is undesirable because (1) It is unsightly, (2) it encourages mold growth, and (3) the water drops can fall to the floor and create a slip hazard. These heaters are often electricity-consuming resistance heaters. However, many refrigeration products also use waste heat from the refrigeration system to provide anti-sweat heating functions. This is accomplished by routing hot gas or warm liquid refrigerant tubing in the regions of the cabinet that require anti-sweat heating.

GE and AHAM both supported DOE's proposal to amend the current test procedure to address the treatment of products equipped with a variable anti-sweat heater control system. These systems control anti-sweat heater operation by reducing or eliminating their energy use when ambient conditions, such as humidity, indicate that heater operation at full load is unnecessary. (GE, No. 37 at p. 2; AHAM, No. 34 at p. 10) DOE notes that, while it plans to modify the current test procedure to enable it to address variable anti-sweat heater control systems, the agency may choose not to directly incorporate the current waiver language covering these types of systems into the test procedure. *See, e.g.,* variable antisweat heater waivers published at 73 FR 10425 (February 27, 2008) and 74 FR 20695 (May 5, 2009). DOE proposed as part of its test procedure amendments to incorporate a modified version of that procedure (*see* 75 FR 29835–37 (May 27, 2010)), and is considering public comments in finalizing those amendments.

5. Standby and Off Mode Energy Use

DOE also notes that EPCA, as amended by EISA 2007, requires DOE to

amend its test procedures for all covered products, including those for refrigeration products, to include measurement of standby mode and off mode energy consumption, except where current test procedures fully address such energy consumption. (42 U.S.C. 6295(gg)(2)) As indicated above, DOE's current test procedures for refrigeration products fully address standby and off mode energy use, and any amended test procedure that DOE adopts for these products will continue to do so.

B. Technological Feasibility

1. General

In each standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that have the potential to improve product or equipment efficiency. To conduct the analysis, DOE develops a list of design options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of these means for improving efficiency are technologically feasible. DOE considers a design option to be technologically feasible if it is currently in use by the relevant industry, or if a working prototype exists. *See* 10 CFR part 430, subpart C, appendix A, section 4(a)(4)(i) (providing that "[t]echnologies incorporated in commercially available products or in working prototypes will be considered technologically feasible.")

Once DOE has determined that particular design options are technologically feasible, it evaluates each of these design options using the following additional screening criteria: (1) Practicability to manufacture, install, or service; (2) adverse impacts on product utility or availability; and (3) adverse impacts on health or safety. (10 CFR part 430, subpart C, appendix A, section 4(a)(4)). Section IV.B of this notice discusses the results of the screening analysis for refrigeration products, particularly the designs DOE considered, those it screened out, and those that are the basis for the trial standard levels (TSLs) in this rulemaking. For further details on the screening analysis for this rulemaking, see chapter 4, Screening Analysis, of the NOPR TSD.

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt (or not adopt) an amended standard for a type or class of covered product, it must "determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible" for such product. (42 U.S.C. 6295(p)(1)) Accordingly, DOE determined the maximum technologically feasible (hereafter max-tech) reductions in energy use for refrigeration products in the engineering analysis.

As described in the preliminary TSD, DOE conducted a full analysis of a set of product classes that comprise a large percentage of product shipments in the market today. DOE's approach for extending proposed standard levels established for these product classes to the non-analyzed product classes is described in chapter 2, Analytical Framework, of the preliminary TSD, in section 2.15. However, this section of this notice reports the max-tech efficiency levels only for the directly analyzed product classes.

DOE used the proposed test procedures that would apply once manufacturers must comply with the new standard to determine the max-tech efficiency levels of the directly analyzed product classes. The efficiency levels are defined as reductions in that portion of the energy use not associated with icemaking. As described in section III.A, above, the energy use associated with icemaking under the proposed test procedure is a fixed quantity not correlated with an efficiency level. Separating this fixed quantity of energy use from the definition of efficiency level allows a more direct comparison of products, irrespective of whether a given product is equipped with an automatic icemaker. This approach also allows DOE to compare the efficiency levels based on the proposed test procedure (*i.e.,* projections of possible energy use reductions) against the energy use based on the existing test procedure and current standard.[14]

DOE used the full set of design options considered applicable for these products classes to determine the max-tech efficiency levels for the analyzed product classes. (*See* chapter 5 of the NOPR TSD, section 5.4.4.) Table III.1 lists the max-tech levels that DOE determined for this rulemaking. The table also presents the max-tech levels that are commercially available. The max-tech levels differ from those presented in the preliminary TSD, and are generally lower (*i.e.,* the percent energy use reductions are lower for the NOPR analysis, thus the max-tech energy use is higher). The reduction in the max-tech efficiency levels is due to the revisions DOE implemented in the NOPR engineering analysis to address new information obtained during this phase of the work.

TABLE III.1—MAX-TECH EFFICIENCY LEVELS FOR THE REFRIGERATION PRODUCTS RULEMAKING

Product class	Description	Efficiency level (percent energy use reduction)	
		DOE analysis (in percent)	Max tech commercially available (in percent)
Standard-Size Refrigerator-Freezers			
3	Refrigerator-freezers—automatic defrost with top-mounted freezer without through-the-door ice service.	36	30
5	Refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service.	36	33
7	Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.	33	32

[14] In other words, a product with energy usage that is a certain percentage below the current energy standard should remain the same percentage below the baseline energy use under the proposed test procedure after subtracting icemaking energy use. Hence, the max-tech levels expressed as percentage of energy use reduction should be the same for both sets of test procedures.

TABLE III.1—MAX-TECH EFFICIENCY LEVELS FOR THE REFRIGERATION PRODUCTS RULEMAKING—Continued

Product class	Description	Efficiency level (percent energy use reduction)	
		DOE analysis (in percent)	Max tech commercially available (in percent)
Standard-Size Freezers			
9	Upright freezers with automatic defrost	44	27
10	Chest freezers and all other freezers except compact freezers	41	16
Compact Products			
11	Compact refrigerators and refrigerator-freezers with manual defrost	59	27
18	Compact chest freezers	42	23
Built-In Products			
3A–BI	Built-In All-refrigerators—automatic defrost	28	31
5–BI	Built-In Refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service.	27	27
7–BI	Built-In Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.	22	21
9–BI	Built-In Upright freezers with automatic defrost	27	27

The max-tech efficiency levels identified for commercially available products are in most cases different from the max-tech levels shown in Table III.1. These levels are significantly higher than the commercially available max-tech levels for product classes 9 (upright freezers with automatic defrost), 10 (chest freezers), 11 (compact refrigerators and refrigerator-freezers with manual defrost), and 18 (compact chest freezers). DOE determined that higher max-tech levels for these products were possible because the commercially available products generally do not use all of the energy efficient design options considered in the DOE max-tech analyses. Prototypes with the DOE max-tech levels have not been identified, but the design options are all used in commercially available products.

DOE determined the max-tech levels using the EPA Refrigerator Analysis (ERA) program to conduct energy modeling. DOE conducted this energy modeling for specific products examined during the engineering analysis. DOE created energy models for the existing products and adjusted these models to represent modified designs using the screened-in design options. The max-tech levels represent the most efficient design option combinations applicable for the analyzed products. This process is described in the NOPR TSD in chapter 5, Engineering Analysis in sections 5.4.4 and 5.7. DOE considered different sets of design options for each product class, as indicated in Table III.2,

TABLE III.2—DESIGN OPTIONS CONSIDERED FOR MAX TECH

Product class	Design option							
	BLDC* fan motors	Heat exchanger improvement	Thicker walls	Vacuum insulation panels (VIPs)	Variable speed compressor	Adaptive defrost	Variable anti-sweat heater control	Isobutane refrigerant
3	√	√		√	√	√		
5	√	√		√	√	√	√	
7	√	√		√	√	√	√	
9	√	√	√	√	√	√		
10		√	√	√	√			
11		√	√	√	√			√
18		√	√	√	√			
3A–BI	√	√		√	√	√		
5–BI	√	√		√	√	√	√	
7–BI	√	√		√	√	√	√	
9–BI	√	√		√	√	√		

* Brushless-Direct-Current.

Stakeholder comments and questions regarding the preliminary analysis max-tech levels primarily address (a) The validity of max tech that is calculated based on technology options that are used in commercialized products but which is not achieved in actual products or prototypes, (b) the validity of consideration of variable speed compressors for compact products, (c) whether some of the design options, particularly heat exchanger size increases, would fit physically in the products, and (d) the validation of the energy modeling predictions. Comments falling under categories (b) through (d) address engineering analysis issues and are discussed in section IV.C, below.

Some stakeholders questioned DOE's use of energy analysis based on design options used in commercial products to determine max-tech levels rather than the maximum efficiency levels of available products.

AHAM questioned DOE's use of the max-tech evaluation. AHAM supports DOE's historical approach of using the max-tech reference to identify those units in the market that have achieved the maximum efficiency. (AHAM, No. 34 at pp. 10, 15)

GE also pointed out the discrepancy between the commercially available max-tech level and the theoretical max-tech level. (GE, Public Meeting Transcript, No. 28 at p. 77) GE mentioned that DOE has not provided a detailed comparison of the maximum efficiency levels currently available in the market with the model-based max tech. (*Id.*) In written comments, GE also stated that DOE should not use theoretical max-tech levels not yet proven as viable alternatives in the marketplace and noted that there may be some instances where the inclusion of certain designs options may not yield additive improvements in efficiency. (GE, No. 37 at p. 2)

While DOE has often selected max-tech levels that are based on commercially available efficiency levels, max-tech selections are not required to be limited to commercially available products or prototypes. DOE follows a prescribed method for evaluating technologies, which is laid out in 10 CFR part 430, subpart C, appendix A. When DOE evaluates design options in ascertaining max-tech levels, these options are ones that have been incorporated into commercial products or in working prototypes. See, *e.g.,* 10 CFR part 430, subpart C, appendix A, section 4(a)(4)(i) and 5(b)(1). The range of candidate standard levels will typically include the most energy efficient combination of design options. 10 CFR part 430, subpart C, appendix A, section 5(c)(3)(i)(A). Because all of the design options represented by the max-tech levels examined by DOE are in use in the marketplace, DOE is considering max-tech levels that employ *combinations* of these design options, which, for some of the product classes, are not currently found in the marketplace. DOE considered in the analysis whether the chosen design options used for the max-tech analyses can be combined and concluded that the chosen combinations are valid. For example, when considering VIPs, DOE adjusted the analysis to remove some conventional insulation, and when considering variable-speed compressors, DOE removed high-efficiency single-speed compressor design options.

DOE requests comment on the max-tech levels identified and on the combinations of design options considered applicable to achieve max-tech designs. DOE requests that comments also address as appropriate the differences in applicable design options for different product classes. *See* Issue 2 under "Issues on Which DOE Seeks Comment" in section VII.E. Based on comments received in response to these issues, DOE may make adjustments to its proposed levels.

C. Energy Savings

1. Determination of Savings

DOE used its NIA spreadsheet model to estimate energy savings from amended standards for the refrigeration products that are the subject of this rulemaking.[15] For each TSL, DOE forecasted energy savings beginning in 2014, the year that manufacturers would be required to comply with amended standards, and ending in 2043. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between the standards case and the base case. The base case represents the forecast of energy consumption in the absence of amended mandatory efficiency standards, and considers market demand for more-efficient products.

The NIA spreadsheet model calculates the electricity savings in "site energy" expressed in kilowatt-hours (kWh). Site energy is the energy directly consumed by refrigeration products at the locations where they are used. DOE reports national energy savings on an annual basis in terms of the aggregated source (primary) energy savings, which is the savings in the energy that is used to generate and transmit the site energy. (See TSD chapter 10.) To convert site energy to source energy, DOE derived annual conversion factors from the model used to prepare the Energy Information Administration's (EIA) *Annual Energy Outlook 2010 (AEO2010).*

2. Significance of Savings

As noted above, 42 U.S.C. 6295(o)(3)(B) prevents DOE from adopting a standard for a covered product if such standard would not result in "significant" energy savings. While the term "significant" is not defined in the Act, the U.S. Court of Appeals, in *Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355, 1373 (DC Cir. 1985), indicated that Congress intended "significant" energy savings in this context to be savings that were not "genuinely trivial." The energy savings for all of the TSLs considered in this rulemaking are nontrivial, and, therefore, DOE considers them "significant" within the meaning of section 325 of EPCA.

D. Economic Justification

1. Specific Criteria

As noted in section II.B, EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)) The following sections discuss how DOE has addressed each of those seven factors in this rulemaking.

a. Economic Impact on Manufacturers and Consumers

In determining the impacts of an amended standard on manufacturers, DOE first determines the quantitative impacts using an annual cash-flow approach. This step includes both a short-term assessment—based on the cost and capital requirements during the period between the issuance of a regulation and when entities must comply with the regulation—and a long-term assessment over a 30-year analysis period. The industry-wide impacts analyzed include INPV (which values the industry on the basis of expected future cash flows), cash flows by year, changes in revenue and income, and other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, paying particular attention to impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of different DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and the PBP associated with new or amended standards. The LCC, which is separately specified in EPCA as one of the seven factors to be considered in determining the economic justification for a new or amended standard, 42 U.S.C. 6295(o)(2)(B)(i)(II), is discussed in the following section. For consumers in the aggregate, DOE also calculates the national net present value of the economic impacts on consumers over the forecast period used in a particular rulemaking.

b. Life-Cycle Costs

The LCC is the sum of the purchase price of a product (including its installation) and the operating expense (including energy and maintenance and

[15] The NIA spreadsheet model is described in section IV.G of this notice.

repair expenditures) discounted over the lifetime of the product. The LCC savings for the considered efficiency levels are calculated relative to a base case that reflects likely trends in the absence of amended standards. The LCC analysis requires a variety of inputs, such as product prices, product energy consumption, energy prices, maintenance and repair costs, product lifetime, and consumer discount rates. DOE assumed in its analysis that consumers will purchase the considered products in 2014.

To account for uncertainty and variability in specific inputs, such as product lifetime and discount rate, DOE uses a distribution of values with probabilities attached to each value. A distinct advantage of this approach is that DOE can identify the percentage of consumers estimated to receive LCC savings or experience an LCC increase, in addition to the average LCC savings associated with a particular standard level. In addition to identifying ranges of impacts, DOE evaluates the LCC impacts of potential standards on identifiable subgroups of consumers that may be disproportionately affected by a national standard.

c. Energy Savings

While significant conservation of energy is a separate statutory requirement for imposing an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) DOE uses the NIA spreadsheet results in its consideration of total projected energy savings.

d. Lessening of Utility or Performance of Products

In establishing classes of products, and in evaluating design options and the impact of potential standard levels, DOE sought to develop standards for refrigeration products that would not lessen the utility or performance of these products. None of the TSLs presented in today's NOPR would substantially reduce the utility or performance of the products under consideration in the rulemaking. However, manufacturers may reduce the availability of features that increase energy use, such as multiple drawers, in response to amended standards. (42 U.S.C. 6295(o)(2)(B)(i)(IV))

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider any lessening of competition that is likely to result from standards. It also directs the Attorney General of the United States (Attorney General) to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(i)(V) and (B)(ii)) DOE has transmitted a copy of today's proposed rule to the Attorney General and has requested that the Department of Justice (DOJ) provide its determination on this issue. DOE will address the Attorney General's determination in the final rule.

f. Need for National Energy Conservation

Certain benefits of the proposed standards are likely to be reflected in improvements to the security and reliability of the Nation's energy system. Reductions in the demand for electricity may also result in reduced costs for maintaining the reliability of the Nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the Nation's needed power generation capacity.

Energy savings from the proposed standards are also likely to result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases associated with energy production. DOE reports the environmental effects from the proposed standards for refrigeration products, and from each TSL it considered, in the environmental assessment contained in chapter 15 in the NOPR TSD. DOE also reports estimates of the economic value of emissions reductions resulting from the considered TSLs.

g. Other Factors

EPCA allows the Secretary of Energy, in determining whether a standard is economically justified, to consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) In developing the proposals of this notice, DOE has also considered the comments of the stakeholders, including those raised in the Joint Comments.

2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii), EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of a product that meets the standard is less than three times the value of the first-year of energy savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and PBP analyses generate values used to calculate the payback period for consumers of potential amended energy conservation standards. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable presumption test. However, DOE routinely conducts an economic analysis that considers the full range of impacts to the consumer, manufacturer, Nation, and environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section IV.F.12 of this NOPR and chapter 8 of the NOPR TSD.

IV. Methodology and Discussion

DOE used two spreadsheet tools to estimate the impact of today's proposed standards. The first spreadsheet calculates LCCs and payback periods of potential new energy conservation standards. The second provides shipments forecasts, and then calculates national energy savings and net present value impacts of potential new energy conservation standards. DOE also assessed manufacturer impacts, largely through use of the Government Regulatory Impact Model (GRIM). The two spreadsheets will be made available online at the rulemaking Web site: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/refrigerators_freezers.html.*

Additionally, DOE estimated the impacts on utilities and the environment of energy efficiency standards for refrigeration products. DOE used a version of EIA's National Energy Modeling System (NEMS) for the utility and environmental analyses. The NEMS model simulates the energy sector of the U.S. economy. EIA uses NEMS to prepare its *Annual Energy Outlook,* a widely known energy forecast for the United States. The version of NEMS used for appliance standards analysis is called NEMS–BT,[16] and is based on the *AEO* version with minor modifications.[17] The

[16] BT stands for DOE's Building Technologies Program.

[17] The EIA allows the use of the name "NEMS" to describe only an *AEO* version of the model without any modification to code or data. Because the present analysis entails some minor code

Continued

NEMS–BT offers a sophisticated picture of the effect of standards because it accounts for the interactions between the various energy supply and demand sectors and the economy as a whole.

A. Market and Technology Assessment

When beginning an energy conservation standards rulemaking, DOE develops information that provides an overall picture of the market for the products concerned, including the purpose of the products, the industry structure, and market characteristics. This activity includes both quantitative and qualitative assessments, based primarily on publicly available information. The subjects addressed in the market and technology assessment for this rulemaking include product classes and manufacturers; quantities, and types of products sold and offered for sale; retail market trends; regulatory and non-regulatory programs; and technologies or design options that could improve the energy efficiency of the product(s) under examination. See chapter 3, Market and Technology Assessment, of the NOPR TSD for further discussion of the market and technology assessment.

Discussion presented in this section of today's NOPR primarily addresses the scope of coverage of refrigeration products and the product class structure. Both of these issues were discussed at length during the preliminary analysis public meeting. DOE is proposing several modifications of the product class structure, as discussed in section IV.A.2, Below.

1. Exclusion of Wine Coolers From This Rulemaking

During the preliminary analysis, DOE considered whether wine coolers are covered products under EPCA, and whether they would be considered in this rulemaking. DOE modified the definition of "Electric Refrigerator" on November 19, 2001, by limiting the definition to products designed for the refrigerated storage of food at temperatures above 32 °F and below 39 °F. 66 FR 57845, 57848 (November 19, 2001). The modification imposed an upper limit on the applicable storage temperature range, thus eliminating wine storage products, which operate with storage temperatures above 40 °F (and generally near 55 °F) from consideration as electric refrigerators. The industry generally urged DOE to consider wine coolers within the scope of its rulemaking. (AHAM, No. 34 at p. 9; Sub Zero, Public Meeting Transcript, No. 28 at p. 108; Sub Zero, No. 40 at p. 9; Whirlpool, No. 31 at p. 2) AHAM further argued that DOE does have the authority to regulate wine coolers, and stated that regulation of wine coolers under a DOE standard is important to prevent manufacturers from having to meet multiple State requirements. (AHAM, Public Meeting Transcript, No. 28 at p. 36) Sub Zero suggested that DOE establish a standard that is consistent with current standards set by the California Energy Commission (CEC) and Natural Resources Canada (NRCan), and also argued that no State or foreign requirement should set a de facto national standard for any appliance. (Sub Zero, No. 40 at p. 9) Other commenters, IOU and Energy Solutions, representing Pacific Gas and Electric (PG&E), supported DOE's proposal. (IOU, No. 36 at p. 12; PG&E, Public Meeting Transcript, No. 28 at p. 36)

DOE notes that residential wine coolers are appliances designed for the storage of wine at a temperature of approximately 55 °F. Because they are neither designed for food storage, nor maintain storage temperatures below 39 °F, they are not "electric refrigerators" as defined in 10 CFR 430.2. Since EPCA does not define the term "refrigerators" or "refrigeration products," a definition could be developed to account for those products that operate with warmer compartment temperature ranges, including wine storage products. DOE may consider such a change in a future rulemaking.

2. Product Classes

In evaluating and establishing energy conservation standards, DOE generally divides covered products into classes by the type of energy used, or by capacity or other performance-related feature that justifies a different standard for those products. (See 42 U.S.C. 6295(q)). In deciding whether a feature justifies a different standard, DOE must consider factors such as the utility of the feature to users. (*Id.*) DOE normally establishes different energy conservation standards for different product classes based on these criteria. The CFR sets forth 18 product classes for refrigerators, refrigerator-freezers, and freezers.[18] These classes are based on the following characteristics: type of unit (refrigerator, refrigerator-freezer, or freezer), size of the cabinet (standard or compact), type of defrost system (manual, partial, or automatic), presence or absence of through-the-door (TTD) ice service, and placement of the fresh food and freezer compartments for refrigerator-freezers (top, side, bottom).

DOE proposes to create 19 new product classes to account for the increasingly wider number of variants of products. Six new product classes were discussed and proposed in the preliminary analysis phase. Table IV.1 presents the product classes under consideration in this rulemaking, including both current and proposed classes. Note that the designation of some of the current product classes has changed in order to address the proposed division of these product classes. The subsections below provide additional details and discussion of comments relating to the product classes under consideration.

TABLE IV.1—PROPOSED PRODUCT CLASSES FOR REFRIGERATION PRODUCTS

Number	Product class
Classes listed in the CFR	
1	Refrigerators and refrigerator-freezers with manual defrost.
2	Refrigerator-freezers—partial automatic defrost.
3	Refrigerator-freezers—automatic defrost with top-mounted freezer without an automatic icemaker.
4	Refrigerator-freezers—automatic defrost with side-mounted freezer without an automatic icemaker.
5	Refrigerator-freezers—automatic defrost with bottom-mounted freezer without an automatic icemaker.
6	Refrigerator-freezers—automatic defrost with top-mounted freezer with through-the-door ice service.
7	Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.

modifications and runs the model under various policy scenarios that deviate from *AEO* assumptions, the name "NEMS–BT" refers to the model as used here. For more information on NEMS, refer to *The National Energy Modeling System: An Overview,* DOE/EIA–0581 (98) (Feb.1998), available at: *http://tonto.eia.doe.gov/FTPROOT/forecasting/058198.pdf.*

[18] Title 10—Energy, Chapter II—Department of Energy, Part 430—Energy Conservation Program for Consumer Products, Subpart A—General Provisions, Section 430.32—Energy and Water Conservation Standards and Effective Dates.

TABLE IV.1—PROPOSED PRODUCT CLASSES FOR REFRIGERATION PRODUCTS—Continued

Number	Product class
8	Upright freezers with manual defrost.
9	Upright freezers with automatic defrost without an automatic icemaker.
10	Chest freezers with manual defrost and all other freezers except compact freezers.
11	Compact refrigerators and refrigerator-freezers with manual defrost.
12	Compact refrigerator-freezers—partial automatic defrost.
13	Compact refrigerator-freezers—automatic defrost with top-mounted freezer.
14	Compact refrigerator-freezers—automatic defrost with side-mounted freezer.
15	Compact refrigerator-freezers—automatic defrost with bottom-mounted freezer.
16	Compact upright freezers with manual defrost.
17	Compact upright freezers with automatic defrost.
18	Compact chest freezers.
Product classes proposed to be established in this rulemaking and introduced in the preliminary TSD	
1A	All-refrigerators—manual defrost.
3A	All-refrigerators—automatic defrost.
5A	Refrigerator-freezers—automatic defrost with bottom-mounted freezer with through-the-door ice service.
10A	Chest freezers with automatic defrost.
11A	Compact all-refrigerators—manual defrost.
13A	Compact all-refrigerators—automatic defrost.
Additional product classes proposed to be established in this rulemaking	
3–BI	Built-in refrigerator-freezer—automatic defrost with top-mounted freezer without an automatic icemaker.
3I	Refrigerator-freezers—automatic defrost with top-mounted freezer with an automatic icemaker without through-the-door ice service.
3I–BI	Built-in refrigerator-freezers—automatic defrost with top-mounted freezer with an automatic icemaker without through-the-door ice service.
3A–BI	Built-in all-refrigerators—automatic defrost.
4I	Refrigerator-freezers—automatic defrost with side-mounted freezer with an automatic icemaker without through-the-door ice service.
4–BI	Built-in refrigerator-freezers—automatic defrost with side-mounted freezer without an automatic icemaker.
4I–BI	Built-in refrigerator-freezers—automatic defrost with side-mounted freezer with an automatic icemaker without through-the-door ice service.
5I	Refrigerator-freezers—automatic defrost with bottom-mounted freezer with an automatic icemaker without through-the-door ice service.
5–BI	Built-in refrigerator-freezers—automatic defrost with bottom-mounted freezer without an automatic icemaker.
5I–BI	Built-in refrigerator-freezers—automatic defrost with bottom-mounted freezer with an automatic icemaker without through-the-door ice service.
5A–BI	Built-in refrigerator-freezer—automatic defrost with bottom-mounted freezer with through-the-door ice service.
7–BI	Built-in refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.
9–BI	Built-in upright freezers with automatic defrost without an automatic icemaker.

DOE proposed six new product classes in the preliminary TSD. Two of these, product class 5A, "automatic defrost refrigerator-freezers with bottom-mounted freezer with through-the-door ice service," and product class 10A, "chest freezers with automatic defrost," were identified in the framework document as product classes 19 and 20. DOE modified the designation of these product classes in order to maintain consistency with the product class designations adopted by Canada. DOE received comments from AHAM and Whirlpool supporting this modification. (AHAM, Public Meeting Transcript, No. 28 at pp. 40; AHAM, No. 34 at p. 3; Whirlpool, No. 31 at p. 1)

Four additional product classes proposed in the preliminary TSD are all-refrigerators. As described below, the proposed new test procedure has led to DOE's proposal to establish separate product classes for these products.

As part of today's NOPR, DOE proposes 13 additional new product classes. These classes are based on incorporation of icemaking energy use into the test procedure, and the need to address the different consumer utility and energy use characteristics of built-in products.

EPCA requires that the establishment of separate product classes be based on either (A) consumption of a different kind of energy from that consumed by other covered products within such type (or class); or (B) a capacity or other performance-related feature which other products within such type (or class) do not have, where such feature justifies a higher or lower standard from that which applies to other products within such type (or class). (42 U.S.C. 6295(q)). The second of these criteria is applicable to all of the new product classes proposed in this rulemaking.

a. French Door Refrigerators With Through-the-Door Ice Service

DOE proposes to establish a new product class 5A (refrigerator-freezers—automatic defrost with bottom-mounted freezer with through-the-door ice service). Most, if not all, products of this class have a pair of French doors rather than a single door serving the upper fresh food compartment. Products of class 5A have TTD ice service features which are not present in current product class 5 (refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service). These added features increase energy use because of the thermal load associated with the TTD dispenser penetration and the anti-sweat heater energy generally used in this area of the product. *See, e.g.,* Decision and Order (Maytag Corporation), Office of Hearings and Appeals, Case No. TEE–0022 (published August 11, 2005) (granting

exception relief to Maytag and creating a revised energy equation to permit the sale of refrigerator-freezers equipped with a bottom-mounted freezer and through-the-door ice service). Hence, because of the presence of this capability, DOE has determined that these unique features merit a separate product class and justify a separate maximum energy use standard.

b. Chest Freezers With Automatic Defrost

Products of class 10A (chest freezers with automatic defrost) include an automatic defrost function, a feature not present in chest freezers with manual defrost. Automatic, as opposed to manual, defrost is recognized as a feature with distinct consumer utility that increases energy use, justifying a separate energy use standard. *See, e.g.,* Decision and Order (Electrolux Home Products, Inc.), Office of Hearings and Appeals, Case No. TEE–0012 (published September 13, 2004).

c. All-Refrigerators

DOE proposes establishing four new all-refrigerator product classes to separate these products from their current product classes. These current product classes—1 (refrigerators and refrigerator-freezers with manual defrost), 3 (refrigerator-freezers—automatic defrost with top-mounted freezer without through-the-door ice service and all-refrigerators—automatic defrost), 11 (compact refrigerators and refrigerator-freezers with manual defrost), and 13 (compact refrigerator-freezers—automatic defrost with top-mounted freezer and compact all-refrigerator—automatic defrost)—include refrigerators with freezer compartments ("basic refrigerators"), refrigerator-freezers, and all-refrigerators. The proposed test procedure changes described in section III.A will result in significantly higher measured energy use for basic refrigerators and refrigerator-freezers, and somewhat less energy use for all-refrigerators. At this time, DOE believes that these differences in energy use characteristics under the proposed new test procedures, combined with the distinct utility difference associated with presence of a freezer compartment (of 0.5 cubic foot size or greater) satisfy the criteria under EPCA to establish separate product classes. (See 42 U.S.C. 6295(q)(1)(B)). DOE received comments supporting this proposal from AHAM and Whirlpool (AHAM, Public Meeting Transcript, No. 28 at p. 40; AHAM, No. 34 at p. 4; Whirlpool, Public Meeting Transcript, No. 28 at pp. 41–42) Whirlpool clarified in written comments that separate product classes should not be added for multi-door refrigerators (Whirlpool, No. 31 at p. 1).

DOE's proposal to separate all-refrigerators from the product classes that currently include all-refrigerators, refrigerator-freezers, and basic refrigerators is based on the performance afforded by the freezer compartments of refrigerator-freezers and basic refrigerators. All-refrigerators were not explicitly mentioned when the 1990 energy standard was established. 54 FR 6062, 6077 (February 7, 1989). Product class 1 includes all-refrigerators with manual defrost, since "all-refrigerator" is a sub-category of "refrigerator." That final rule did not explicitly recognize the existence of all-refrigerators with automatic defrost. (*Id.*) These products were subsequently added to product class 3 starting with the 1993 standard. 54 FR 47916 (November 17, 1989). The NOPR for that final rule, made this change in response to comments received from Whirlpool and AHAM. 53 FR 48798, 48809 (December 2, 1988). When compact products were later separated from standard-size products with the 2001 standard, the compact all-refrigerators became part of product classes 11 (for manual defrost products) and 13 (for automatic defrost products). 62 FR 23102 (April 28, 1997).

Under the proposed test procedures that underpin today's proposed levels, the energy use characteristics of all-refrigerators will not be consistent with the refrigerator-freezers and basic refrigerators of the same current product classes. Specifically, the measured energy use of all-refrigerators is expected to decrease under the proposed new test procedures, while the measured energy use of refrigerator-freezers and basic refrigerators is expected to increase significantly (See the preliminary TSD chapter 5, Engineering Analysis, section 5.4.2.1). Since the freezer compartments of refrigerator-freezers and basic refrigerators provide a different level of consumer utility than all-refrigerators, and because the product differences also contribute to different efficiency characteristics, DOE tentatively believes that separating these product classes is justified under EPCA. *See* 42 U.S.C. 6295(q).

With respect to the treatment of those products equipped with off-cycle defrost, DOE sought comment on whether stakeholders agree with the agency's interpretation that this feature is a form of automatic defrost and whether the proposed product class 1A (all-refrigerators with manual defrost) is needed. In products with off-cycle defrost, the evaporator warms above freezing temperature when the compressor turns off, thus allowing the frost to melt. Such defrost systems are used only in all-refrigerators or fresh food compartments of refrigerator-freezers, because the compartment temperature must be above 32 °F for the evaporator to warm above freezing. The proposed product class 1A includes standard-size all-refrigerators with manual defrost. If off-cycle defrost is treated as automatic defrost rather than manual defrost, product class 1A would consist primarily of refrigerators with roll-bond evaporators enclosing freezer compartments with a size of less than 0.5 cubic foot. During the preliminary analysis discussion, DOE was unaware of whether standard-size products with such small freezer compartments exist and requested comment on these issues for this reason.

AHAM commented during the public meeting that it considers off-cycle defrost to be automatic defrost, but that it was not aware of any all-refrigerator products with manual defrost (AHAM, Public Meeting Transcript, No. 28 at p. 40) However, Sanyo E&E Corporation (Sanyo) indicated in written comments that it manufacturers such products (Sanyo, No. 32 at p. 3) Based on this information, DOE proposes that product class 1A be established in addition to the other all-refrigerator product classes.

ASAP urged DOE to avoid introducing too many product classes, and that streamlining product classes has been shown to reduce overall energy consumption. (ASAP, Public Meeting Transcript, No. 28 at p. 41) DOE believes that each of its proposed product classes is needed to ensure that meaningful efficiency levels will be established for each of these products. Because the measured energy use of products with freezer compartments larger than 0.5 cubic foot is expected to increase roughly 15 percent under the proposed new test procedure and the energy use of all-refrigerators is expected to decrease roughly 3 percent (see chapter 5, Engineering Analysis, of the preliminary TSD, section 5.4.2.1), the energy use characteristics of the former group of products will determine the new standards for these product classes. The proposed test procedure would be more representative of field energy use differences of these product classes and would show higher energy use for basic refrigerators and refrigerator-freezers than all-refrigerators. Accordingly, by DOE's estimates, the potential energy savings associated with all-refrigerators resulting from the new energy standard would be roughly 18 percent less if DOE

retains the current product class structure than they would be if DOE establishes separate all-refrigerator product classes.

d. Products With Automatic Icemakers

The test procedure proposed to apply to refrigeration products covered under the proposed new energy conservation standards incorporates energy use associated with automatic icemaking. 75 FR 29846 (May 27, 2010). DOE considers an automatic icemaker to be a feature that provides unique consumer utility. Products equipped with an automatic icemaker would have energy characteristics that are distinct from those without one because the energy use measured under the proposed test procedure depends on the presence of an automatic icemaker. Therefore, DOE tentatively concludes that establishing product class distinctions based on the presence of an automatic icemaker is justified. (*See* 42 U.S.C. 6295(q).)

Some of the existing product classes denote products that inherently have automatic icemakers. These include product classes 6 (refrigerator-freezers—automatic defrost with top-mounted freezer with through-the-door ice service) and 7 (refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service). However, some of the other product classes denote products that may or may not include automatic icemakers. For these products, DOE proposes to establish new product classes, as indicated in Table IV.1, above. These proposed new product classes include conventional (free-standing) and built-in classes of refrigerator-freezers with automatic defrost. Built-in product classes are discussed further in section IV.A.2.e below.

DOE requests comments on its proposal to establish product classes for products with automatic icemakers, including DOE's proposed approach to account for icemakers in the product class structure. See Issue 3 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR. The classes and levels that DOE ultimately adopts may be adjusted from the proposal based on the comments an information DOE receives and gathers.

e. Built-In Products

DOE received several comments on the possible establishment of separate product classes for built-in refrigeration products. Sub Zero supported establishing separate product classes, citing (i) inherent design differences between built-in and free-standing products that make attaining higher efficiency levels more difficult for built-ins (the efficiency level difference was quantified as about 15 percent), (ii) limited design options for improving built-in unit efficiency, (iii) the unique utility of these products, not offered by conventional units, which, in Sub Zero's view, satisfies the criteria under EPCA to justify creating a new product class, and (iv) the precedent set in the previous refrigeration product rulemaking, where separate product classes were established for compact refrigerators. (Sub Zero, Public Meeting Transcript, No. 28 at pp. 101–04; Sub Zero, No. 40 at pp. 5–7) In Sub Zero's view, the unique consumer utility offered by built-ins is their ability to fit seamlessly into the surrounding kitchen cabinetry. (Sub-Zero, No. 40 at p. 6) Sub Zero also commented that built-ins have numerous differences when compared to their free-standing counterparts. Typically, built-in units have more doors and drawers than other products, and may also have glass doors and several different temperature compartments. (*Id.*) Sub Zero supported these statements with additional comments and concluded that DOE's decision on whether to create product classes for built-in units is pivotal to Sub Zero's ability to compete in the market. (Sub Zero, Public Meeting Transcript, No. 28 at p. 104; Sub Zero, No. 40 at p. 7)

AHAM, Whirlpool, and Sanyo all submitted comments supporting Sub Zero's request for separate product classes for built-in units. (AHAM, Public Meeting Transcript, No. 28 at pp. 104–05; AHAM, No. 34 at p. 8; Whirlpool, No. 31 at p. 4; and Sanyo, No. 32 at p. 2) AHAM supported Sub Zero's statement that built-in products provide an important utility to a subset of refrigeration product consumers. (AHAM, No. 34 at p. 8) Whirlpool agreed that the characteristics of built-in units are sufficiently different from free-standing models, and noted that built-ins have significantly different cost requirements to reach higher efficiencies. (Whirlpool, No. 31 at p. 4) Sanyo stated that the design issues affecting standard-sized built-in models affect compact built-ins as well. (Sanyo, No. 32 at p. 2)

To address the built-in issue, AHAM suggested a definition for built-in products:

> Refrigerators, freezers and refrigerators with freezer units that are 7.75 cubic feet or greater; are totally encased by cabinetry or panels by either accepting a custom front panel or being equipped with an integral factory-finished face; are intended to be securely fastened to adjacent cabinetry, walls or floor; has sides which are not fully finished and are not intended to be visible after installation.

(AHAM, No. 34 at p. 8)

Despite these comments in favor of establishing a separate built-in class, DOE also received a number of comments opposing this approach. In their joint comments, ACEEE and ASAP voiced concern that lower standards for built-in products would lead to a consumer shift toward the built-in segment, thereby reducing the projected energy savings from the standard. (ACEEE/ASAP, No. 43 at p. 5) IOU agreed with the ACEEE/ASAP concern regarding an increasing built-in market share and noted that the incremental cost and associated price increase that manufacturers would incur to design built-in products that would satisfy the same level of efficiency as their free-standing counterparts is likely to be small when compared to the final retail price. Additionally, IOU, along with Earthjustice and NRDC, indicated that built-in products provide essentially the same amenity and service as free-standing products, and do not warrant separate product classes on the basis of offering a unique customer utility. (IOU, No. 36 at p. 11; Earthjustice, No. 35 at pp. 1–5; NRDC, No. 39 at p. 2)

Requirements for consideration of separate product classes are addressed in 42 U.S.C. 6295(q). That section provides that when creating a separate class of products, certain criteria must be met:

> (q) Special rule for certain types or classes of products.
>
> (1) A rule prescribing an energy conservation standard for a type (or class) of covered products shall specify a level of energy use or efficiency higher or lower than that which applies (or would apply) for such type (or class) for any group of covered products which have the same function or intended use, if the Secretary determines that covered products within such group—
>
> (A) Consume a different kind of energy from that consumed by other covered products within such type (or class); or
>
> (B) Have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type (or class).
>
> In making a determination under this paragraph concerning whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary shall consider such factors as the utility to the consumer of such a feature, and such other factors as the Secretary deems appropriate.
>
> (2) Any rule prescribing a higher or lower level of energy use or efficiency under paragraph (1) shall include an explanation of the basis on which such higher or lower level was established.

(42 U.S.C. 6295(q))

Based on the available facts currently before DOE, built-in products appear to provide unique consumer utility by enabling consumers to build these products seamlessly into their kitchen cabinetry. These products are designed with standard dimensions to fit standard cabinet sizes, including a shallow depth of 24 inches. As Sub-Zero pointed out, many of the design differences that permit this capability also have an impact on energy use. DOE's analysis confirms the increased difficulty these products have as compared with freestanding units in achieving further reductions in energy use. This information is presented in detail in the NOPR TSD, and some of the information is summarized below in this section.

However, the use of glass doors or additional doors and drawers do not appear to be unique to built-in products. DOE's Web site research of the product offerings of four built-in manufacturers (Sub Zero, GE Monogram, Kitchenaid, and Viking, Web sites accessed June 3, 2010) showed that most built-in products do not have these features ("Online Research on Built-in Refrigeration Features", No. 51). Table IV.2 shows the results of a review of built-in products on the Web sites of these four major manufacturers of built-in refrigeration products. A very limited number of the available products (13 out of 116) had these special features. Additionally, DOE's review of product offerings of conventional free-standing products shows that many product offerings have French doors or multiple drawers. Because these features are neither exclusive to built-ins nor shared by a vast majority of built-ins, DOE does not consider these features to be particularly relevant to the consideration of the consumer utility provided by built-in products.

TABLE IV.2—BUILT-IN PRODUCT SPECIAL FEATURES

Glass window	One extra drawer	French doors	One extra door and three extra drawers	Number of products
X				3
X			X	1
	X			6
		X		2
			X	1
No special features				103
Total number of products				116

Note: Based on products on the Web sites of four key manufacturers of built-in refrigeration products.

As noted above, in addition to providing special consumer utility, EPCA requires that the consumer utility offered by the product form the basis for the different efficiency characteristics that would merit the creation of a separate product class. Sub Zero's comments to DOE have enumerated the design differences associated with the utility provided by built-in products that affect their energy efficiency, including the following:

1. Built-ins are typically constrained by kitchen cabinetry, which can increase the exterior surface area and the door perimeter length per interior volume, and also limit manufacturers' ability to increase wall thickness for built-in products more so than for conventional products because depth increase is limited by the standard cabinetry depth.
2. Built-ins have more complex hinge motion to avoid adjacent cabinets, which increases the size of the hinge hardware embedded in the cabinet walls, thus increasing thermal loss.
3. Air flow is more restricted for built-ins, since the installation imposes more limits on access for air movement. Condenser air flow is often in and out of the front of the condenser area, thus reducing condenser air flow rate.

(Sub-Zero, No. 40 at p. 6)

In addition, some built-in products use hot gas rather than warm liquid anti-sweat heating loops. Nearly all conventional free-standing products with refrigerant anti-sweat loop use warm liquid. Warm liquid loops use refrigerant liquid that has left the condenser to warm the surfaces in question, while hot gas loops use hot gas that has not yet entered the condenser. Because the hot gas refrigerant is at a higher temperature than the warm liquid used in a warm liquid loop, it can transfer significantly more heat to the heated surface and, in turn, to the cabinet interior. Hot gas loops are sometimes used in built-ins because the paneling mounted on the doors blocks the door frame surfaces from being warmed by ambient air, which more readily leads to condensation during field use (*i.e.,* in a customer's home). This design can increase cabinet load, resulting in a higher measured energy use.[19]

DOE analyzed four built-in products for the NOPR to determine whether their efficiency characteristics differ significantly from those of conventional free-standing products. These four products represent four key product classes for built-in products, all of standard (not compact) size: All-refrigerator—automatic defrost (proposed product class 3A), refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service (product class 5), refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service (product class 7), and upright freezers with automatic defrost (product class 9). DOE compared the results of these analyses with those conducted for conventional (free-standing) products for product classes 3 (refrigerator-freezer—automatic defrost with top-mounted freezer without through-the-door ice service), 5, 7, and 9.

Product class 3 under the current standard includes both all-refrigerator—automatic defrost and refrigerator-freezer—automatic defrost with top-mounted freezer without through-the-door ice service. Because there are very few shipments of built-in top-mount refrigerators, and all-refrigerators are a minority product for the free-standing market, DOE compared a conventional top-mount refrigerator with the built-in all-refrigerator.

DOE analyzed two conventional products of each examined product class. The max-tech levels for the analyzed built-ins and conventional products are compared in Table IV.3. The max-tech levels for the built-in

[19] Cabinet load refers to the thermal load (heat) entering the cabinet. The refrigeration system must remove this load from the cabinet to maintain compartment temperatures, and it expends energy in doing so.

products are significantly lower than those for the conventional products, by roughly 10 percent for the refrigerator-freezers (product classes 5 and 7) and 15 percent for the upright freezers (product class 9). The difference is greater for upright freezers because DOE considered wall thickness increases appropriate for conventional upright freezers but not for built-in upright freezers, due to the limited-space kitchen installation typical for built-in upright freezers.

TABLE IV.3—MAX-TECH DIFFERENCES BETWEEN BUILT-IN AND CONVENTIONAL PRODUCTS

Product class	Built-in: 3A conventional: 3	5 (see Note 1)	7	9
Design Options	• Larger Heat Exchangers • BLDC Fan Motors • VIPs (see Note 2) • Variable-Speed Compressors. • Adaptive Defrost	• Larger Heat Exchangers • BLDC Fan Motors • VIPs (see Note 2) • Variable-Speed Compressors. • Adaptive Defrost • Variable Anti-Sweat Heater Control (see Note 4).	• Larger Heat Exchangers.. • BLDC Fan Motors. • VIPs (see Note 2). • Variable-Speed Compressors.. • Adaptive Defrost. • Variable Anti-Sweat Heater Control for Ice Dispenser.	• Larger Heat Exchangers • BLDC Fan Motors • VIPs (see Note 2) • Variable-Speed Compressors • Adaptive Defrost • Forced Convection Condenser (see Note 5). • Wall Thickness Increase (see Note 6).
Percentage energy use lower than a baseline-efficiency product				
Built-In Max Tech	29%	27%	22%	27%
Conventional Max Tech	36%	36%	33%	44%

Notes:
1. Percentage reduction is from reference standard curve with increased slope for product class 5.
2. VIPs applied fully to doors and to half of cabinet.
3. Many of the design options such as BLDC fan motors and adaptive defrost are already present in baseline-efficiency built-in products.
4. Variable Anti-Sweat Heater control was not considered for the built-in products of product class 5, since French doors are not common for product class 5 built-ins.
5. Forced convection condenser already present in the baseline built-in upright freezer.
6. Wall thickness increase considered only for the conventional upright freezer, since the built-in upright freezer is designed primarily for installation in a kitchen, where limitations to product growth apply.

Information provided by built-in unit manufacturers during the NOPR Manufacturer Impact Analysis (MIA) discussions is generally consistent with the design differences between built-in and conventional products shown in the detailed analysis described above. For example, achieving the ENERGY STAR efficiency level for built-in standard-size refrigerator-freezers generally requires use of variable-speed compressors, VIPs, or both. In contrast, conventional standard-size refrigerator-freezers generally achieve this efficiency level without use of either of these design options. This situation leaves fewer options available for further efficiency improvements for built-in products. Accordingly, based on this information, there do not appear to be additional design options currently available to enable manufacturers to produce built-ins to an efficiency level matching their free-standing counterparts.

Moreover, the unique consumer utility offered by built-in products is demonstrated in part by the higher costs some customers are willing to pay to obtain this utility. While cost difference alone is generally not considered to be basis for consumer utility, the significantly higher price paid by consumers for built-in products can be considered an indicator that consumers value the utility associated with the built-in design. The cost difference between built-in and conventional products is presented in Table IV.4 for product classes 4 (refrigerator-freezers—automatic defrost with side-mounted freezer without through-the-door ice service), 5, 7, and 9. This comparison is based on proprietary retail price data collected by The NPD Group, which includes retail purchase price information for millions of purchases of refrigeration products. The comparison between the built-in and conventional product types is based on separate consideration of brands that include only built-in products and brands that include only conventional products. Brands that include both built-in and conventional products (*e.g.,* KitchenAid) are not represented in the table because the NPD Group dataset does not clearly distinguish built-in status in the data of such brands. The data show that built-in product average prices are approximately $3,500 to $6,200 higher than those of conventional products.

TABLE IV.4—BUILT-IN PRODUCT COST COMPARED WITH CONVENTIONAL PRODUCTS

	Product class 4	Product class 5	Product class 7	Product class 9
Built-In Median	$6,214	$5,190	$6,637	$3,181
Average	7,017	4,983	7,213	4,062
Std. Deviation	1,990	817	1,018	1,023
Conventional Median	1,073	797	1,019	509
Average	2,220	852	1,048	520
Std. Deviation	1,333	239	485	209

Source: NPD, 2007–2008.

DOE notes that retail price differences alone do not form the basis for consumer utility. In the commercial clothes washer (CCW) rulemaking, Alliance Laundry Systems (Alliance) asserted that the ability to load a clothes washer from the top is a "feature" within the meaning of 42 U.S.C. 6295 because it provides consumers the opportunity to purchase lower cost CCWs. 75 FR 1122, 1130 (January 8, 2010). DOE disagreed and noted that while price is an important consideration to consumers, DOE accounts for these consumer impacts in its LCC and PBP analyses. 75 FR 1134.

In the case of built-in refrigeration products, the facts suggest that the higher price paid for a built-in unit reflects the view of consumers that these products have a special utility when compared to free-standing equivalent products. As a result, unlike in the case of commercial clothes washers, where pricing itself was alleged to be a critical feature within the meaning of EPCA, pricing with respect to built-in products reflects the additional utility provided by these units. This price differential between built-in and stand-alone units indicates that consumers believe that built-in products offer a unique utility or other performance characteristic not offered by stand-alone units—in this case, that utility or performance would be the seamless integration of refrigeration products into kitchen cabinetry and the surrounding environment.

In summary, DOE tentatively concludes that built-in products provide consumer utility associated with the ability to build the products into the kitchen cabinetry, an attribute that is not provided by other products, and that the design details associated with this product characteristic result in the reduced efficiency of these products. DOE has tentatively concluded that these criteria satisfy 42 U.S.C. 6295(q) and is tentatively proposing the creation of a separate built-in product class.

DOE also proposes to adopt a modified version of the draft definition developed by AHAM for built-in products cited above, which would read as follows (changes from the AHAM draft are shown with italics for additions and bracketed text for deletions):

Built-In Refrigerator/Refrigerator-Freezer/Freezer means any refrigerator, refrigerator-freezer or freezer with 7.75 cubic feet or greater total volume *and 24 inches or less depth not including handles and not including custom front panels;* is *designed to be* [totally] encased *on the sides and rear* by cabinetry [or panels by either accepting a custom front panel or being equipped with an integral factor-finish face]; is *designed* [intended] to be securely fastened to adjacent cabinetry, walls or floor; and has sides which are not fully finished and are not designed to be visible after installation.

DOE considered AHAM's draft definition's exclusion of products with volumes less than 7.75 cubic feet. This limitation would exclude compact products, which are currently defined as having total volume less than 7.75 cubic feet and height less than 36 inches. (10 CFR 430.2). The draft definition would also exclude non-compact products that have volume less than 7.75 cubic feet (such products would exceed 36 inches in height). DOE proposes retaining the AHAM draft definition's omission of additional clarification regarding the 36-inch height limitation because DOE proposes to remove this limitation from the definition of compact products (see section IV.A.2.g, below). Sanyo suggested that DOE consider compact products as part of any built-in product classes that the agency establishes. (Sanyo, No. 32 at p. 2) However, DOE notes that special consideration for compact products was provided when the current energy standards were established in 1997. 62 FR 23102 (April 28, 1997). In particular, DOE created separate product classes with less stringent standards for all compact refrigeration products to address their particular characteristics. (*Id.*) As discussed in section IV.A.2.g, the arguments for creating separate product classes for compact products at that time emphasized the issues associated with undercounter products (essentially built-in compact products) rather than compact products in general. For this reason, in DOE's view, the relief sought by Sanyo for compact built-in products has already been provided and, under the available facts, no additional consideration appears to be merited at this time.

Further, DOE understands that undercounter products are generally sold with finished sides to permit both free-standing and undercounter use. As a result, these products would not meet the proposed built-in definition. DOE does not propose relaxing the requirement for unfinished sides to allow for the inclusion of undercounter products. DOE is declining to take this step to prevent potential gaming by manufacturers seeking to claim their conventional products as built-in units.

DOE also proposes to include a depth limitation in the definition for built-in products. The consumer utility and energy impacts associated with the depth limitation are highlighted in stakeholder comments (*see, e.g.,* Sub Zero, No. 40 at p. 6). Investigation of dimensional data for built-in products shows that nearly all of these products have a 24-inch depth. DOE requests comments on whether any adjustment of the 24-inch dimension specified in the proposed definition should be made. *See* Issue 4 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.

DOE does not propose to adopt the portion of AHAM's proposed built-in definition that addresses the front portion of the product—*i.e.,* "* * * by either accepting a custom front panel or being equipped with an integral factory-finished face * * *") DOE declines to adopt this aspect of AHAM's definition because it does not distinguish built-in products from conventional free-standing products, which generally have an integral factory-finished face.

DOE is aware of the potential that manufacturers may attempt to apply the proposed definition in order to avail themselves of the more lenient efficiency levels that DOE proposes to permit built-in units to meet. DOE tentatively believes that the modified definition presented above provides sufficient protection against such improper use of the definition. DOE requests comment on whether the proposed definition is adequate to prevent potential gaming or whether changes are needed to further strengthen it while avoiding disqualifying any legitimate built-in products. (*See* Issue 4 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.)

DOE's investigation of the built-in market through examination of built-in product offerings and discussion with manufacturers shows that the key standard-size built-in product classes include current product classes 4, 5, 7, 9, and the all-refrigerators associated with current product class 3. DOE proposes establishing seven new built-in product classes, as listed in Table IV.1, above. Two of these product classes address the need to separate products with automatic icemakers from those without automatic icemakers, as described in section IV.A.2.d above.

DOE requests comment on its proposal to establish separate product classes for built-in products. (*See* Issue 4 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.) As with all other aspects of this proposal, DOE may adjust its treatment of built-in products depending on the comments and information it receives in response to the NOPR.

DOE also requests comment on whether any additional product classes are required to fully address icemaking

and built-in products. (*See* Issue 5 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.)

f. Combining Product Classes 2 With 1, and 12 With 11

In the preliminary analysis phase, DOE proposed combining product class 2 (refrigerator-freezers—partial automatic defrost) with product class 1 (refrigerators and refrigerator-freezers with manual defrost); and product class 12 (compact refrigerator-freezers—partial automatic defrost), with product class 11 (refrigerators and refrigerator-freezers with manual defrost). DOE noted that units in product classes 2 and 12 contain freezer compartments that undergo manual defrost and fresh food compartments that undergo off-cycle defrost, a process which does not require additional energy to defrost. Hence, the defrost energy consumption for these units is expected to be the same as it would be for an identical unit in either product class 1 or 11.

Additionally, DOE noted that shipments for product classes 1 and 2 are very low (representing roughly 0.1 percent of shipments), and the energy consumption standards for those product classes are identical. The shipments for product class 12 are also very low (representing less than 0.1 percent of shipments).

Finally, DOE noted that although the energy consumption standard for product class 12 is currently at a higher energy level than for product class 11, there is no obvious technical basis for this distinction. AHAM supported DOE's proposal to combine these pairs of product classes into two classes (AHAM, Public Meeting Transcript, No. 28 at p. 40 and No. 34 at p. 4) The Joint Comments that DOE received, to which AHAM was a signatory, suggested that DOE continue to maintain these separate classes.

DOE requests comment on whether these proposed combinations (combining product class 2 with product class 1 and combining product class 12 with product class 11) should be adopted. DOE notes that the Joint Comments suggested maintaining the current separation.[20] (See Issue 6 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.) This approach may be adjusted based on comments and information submitted in response to today's NOPR.

g. Modification of the Definition for Compact Products

Sanyo suggested in its comments that DOE remove the current 36 inch height limit for compact products. Sanyo stated that this requirement qualifies some Sanyo products as standard-size units even though they meet the volume provision under the compact unit definition. The energy consumption standards for standard-size products are more stringent than the standards for compact products. Sanyo believes that energy consumption is strongly correlated with volume, and only minimally correlated with height. (Sanyo, No. 32 at p. 2)

DOE recognizes that a relationship between energy consumption and internal volume exists. DOE notes that the compact product classes were created as part of the rulemaking establishing the 2001 energy standards. As DOE explained in a July 1995 NOPR, these classes were created because fewer design options exist for reducing the energy consumption in these products. 60 FR 37388, 37396 (July 20, 1995). The July 1995 NOPR discussed this 36-inch limitation within the context of insulation thickness and noted that issues related to the increase in insulation thickness in top and bottom panels "is recognized in the new definition of the compact class as limited to models below 36 inches in height." 60 FR 37397. U–Line comments summarized in the 1995 NOPR indicated that "consumer uses of undercounter refrigerators and freezers will not permit increased exterior cabinet dimensions; exterior cabinet dimensions cannot exceed 24 inches in depth and width and 34 inches in height." (*Id.*)

However, the majority of compact products are not undercounter products with these specified dimensions. For example, the external dimensions of the compact products examined for reverse engineering during the engineering analysis, are summarized in Table IV.5.[21] Some of these products are smaller than the undercounter maximum dimensions and some are larger. If smaller, increasing the height of these products to a 34-inch height and/or 24-inch depth or width would be possible. If larger, the product would not be used in the restricted undercounter application. The chest freezers would not be used in undercounter applications in any case because such installation would interfere with door operation, since the doors of chest freezer open upwards. As a result, DOE believes that the absolute restriction on external size increase suggested by the undercounter dimension limits (*i.e.,* 24 inches and 34 inches) does not apply to these products. Hence, DOE tentatively concludes that, while the 36-inch height limitation may be relevant for undercounter products, it is not relevant for compact products in general.

TABLE IV.5—EXTERNAL DIMENSIONS OF COMPACT REVERSE-ENGINEERED PRODUCTS

Product	Height (inches)	Width (inches)	Depth (inches) [1]
1.7 cubic foot refrigerator	18.5	17.5	17.6
4 cubic foot refrigerator	32.9	18.6	17.5
4 cubic foot ENERGY STAR refrigerator	33.0	19.5	19.8
3.4 cubic foot chest freezer	32.0	21.0	23.0
7 cubic foot chest freezer	31.5	36.5	20.4
Second 7 cubic foot chest freezer	31.0	37.0	23.0

[1] Depth does not include door handle and condenser (if applicable).

Basic thermal considerations also suggest that the 36-inch limitation is not a particularly reliable indicator of the potential for energy use reduction. For example, consider two 7-cubic foot volume products, one 40 inches high and the other 30 inches high, both with a depth of 20 inches. Assuming a 1.5-inch insulation thickness and ignoring the volume associated with the evaporator, the 40-inch product would have an insulated surface area of 28

[20] DOE Docket No. EERE–2008–BT–STD–0012, Comment 49.

[21] Throughout this notice the term "reverse-engineered product" refers to the products purchased and examined (reverse engineered) as part of the engineering analysis. Many of these products were entirely dismantled (torn down) to completely examine manufacturing details.

square feet (based on external dimensions) and door gasket perimeter length of 121 inches, while the 30-inch product would have both less surface area (27 square feet) and less door gasket perimeter length (114 inches). DOE expects that the taller product would have a greater thermal load as a result (because of the greater surface area and door perimeter length), yet it would not be considered a compact product under the current definition and would, thus, have to satisfy a more stringent energy standard. This example shows that basic theoretical considerations do not support the 36-inch limitation.

Because the justification of limited undercounter space that led to the 36-inch limitation does not apply to most compact products, and because basic thermal considerations suggest that the limitation does not have a firm theoretical basis, DOE proposes to eliminate the limitation from the definition of compact products. DOE requests comment on its proposal to eliminate the 36-inch height limitation for compact products. (*See* Issue 7 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.)

B. Screening Analysis

DOE uses the following four screening criteria to determine which design options are suitable for further consideration in a standards rulemaking:

1. *Technological feasibility.* DOE will consider technologies incorporated in commercially available products or in working prototypes to be technologically feasible.

2. *Practicability to manufacture, install, and service.* If mass production and reliable installation and servicing of a technology in commercially available products could be achieved on the scale necessary to serve the relevant market at the time the standard comes into effect, DOE would consider that technology practicable to manufacture, install, and service.

3. *Adverse impacts on product utility or product availability.* If DOE determines that a technology would have significant adverse impact on the utility of the product to significant subgroups of consumers, or would result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not consider this technology further.

4. *Adverse impacts on health or safety.* If DOE determines that a technology will have significant adverse impacts on health or safety, it will not consider this technology further.

10 CFR part 430, subpart C, appendix A, (4)(a)(4) and (5)(b)

In the framework document [22] and accompanying public workshop held on September 29, 2008, DOE identified the technologies for improving refrigeration product efficiency that were under consideration for the rulemaking analyses. These technologies are listed in Table IV.6. *Please see* chapter 3 of the NOPR TSD for detailed descriptions of these technology options.

TABLE IV.6—TECHNOLOGIES DOE CONSIDERED FOR RESIDENTIAL REFRIGERATION PRODUCTS

Insulation:	Expansion Valve:
Improved resistivity of insulation	Improved expansion valves
Increased insulation thickness	Cycling Losses:
VIPs	Fluid control or solenoid valve
Gas-filled panels	Defrost System:
Gasket and Door Design:	Reduced energy for automatic defrost
Improved gaskets	Adaptive defrost
Double door gaskets	Condenser hot gas
Improved door face frame	Control System:
Reduced heat load for TTD feature	Temperature control
Anti-Sweat Heater:	Air-distribution control
Condenser hot gas	Other Technologies:
Electric heater sizing	Alternative refrigerants
Electric heater controls	Component location
Compressor:	Alternative Refrigeration Cycles:
Improved compressor efficiency	Lorenz-Meutzner cycle
Variable-speed compressors	Dual-loop system
Linear compressors	Two-stage system
Evaporator:	Control valve system
Increased surface area	Ejector refrigerator
Improved heat exchange	Tandem system
Condenser:	Alternative Refrigeration Systems:
Increased surface area	Stirling cycle
Improved heat exchange	Thermoelectric
Force convection condenser	Thermoacoustic
Fans and Fan Motor:	
Evaporator fan and fan motor improvements	
Condenser fan and fan motor improvements	

DOE requested, but did not receive any comments, at either the framework workshop or during the framework comment period identifying additional technologies not mentioned that should be considered. Likewise, DOE received no comments recommending additional technologies during the preliminary analysis public meeting or comment period.

As described in chapter 4, Screening Analysis of the NOPR TSD, DOE screened out several of the technologies listed in Table IV.6 from consideration in this rulemaking based on one or more

[22] Available at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/refrigerator_freezer_framework.pdf.*

of the screening criteria described above. A summary of the screening analysis identifying technologies that were screened out and the EPCA criteria used for the screening is presented in Table IV.7. The checkmarks in the table indicate which screening criteria were used to screen out the listed technologies. For greater detail regarding the screening analysis, *see* chapter 4 of the NOPR TSD.

TABLE IV.7—SUMMARY OF SCREENING ANALYSIS

Excluded technology option	EPCA criteria for screening			
	Technological feasibility	Practicability to manufacture, install, and service	Adverse impacts on product utility	Adverse impacts on health and safety
Improved Insulation Resistivity	√			
Gas-Filled Panels	.....	√	√	
Improved Gaskets, Double Gaskets, Improved Door Frame	.....	√	√	
Linear Compressors	√			
Improved Evaporator Heat Exchange	√	.....	√	
Improved Condenser Heat Exchange	√	.....	√	
Component Location	.....	√	√	√
Lorenz-Meutzner Cycle	√	√		
Two-Stage System	√	√		
Control Valve System and Tandem System	√	√		
Ejector Refrigerator	√	√		
Stirling Cycle	√	√		
Thermoelectric	√	√		
Thermoacoustic	√	√		

In addition to this screening, DOE did not analyze a number of technologies in the engineering analysis because they were judged unsuitable for improving the measured energy use of refrigeration products for one or more of the following reasons:

- Technology already used in baseline products and incapable of generating additional energy efficiency or reducing energy consumption.
- Technology does not reduce energy use.
- Insufficient data available demonstrating benefit of the technology.

The technologies not analyzed for these reasons include Improved Expansion Valve, Off-Cycle Valve, Reduced Energy for Automatic Defrost, Condenser Hot Gas Defrost, Reduced Heat Load for TTD Feature, Warm Liquid or Hot Gas Refrigerant Anti-Sweat Heating, Electric Anti-Sweat Heater Sizing, Electronic Temperature Control, Air Distribution Control, Fan Blade Improvements, and Dual Loop System. Chapter 4 of the NOPR TSD discusses the reasons for not analyzing these technologies in greater detail.

1. Discussion of Comments

AHAM commented that efficiency levels based on noteworthy technologies can have implications on competition within the market, since technologies may be proprietary or in limited supply (AHAM, No. 34 at p. 15) AHAM specifically pointed out VIPs as an example of such a technology. (*Id.*) Neither EPCA nor the CFR (*i.e.,* 10 CFR part 430, subpart C, appendix A) identify the proprietary status of a technology as a reason for screening out technologies. If a technology is in sufficiently limited supply to make its use in manufacturing of products impractical, DOE has the option of screening out such a technology based on one of the EPCA screening criteria. While proprietary status is not a filter for screening out potential technologies, DOE is required to consider "the impact of any lessening of competition * * * that is likely to result from the imposition of the standard" (42 U.S.C. 6295(o)(2)(B)(i)(V)). Section IV.B.1.c below, discusses VIPs. DOE considered whether any others selected design options may be screened out based on supply constraints or whether their use might impact competition. DOE tentatively concluded that these screening criteria did not preclude further consideration of the selected design options in the analysis.

During the NOPR phase manufacturer interviews, some manufacturers expressed concerns that the supply of the highest-efficiency compressors and/or variable-speed compressors might be limited. Initial investigation of the compressor vendors supplying high-efficiency compressors and variable speed compressors during the preliminary analysis phase indicated that one compressor supplier, Embraco, served as the primary source for these components. Embraco is a business unit of Whirlpool S/A, a majority-owned subsidiary of the Whirlpool Corporation. Discussions with compressor manufacturers during the NOPR phase of the rulemaking indicated that most manufacturers are planning to commercialize high-efficiency compressors that would match the peak performance under consideration in the NOPR analysis and that these compressors would be available well before the arrival of the 2014 compliance date that would apply to the final rule under development. In addition, DOE is aware that these other manufacturers have been developing and perfecting variable-speed compressors for over ten years. Information gathered during the NOPR phase indicates that these manufacturers are prepared to commercialize this technology and ramp up production as the market for such compressors emerges and grows.

Based on all of this information, DOE tentatively concludes that neither high-efficiency compressors nor variable-speed compressors would be in limited supply if the efficiency levels selected by DOE were to require the use of these types of compressors. DOE requests comment on these findings, including information that would confirm or cast doubt on DOE's conclusions regarding compressor supply. (*See* Issue 8 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.)

DOE's review of the screened-in technologies did not reveal that they would involve the use of proprietary technologies or that they would be in short supply, or that their use would lead to a lessening of competition.

Additionally, DOE received comments on the screening analysis

from several interested parties primarily addressing the following design options: alternative refrigerants, alternative foam-blowing agents, and VIPs. The following sections describe the comments associated with these design options in detail.

a. Alternative Refrigerants

Most refrigeration products sold in the U.S. currently use HFC–134a refrigerant, a hydrofluorocarbon (HFC) with a high global warming potential (GWP).

ACEEE, ASAP, Earthjustice, and the Natural Resources Defense Council (NRDC) all stated that DOE must consider hydrocarbon refrigerants as a design option because hydrocarbons are in widespread use overseas (ACEEE/ASAP, No. 43 at pp. 4–5; Earthjustice, No. 35 at p. 5; NRDC, No. 39 at p. 7) Earthjustice and NRDC both also claimed that DOE has not provided evidence to support the exclusion of isobutane [23] as an alternative refrigerant. (Earthjustice, No. 35 at p. 5; NRDC, No. 39 at p. 7) AHAM commented that the relevant safety standard—Underwriters Laboratories (UL) Standard 250, "Household Refrigerators and Freezers" (UL 250) [24]—currently limits the quantity of hydrocarbon refrigerants permitted to be used in refrigeration products to 50 grams.[25] AHAM suggested that this quantity of refrigerant is insufficient for most typical refrigeration products and that UL had recently reopened the rulemaking process for UL 250 under a proposal calling for a higher hydrocarbon limit. (AHAM, Public Meeting Transcript, No. 28 at p. 49–50) GE stated that although the UL restriction may make it difficult to use isobutane, it does not make it impossible, and that UL may consider increasing the limit. (GE, Public Meeting Transcript, No. 28 at p. 50) Sub Zero agreed with GE's comment but pointed out that there can be a significant capital expenditure associated with adopting isobutane refrigerant or hydrocarbon blowing agents. (Sub Zero, Public Meeting Transcript, No. 28 at p. 50)

Many of the comments addressed issues with HFCs used both as refrigerant and as a blowing agent. These comments are presented in this section, but they apply equally to section IV.B.1.b, below, which addresses blowing agents.

Many stakeholders noted the trend away from HFC use both worldwide and in the United States. The stakeholders commented that DOE's analysis should more thoroughly consider this trend in order to avoid becoming immediately outdated, and that DOE should develop cost-efficiency analyses that account for a mandated phase-down of HFC substances. (GE, Public Meeting Transcript, No. 28 at pp. 47–48; AHAM, Public Meeting Transcript, No. 28 at p. 18; Greenpeace, Public Meeting Transcript, No. 28 at pp. 50–51; ACEEE/ASAP, No. 43 at p. 5; Sub-Zero, No. 40 at p. 7; Greenpeace, No. 42 at pp. 1, 2; GE, No. 37 at p. 2; NRDC, No. 39 at p. 7; Whirlpool, No. 31 at pp. 4, 5; AHAM, No. 34 at pp. 8–9)

AHAM commented that upcoming regulations and legislation on the phase-down of HFCs could have a substantial impact on efficiency in the refrigeration products industry (AHAM, Public Meeting Transcript, No. 28 at p. 18) AHAM, Whirlpool, and Sub Zero further stated that they believe a phase-down of HFCs would have a net negative impact on energy efficiency and manufacturing cost (AHAM, No. 34 at pp. 8–9; Sub Zero, No. 40 at p. 7; Whirlpool, No. 31 at pp. 4–5) AHAM and Whirlpool also argued that any analysis that does not account for an HFC phase-down would likely result in energy consumption standards that are unattainable (AHAM, No. 34 at p. 9; Whirlpool, No. 31 at pp. 4–5)

GE suggested that DOE consider the positions of the current administration and the Environmental Protection Agency (EPA) on HFCs and other macro trends that GE asserts will significantly impact the industry. (GE, Public Meeting Transcript, No. 28 at pp. 47–48) For this rulemaking, GE commented that it is important for DOE to evaluate the potential industry impact of the HFC phase-down from a technical and economic perspective to avoid creating a disincentive for manufacturers to employ low-GWP foams and refrigerants. GE commented that DOE should recognize the potential environmental benefits that could be realized in a transition to low-GWP foams and refrigerants. (GE, No. 37 at p. 2)

Comments from the IOUs supported DOE's use of HFCs in the baseline analysis but encouraged consideration of discontinued or reduced use of HFCs in case legislation is enacted or regulations established limiting their use (IOU, No. 36 at p. 12) Whirlpool stated that it would not switch to non-GWP substances, because of the costs associated with doing so, unless this is required by legislation (Whirlpool, No. 31 at p. 5)

DOE eliminated alternative refrigerants as a design option for most product classes because the available alternatives are either banned, have lower thermodynamic efficiencies, or, as in the case of hydrocarbons, are currently only allowed in limited quantities due to UL safety requirements. The UL proposal for modification of UL 250 calls for transition from an allowance of 50 g refrigerant being permitted to escape from a refrigeration product in case of a leak to a higher limit of 60 g total charge.[26] This proposed change would not significantly affect the amount of refrigerant that can be used because roughly 10 g remains absorbed in the compressor oil during a typical catastrophic leak. DOE notes that UL had not made a final determination regarding changes to UL 250 at the time of the preparation of this notice. UL has indicated that due to the large number of comments to the proposals, UL's next step would be to convene a Standards Technical Panel meeting, which would likely be held no earlier than September 2010.[26]

DOE also considered EPA's recently published proposed rule addressing hydrocarbon refrigerants, which includes a proposal to include isobutane on the EPA's Significant New Alternatives Policy (SNAP) program list of allowed alternative refrigerants. 75 FR 25799 (May 10, 2010). The EPA proposal calls for a total charge limit of 57 g of isobutane. *Id.* at 25803. No final rule had issued at the time of the preparation of this notice.

DOE calculated the potential range of isobutane charge levels that could replace the HFC–134a refrigerant in the products purchased for reverse engineering. DOE converted the actual charge of each reverse-engineered product to an equivalent isobutane charge (measured in grams), by adjusting for the lower density of isobutane. The equivalent isobutane charge levels for these products were in excess of both the EPA-proposed limit and the charge limit in the UL 250 standard for all of the products covered by today's NOPR except in the case of compact refrigerators. In order for a

[23] Isobutane, also known as R–600a, is used as a refrigerant in a large percentage of the world's refrigeration products, particularly in Europe, where it was first adopted in the 1990s.

[24] This UL safety standard sets numerous requirements for refrigeration products and details tests for evaluating compliance with many of the requirements.

[25] The isobutane limitation of UL 250 specifies 50 grams maximum leakage during a system breach. Because some of the refrigerant remains in the system in such a scenario, the total allowable charge is somewhat higher than 50 grams under this standard, generally in a range approaching 60 grams.

[26] Personal communication with Randall J. Haseman of Underwriters Laboratories, February 1, 2010 and June 28, 2010.

standard-size refrigerator-freezer to meet those charge levels, it would be necessary to make engineering changes such as adding a second refrigerant loop. Such a design change would reduce useful interior volume in the appliance, which represents a reduction in consumer utility. DOE is under general legal obligations to avoid promulgating standards that would either reduce the utility of a product, 42 U.S.C. 6295(o)(2)(B)(i)(IV) or eliminate those products with capacities and volumes available at the time that DOE establishes its standard, 42 U.S.C. 6295(o)(4). Therefore, DOE considered use of isobutane refrigerant as a design option only for compact refrigerators.

DOE requests comment on the consideration of conversion to use of isobutane refrigerant as a design option only for compact refrigerators. (See Issue 9 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.)

b. Alternative Foam-Blowing Agents

Blowing agents are included in the materials that are used to form insulation during the manufacturing process. The blowing agents help form the closed cell microstructure of the insulation as the blowing agent gases expand after the insulation components are injected into the wall cavities. Manufacturers selling refrigeration products in the U.S. market have predominantly used HFC blowing agents since 2003, which is when the EPA imposed a ban on the primary hydrochlorofluorocarbon (HCFC) blowing agent most manufacturers were using at the time. *See* 58 FR 65018 (December 10, 1993) (phasing out production of HCFC–141b through the accelerated phase out rule promulgated under section 606 of the Clean Air Act). In response, some manufacturers have started using cyclopentane as a blowing agent rather than HFCs because of its much lower GWP. However, insulation made using cyclopentane during the blowing process has higher conductivity (see for example the preliminary TSD chapter 3, Table 3.3.2), leading to higher energy use.

DOE received many comments encouraging DOE to consider the shift from HFCs to refrigerants and/or blowing agents with low GWP in refrigeration products. These comments are cited in section IV.B.1.a, above. None of the comments specifically indicated that use of alternative foam-blowing agents would reduce energy use. DOE has investigated this issue and has concluded that use of alternative foam-blowing agents would not reduce energy use (see chapter 3 of the NOPR TSD, section 3.3.2.1, for more detail). Hence, DOE did not treat alternative foam-blowing agents as a design option in its analyses.

DOE recognizes that possible legislation or regulations limiting the use of HFCs would have an impact on the industry's transition to higher efficiency designs and, depending on the performance impact of insulation made without HFCs, may reduce the potential for efficiency improvement. Given that this step has not occurred, DOE believes that basing energy conservation standards on the uncertain prospect of passage of certain legislation would be speculative. DOE is, however, prepared to address this issue by evaluating the efficiency improvement and trial standard levels for products using alternative foam insulation materials, if legislation or some other legal requirements banning HFCs should be enacted or otherwise become effective.

c. Vacuum-Insulated Panels

DOE received comments concerning the viability of VIPs as a design option. These comments, examined below, addressed the supply, longevity, durability, and cost of VIPs.

NPCC and ASAP emphasize that the standards are not prescriptive, and therefore manufacturers are not required to use VIPs to meet the standard even if the design options analysis has used VIPs (NPCC, No. 33 at p. 3; ASAP, Public Meeting Transcript, No. 28 at p. 96) DOE agrees with this statement, but without being able to show that alternative design paths can be used to reach certain efficiency levels without VIPs, the viability of this technology must be considered when contemplating these levels.

VIP Supply

AHAM, LG, Sub Zero, and Whirlpool expressed concern regarding the ability of VIP vendors to keep up with the demand that might be generated by more stringent energy conservation standards for refrigeration products (AHAM, Public Meeting Transcript, No. 28 at p. 94; Sub Zero, Public Meeting Transcript, No. 28 at p. 97; LG, No. 41 at p. 4; Sub Zero, No. 40 at p.4; Whirlpool, No. 31 at p. 4; AHAM, No. 34 at pp. 6, 7) Some of these comments raise the concern that VIP costs could increase to levels significantly greater than the levels DOE used in its analysis (AHAM, Public Meeting Transcript, No. 28 at p. 94; Whirlpool, No. 31 at p. 4; AHAM, No. 34 at pp. 6, 7) AHAM, LG, Whirlpool, and Sub Zero recommended that DOE assess the market's ability to mass-produce VIPs (AHAM, Public Meeting Transcript, No. 28 at p. 94; Sub Zero, Public Meeting Transcript, No. 28 at p. 97; LG, No. 41 at p. 4; Sub Zero, No. 40 at p. 4; Whirlpool, No. 31 at p. 4; AHAM, No. 34 at pp. 6–7) An additional factor cited by stakeholders that could potentially exacerbate any VIP supply issue is the increase in stringency of refrigeration product standards in other regions of the world, such as India and Europe. (Whirlpool, Public Meeting Transcript, No. 28 at p. 95; AHAM, Public Meeting Transcript, No. 28 at p. 94) Whirlpool commented that it is expensive to increase VIP production capacity (Whirlpool, No. 31 at p. 4)

In contrast, IOU, ACEEE/ASAP, NRDC, and NPCC stated that the VIP industry is prepared to ramp up production to meet the high demand predicted for the refrigeration industry (IOU, No. 36 at p. 9; ACEEE/ASAP, No. 43 at pp. 2–4; NRDC, No. 39 at p. 3; NPCC, No. 33 at p. 2) IOU estimated that demand would rise to the low millions to tens of millions of panels at most based on the results of the preliminary DOE analysis (IOU, No. 36 at p. 9) IOU also noted that there is rising interest for VIP use as building insulation, which could further stimulate growth in the market. (IOU, No. 36 at p. 10) ACEEE/ASAP also reported that the VIP manufacturers were confident about scaling up to meet global demand (ACEEE/ASAP, No. 43 at p. 4)

As Sub Zero notes, manufacturers have installed VIPs in refrigeration products for at least 20 years. (Sub Zero, No. 40 at p. 4) Sub Zero, which has installed VIPs in their products for the past 10 years, commented that three VIP suppliers are confident that they can meet the expected VIP demand, but that it is unclear whether they could meet the potential demand associated with major manufacturers and millions of refrigeration products. (*Id.*) IOU and the ACEEE/ASAP joint comment stated that VIPs have been incorporated into various new refrigerator models (IOU, No. 36 at p. 7; ACEEE/ASAP, No. 43 at p. 4)

Several adjustments made to the assumptions in the engineering analysis reduced the relative importance of VIPs in meeting the proposed standard levels decreased when compared to the preliminary. Specifically, the adjustments involved reduced panel coverage, reduced effectiveness, and application only after all other design options were considered. (Details about the changes in relevant assumptions can be found in chapter 5, section 5.8.3 of the NOPR TSD.) In response to stakeholder comments, DOE conducted an assessment of the VIP market and the

potential ramp-up required by proposed standards and concluded that the market does not show ramp-up to be a critical issue leading to price pressure. From this analysis, DOE does not expect the estimated lead time for expanded VIP production to limit the availability of VIPs at mass-production levels.

DOE contacted several VIP suppliers during the NOPR analysis phase to better assess the current production capacity and the ability of the industry to ramp up to expected demand by 2014. These suppliers include Porextherm (Germany), Va-Q-tec (Germany), ThermoCor (U.S.), NanoPore Insulation LLC (U.S.), Glacier Bay (U.S.), and ThermalVisions (U.S.). DOE did not receive a response from any Asian companies it attempted to contact during this phase, but Porextherm estimated that there are five VIP producers based in China and Japan.

DOE estimates the current worldwide VIP market to be in the range of 2.5 to 5 million square meters based on input from VIP manufacturers. Va-Q-tec estimated that world demand is approximately 2 million square meters. ThermoCor estimated it to be about 5 million square meters. Other vendors interviewed declined to provide estimates.

ThermoCor noted that most of the growth in the U.S. market has happened since 2008, driven largely by the Federal manufacturer tax credit available for high efficiency refrigerators. (Energy Improvement and Extension Act of 2008, Pub. L. 110–343, Div. B, Sec. 305 (October 3, 2008)) In the U.S., major refrigerator manufacturers have started using VIPs in commodity models in addition to higher end products as a result of the manufacturer tax credit (available from 2008–2010). Manufacturers can receive $200 per unit for units with energy use at least 30 percent lower than the standard. Va-Q-tec stated that the VIP demand was largely concentrated in Japan prior to 2008, and that the U.S. tax credit rapidly changed the landscape for VIP manufacturers, creating much greater demand. The VIP industry responded with a dramatic ramp-up in production, which demonstrates the industry's ability to respond quickly to rapid increases in demand.

DOE estimates that approximately 5.8 million square meters of VIPs would be needed in the U.S. to meet the proposed standard levels in 2014 based on the design options presented in the NOPR engineering analysis (see the discussion of this estimate in TSD appendix 4–A, Investigation of VIP Supply, section 4–A–2).

DOE also considered the potential increase in demand for VIPs in Europe and India, as highlighted by stakeholders during the preliminary analysis public meeting (Whirlpool, Public Meeting Transcript, No. 28 at p. 95; AHAM, Public Meeting Transcript, No. 28 at p. 94)

As part of this examination, DOE reviewed a variety of European directives aimed at improving energy efficiency. The European Energy Labeling Directive (94/2/EC) for cold appliances, which was issued by the European Commission on January 21, 1994, established 7 efficiency levels for these products, from least efficient (G) to most efficient (A). In 2003, additional higher efficiency levels A+ and A++ were established. These levels all represent different percentages of reference energy use (representative energy use when the labeling directive was first established), called Energy Efficiency Index (EEI). The levels range from less than 30 percent of the reference value for A++ (the most efficient) to 125 percent of the reference value for G. The European Union established efficiency standards for residential refrigeration products with EU Council Directive 96/57/EC, dated September 3,1996. Maximum energy use standards were established for 10 "product categories," the equivalent of the different product classes associated with DOE regulations. Commission Regulation (EC) No 643/2009 requires that the maximum allowable EEI will be 55 starting July 1, 2010 ("European Commission Regulation 643/2009", No. 52). This level will drop to 44 on July 1, 2012, and to 42 (equivalent to current efficiency level A+) on July 1, 2014.

DOE received estimates from various VIP manufacturers that European demand is expected to rise to 2–5 million square meters in response to the new standards. Information obtained from a manufacturer that has used VIPs in multiple products suggests that VIPs will be used primarily for A++ products, which may be considered the equivalent of the U.S. ENERGY STAR products.

Along similar lines, India introduced a labeling program in 2006 that was initially voluntary but became mandatory in January 2010 ("Indian Refrigerator Regulations", No. 53). The program establishes efficiency levels represented by ranges of energy use. The product label is required to indicate the product's efficiency level. The allowable maximum energy use values associated with the efficiency levels are scheduled to be reduced in three steps between 2010 and 2014. Based on discussions with manufacturers, India's proposed standards for 2014 are not expected to be as stringent as those in the U.S. or Europe, and are not expected to require use of VIPs.

Based on the available data, DOE estimates that the potential VIP demand for the U.S. and Europe would reach an annual level of roughly 10 million to 15 million square meters. While this represents significant growth compared to the current market, it is consistent with the growth that the market has experienced recently for which VIP vendors have successfully ramped up their production.

Several VIP manufacturers are currently expanding their facilities, while others have plans to expand if the increased demand becomes more reliable. Overall, the VIP manufacturers interviewed were confident that neither the time nor the capital investment is a limiting factor as long as they have a stable backlog. Five of the manufacturers interviewed have recently undergone significant expansion efforts. One manufacturer has increased its production capacity by 10 times between 2008 and spring 2010 to reach a level of about 1.5 million square meters. Two other manufacturers have doubled their capacities in the past 9 months, one reaching 1 million square meters and another reaching 120,000 square meters. A fourth manufacturer has reached the capacity of about 300,000 square meters over the past 1.5 years. Lastly, as mentioned by ACEEE/ASAP, NanoPore has recently doubled its capacity and has plans to expand to 0.9 million square meters of capacity by 2010. (ACEEE/ASAP, No. 43 at p. 4)

VIP manufacturer estimates of the time required to bring a new plant on-line ranged from 6 to 18 months. The required time depends on whether existing production technology is replicated, or whether further improvements in production technology are designed and incorporated into new plants. Possible improvements include increased automation of the panel assembly and a shift to continuous rather than batch processing. Automation may involve the drying of the core material and the cutting of the bag and core. DOE visited a VIP production facility during the course of this investigation and concluded that the estimates provided by VIP vendors of time required to bring new production capacity online are consistent with the production process, given the equipment used.

Sub Zero noted that large volume refrigerator manufacturers could produce VIPs in-house to control costs, though Sub Zero and other small manufacturers would not have that ability (Sub Zero, No. 40 at p. 4)

ThermoCor agreed that large manufacturers would have the means to develop VIP production capability in-house by 2014. Several VIP manufacturers have considered joint ventures and licensing opportunities with refrigerator manufacturers. Manufacturers of VIPs suggest that transferring the knowledge and expertise of VIP production would be a straightforward process. A new VIP fabrication facility would need to have a production capacity between 300,000 and 1.5 million square meters per year to be cost-effective at today's VIP price levels. The capacity will typically vary based on the manufacturer, the panel type, and the facility location.

VIP manufacturers do not anticipate the supply of raw materials to be an issue as production ramps up. The industry uses multiple suppliers for both the barrier film and the fill material. Materials used for the fill include glass fiber, fumed silica, and aerogel. Glass fiber is produced for a wide range of uses worldwide. Fumed silica, used as fill by some VIP manufacturers, currently is produced on a much smaller scale. Asked if the more limited range of uses of fumed silica could present material supply issues due to capacity ramp-up delays or intellectual property issues, Porextherm noted that intellectual property issues would not prevent new suppliers from building new fumed silica plants, citing several new production facilities that have come online recently in Asia. Porextherm also noted that the solar collector industry in particular is helping to expand the production of pure silica, which produces fumed silica as a by-product. Va-Q-tec estimates that it would take approximately 2.5 years to build a new fumed silica plant, but that current worldwide production capacity is sufficient to provide enough fumed silica for production of 100 million m^2 of VIPs annually. Thermal Visions did not anticipate suppliers needing more than one year to respond to the ramp-up in production.

NRDC recommended that DOE explore other applications in which durable vacuum-sealing is required in large production volumes for lessons and strategies (NRDC, No. 39 at p. 4) DOE interprets this comment to mean that the production technologies required for this aspect of VIP production may have already been developed for other industries, thus potentially limiting the required time to development the process for the VIP industry. Through its research discussed above, DOE confirmed that current technology is already enabling mass production of VIPs, so an additional survey of other applications was unnecessary.

In summary, based on all of the above, DOE tentatively concludes that the VIP industry has the ability to increase production to meet the potential demand for VIPs within the three year gap between the final rule's issuance and the compliance date for any amended standard.

VIP Longevity

AHAM questioned whether the average lifetime of VIPs is consistent with lifetime expectations for refrigeration products (AHAM, Public Meeting Transcript, No. 28 at p. 94–95) In response, DOE investigated the issue of VIP longevity in more depth. ACEEE and ASAP commented that VIP manufacturers have used accelerated aging techniques to estimate panel life. Manufacturers have estimated lifetimes between 20 and 50 years for silica core panels, and generally up to 15 years for panels constructed of other core materials. (ACEEE/ASAP, No. 43 at p. 3)

ThermoCor and Va-Q-tec provided data on VIP degradation. ThermoCor panels, which have a glass fiber core, have been shown to retain about 75 percent of their insulation value over 10 years, a finding extrapolated from 7 years of data collected from panels aged at room temperature. Va-Q-tec determined that their panels would yield a 15 percent increase in thermal conductivity over 15 years, based on 7 years of observation of panels held in storage ("Va-q-tec Lifetime Analysis", No. 55). In both cases, the data suggest that the degradation in insulation value is similar to that of polyurethane foam (Wilkes 2001),[27] the insulating material used currently in nearly all products, and the insulation value would remain well above that of the baseline polyurethane foam for the lifetime of the refrigerator. As such, DOE did not factor VIP degradation into its analysis.

VIP Quality and Durability

AHAM and LG expressed concern that a short transition time to mass produce VIPs would adversely impact their quality (AHAM, No. 34 at p. 7; LG, No. 41 at p. 4) Sub Zero commented that there is a significant learning curve for commercialization of VIPs that will be steepened if standards require the wholesale transition to use of VIPs (Sub Zero, No. 40 at p. 4).

Sub Zero also pointed out that shipping and handling may weaken a panel, causing it to fail slowly, without becoming apparent during visual inspections prior to installation. In addition, Sub Zero commented that panel installation is more critical to performance and reliability than it is for most other components, contributing to a steepened learning curve. In Sub Zero's experience, VIP failure can cause the wall to bulge, leading to higher rejection rates, installation problems for built-ins, condensation, and compromised door structures. Sub Zero added, however, that their own service records for VIPs indicate that these panels have performed well in the field. (Sub Zero, No. 40 at p. 4; Sub Zero, Public Meeting Transcript, No. 28 at p. 105)

The IOUs asserted that technological advancements have occurred in core materials, external barriers, and methods to maintain vacuum integrity, all of which would help to improve panel durability. Additionally, VIP manufacturers are taking steps to maintain quality throughout the installation process, including the use of on-site quality checking devices and training programs for workers to help ensure that proper handling techniques are used. Also, the IOUs pointed out that some products have high insulation values even when the vacuum has been compromised (IOU, No. 36 at pp. 6–8) NRDC commented that the risk of premature failure is overstated given the ample opportunities for detection (NRDC, No. 39 at p. 4) NPCC concurred that concerns over VIP durability are overstated, but recommended that DOE assess efficiency improvements feasible without VIPs to identify efficiency levels that are particularly "robust". (NPCC, No. 33 at p. 2–3)

DOE acknowledges that VIPs are more sensitive to handling issues during transport and installation when compared to other components. With this fact in mind, DOE still anticipates that manufacturers will make adjustments to their handling procedures to improve success rates of applying VIPs to their products, including taking those needed steps to ensure that VIPs remain intact after fabricating a refrigeration product. DOE also believes that innovations such as (1) the rapid VIP integrity testing system that one VIP manufacturer has developed for installation into each panel, which allows verification of each panel's integrity even after installation into the product, and (2) the compartmentalized design of another available VIP technology that limits performance degradation to a small

[27] Wilkes, K., *et al.* "Aging of Polyurethane Foam Insulation in Simulated Refrigerator Panels—One-Year Results with Third-Generation Blowing Agents." 29 Sep. 1999. *http://www.ornl.gov/webworks/cpr/pres/107629.pdf.* Accessed 14 June 2010.

region of a VIP will mitigate the potential impacts of VIP damage prior to installation. DOE believes that, after installation, VIPs would likely be very well protected from damage because they are encased inside the product walls or door, protected on one side by the product's external shell (or interior liner) and on the other side by the polyurethane foam insulation. DOE notes that its discussions with manufacturers did not reveal a single instance in which a VIP field failure occurred. While this tentative finding does not imply that there have been no failures, DOE believes, based on the information made available for review, that this particular issue has had minimal to no impact on manufacturer warranty or maintenance costs. DOE tentatively concludes that the risk of VIP failure is an issue that can be sufficiently addressed through design innovations and careful handling procedures during the manufacturing process.

VIP Cost Assumptions

Several specific comments were made regarding VIP cost assumptions. These comments address treatment of the technology in the engineering analysis, and are addressed later in section IV.C.4.d, below.

DOE requests comment and information on aspects of VIP technology that affect its suitability for consideration as a design option. Particularly, DOE seeks any new information not already discussed or considered in the rulemaking. (*See* Issue 10 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.)

2. Technologies Considered

DOE has tentatively concluded that: (1) All of the efficiency levels discussed in today's NOPR are technologically feasible; (2) products at these efficiency levels could be manufactured, installed, and serviced on a scale needed to serve the relevant markets; (3) these efficiency levels would not force manufacturers to use technologies that would adversely affect product utility or availability; and (4) these efficiency levels would not adversely affect consumer health or safety. Thus, the efficiency levels that DOE analyzed and is discussing in this notice are all achievable using "screened in" technology options identified through the screening analysis. The technologies DOE considered for each group of products are shown in Table IV.8.

TABLE IV.8—TECHNOLOGIES CONSIDERED BY DOE FOR RESIDENTIAL REFRIGERATION PRODUCTS, BY PRODUCT GROUP

Design option	Standard-size refrigerator-freezers	Standard-size freezers	Compact refrigerators	Compact freezers
Increased Insulation Thickness		√ (see Note 1)	√	√
Isobutane Refrigerant			√	
VIPs	√	√	√	√
Improved Compressor Efficiency	√	√	√	√
Variable-Speed Compressor	√	√	√	√
Increased Evaporator Surface Area	√	√	√	√
Increased Condenser Surface Area	√	√	√	√
Forced Convection Condenser		√		
Brushless DC Evaporator Fan	√	√		
Brushless DC Condenser Fan	√	√		
Adaptive Defrost	√	√		
Variable Anti-Sweat Heater Control	√			

Note 1: Increased Insulation Thickness was not considered for built-in, standard-size freezers.

C. Engineering Analysis

The engineering analysis uses cost-efficiency relationships to show the manufacturing cost increases associated with achieving increased efficiency. DOE has identified the following three methodologies to generate the manufacturing costs needed for the engineering analysis: (1) The design-option approach, which provides the incremental costs of adding to a baseline model design options that will improve its efficiency; (2) the efficiency-level approach, which provides the relative costs of achieving increases in energy efficiency levels, without regard to the particular design options used to achieve such increases; and (3) the cost-assessment (or reverse engineering) approach, which provides "bottom-up" manufacturing cost assessments for achieving various levels of increased efficiency, based on detailed data as to costs for parts and material, labor, shipping/packaging, and investment for models that operate at particular efficiency levels.

DOE conducted the engineering analysis for this rulemaking using a combined efficiency level/design option/reverse engineering approach. DOE defined efficiency levels using percentages representing energy use reductions. The reductions are defined to apply to energy use (not including icemaking energy use) measured using the proposed new test procedure, DOE's premise that efficiency levels expressed as a percentage of energy use lower than that of baseline products are equivalent when calculated based on both the current test procedure and the proposed new test procedure (without icemaking energy use) allowed DOE to compare information developed from different sources. However, DOE's analysis is based on the efficiency improvements associated with groups of design options. DOE developed estimates for efficiency improvements for design options through energy use modeling analysis conducted for selected reverse-engineered products. The energy models were first established based on the existing product designs, and the models were subsequently adjusted to reflect application of the groups of design options considered for analysis. DOE based some of the design option information on data gained through reverse-engineering analysis, but also used other sources, such as component vendor inquiries and discussions with manufacturers as appropriate. Details of the engineering analysis are provided in the NOPR TSD chapter 5.

DOE received several comments from interested parties on its approach to the engineering analysis, as described below.

1. Product Classes Analyzed/ Representative Products

DOE initially selected seven key product classes for direct analysis.

These product classes are summarized in Table IV.9. The direct analysis included reverse engineering, manufacturing cost modeling, and energy use modeling.

TABLE IV.9—PRODUCT CLASSES DIRECTLY ANALYZED IN THE PRELIMINARY ENGINEERING ANALYSIS

Product category	Product class
Standard-size refrigerators and refrigerator-freezers	3. Refrigerator-freezer—automatic defrost with top-mounted freezer without through-the-door ice service. 5. Refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service. 7. Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.
Standard-size freezers	9. Upright freezers with automatic defrost. 10. Chest freezers and all other freezers except compact freezers.
Compact refrigerators	11. Compact refrigerators and refrigerator-freezers with manual defrost.
Compact freezers	18. Compact chest freezers.

DOE selected representative products from each of these product classes to analyze and assess the products' potential for energy use reduction. DOE selected these products by reviewing product offerings on manufacturer and retailer Web sites and selecting products for analysis that had features affecting energy use that are typical for the product classes. DOE selected products of two volumes for each analyzed product class and attempted to select two products of one of these volumes to serve as a product pair. Each product of this pair would be nearly identical in design except that one would be rated at the maximum allowable energy use and the other would satisfy the ENERGY STAR requirements. DOE presented these representative product selections at the Framework Workshop. For these directly-analyzed product classes, DOE developed two cost-efficiency curves for each class based on two of the three products purchased for reverse engineering that represented distinct designs. (The third reverse-engineered product of each class, as mentioned above, was typically a variant of one of the other products, and full analysis of this third product would not have provided additional useful information.)

During the preliminary analysis public meeting, DOE again requested comment on the variation present in refrigeration product design, and the distribution of incremental costs to achieve energy use reductions as compared to the designs selected for analysis.

AHAM commented that it is unable to provide detailed design data for its members, because such data are impossible to aggregate. AHAM suggested that DOE work with individual manufacturers during the MIA interviews to obtain this specific information. (AHAM, Public Meeting Transcript, No. 28 at p. 55; AHAM, No. 34 at p. 5) Whirlpool commented that detailed study would be required to gather such information, and this analysis should be discussed in NOPR-phase manufacturer interviews. (Whirlpool, No. 31 at p. 2) LG suggested that DOE review company Web sites to determine product design options. (LG, Public Meeting Transcript, No. 28 at p. 56)

DOE discussed with individual manufacturers the improvement potential of design options and the design option groupings required to achieve different efficiency levels for different product classes during the MIA interviews. Alone, this information was insufficient to clearly identify the design option pathways required to achieve all of the considered efficiency levels, but DOE made many engineering analysis adjustments based on the information gathered in these discussions (*see* Table IV.10 for a summary of key changes in the analysis).

Based on the manufacturer discussions and accompanying analytical work, DOE concluded that the average characteristics of the products initially purchased for reverse engineering and subsequently used as the basis for the engineering analyses provide a reasonable representation of baseline products. DOE calculated the representative engineering cost-efficiency curve for each product class listed in Table IV.9, above, as the average of the two cost-efficiency curves developed for the two reverse-engineered products of that class. Regarding LG's suggestion that DOE examine manufacturer Web sites to obtain the information sought for its analysis, DOE notes that the detailed information DOE requires for its analysis is unavailable on these Web sites.

TABLE IV.10—SUMMARY OF KEY ADJUSTMENTS TO THE ENGINEERING ANALYSIS

Parameter(s)	Preliminary	Changes for the proposed rule
VIP Surface Coverage	Full product coverage, except for chest freezer walls.	Full coverage of doors, 50% coverage of cabinet to assure structural integrity, preference for coverage of freezer compartments, no change to exception for chest freezer walls.
VIP Effectiveness	Full effectiveness as determined by the ERA energy model.	50% of ERA energy model effectiveness to better match results reported by manufacturers.
Cost Increase for Higher-Efficiency Components.		Adjusted based on additional information.
Conversion Costs for Increase of Door and Cabinet Insulation Thickness.	Based on Manufacturing Cost Model.	Increased due to updating of production equipment costs in manufacturing cost model. Shift in allocation of this cost to increase the portion allocated to the door thickness increase.

TABLE IV.10—SUMMARY OF KEY ADJUSTMENTS TO THE ENGINEERING ANALYSIS—Continued

Parameter(s)	Preliminary	Changes for the proposed rule
Heat Exchanger (Condenser and Evaporator) Size Increase.	Application of a 20% increase in the UA value (inverse of thermal resistance) of the heat exchangers.	Application of this design option based on examination of product design details only for products for which size increase was possible. Direct modeling of heat exchanger performance based on selected geometry changes. Increase of fan power requirement for heat exchanger depth increases.
Standby Power for Variable Speed Controls.	Not included	Addition of 1.5W load outside the cabinet for products not already having electronic control.
Variable Speed Compressor System Fan Control.	Inconsistent selection of fan speed	Fan operation at reduced speed to deliver reduced air flow at 50% power input consistent with cubic fan law.
Variable Speed Compressor Performance for Compact Products.		Degradation of compressor capacity in ERA energy modeling based on performance data obtained from a manufacturer.
Isobutane Refrigerant	Not considered	Consideration of isobutane refrigerant for compact refrigerators, with 5% energy use reduction.
Variable Anti-Sweat Heater Control	Considered for product class 5*	Considered for product classes 5* and 7**.
Baseline Anti-Sweat Heater Operation (Product Class 5* only).		Baseline average wattage reduced for both directly analyzed products.
Variable Defrost Compressor Run time between defrosts.	38 hours	30 hours; Also, adjustment made in this value when converting to variable speed compressors to avoid modeling excessive defrost frequency.

* Refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service.
** Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.

DOE also analyzed four product classes of built-in products (see Table IV.11). DOE selected one representative built-in product for analysis for each of these product classes. DOE judged the representativeness of these product selections based on discussions with manufacturers regarding design option groupings required to meet key efficiency levels with built-in products.

TABLE IV.11—BUILT-IN PRODUCT CLASSES ANALYZED

Product category	Product class
Standard-size refrigerators and refrigerator-freezers	3A–BI. All Refrigerators with automatic defrost. 5–BI. Refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service. 7–BI. Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.
Standard-size freezers	9–BI. Upright freezers with automatic defrost.

DOE's proposal to directly analyze a limited number of product classes was initially presented in the framework document and discussed at the framework workshop. ("Framework Document Public Meeting on Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers," No. 6 at p. 45) DOE did not conduct a full analysis of all product classes in light of limited resources and the limited value this additional data would have yielded given the small number of product shipments associated with the non-analyzed product classes. Instead, DOE developed an approach to extend the energy standards to these product classes. Discussion of this extension of the standards and associated comments is presented in section IV.C.7, below.

2. Baseline Energy Use Curves

a. Baseline Energy Use Under the Proposed New Test Procedure

As described in section III.A, above, DOE has proposed new test procedures for refrigeration products that will affect their measured energy use. DOE developed equations for baseline product energy use as a function of adjusted volume under the proposed new test procedures (which excludes the energy required to make ice—*i.e.,* icemaking energy use) based on information provided by AHAM, as described in chapter 5, section 5.4.2, of the preliminary TSD. (Icemaking energy is the additional energy used to produce ice, which is distinct from the energy expended by an automatic ice dispensing system to dispense ice.) These equations address the test procedure changes associated with compartment temperatures and volume calculation method.

DOE sought comment on the proposed baseline energy use/adjusted volume relationships under the proposed new test procedure. AHAM and Whirlpool supported the DOE approach and found it to be well-summarized and sufficiently rigorous. (AHAM, No. 34 at p. 5 and Public Meeting Transcript, No. 28 at p. 61; Whirlpool, No. 31 at p. 1)

LG questioned the development of baseline energy use equations that do not include automatic icemaker energy use for products with automatic icemakers and suggested that the energy use of automatic icemakers should be included in the DOE analysis and in the baseline energy use equations. (LG, Public Meeting Transcript, No. 28 at p. 60) The LG comment also suggests that it would not be possible to develop a baseline energy use equation prior to finalization of the applicable test procedure, indicating that the portion of the measurement associated with automatic icemakers is still in development. (*Id.*)

The proposed test procedure includes a value for icemaking energy use for those products that have automatic icemakers. 75 FR 29846 (May 27, 2010). However, the discussion regarding efficiency levels is based on the percentages of energy use reductions from baseline energy use excluding

icemaking energy use. In this context, icemaking energy use is the 84 kWh assigned to icemaking in the proposed test procedure. *Id.* at 29847. As described in section III.A, above, sufficient information is unavailable to accurately determine the variation of icemaking energy use as a function of efficiency level. Hence, DOE is not considering reductions of the 84 kWh allocated to icemaking energy use as part of this standard. Instead, the examined energy use reductions exclude icemaking energy use. DOE believes this treatment also allows more meaningful comparisons to other information sources, such as information obtained from discussions with manufacturers regarding design option groups required to achieve efficiency levels.

Electrolux requested that DOE clarify its definition of baseline energy use, as referenced throughout the preliminary TSD. (Electrolux, Public Meeting Transcript, No. 28 at pp. 62–63) Sub Zero also commented that it is unclear in the preliminary TSD whether references to baseline energy refer to calculations under the current test procedure or under the proposed test procedure. (Sub Zero, Public Meeting Transcript, No. 28 at pp. 63–66)

DOE interprets these comments to mean that the preliminary TSD did not clearly explain in its discussion of cost-efficiency curves and efficiency levels whether the examined percentage energy use reductions applied to the current energy standard (*i.e.,* a baseline product tested using the current test procedure) or to a baseline product tested under the new proposed test procedure. To clarify stakeholders' concerns, DOE notes that standards determined by reducing the current standard levels by the stated percentage reductions applied to products tested under the proposed new test procedure would have hidden in them the additional energy use reductions associated with the impacts of applying the proposed new test procedure. The equation below indicates, for products with automatic icemakers, how energy use associated with the analyzed efficiency levels would be calculated. For products without automatic icemakers, the icemaking energy use would not be added (*i.e.,* the last term in the expression would be eliminated).

$$TEC_{EL+ICE,NEW} = TEC_{STD,NEW} \times (1 - R) + TEC_{ICE}$$

Where:

$TEC_{EL+ICE,NEW}$ = Test energy consumption at a given efficiency level, including icemaking energy consumption, using the new test procedure

$TEC_{STD,NEW}$ = Test energy consumption under the current standard, not including icemaking energy consumption, using the new test procedure

R = Reduction in energy consumption (expressed as fraction) due to efficiency improvements at a given efficiency level

TEC_{ICE} = Icemaking test energy consumption

DOE conducted the analysis based on the proposed new test procedure. However, as discussed, DOE applies the energy use reduction associated with the efficiency level to the baseline energy use, excluding icemaking energy use. For the purposes of this discussion, DOE defines the Proposed Procedure Reduced Baseline Energy Use as the representative energy use [28] not including the icemaking energy use of a minimally compliant product measured under the proposed new test procedure. For a product with a 20 percent efficiency level (*i.e.,* with energy use 20 percent lower than the maximum allowable energy use) and with an automatic icemaker, the energy use measured under the proposed test procedure would be equal to the icemaking energy use plus 80 percent of the Proposed Procedure Reduced Baseline Energy Use. Equations representing the Proposed Procedure Reduced Baseline Energy Use are presented in Table 5.4.10 of the preliminary TSD. For a product at a 20 percent efficiency level without an automatic icemaker, the energy measured under the proposed new test procedure would be 80 percent of the Proposed Procedure Reduced Baseline Energy Use.

Whirlpool questioned the change in adjusted volume for product class 7 (refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service) associated with the new test procedure, as reported in the preliminary TSD (Tables 5.4.5 through 5.4.7), suggesting that the new volume calculation method, which has eliminated the insulating hump and cup recess areas from the volume calculation, should result in lower volumes. The cup recess area is the recess on the outside of the product under the dispenser, where a cup would be placed to fill it with ice or water. The insulating hump is the "bulge" towards the inside of product that is necessary to provide insulation around the back of the cup recess and around the ice dispensing chute. (Whirlpool, Public Meeting Transcript, No. 28 at pp. 58–59)

DOE notes that the data associated with the tables were provided by AHAM as aggregated data, which limited the extent to which DOE could draw conclusions about these data. However, the information indicates that the average freezer volume for the 24 examined product class 7 samples dropped from 9.3 cubic feet under the current test procedure to 9.0 cubic feet under the proposed new test procedure, consistent with expectations of a reduction in volume. The larger volume adjustment factor associated with the proposed new test temperatures (the volume adjustment factor for the freezer compartment increases from 1.63 to 1.76 under the proposed test procedure) more than compensates for the reduction in volume and results in a small increase in adjusted volume.

b. Change of Energy Use Equation Slope

The energy standards for refrigeration products are expressed as a product's adjusted volume multiplied by a parameter called the slope and added to another parameter called the intercept. Energy use is expressed using an equation rather than as a fixed value to reflect the fact that a larger product consumes more energy. An energy use equation with a larger slope means that energy use increases more rapidly as the size increases (*i.e.,* is more sensitive to product size), while a lower slope means that energy use increases less rapidly. Different slope and intercept parameters are established to represent the energy standard for each product class. Casting the energy standards in this fashion allows DOE to set a standard for each product class as a single relationship applicable for a wide range of product volumes, rather than providing separate standards for many limited volume ranges.

Based on information derived from energy use modeling, the preliminary TSD (see chapter 5, section 5.4.2) suggested that the slopes for at least some of the examined products may need adjustment. DOE sought comment on whether to adjust the slopes of the baseline energy use curves under the new test procedure for any of the proposed product classes.

AHAM requested additional information on (a) How product classes were selected for evaluating the slope adjustment, (b) how the modified slopes were determined, and (c) how the intercepts would change with proposed slope changes. (AHAM, No. 34 at p. 6 and Public Meeting Transcript, No. 28 at pp. 68–69) AHAM supported DOE's proposal to increase the slope for

[28] The word "representative" is inserted here to indicate that the Proposed Procedure Reduced Baseline Energy Use is intended to be representative of the products in a product class, rather than applying to any one particular product that is minimally-compliant under the current standard. This distinction is made because there is variation in the change in measured energy use when applying the proposed test procedure.

current product class 5 (refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service) to 12.3 assuming the intercept value remains the same, since the slope for this product class was 16.5 in 1993 and it dropped to 4.6 with the 2001 rulemaking, thus making the standard more stringent for large products than for small products. (AHAM, No. 34 at p. 6 and Public Meeting Transcript, No. 28 at p. 68) AHAM expressed concerns about the slopes for the product classes the preliminary TSD did not analyze, such as product classes 17 (compact upright freezers with automatic defrost), 3A (all-refrigerators—automatic defrost), 5A (refrigerator-freezer—automatic defrost with bottom-mounted freezer with through-the-door ice service), 10A (chest freezers with automatic defrost), and 11A (compact refrigerators and refrigerator-freezers with manual defrost). However, AHAM's comments regarding product class 17 appear to address the magnitude of the energy standard rather than the slope of the energy use equation for this product class. (AHAM, Public Meeting Transcript, No. 28 at p. 69) Finally, AHAM commented that the slopes determined using energy modeling should be validated if possible to determine if the proposed slope values are realistic. (AHAM, Public Meeting Transcript, No. 28 at p. 68) Whirlpool commented that the preliminary TSD provides insufficient information on the assessment of energy equation slopes to allow the company to either support or reject of the proposal. (Whirlpool, No. 31 at p. 1)

DOE presented during the preliminary analysis meeting background information regarding the slopes of different product classes based on energy modeling. DOE highlighted the need to obtain data and feedback to properly assess which slopes should change and what the new slope and intercept values should be. DOE explicitly asked for information that might help in making slope adjustments at the preliminary analysis public meeting and as part of the preliminary analysis comment period, but did not receive any relevant data at that time. DOE also asked for data on this topic during the NOPR phase manufacturer interviews and received information for two pairs of product class 5 products. As described in the NOPR TSD in chapter 5, section 5.4.2, DOE incorporated this information into its evaluation of the applicable energy efficiency equation for this product class. DOE proposes to apply the slope for product class 7 (refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service) to product class 4 (refrigerator-freezers—automatic defrost with side-mounted freezer without through-the-door ice service) because the presence of through-the-door ice features for product class 7 products should have only a limited impact on the increase in energy use associated with cabinet growth, which the slope represents. These adjustments are also described in section 5.4.2 of chapter 5 of the NOPR TSD. Otherwise, DOE is not proposing any slope changes based solely on energy modeling information. DOE will consider modifying its slope and intercept values if sufficient data are received.

In assessing possible slope changes, DOE primarily chose products for which energy use models had already been prepared as part of the preliminary analysis. As described in the preliminary TSD, chapter 5, section 5.4.2, the analysis started with the energy models of minimally-compliant products based on the two reverse-engineered products for each product class DOE examined. DOE examined the trend in calculated energy use as the product size changes with insulation thickness remaining constant. For the smaller of the two reverse-engineered products, DOE examined the trend as size increases, and for the larger of the two products, DOE examined the trend as size decreases. DOE averaged these two results.

For the analysis of compact refrigerators, DOE considered the change in efficiency of typically available compressors sized appropriately for the products examined. For standard-size products, DOE used a constant compressor efficiency in the analysis. DOE selected this approach based on observed data indicating that compressor efficiency does not vary significantly in the capacity range suitable for most standard-size products (see, *e.g.,* Figure 5.8.1 of chapter 5 of the preliminary TSD).

The preliminary TSD did not address the approach for determining new intercepts for baseline energy use equations with modified slopes. Changing the slope without a corresponding change to the intercept value would result in a dramatic increase or decrease in the calculated baseline energy use. For example, consider the preliminary baseline energy use equation for product class 5, which is $5.32 \times AV + 542.5$. DOE proposes to change this slope from 5.32 to 11.0. If the intercept remains equal to 542.5, the calculated energy use of a product with an adjusted volume equal to 20 would increase from 648.9 to 762.5, an increase of 17.5 percent. A lower intercept would be needed in order to offset this change and permit the calculated baseline energy use for products with typical adjusted volumes to remain constant. Without this corresponding adjustment, the resulting equation would not be representative of baseline product energy use. For a product with an adjusted volume equal to 20, an intercept equal to 428.9 would assure that the energy use remains 648.9.

Rather than keep the same intercept value, as suggested by AHAM (AHAM, No. 34 at p. 6), DOE proposes, in developing a new baseline energy use equation, that the calculated baseline energy use for the typically-shipped range of products of the class remains constant. Ideally, this approach would require knowledge of shipment quantities for the product class disaggregated by adjusted volume. DOE does not have access to such shipment data and cannot conduct a calculation to determine an intercept that is known to result in zero change in the shipment-weighted average baseline energy use. To work around this limitation, DOE proposes to select a new intercept so that the increase in the baseline energy calculated for the largest adjusted volume (based on the new proposed test procedure with its modified volume adjustment factor) typical for the examined product class is equal to the decrease in the baseline energy use for the smallest adjusted volume typical for that product class. For product class 5, DOE selected representative minimum and maximum adjusted volumes for this calculation equal to the adjusted volumes of the 18.5 and 25 cubic foot reverse engineered products. The adjusted volumes for these products are 22.4 and 29.8 cubic feet. With the proposed new intercept of 394.2, the baseline energy use for the smaller product decreases 21.2 kWh from 661.6 to 640.4 kWh, while the baseline energy use for the larger product increases 21.2 kWh from 701.3 to 722.5 kWh. A similar approach is proposed for product class 4, as described in section 5.4.2 of chapter 5 of the NOPR TSD. The chapter also discusses development of a baseline energy use equation for product class 5A. DOE's Proposed Procedure Reduced Baseline Energy Use equations for all of the proposed product classes are presented in Table 5.4.12 of chapter 5 of the NOPR TSD. These equations are the basis for development of the energy standards in this NOPR.

DOE requests comment on the approach used to develop Proposed Procedure Reduced Baseline Energy Use equations with adjusted slopes for product classes 4, 5, and 5A. DOE also seeks relevant data that would allow more rigorous adjustment of the curve intercept to ensure that the shipment-weighted average impact of the slope change would be neutral (*i.e.,* zero change) with respect to energy use. DOE also seeks any additional information that would support similar development of adjusted-slope baseline energy curves for other product classes. (*See* Issue 11 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.)

c. Energy Use Measurement Changes Associated With Other Test Procedure Changes

As described in section IV.C.2.a, above, DOE developed the Proposed Procedure Reduced Baseline Energy Use equations based on energy use measurement changes associated with proposed test procedure changes associated with compartment temperatures and volume calculation methods. DOE calculated the new energy conservation standards proposed in this notice by applying efficiency level percentages to the Proposed Procedure Reduced Baseline Energy Use equations. Section III. A, above, describes the test procedure rulemaking and its associated NOPR, which has proposed numerous test procedure changes in addition to the compartment temperature and volume calculation method changes. The test procedure final rule has not yet been published. However, DOE tentatively concludes, based on its analysis and the comments received in response to the proposed procedure, that none of these other proposed test procedure changes will affect measured energy use. Therefore, DOE has used the Proposed Procedure Reduced Baseline Energy Use equations developed during the preliminary analysis (subject to changes in some of these equations to address equation slope) to establish the proposed standards in this notice.

3. Efficiency Levels Analyzed

DOE selected baseline products as reference points for all of the product classes and compared these baselines to projected changes resulting from using energy saving design options. The baseline products in each product class represent the common characteristics of equipment in that class.

DOE established a series of incremental efficiency levels for which it has developed incremental cost data and quantified the cost-efficiency relationship for each of the eleven analyzed product classes. In each product class, the highest efficiency level is the max-tech level, which represents the theoretical maximum possible efficiency if all available design options are incorporated. Because the two products selected for reverse engineering for each of the seven conventional (free-standing) product classes had differing characteristics, the max-tech levels for the two products were not the same. DOE did not consider that the higher of the two max-tech levels would be representative of the entire product class. Instead, DOE calculated max tech for the product class as the average of the max-tech levels for the two products analyzed.

DOE sought comment on the incremental efficiency levels and the max-tech level for each product class. Stakeholders primarily made comments about the max-tech levels. The comments primarily addressed (a) Validity of max tech that is calculated based on technology options that are used in commercialized products but whose combinations in the max-tech designs may not be represented by products or prototypes, (b) validity of DOE's consideration of variable speed compressors for compact products, (c) questions regarding whether some of the design options, particularly heat exchanger size increases, fit physically in the products, and (d) questions regarding validation of the energy modeling predictions. The specific comments are detailed below. The comments described by topics (b) and (c) address the treatment in the engineering analysis of design options that have been screened-in, and are discussed in section IV.C.4, below. DOE modified its treatment of some of these design options in the NOPR analysis, which resulted in adjusting the max-tech levels. The comments described by topic (d) address validation of the energy modeling tool DOE used in the analysis and are discussed in section IV.C.5, below. Comments that specifically address max-tech levels but not energy model validation or treatment of design options in the analysis are discussed in section III.B.2, above.

4. Engineering Analysis Treatment of Design Options

GE recommended that DOE reevaluate its assumptions underlying the technologies included in the max-tech levels, because some of the design options are not feasible for certain product classes and some design options are not as effective when combined with other design options. (GE, No. 37 at p. 2) But GE did not identify specific options it believed were problematic. DOE cannot directly respond to comments that do not address particular design options in question and the specific concerns with the way they were evaluated. The energy modeling used to determine impacts of groups of design options modeled the design option groups rather than modeling each design option individually. The modeling showed the reduced effectiveness of design options added after other design options had already been considered. This resulted in less reduction in energy use for such design option groups. Hence, the analysis captured the reduced effectiveness associated with the grouping of design options and DOE did not modify its analysis in response to this comment.

a. Heat Exchangers

AHAM, Sub Zero, and GE commented that some of the design options considered could not be implemented due to cabinet size limitations. (AHAM, Public Meeting Transcript, No. 28 p. 73; Sub Zero, Public Meeting Transcript, No. 28 p. 73; GE, Public Meeting Transcript, No. 28 p. 74) GE did not offer any specifics in its statements or comments. When asked to identify specific design options that were size-dependent, Sub Zero cited heat exchangers (Sub Zero, Public Meeting Transcript, No. 28 p. 73) As a result, DOE revised its assessment of the benefits from increased heat exchanger sizes in the NOPR analysis by (a) evaluating the potential to increase heat exchanger size in each analyzed product based on the reverse-engineered product details and limiting the size increase—in some cases, to no increase—and (b) revising the analysis to analyze the heat transfer benefit, the increase in refrigerant-side pressure drop, and the added airside pressure drop and/or possible fan power increase associated with the change. DOE adopted the latter approach rather than applying a factor representing an increase in performance, as was done for the preliminary engineering analysis. This revised assessment is discussed in detail in chapter 5 of the NOPR TSD in sections 5.8.6 and 5.8.7.

b. Variable Speed Compressors for Compact Products

Whirlpool and Electrolux commented that variable speed compressors may not be available in the market for product class 11 (compact refrigerators and refrigerator-freezers with manual defrost). (Whirlpool, Public Meeting

Transcript, No. 28 at p. 75; Electrolux, Public Meeting Transcript, No. 28 at p. 75) DOE utilized performance data for commercialized variable-speed compressors in its analysis. For the compact product classes, DOE considered the smallest-capacity variable speed compressors operating at their lowest rated speed. For the smallest compact refrigerator analyzed, DOE considered replacement of the baseline compressor, nominally rated at 211 Btu/hr capacity and an EER of 3.02 Btu/hr-W, with a variable speed compressor with ratings of 139 Btu/hr capacity and 4.96 Btu/hr-W EER at low speed (capacity, power input, and EER all vary as compressor speed varies). DOE confirmed with the compressor vendor that these compressors can be used in this fashion, although doing so may not be cost effective. Based on data provided by a manufacturer, DOE also degraded the modeled performance of variable speed compressors when applied to compact products, by reducing their modeled capacity by 11 percent.

c. Variable Anti-Sweat Heaters

Whirlpool commented that the variable anti-sweat heater design option would apply to product class 7 (refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service) and possibly 6 (refrigerator-freezers—automatic defrost with top-mounted freezer with through-the-door ice service), in addition to product class 5 (refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service). (Whirlpool, Public Meeting Transcript, No. 28 at pp. 44–45) In response, DOE included this design option for analysis of product class 7. The design option had already been incorporated into the analysis for product class 5, with respect to the gasket heaters used between this product class's French Doors (see Preliminary TSD, chapter 5, section 5.8.9). DOE did not develop cost-efficiency curves for product class 6, as this was not one of the directly-analyzed product classes (see section IV.C.1, above).

d. Vacuum-Insulated Panels

Section IV.B.1.c, above, discusses VIPs from the perspective of the screening analysis. As described in that section, VIPs were not screened out for the NOPR analysis. This section addresses comments associated with the treatment of VIP technology in the engineering analysis.

AHAM stated that the VIP application cost is higher for cabinets than it is for doors and questioned whether DOE had incorporated the additional cost in its analysis (AHAM, Public Meeting Transcript, No. 28 at p. 94; AHAM, No. 34 at p. 7) In addressing this issue, DOE assumed for the preliminary analysis that VIP installation in a cabinet requires 10 times as much labor as installation in a door. Information DOE obtained during manufacturer interviews during the NOPR suggests that its labor cost estimates are appropriate. DOE used these assumptions in calculating its VIP labor cost assumptions in the NOPR analysis.

LG urged DOE to study the incremental installation, maintenance, and service costs for products using VIPs. (LG, No. 41 at p. 4) As discussed in more detail in chapter 5 of the NOPR TSD, the VIP cost estimate includes labor costs and a cost contribution attributable to overhead and capital costs. As discussed in section IV.B.1.c, above, no information is available regarding any VIP field failure. DOE is also unaware of any specific maintenance or service costs associated with VIPs. Hence, DOE did not include these costs in the analyses for VIPs.

Sub Zero commented that VIP costs offered by three different VIP manufacturers are similar, indicating that an industry standard has been established at present levels of technology, maturity, and volume. It added that costs may rise to ensure that shipping and handling are conducted in a way that does not damage the panels. (Sub Zero, No. 40 at p. 4) IOU agrees with the costs used by DOE in the preliminary analysis and expects that costs will likely decline in the future due to economies-of-scale (IOU, No. 36 at p. 10) ThermoCor, a VIP vendor contacted as part of DOE's investigation of VIP supply issues (see section IV.B.1.c, above), expects the increase in supply to drive down raw material prices and the transition to increased automation to reduce production cost. DOE did not change the VIP cost assumptions from the preliminary analysis, because, based on available information, (1) DOE expects that VIP production capacity can be increased as needed within the necessary timeframe, thus avoiding a supply/demand imbalance that would lead to cost increases, and (2) adjustments to shipping costs to reduce VIP failure risk during transport are insignificant compared to overall VIP application cost. (DOE projects that if, in order to account for the need for special handling, transport costs are twice as high as normal bulk materials transport costs via truck, they would still only amount to about 2 percent of total VIP costs).

IOU predicted that the cost premium for VIPs could become less significant under future regulations that require manufacturers to switch from HFC blowing agents to alternatives (IOU, No. 36 at p. 10) DOE does not agree with this statement. Information obtained through manufacturer interviews and discussion with an insulation vendor indicates that material cost for insulation made using HFC–245fa is more expensive than for insulation made using the most likely replacement blowing agent, cyclopentane. Hence, the cost premium for VIPs may more likely increase slightly. As an example, HFC–245fa may represent 12.5 percent of the mass of the foam insulation. At a cost of roughly $5/lb and insulation density of roughly 2 pounds per cubic foot, the blowing agent represents $1.25 per cubic foot of insulation. Cyclopentane costs roughly $1 per pound. Hence, when switching to cyclopentane-blown insulation, the blowing agent represents $0.25 per cubic foot of insulation. DOE used a VIP price in its analysis of $3.19 per square foot at a thickness of one-half inch—this is equal to $76.56 per cubic foot on a volume basis. The total cost of the displaced HFC–245fa foam insulation when applying VIPs is roughly 2 percent of the VIP cost, or $1.53. Hence, switch from HFC–245fa to cyclopentane blowing agent will increase the cost of the use of VIPs from $75.03 to $76.03 per cubic foot. This increase is very small compared to the overall cost of implementing VIPs.

The IOU comment also suggests that VIPs could be used to maintain thermal performance with reduced impact on external size or internal volume (IOU, No. 36 at p. 10) DOE agrees with this statement, and expects that some manufacturers might use this approach to maintain internal volume. However, this possibility has no bearing on DOE's engineering analysis, in which DOE must determine the most cost effective groups of screened-in design options that are needed to achieve each considered efficiency level.

NRDC stated that VIPs could alleviate some of the cost burden associated with potential climate change legislation or regulation that would increase the cost of HFC blowing agents by reducing the amount of foam insulation needed (NRDC, No. 39 at p. 4) At this time, DOE does not believe that a scenario involving limits on HFC use would involve manufacturers switching to increased use of VIPs while continuing to use HFC blowing agent. Instead, the available information leads DOE to predict that manufacturers would

instead switch to insulation not containing HFC blowing agent, since this approach is much more cost effective than the adoption of VIPs. This result assumes that additional moderate-cost design options can be applied to make up for any efficiency loss associated with the switch to alternative blowing agents. DOE believes that VIPs would be used only if they are the most cost-effective design option for making up this efficiency difference.

DOE requests comment on its treatment of design options in the engineering analysis. (See Issue 12 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR, below.)

5. Energy Modeling

DOE upgraded the ERA program used in the previous refrigerator rulemaking in preparation for the energy analysis conducted for this rulemaking. Upgrades, including use of heat exchanger models based on more recent literature and development for a Windows platform are described in more detail in appendix 5–B of the NOPR TSD. The program has also been made available on the DOE rulemaking Web site at the following URL: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/refrigerators_freezers_prelim_analytical_spreadsheets.html.*

Sub Zero asked DOE whether and to what extent it used actual test data to calibrate ERA models, and how well it predicted performance over a range of operating conditions. (Sub Zero, No. 40 at p. 8) AHAM questioned the evaluation of design options and requested that the ERA simulation program be made available. (AHAM, No. 34 at p. 10) Electrolux also posed questions regarding calibration of the ERA model and asked whether the model could be made available. (Electrolux, Public Meeting Transcript, No. 28 at p. 76)

DOE notes that the ERA program has been posted on the DOE's rulemaking Web site since the end of February 2010. Additionally, the preliminary TSD described many of the inputs that were used in developing of the energy use models for the reverse-engineered products that served as the basis of DOE's efficiency improvement calculations. DOE tested many of the reverse-engineered products, including tests for standard-size refrigerator-freezers for both the current test procedure compartment temperatures and the proposed new compartment temperatures. DOE instructed the test facility to measure refrigerant tube temperatures during these tests to indicate refrigerant conditions during compressor on-cycles. DOE measured the power input of fans as part of the reverse-engineering process, and used this information as input for the models. DOE also used the compressor power input during on-cycles during testing to help calibrate teardown product energy models. DOE adjusted input data for the energy models based on all available information to obtain energy use estimates within a few percentage points of the rated or measured energy of the products analyzed. In some cases, DOE adjusted the input using additional load and/or other input factors to degrade or improve system or cabinet thermal performance to match measured energy use or operating parameters. Examples include (1) boost of performance of one style of condenser to match measured condensing temperature and compressor power input during the on-cycle, and (2) addition of thermal load for some products, particularly side-mount refrigerator-freezers and upright freezers, to match total energy use. The energy model input data for the reverse-engineered products are presented in appendix 5–A of the NOPR TSD.

DOE also examined whether model predictions for the design options groups required to achieve higher efficiency levels matched the design options used in actual products, where such information was available. For example, DOE obtained information from manufacturers during the NOPR phase discussions regarding the combination of design options required to achieve a 30 percent reduction in energy use in standard-size refrigerator-freezers as compared with the current standard. Achieving this level generally required using the highest-efficiency single-speed compressors, brushless-DC fan motors, and substantial use of VIPs. The energy model results were consistent with this information.

DOE requests comments, information, and data that would help adjust its energy modeling input and/or results that would allow more accurate representation of the energy use impacts of design options using the ERA energy model. (See Issue 13 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR, below.)

6. Cost-Efficiency Curves

Chapter 5 of the NOPR TSD provides the full list of manufacturer production costs (MPCs) and MSPs at each efficiency level for each analyzed product class.

ACEEE/ASAP stated that DOE should not rely principally on manufacturer-provided cost curves. (ACEEE/ASAP, No. 43 at p. 6) This comment addresses the variation in the cost information provided to DOE by AHAM. ACEEE/ASAP cited (a) the lack of transparency of consolidated data provided by AHAM and (b) the expectation that such data do not accurately predict future costs as reasons why DOE should not rely on these data. The commenters urged DOE to use the lowest cost information provided by any manufacturer, since other manufacturers would have to adopt the lowest-cost design approaches to remain competitive, or they would lose market share, thus increasing the representativeness of the lowest-cost designs. (*Id.*) AHAM expressed concerns regarding how manufacturers reported cost data and will reevaluate its submissions to DOE. (AHAM, Public Meeting Transcript, No. 28 at pp. 89–90)

DOE has not received updated information. Because of the questions cited above regarding AHAM's data collection and aggregation, DOE has not attempted to present comparisons of DOE's NOPR analysis results with the preliminary analysis data provided by AHAM. DOE has developed curves representing the cost of achieving the analyzed efficiency levels using manufacturing cost modeling and energy modeling based on reverse engineering. DOE used its own curves in the downstream analyses such as the LCC/PBP and NIA analyses.

AHAM and GE requested clarification regarding the cost-efficiency curve presented on page 55 of the preliminary TSD, specifically asking which of the two design options labeled "VIP to FZR door" was actually the "VIP to FZR door" design option. (AHAM, No. 34 at p. 10; GE, Public Meeting Transcript, No. 28 at p. 85) DOE has since adjusted the analyses on which this comment was based (see the changes made to analyses between the preliminary analysis and NOPR phases listed in Table IV.10, above). Accordingly, this comment has been superseded by intervening events.

7. Development of Standards for Low-Volume Products

DOE sought comment on its approach to developing energy standards for low-volume products. Sub Zero commented on the high degree of uncertainty of the analysis which was based on computer models and selective teardowns, and suggested adding margins of uncertainty to the results. (Sub Zero, No. 40 at p. 3–4) AHAM recommended that DOE generate cost-efficiency curves for all product classes, since low shipment product classes (*i.e.,* low-volume compacts) have much smaller economies of scale and greater design

challenges due to size and special constraints. As a result, these product classes have much higher costs and reduced energy efficiency improvements compared to the high-volume product classes. AHAM suggested that DOE request data to estimate cost-efficiency curves for low-volume products during MIA interviews. Finally, AHAM stressed that low-volume product classes can make up a major portion of a niche manufacturer's sales, so it is critical to evaluate these product classes as realistically as possible to be fair to these manufacturers. (AHAM, Public Meeting Transcript, No. 28 at pp. 98, 99 and No. 34 at pp. 7–8) Whirlpool agreed with AHAM and offered to provide data for all product classes in an effort to help DOE model low-volume product classes accurately. (Whirlpool, No. 31 at p. 2)

In response, DOE adopted AHAM's suggestion for certain low-volume products such as built-ins, for which DOE obtained detailed engineering data from a built-in manufacturer to allow development of cost-efficiency curves. However, because of limited resources, DOE cannot conduct a complete analysis for every product variation. DOE explained the proposed approach thoroughly during the framework meeting and in the framework document and was not urged by stakeholders at that time to consider detailed analyses of more product classes.

D. Markups To Determine Product Cost

The markups analysis develops appropriate markups in the distribution chain to convert the estimates of manufacturer cost derived in the engineering analysis to consumer prices. DOE determined the distribution channels for refrigeration products and the markups associated with the main parties in the distribution chain, manufacturers and retailers. DOE developed an average manufacturer markup by examining the annual Securities and Exchange Commission (SEC) 10–K reports filed by four publicly-traded manufacturers primarily engaged in appliance manufacturing and whose combined product range includes residential refrigeration products. For retailers, DOE developed separate markups for baseline products (baseline markups) and for the incremental cost of more-efficient products (incremental markups). Incremental markups are coefficients that relate the change in the manufacturer sales price of higher-efficiency models to the change in the retailer sales price.

Commenting on the preliminary TSD, AHAM filed supplemental comments that criticized DOE's application of "incremental" markups to the incremental manufacturer selling price of products more efficient than the baseline products. (AHAM, No. 34 at p. 14) In Exhibit B accompanying this comment, AHAM stated that (1) DOE provides no empirical evidence to validate that retailers obtain only incremental markups on products with greater features and costs; and (2) DOE is asserting a normative approach without any support showing that its model reflects actual retail practices. These comments effectively criticized two of the key assumptions in DOE's theoretical construct. The first of these assumptions is that the costs incurred by appliance retailers can be divided into costs that vary in proportion to the MSP (variable costs), and costs that do not vary with the MSP (fixed costs). The second of these assumptions is that retailer prices vary in proportion to retailer costs that are included in the balance sheets.

Regarding the first assumption, AHAM stated that DOE has offered no evidence that the fixed/variable cost mix of a retailer has anything to do in practice with the markups that will be earned by a retailer on products that meet a new energy conservation standard. It added that DOE uses a "spurious analogy" of HVAC contractors as a basis for considering the costs of a retailer, and that DOE did not analyze the actual drivers of retail costs, where the cost structure has considerably different characteristics from those of an HVAC contractor. It stated that DOE has not presented any data or analysis that would yield a fixed versus variable cost allocation applicable to retailers. Regarding DOE's second assumption, AHAM stated that DOE's approach depends on the presence of a relatively high level of competition in the retail industry. AHAM presented data showing that the four firm concentration ratio (FFCR) of the sectors that sell major appliances ranges from 42 to 65 percent, which verges on the standard definition of an oligopoly.[29]

In conclusion, AHAM viewed DOE's incremental markup approach as lacking a credible theoretical underpinning and demonstrated reliability and asserted that the data required for the approach are not available. AHAM stated that DOE should return to its traditional practice of using average markups for both the baseline products and for the added costs of efficiency improvements. In AHAM's view, the stability of markups in the retailing sectors leads to the reasonable inference that such markups will continue and apply to higher-efficiency products in the future when they become the bulk of sales under amended standards. (AHAM, No. 34, Exhibit B, p. 12) In addition to AHAM's comment, GE expressed concerns with the assumptions DOE is using in proposing a lower markup on energy efficiency improvements. (GE, No. 37 at pp. 2–3)

In response to the above comments, DOE extensively reviewed its incremental markup approach. It assembled and analyzed relevant data from other retail sectors, and held preliminary discussions with an expert retailing consultant. As a result of this research, DOE found that empirical evidence is lacking with respect to appliance retailer markup practices when a product increases in cost (due to increased efficiency or other factors). DOE understands that real-world retailer markup practices vary depending on market conditions and on the magnitude of the change in cost of goods sold (CGS) associated with an increase in appliance efficiency.

Given this uncertainty with respect to actual markup practices in appliance retailing, DOE uses an approach that reflects two key concepts. First, changes in the efficiency of the appliances sold are not expected to increase economic profits. Thus, DOE calculates markups/gross margins to allow cost recovery for retailers (including changes in the cost of capital) without changes in company profits. Second, efficiency improvements only impact some distribution costs. DOE sets markups to cover only the variable costs expected to change with efficiency.

DOE's separation of operating expenses into fixed and variable components to estimate an incremental markup follows from the above concepts. DOE defines fixed expenses as including labor and occupancy expenses because these costs are not likely to increase as a result of a rise in CGS due to amended efficiency standards. All other expenses, as well as the net profit, are assumed to vary in proportion to the change in CGS. DOE acknowledges that its allocation of expenses into fixed and variable categories is based largely on limited information and seeks additional information from interested parties to help refine its allocation approach.

[29] The FFCR represents the market share of the four largest firms in the relevant sector. Generally, an FFCR of less than 40 percent indicates that a sector is not concentrated and an FFCR of more than 70 percent indicates that a sector is highly concentrated.

DOE's method results in an outcome in which retailers are assumed to cover their costs while maintaining their profit margins when the CGS of appliances changes. Market competition is a main reason why DOE believes that profit margins would not change in a significant way. Regarding AHAM's assertion that the degree of competition in appliance retailing is not sufficient to support DOE's model, DOE believes that AHAM's measure of competition is faulty. AHAM measured the FFCR of three retail channels: Electronics and Appliance Stores, Building and Material and Supplies Dealers, and General Merchandise Stores. These values represent competitiveness within each sector, but refrigerators are sold across all three sectors, preventing major retailers in each sector from exercising significant market power. To properly measure the competitiveness within appliance retailing, DOE believes that one should measure the FFCR for only the appliance sub-sector within the above channels, and accordingly estimated the "appliance sales" FFCR, equal to the sector FFCR times the percent of appliance sales within each sector. DOE estimated that these sub-sector FFCRs are under the 40 percent threshold. Furthermore, "Household Appliance Stores," a subsector of the Electronics and Appliance Stores sector that specifically represents appliance retailers, rather than computer or other electronics stores, has an FFCR of 17 percent, signifying an unconcentrated sector.

Regarding AHAM's observation about the relative stability of average markups for the major retail channels that sell home appliances, DOE believes that the usefulness of this information for estimating markups on specific product lines is limited. The markups implied by gross margin at the level of major retail channels [30] are averaged over multiple product lines and many different store types. The empirical data at this level do not provide useful guidance for estimating what happens to the markup on specific products when their costs change. Applying the same markup as CGS increases, as AHAM recommends, would mean that the rise in CGS associated with higher-efficiency products would translate into higher retail gross margins for that product line. Since the majority of operating expenses would not be affected by the rise in CGS, the result would be an increase in net profit as a share of sales. While such an outcome could occur in the short run, DOE believes that competitive forces in the market would tend to decrease the profit margin over time.

Based on the above considerations, DOE has decided to continue to apply an incremental markup to the incremental MSP of products with higher efficiency than the baseline products. As part of its review, DOE developed a new breakdown into fixed and variable components using the latest expense data provided by the U.S. Census for Electronics and Appliance Stores, which cover 2002. The newly-derived incremental markup, which would be applied to an incremental change in CGS, is 1.17, which is slightly higher than the value of 1.15 that DOE used in the preliminary analysis. Chapter 6 of the NOPR TSD provides a description of both the method and its current application using the afore-mentioned data.

DOE requests information regarding the response of retailers to incremental change in the CGS of appliances associated with energy conservation standards. (See Issue 14 under "Issues on Which DOE Seeks Comment" in section VII.E, below.)

Chapter 6 of the NOPR TSD provides additional detail on the markups analysis.

E. Energy Use Analysis

DOE's analysis of the energy use of refrigeration products estimated the annual energy use of products in the field that would meet the considered efficiency levels, *i.e.,* as they are actually used by consumers. The energy use analysis provides the basis for other analyses DOE performs, particularly assessments of the energy-savings and the savings in consumer operating costs that could result from DOE's adoption of amended standard levels. In contrast to the DOE test procedure, which provides standardized results that can serve as the basis for comparing the performance of different appliances used under the same conditions, the energy use analysis seeks to capture the range of operating conditions for refrigeration products in U.S. homes.

To determine the field energy use of products that would meet possible amended standard levels, DOE used data from the Energy Information Administration (EIA)'s 2005 Residential Energy Consumption Survey (RECS), which was the most recent such survey available at the time of DOE's analysis.[31] 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 sufficient information to establish the type (product class) of refrigeration product used in each household, and also provides an estimate of the household's energy consumption attributable to "refrigerators" or "freezers". As a result, DOE was able to develop household samples for the representative product classes for standard-size units. DOE did not use RECS for compact refrigerators and freezers because a large fraction of these products are used outside the residential sector. Instead, it based the energy use for these products on the DOE test procedure.

The preliminary analysis treated the energy consumption attributed by RECS to refrigerators or freezers as the field energy consumption, referred to as FEC_{RECS}, of the refrigeration product(s) in each sample household. DOE derived a multiplicative 'usage adjustment factor' (UAF) that relates this quantity to the estimated test energy consumption of the products in each household. To develop a UAF for each RECS household, DOE utilized information that RECS provides on the size (*i.e.,* volume), age and the product class of the refrigeration product in use. DOE determined, for each household's unit, the corresponding maximum allowable tested energy consumption, referred to as TEC_{STD}, based on the energy conservation standard that was in effect at the time the household purchased the refrigeration product. Using FEC_{RECS} and TEC_{STD}, DOE then developed the UAF for each household to capture the combined effects of consumer behavior (*e.g.,* door openings), operating conditions (*e.g.,* room temperature and humidity), and product characteristics (*e.g.,* efficiency relative to the minimum allowable). The UAF represents the adjustment that needs to be made to the maximum allowable tested energy use to arrive at the field energy consumption of the refrigeration product.

Commenting on the preliminary TSD, AHAM criticized DOE's proposed approach for estimating the energy use of refrigerator-freezers, and stated that DOE should instead rely on the test procedure. (AHAM, No. 34 at pp. 11–12) Accompanying its comment, AHAM submitted Exhibit A, which elaborated

[30] The channels for which AHAM provided gross margin data for 1993–2007 are Electronics and Appliance Stores, General Merchandise Stores, and Building Material and Supplies Dealers. According to AHAM, these channels accounted for 43%, 31% and 17% of major appliance sales in 2007, respectively.

[31] For information on RECS, *see http://www.eia.doe.gov/emeu/recs/.*

on AHAM's concerns criticisms.[32] In AHAM's view:

1. RECS data has served well as a directional, general guidance tool in energy policymaking, but the preliminary TSD proposes an unprecedented use of these data in a specific appliance energy efficiency rulemaking.

2. Use of RECS data to set a refrigerator/freezer standard is improper, legally flawed and is arbitrary and capricious. The proposed RECS data approach operates as a "black box," the inner workings of which are not well understood. The input data are not direct and actual measurements of energy use, but rather statistical inferences.

3. While the current, long-standing methodology that relies on the test procedure for determining future energy savings and PBP under a new or amended efficiency standard has a very clear basis in current law, the preliminary TSD proposal to use RECS data does not.

4. Because of its statistical deficiencies, the UAF approach does not permit the Secretary to rationally and substantially meet his legal obligation in this rulemaking to determine savings in operating costs and total projected amount of energy savings likely to result directly from imposition of the standard.

5. Rather than use RECS data, as the preliminary TSD proposes, DOE should amend and use the test procedure.

Whirlpool and LG also questioned DOE's approach, and recommended that DOE should use the test procedure and drop UAFs from the analysis. (Whirlpool, No. 31 at p. 2; LG, No. 41 at p. 1)

In response, DOE first addresses the appropriateness of using RECS data to estimate appliance energy use (AHAM's points 1 and 3, above). As further discussed below, DOE has used RECS data to help determine the energy use of covered products in many residential appliance standards rulemakings over the past decade. Regarding the legal basis for using RECS data, DOE uses RECS data because it helps DOE to evaluate two of the factors that EPCA directs the Secretary to consider in determining whether an energy conservation standard for a particular covered product is economically justified. The first of these is the economic impact of potential standards on the manufacturers and the consumers of the covered products. (42 U.S.C. 6295(o)(2)(B)(i)(I)) The second factor is the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard. (42 U.S.C. 6295(o)(2)(B)(i)(II))

To evaluate economic impacts on consumers and the savings in operating costs as accurately as possible, DOE needs to determine the energy savings that are likely to result from a given standard. Such a determination requires knowledge of actual use of covered products by consumers. RECS provides information that helps DOE to determine such use.

In addition, DOE uses RECS data because it is consistent with the guidance contained in 10 CFR part 430, subpart C, appendix A—Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products. Specifically, section 11 of appendix A lists variation in consumer impacts as one of the principles for the analysis of impacts on consumers. Because RECS is a representative sample of U.S. households that provides considerable information about each household in the sample, it allows DOE to evaluate factors that contribute to variation in the energy use of covered products. In turn, this allows DOE to estimate the fraction of consumers that will benefit from standards at various efficiency levels.

Consistent with the statute and DOE's regulatory guidance, DOE has used RECS data in a variety of ways over the past decade. In most cases, DOE has used the relevant DOE test procedure or a similar procedure as the basis for energy use calculation, and used RECS data to provide a range for key input variables concerning the operation of covered products. Examples include the standards rulemaking for water heaters concluded in 2001 (66 FR 4474 (January 17, 2001)), and in the recently-concluded rulemaking that amended standards for water heaters (75 FR 20112 (April 16, 2010)). In both rulemakings, DOE used data for each of the households in the RECS sample to estimate the amount of household daily hot water use, and to specify certain factors that affect water heater operating conditions.

Additionally, DOE's 2001 final rule for central air conditioners and heat pumps relied on annual energy use based on the annual end-use energy consumption values in RECS. 66 FR 7170 (January 22, 2001). DOE determined that basing the energy use on RECS household data provided a more accurate measure of the savings possible from more-efficient equipment, and accounted for variability due to climatic conditions and consumer behavior. The particular use of RECS data in the preliminary TSD to derive UAFs reflected a new analytical approach, but it was consistent with the purposes underlying DOE's use of RECS in previous rulemakings.

Regarding AHAM's recommendation that DOE should use the amended test procedure for refrigerator-freezers to estimate energy use for the purposes of its analysis of standards, test procedures must 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. (42 U.S.C. 6293(b)(3)) Relying solely on a representative average use cycle or period of use does not provide an accurate measure of the possible energy savings since this approach inadequately evaluates the economic impact of the standard on consumers, and the savings in operating costs throughout the estimated life of the product—two factors under EPCA that DOE must consider when promulgating an amended energy conservation standard. Further, the approach suggested by AHAM would not account for the variability stemming from household differences or be consistent with the above-cited guidance contained in 10 CFR part 430, subpart C, appendix A. In contrast, the approach that DOE has used in residential product rulemakings for over a decade accounts for all of these factors.

DOE applies the test procedure to ascertain whether the consumer costs associated with the purchase of a product that complies with the proposed standard level is less than three times the value of the energy savings the consumer will receive during the first year of ownership. (42 U.S.C. 6295(o)(2)(B)(iii)) This calculation is separate from the payback periods calculated in the LCC and payback period analysis, as the latter is intended to assess the economic impact of potential standards on the consumers of the covered products. Both calculations are part of DOE's routine analysis when evaluating potential standards for a given product.

AHAM also questioned how DOE justifies using the test procedure to carry out its engineering analysis and manufacturing impact analysis while using a different set of values for

[32] Exhibit A: Evaluation of the Proposed Use by the Department of Energy of RECS Data in its Energy Use Determination Under the Preliminary Technical Support Document (TSD) for Refrigerators, Freezers and Refrigerator-Freezers.

carrying out a life-cycle cost and national impact analysis. (AHAM, No. 34 at p. 11) In the engineering analysis, DOE uses the test procedure to evaluate the relative improvement in energy efficiency provided by different design options. The manufacturing impact analysis uses the same cost-efficiency curves developed in the engineering analysis to calculate industry revenue. DOE does not rely solely on the test procedure in the LCC and payback period analysis or the national impact analysis for the reasons stated above.

AHAM's criticism of the statistical technique that DOE used to develop UAFs for refrigerator-freezers was echoed by other interested parties who raised issues regarding use of the RECS data. Whirlpool and GE stated that DOE should refrain from using RECS data for the rulemaking because it will be outdated and it does not discriminate between top- and bottom-mount refrigerators. (GE, No. 37 at p. 2; Whirlpool, No. 31 at p. 2) LG also commented that the RECS data are outdated, as many factors involved in household usage have changed since 2005. (LG, No. 41 at p. 2)

ACEEE supported DOE's efforts to develop UAFs to capture the difference between measured energy use in the lab and in-field energy use, but commented that the suggested approach is flawed. It urged DOE to look for any existing sets of metered field data that can be used to develop UAFs. (ACEEE, No. 43 at p. 2) NRDC also cautioned against the use of RECS data without metered data to help justify the conclusions, and urged DOE to collect metered data and explore all other data sources to keep the UAFs in perspective. (NRDC, No. 39 at p. 6) The IOUs also supported use of UAFs, but stated that ideally they should be based on metered data. (IOU, No. 36 at p. 10) NEEP expressed its general support for DOE's approach, but cautioned that RECS data misrepresents refrigeration-only energy use because it includes the energy used for icemaking. NEEP recommended taking icemaking energy use in the RECS data into account when developing UAFs. (NEEP, No. 38 at p. 2) Similarly, NPCC supported DOE's effort to estimate in situ energy use, but stated that DOE's use of statistical regression may result in exaggerated differences between test and field energy use. It stated that UAFs should be based on metered energy use or a regression that permits isolation of icemaking energy use. (NPCC, No. 33 at p. 2)

For the reasons previously discussed, DOE believes that, in general, using RECS data in the estimation of field energy use of refrigeration products is valid. However, it acknowledges that the approach used in the preliminary analysis has shortcomings. Recognition of these shortcomings, combined with the urging of several interested parties that DOE should look for existing sets of metered field data, prompted DOE to develop a new approach for the NOPR to estimate energy use of refrigeration products in U.S. homes. This approach involved collecting field-metered electricity use data for residential refrigeration products.

DOE was able to obtain data from seven studies, including about 100 data points that DOE collected itself. A total of 1,967 data points were collected that included units from all representative product classes except compact freezers, and spanned a variety of collection years, unit ages, U.S. locations and household populations, including some units used in commercial settings (*e.g.,* offices and hotels). DOE made various adjustments to the raw data, including extrapolation to annual electricity consumption where necessary.

Test energy consumption was obtained for each unit. From identifying information about each unit, test energy consumption was estimated for each unit and the UAF was calculated as the ratio of metered energy use to test energy use. The data were pooled into four categories: primary refrigerators, secondary refrigerators, freezers and compact refrigerators. Although DOE considered including data for compact refrigerators in the final analysis, it decided not to include those data due to concerns over data quality and representativeness.

For each category, DOE performed weighted least-squares regressions on numerous variables of potential interest in order to construct a function that predicts the UAF based on household and climate variables. DOE selected for final evaluation a small number of variables for which the regression results had sufficient statistical significance, and that could be obtained or reasonably inferred from RECS variables. Within each of the three product categories modeled, DOE used the appropriate set of regression coefficients, along with values for the relevant variables specific to each household to generate UAF estimates for each RECS household. For compact refrigeration products, a UAF of 1 was used.

Using the UAF derived for each RECS household, DOE determined the field energy consumption in each household of a new refrigeration product at each considered efficiency level using the following equation:

$$FEC_{EL} = FEC_{RECS} \bullet (1 - R) = UAF_{RECS} \bullet TEC_{RECS} \bullet (1 - R)$$

Where:

FEC_{EL} = new refrigeration product's field energy consumption at a given efficiency level;

FEC_{RECS} = new refrigeration product's field energy consumption at baseline efficiency level;

R = reduction in energy consumption (expressed as fraction) due to efficiency improvements;

UAF_{RECS} = usage adjustment factor specific to RECS household;

TEC_{RECS} = maximum allowable test energy consumption for the new baseline refrigeration product.

In order to make the 2005 RECS sample more representative of current refrigeration products, DOE made two modifications. First, DOE modified the RECS weights for top- vs. bottom-mount refrigerators in order to reflect current information on the relationship between income and refrigerator door style (*i.e.,* top- or bottom-mount) provided by AHAM in 2010. Second, DOE examined recent data from three sources [33] to scale the average interior volume of standard-size refrigerator-freezers from the 2005 RECS data. The average scaled volumes for product classes 3 (refrigerator-freezer—automatic defrost with top-mounted freezer without through-the-door ice service), 5 (refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service) and 7 (refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service) are now 18.3, 20.9 and 24.8 cubic feet, respectively (approximately 2, 16 and 18 percent higher, respectively, than in the preliminary analysis). As for other factors affecting household usage, the field metered data indicate no significant differences in UAF with respect to survey year after 1993. DOE requests comments on the weighting of the RECS sample using income relationships and volume scaling. (*See* Issue 15 under "Issues on Which DOE Seeks Comment" in section VII.E, below.)

For compact refrigerators, DOE used a UAF of 1 in the preliminary analysis. AHAM commented that it supports using UAF of 1 for compact refrigeration

[33] California Energy Commission, Appliances Database—Refrigeration, 1998–2009. *http://www.energy.ca.gov/appliances/database/excel_based_files/Refrigeration/* (Last accessed April 25, 2009); The NPD Group, Inc., The NPD Group/NPD Houseworld—POS, Refrigerators, January–December 2008, 2007–2008, Port Washington, NY; and Association of Home Appliance Manufacturers, data from 2005–2008, memoranda dated January 19, 2009 and March 26, 2010, Washington, DC.

products. (AHAM, No. 34 at p. 12) Because DOE has concerns about the reliability of the metered data for compact refrigerators, it continued to use a UAF of 1 for the NOPR analysis.

Table IV.12 presents a comparison of the UAFs calculated using the above approach with those calculated for the preliminary TSD. The average UAFs in the NOPR analysis are less than those used in the preliminary TSD, particularly for standard-size freezers. DOE requests comments on its approach for developing UAFs using field-metered data. (*See* Issue 16 under "Issues on Which DOE Seeks Comment" in section VII.E, below.)

TABLE IV.12—AVERAGE UNIT ADJUSTMENT FACTORS USED IN THE ENERGY USE ANALYSIS

Product class		Preliminary TSD	NOPR
Number	Description		
3	Refrigerator-freezer—automatic defrost with top-mounted freezer without through-the-door ice service.	1.23	0.93 (0.82 to 1.04) *
5	Refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service.	1.08	0.92 (0.81 to 1.02) *
7	Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.	1.44	0.94 (0.84 to 1.03) *
9	Upright freezers with automatic defrost	1.37	0.85
10	Chest freezers	1.48	0.89
11	Compact refrigerators and refrigerator-freezers with manual defrost	1.00	1.00
18	Compact chest freezers	1.00	1.00

* Averages are based on lifetime distribution and include conversion to 2nd refrigerators. Range indicates average UAF in year 1 (minimum) and year 20 (maximum).

Whirlpool stated that DOE used a flawed approach in backing out icemaker energy use by identifying products with TTD ice as ice-making products and counting other types as not having an ice maker. (Whirlpool, No. 31 at p. 3) In fact, DOE made no such adjustments in deriving UAF data in the preliminary analysis. However, DOE was able to obtain from the field-metered data an average value for TTD icemaking energy consumption, which was subsequently removed for the purpose of calculating average UAFs. There were no data available in the metered data or in the 2005 RECS data to indicate whether an automatic icemaker was present. The revised UAF distributions implicitly include an uncertainty due to the possible presence of non-TTD automatic icemaking.

A detailed description of DOE's energy use analysis for refrigeration products is given in chapter 7 of the NOPR TSD.

F. Life-Cycle Cost and Payback Period Analyses

DOE conducted LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential energy conservation standards for refrigeration products. The LCC is the total consumer expense over the life of a product, consisting of purchase and installation costs plus operating costs (expenses for energy use, maintenance and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product. The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost (normally higher) due to a more stringent standard by the change in average annual operating cost (normally lower) that results from the standard.

For any given efficiency level, DOE measures the PBP and the change in LCC relative to an estimate of the base-case appliance efficiency levels. The base-case estimate reflects the market in the absence of amended energy conservation standards, including the market for products that exceed the current energy conservation standards.

For each considered efficiency level in each product class, DOE calculated the LCC and PBP for a nationally representative set of housing units. For the preliminary analysis and the analysis for today's proposed rule, DOE developed household samples from the 2005 RECS. For each sampled household, DOE determined the energy consumption for the refrigeration product and the electricity price. By developing a representative sample of households, the analysis captured the variability in energy consumption and energy prices associated with the use of residential refrigeration products.

Inputs to the calculation of total installed cost include the cost of the product—which includes manufacturer selling prices, retailer markups, and sales taxes—and installation costs. Inputs to the calculation of operating costs include annual energy consumption, energy prices and price projections, repair and maintenance costs, product lifetimes, discount rates, and the year that proposed standards take effect. DOE determined the operating costs for each sampled household using that household's unique energy consumption and the household's energy price. DOE created distributions of values for some inputs, with probabilities attached to each value, to account for their uncertainty and variability. DOE used probability distributions to characterize product lifetime, discount rates, and sales taxes.

The computer model DOE uses to calculate the LCC and PBP, which incorporates Crystal Ball (a commercially available software program) relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and household samples. The model calculated the LCC and PBP for products at each efficiency level for 10,000 housing units per simulation run. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analyses, are contained in TSD chapter 8 and its appendices.

Table IV.13 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The table provides the data and approach DOE used for the preliminary TSD, as well as the changes made for today's NOPR. The subsections that follow discuss the initial inputs and the changes DOE made to them.

TABLE IV.13—SUMMARY OF INPUTS AND KEY ASSUMPTIONS IN THE LCC AND PBP ANALYSIS*

Inputs	Preliminary TSD	Changes for the proposed rule
Installed Costs		
Product Cost	Derived by multiplying manufacturer cost by manufacturer and retailer markups and sales tax, as appropriate.	Incremental retail markup changed as described in section IV.D.
Operating Costs		
Annual Energy Use	Based on energy use given in 2005 RECS for refrigerators or freezers, adjusted using a 'usage adjustment factor' (UAF) that adjusts the energy use from its test energy consumption to reflect field conditions.	Based on a multiple linear regression of field-metered energy use data, adjusted using a UAF function based on 2005 RECS household characteristics.
Energy Prices	Electricity: Based on EIA's Form 861 data for 2006	Electricity: Updated using Form 861 data for 2007.
	Variability: Regional energy prices determined for 13 regions	Variability: No change.
Energy Price Trends	Forecasted using Annual Energy Outlook 2009 *AEO2009*	Forecasts updated using *AEO2010.*
Repair and Maintenance Costs	Not included	Used repair cost estimation method that estimates the rate of failure for selected components along with the incremental cost of repair or replacement compared to the baseline product.
Present Value of Operating Cost Savings		
Product Lifetime	Estimated using survey results from RECS (1990, 1993, 1997, 2001, 2005) and the U.S. Census American Housing Survey (2005, 2007), along with historic data on appliance shipments. Variability: Characterized using Weibull probability distributions.	No change.
Discount Rates	Approach involves identifying all possible debt or asset classes that might be used to purchase the considered appliances, or might be affected indirectly. Primary data source was the Federal Reserve Board's SCF** for 1989, 1992, 1995, 1998, 2001, 2004 and 2007.	No change.
Compliance Date of New Standard.	2014	No change.

* References for the data sources mentioned in this table are provided in the sections following the table or in chapter 8 of the NOPR TSD.
** Survey of Consumer Finances.

1. Product Cost

To calculate consumer product costs, DOE multiplied the manufacturer selling prices developed in the engineering analysis by the supply-chain markups described above (along with sales taxes). DOE used different markups for baseline products and higher-efficiency products, because DOE applies an incremental markup to the MSP increase associated with higher-efficiency products.

2. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the equipment. DOE did not include installation cost for refrigeration products because it understands that this cost would be the same at all of the considered efficiency levels.

3. Annual Energy Consumption

For each sampled household, DOE determined the energy consumption for a refrigeration product at different efficiency levels using the approach described above in section IV.E.

4. Energy Prices

DOE derived average energy prices for 13 geographic areas consisting of the nine U.S. Census divisions, with four large States (New York, Florida, Texas, and California) treated separately. For Census divisions containing one of these large States, DOE calculated the regional average excluding the data for the large State.

DOE estimated average residential electricity prices for each of the 13 geographic areas based on data from EIA Form 861, "Annual Electric Power Industry Database." DOE calculated an average annual regional residential electricity price by: (1) Estimating an average residential price for each utility (by dividing the residential revenues by residential sales); and (2) weighting each utility by the number of residential consumers served in that region (based on EIA Form 861). DOE calculated average commercial electricity prices in a similar manner. For the preliminary TSD, DOE used EIA data for 2006. The NOPR analysis used the data for 2007.

5. Energy Price Projections

To estimate energy prices in future years for the preliminary TSD, DOE multiplied the above average regional electricity prices by the forecast of annual average residential electricity price changes in the Reference Case from *AEO2009.*[34] *AEO2009* forecasted prices through 2030. For today's proposed rule, DOE updated its energy price forecasts using *AEO2010,* which has an end year of 2035.[35] To estimate the electricity price trend after 2035, DOE used the average annual rate of change in prices from 2020 to 2035. DOE intends to update its energy price forecasts for the final rule based on the latest available *AEO.*

[34] The spreadsheet tool that DOE used to conduct the LCC and PBP analyses allows users to select price forecasts from either *AEO*'s High Economic Growth or Low Economic Growth Cases. Users can thereby estimate the sensitivity of the LCC and PBP results to different energy price forecasts.

[35] U.S. Energy Information Administration. *Annual Energy Outlook 2010.* Washington, DC. April 2010.

6. Maintenance and Repair Costs

Repair costs are associated with repairing or replacing components that have failed in the appliance, whereas maintenance costs are associated with maintaining the operation of the equipment. In its preliminary analysis, DOE did not include repair and maintenance costs because it did not have information suggesting that these costs would change with higher efficiency levels. Commenting on this approach, Whirlpool stated that maintenance and repair costs could be at least double current levels if there is greater reliance on more complex technologies to meet new efficiency levels, as such technologies have a higher cost of replacement components and may require additional training of service technicians. (Whirlpool, No. 31 at p. 3) AHAM stated that higher efficiency products typically contain more components that may need repair and have a higher individual component cost. (AHAM, No. 34 at p. 13) In contrast, ACEEE supported DOE's finding that repair and maintenance costs do not vary with efficiency level. (ACEEE, No. 43 at p. 6)

For the NOPR, DOE developed a new repair cost estimation method that estimates the rate of failure for selected components (compressor, evaporator, condenser, evaporator fan, condenser fan, electronics and automatic icemaker). The estimated average annual repair cost for a given efficiency level can be expressed as the product of two elements: the average rate of repair of a component (expressed as annual probability of failure) times the incremental cost of repair or replacement compared to the baseline product.

DOE obtained repair rates for some components from a prior DOE rulemaking for commercial refrigeration equipment,[36] and used these rates to make estimates of repair rates for some other components. In addition, DOE obtained cumulative total annual repair rates for standard-size refrigerator-freezers for units up to five years old from *Consumer Reports* magazine. DOE used these data to adjust the repair rates estimated for specific components for each product class. DOE was not able to determine a clear trend in repair rate with age, so it used the average repair rate for all years for each product class. For product classes not covered by the *Consumer Reports* data, DOE used the average repair rate for standard-size refrigerator-freezers.

To estimate the total annual repair cost for the baseline products, DOE used retail repair costs by component from data reported by Best Buy Co., Inc. Detailed data on incremental MSP for components was available from the engineering analysis by product class and efficiency level. To convert these values to repair costs, DOE derived the cost to the contractor, and then scaled it to account for the contractor markup.

Nearly all residential refrigerators are sold with a one-year repair warranty. Based on this fact, DOE assumed there were no repair costs for consumers during the first year of operation and the annual average incremental repair cost as calculated above was imposed for all subsequent years of the lifetime of the product. Table IV.14 shows the annual average incremental repair cost by efficiency level for product classes 3 (refrigerator-freezer—automatic defrost with top-mounted freezer without through-the-door ice service), 5 (refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service), and 7 (refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service). DOE requests comments on its derivation of repair costs. (*See* Issue 17 under "Issues on Which DOE Seeks Comment" in section VII.E, below.)

TABLE IV.14—ANNUAL AVERAGE INCREMENTAL REPAIR COST BY EFFICIENCY LEVEL FOR STANDARD-SIZE REFRIGERATOR-FREEZERS

Efficiency level (% less than baseline energy use)	Product class 3 ($)	Product class 5 ($)	Product class 7 ($)
Baseline	.....	.....	.....
1 (10)	$0.04	$0.22	$0.09
2 (15)	0.08	0.33	0.21
3 (20)	0.37	0.42	0.36
4 (25)	0.40	0.76	0.73
5 (30)	0.43	1.32	1.10
6 (33–36) *	0.67	1.76	1.10

* Max-tech level varies with product class.

7. Product Lifetime

Because the basis for lifetime estimates in the literature for refrigeration products is uncertain, DOE used other data sources to estimate the distribution of standard-size refrigerator and freezer lifetimes in the field for both the preliminary analysis and today's NOPR. By combining survey results from various years of RECS and the U.S. Census's *American Housing Survey*[37] with the known history of appliance shipments, DOE estimated the fraction of appliances of a given age still in operation. The survival function, which DOE assumed has the form of a cumulative Weibull distribution, provides an average and median appliance lifetime.

For compact refrigerators, DOE estimated an average lifetime of 5.6 years in the preliminary analysis using data on shipments and the stock-in-place (*i.e.,* the number of units in use). NRDC commented that the estimated lifetime for compact refrigerators is too low and that "the industry suggested" life of ten years is more accurate. (NRDC, No. 39 at p. 6) In contrast, AHAM and Whirlpool supported DOE's estimate. (AHAM, No. 34 at p. 13; Whirlpool, No. 31 at p. 3) DOE found that, given the data on historic shipments of compact refrigerators, using a longer lifetime would result in an equipment stock that is far larger than the stock given by 2005 RECS and EIA's 2003 Commercial Building Energy Consumption Survey. Since the estimate used in the preliminary analysis provides a reasonable match between shipments and the stock, DOE used the same lifetime distribution for the NOPR.

[36] Commercial Refrigeration Equipment Final Rule Technical Support Document. Available at: *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/refrig_equip_final_rule_tsd.html.*

[37] U.S. Census Bureau, American Housing Survey. Available at: *http://www.census.gov/hhes/www/housing/ahs/ahs.html.*

See chapter 8 of the NOPR TSD for further details on the method and sources DOE used to develop product lifetimes.

8. Discount Rates

To establish discount rates for the LCC analysis, DOE identified all debt or asset classes that might be used to purchase refrigeration products, including household assets that might be affected indirectly. DOE used data from the Federal Reserve Board's "Survey of Consumer Finances" (SCF) for 1989, 1992, 1995, 1998, 2001, 2004, and 2007 to estimate the average percentages of the various debt and equity classes in the average U.S. household portfolios. DOE used SCF data and other sources to develop distributions of interest or return rates associated with each type of equity and debt. The average rate across all types of household debt and equity, weighted by the shares of each class, is 5.1 percent. While this value corresponds to the average discount rate, DOE assigned each sample household a specific discount rate drawn from the distributions.

DOE derived the discount rate for commercial-sector compact refrigeration products from the cost of capital of publicly-traded firms in the sectors that purchase those products (these include lodging and other commercial sectors). The firms typically finance equipment purchases through debt and/or equity capital. DOE estimated the cost of the firms' capital as the weighted average of the cost of equity financing and the cost of debt financing for recent years for which data were available (2001 through 2008). The estimated average discount rate for companies that purchase compact refrigeration products is 6.2 percent.

See chapter 8 in the NOPR TSD for further details on the development of discount rates for refrigeration products.

9. Compliance Date of Amended Standards

In the context of EPCA, the compliance date is the future date when parties subject to the requirements of a new standard must begin to comply. As described in DOE's semi-annual implementation report for energy conservation standards activities submitted to Congress, a final rule for the refrigeration products that are the subject of this rulemaking is scheduled to be completed by December 31, 2010. Compliance with amended standards for refrigeration products promulgated by DOE would be required three years after the final rule is published in the **Federal Register**. DOE calculated the LCC and PBP for refrigeration products as if consumers would purchase new products in the year compliance with the standard is required.

10. Base Case Efficiency Distribution

To accurately estimate the share of consumers that would be affected by a standard at a particular efficiency level, DOE's LCC analysis considered the projected distribution of product efficiencies that consumers purchase under the base case (*i.e.,* the case without new energy efficiency standards). DOE refers to this distribution of product of efficiencies as a base-case efficiency distribution. DOE developed base-case efficiency distributions for each of the seven representative product classes. These distributions were developed from industry-supplied data for the year 2007 and were comprised of product efficiencies ranging from existing baseline levels (*i.e.,* meeting existing energy conservation standards) to levels meeting and exceeding ENERGY STAR levels. DOE then projected these distributions to the year that new standards are assumed to become effective (2014). To forecast the base-case efficiency distribution for each representative product class in the preliminary analysis, DOE accounted for change in the market shares of ENERGY STAR appliances based on historical trends.

In the preliminary analysis public meeting, ASAP and Whirlpool questioned DOE's forecast that, in 2014, ENERGY STAR products would reach a market share of 88 percent for bottom-mount refrigerator-freezers. (ASAP, No. 28 at p. 179–180; Whirlpool, No. 28 at p. 180) In their comments, AHAM, GE and Whirlpool expressed doubt with respect to DOE's forecast, and AHAM and GE noted that consumer payback diminishes at higher efficiency levels. (GE, No. 37 at p. 2; Whirlpool, No. 31 at p. 3; AHAM, No. 34 at p. 14)

Based on the comments and shipments data for 2008, DOE modified its approach for estimating base-case efficiency distributions for the NOPR analysis. DOE agrees that because the current ENERGY STAR efficiency level is higher than it was prior to the requirements established in 2008, the growth in market share may be slower. To address this issue, DOE adopted a projected market share of ENERGY STAR models in 2014 (under current requirements) that is equal to the average of ENERGY STAR market shares in 2007 (the last year under the old requirements) and 2008 (when current requirements took effect). With this approach, the ENERGY STAR market shares for product class 3 (refrigerator-freezer—automatic defrost with top-mounted freezer without through-the-door ice service) and product class 5 (refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service) grow more slowly between 2008 and 2014 than they had under the old requirements before 2008. ENERGY STAR products reach a market share in 2014 of 8 percent for product class 3 and 68 percent for bottom-mount refrigerator-freezers. For standard-size freezers and compact products, DOE maintained the same approach for the NOPR as it used in the preliminary analysis.

For further information on DOE's estimate of base-case efficiency distributions, see chapter 8 of the NOPR TSD. DOE requests comments on its approach for estimating base-case efficiency distributions. (*See* Issue 18 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR, below.)

11. Inputs to Payback Period Analysis

The payback period is the amount of time it takes the consumer to recover the additional installed cost of more-efficient products, compared to baseline products, through energy cost savings. The simple payback period does not account for changes in operating expense over time or the time value of money. Payback periods are expressed in years. Payback periods that exceed the life of the product mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation are the total installed cost of the equipment to the customer for each efficiency level and the average annual operating expenditures for each efficiency level. The PBP calculation uses the same inputs as the LCC analysis, except that discount rates are not needed.

12. Rebuttable-Presumption Payback Period

As noted above, EPCA, as amended, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy (and, as applicable, water) savings during the first year that the consumer will receive as a result of the standard, as calculated under the test procedure in place for that standard. (42 U.S.C. 6295(o)(2)(B)(iii)) For each considered efficiency level, DOE determined the value of the first year's energy savings

by calculating the quantity of those savings in accordance with the applicable DOE test procedure, and multiplying that amount by the average energy price forecast for the year in which compliance with the amended standard would be required.

G. National Impact Analysis–National Energy Savings and Net Present Value Analysis

DOE's NIA assessed the national energy savings (NES) and the national NPV of total consumer costs and savings that would be expected to result from amended standards at specific efficiency levels. ("Consumer" in this context refers to consumers of the product being regulated.)

To make the analysis more accessible and transparent to all interested parties, DOE used an MS Excel spreadsheet model to calculate the energy savings and the national consumer costs and savings from each TSL. MS Excel is the most widely used spreadsheet calculation tool in the United States and there is general familiarity with its basic features. Thus, DOE's use of MS Excel as the basis for the spreadsheet models provides interested parties with access to the models within a familiar context. In addition, the TSD and other documentation that DOE provides during the rulemaking help explain the models and how to use them, and interested parties can review DOE's analyses by changing various input quantities within the spreadsheet.

DOE used the NIA spreadsheet to calculate the NES and NPV, based on the annual energy consumption and total installed cost data from the energy use characterization and the LCC analysis. DOE forecasted the energy savings, energy cost savings, product costs, and NPV of consumer benefits for each product class for products sold from 2014 through 2043. The forecasts provided annual and cumulative values for all four output parameters. In addition, DOE used its NIA spreadsheet to analyze scenarios that used inputs from the *AEO2010* Low Economic Growth and High Economic Growth cases. These cases have higher and lower energy price trends compared to the Reference case, as well as higher and lower housing starts, which result in higher and lower appliance shipments to new homes. NIA results based on these cases are presented in appendix 10–A of the NOPR TSD.

DOE evaluated the impacts of amended standards for refrigeration products by comparing base-case projections with standards-case projections. The base-case projections characterize energy use and consumer costs for each product class in the absence of amended energy conservation standards. DOE compared these projections with projections characterizing the market for each product class if DOE were to adopt amended standards at specific energy efficiency levels (*i.e.,* the standards cases) for that class.

Table IV.15 summarizes the approach and data DOE used to derive the inputs to the NES and NPV analyses for the preliminary analysis and the changes to the analyses for the proposed rule. A discussion of these inputs and changes follows the table. See chapter 10 of the NOPR TSD for further details.

TABLE IV.15—APPROACH AND DATA USED FOR NATIONAL ENERGY SAVINGS AND CONSUMER NET PRESENT VALUE ANALYSES

Inputs	Preliminary TSD	Changes for the proposed rule
Shipments	Annual shipments from shipments model	No change in approach; used 2008 data to estimate the ratio of bottom-mount share to side-by-side share.
Compliance Date of Standard	2014	No change.
Base-Case Forecasted Efficiencies.	Used a "roll-up + ENERGY STAR" scenario to establish the distribution of efficiencies.	No change in basic approach; modified efficiency distributions based on new information.
Standards-Case Forecasted Efficiencies.	Used a "roll-up + ENERGY STAR" scenario to establish the distribution of efficiencies.	No change in basic approach; modified efficiency distributions based on new information.
Annual Energy Consumption per Unit.	Annual weighted-average values as a function of SWEUF.*	No change.
Total Installed Cost per Unit	Annual weighted-average values as a function of SWEUF.*	No change.
Energy Cost per Unit	Annual weighted-average values as a function of the annual energy consumption per unit and energy prices.	No change.
Repair and Maintenance Cost per Unit.	Annual values as a function of efficiency level	No change.
Escalation of Energy Prices	*AEO2009* forecasts (to 2035) and extrapolation through 2043	Updated using *AEO2010* forecasts.
Energy Site-to-Source Conversion Factor.	Varies yearly and is generated by DOE/EIA's NEMS	No change.
Discount Rate	Three and seven percent real	No change.
Present Year	Future expenses are discounted to 2010, when the final rule will be published.	No change.

* Shipments-Weighted Energy Use Factor

1. Shipments

The shipments portion of the NIA spreadsheet is a model that uses historical data as a basis for projecting future shipments of the products that are the subject of this rulemaking. In projecting shipments for refrigeration products, DOE accounted for installations in new homes and replacement of failed equipment. In addition, for standard-size refrigerator-freezers, DOE estimated purchases driven by the conversion of a first refrigerator to a second refrigerator. It also estimated purchases by existing households who enter the market as new owners for standard-size freezers.

In the preliminary analysis, DOE examined the historical trends in the market shares of different refrigerator-freezer configurations to disaggregate the total shipments of refrigerator-freezers into the three considered refrigerator-freezer product categories (top-mount, bottom-mount and side-by-side configurations). The market share of side-by-side refrigerator-freezer models has grown significantly during the past two decades. Bottom-freezer

models historically had a small market share, but that share has also grown in recent years. However, DOE had insufficient data to forecast long-term growth of this product class, so DOE assumed that consumer behavior related to bottom-mount models in the future would mirror behavior regarding side-by-side models. DOE developed a model to forecast the combined bottom-mount and side-by-side market shares throughout the 30-year forecast period (beginning in 2014), and assumed that the ratio of bottom-mount share to side-by-side share would remain constant at the 2007 level (the last year for which DOE had disaggregated data).

AHAM commented that DOE's forecasted shares look realistic, but it suggested that DOE consider generating a separate forecast for bottom-mount refrigerator-freezers. (AHAM, No. 34 at p. 14) Whirlpool stated that DOE's approach is directionally correct, but in recent years the decline in top-mount sales and the rise in bottom-mount sales have been more pronounced. It also suggested that DOE should forecast bottom-mount sales separately and reassess the proportion of top-mount sales. (Whirlpool, No. 31 at p. 4)

As discussed above, DOE was not able to obtain sufficient information to separately forecast sales of bottom-mount refrigerator-freezers. Therefore, it retained the approach used for the preliminary analysis in conducting the NOPR analysis, but it used 2008 data to estimate the ratio of bottom-mount share to side-by-side share.

To estimate the effects on product shipments from increases in product price projected to accompany amended standards at higher efficiency levels, DOE applied a price elasticity parameter. It estimated this parameter with a regression analysis that used purchase price and efficiency data specific to residential refrigerators, clothes washers, and dishwashers over the period 1980–2002. The estimated "relative price elasticity" incorporates the impacts from purchase price, operating cost, and household income, and it also declines over time. DOE estimated shipments in each standards case using the relative price elasticity along with the change in the relative price between a standards case and the base case.

ACEEE commented that DOE should revisit its estimates of price elasticity to avoid overstating the impact of standards on future refrigerator sales. It noted that refrigerators are different from clothes washers and dishwashers because consumers have few, if any, alternatives for storing perishable foods. It recommended that DOE consider refrigerator shipments for new construction to be inelastic and that DOE should use a significantly lower price elasticity for replacement purchases. (ACEEE, No. 43 at p. 5) NPCC and the IOUs made similar comments. (NPCC, No. 33 at p. 3; IOUs, No. 36 at p. 12) Earthjustice commented that the price elasticity for refrigerators is less elastic than for other white goods (*i.e.,* large electrical home appliances that are typically finished in white enamel), and it should not be applied to new construction. (Earthjustice, No. 35 at p. 6)

In response, DOE believes that the price elasticity calculated using the full data set for refrigerators, clothes washers, and dishwashers is more robust than an elasticity calculated only for refrigerators because it is based on a larger data sample. Furthermore, the elasticity calculated only for refrigerators is not very different from the value derived from the combined appliance regression equation. DOE does not agree with the comment that there would be no sensitivity to product price of refrigerator shipments for new homes because there is some discretion regarding purchase of a second unit. Furthermore, since DOE derived its price elasticity using data for all shipments, it is appropriate to apply the parameter to total shipments (rather than total shipments excluding shipments to new homes). Based on the above considerations, DOE retained the approach used for the preliminary analysis in the NOPR analysis.

For details on the shipments analysis, see chapter 9 of the NOPR TSD.

2. Forecasted Efficiency in the Base Case and Standards Cases

A key component of the NIA is the trend in energy efficiency forecasted for the base case (without new standards) and each of the standards cases. To forecast the base-case efficiency distribution for each representative product class, DOE accounted for change in the market shares of ENERGY STAR appliances based on historical trends. For its determination of standards-case efficiency distributions, DOE used a "roll-up + ENERGY STAR" scenario to establish the distribution of efficiencies for the year in which compliance with amended standards is required (*i.e.,* 2014). DOE assumed that product efficiencies in the base case that did not meet the standard level under consideration would "roll up" to meet the new standard level in 2014. It further assumed that the ENERGY STAR program and related efforts would continue to promote efficient appliances after the introduction of amended standards in 2014, and that this would lead to increased market shares for products with an efficiency level above the standard level.

For the NOPR analysis, DOE used the same basic approach, but, as discussed below, it modified its base-case and standards-case efficiency distributions based on information obtained in discussion with ENERGY STAR program staff.

To project the efficiency distributions after 2014 for the base case, DOE first considered the potential for changes in ENERGY STAR qualification levels. DOE assumed that, in the absence of a new standard, the ENERGY STAR program would re-examine and possibly revise its qualification levels regardless of the market share in 2014. When setting a minimum product efficiency level for ENERGY STAR qualification, one important metric is that the average payback period compared to the current standard level should not exceed five years. Using the payback period calculation described in section IV.F, DOE applied this criterion to all product classes to evaluate the extent to which the current ENERGY STAR efficiency levels would be increased in the future.

DOE then estimated the market shares for ENERGY STAR products in 2021 based on past experience in the market for these products. As in the preliminary analysis, rather than make long-term projections based on limited information, DOE assumed there would be no further change in market shares between 2021 and the end of the forecast period. DOE recognizes that some change in shares is likely to occur in reality. However, since DOE used the same assumption in the standards cases, the accuracy of the assumption makes no difference to the analysis of energy savings.

For the standards cases (also referred to as candidate standard levels, or CSLs), DOE used the same approach as for the base case and assumed that in the case of amended standards, the ENERGY STAR program would re-evaluate its qualifying levels for all product classes using the five-year payback period criterion. For each CSL, DOE identified the maximum efficiency level with a payback of five years or less. If that level was below the current ENERGY STAR level, DOE maintained the current ENERGY STAR level. At higher CSLs, there is no efficiency level above the standard level with a payback period of less than 5 years. DOE assumed that the ENERGY STAR program would be suspended with standards at higher CSLs on a product-class specific basis. This result is projected to occur for all product classes

at CSL 3 and above; for product classes 9 (upright freezers with automatic defrost) and 10 (chest freezers and all other freezers except compact freezers), it occurs at lower CSLs. The market share estimates for ENERGY STAR products in 2021 and beyond were based on a similar approach as for the base case.

For further details about the forecasted efficiency distributions, see chapter 10 of the NOPR TSD. DOE requests comments on its approach for forecasting base-case and standards-case efficiency distributions. (See Issue 19 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR.)

3. Site-to-Source Energy Conversion

To estimate the national energy savings expected from appliance standards, DOE uses a multiplicative factor to convert site energy consumption (at the home or commercial building) into primary or source energy consumption (the energy required to convert and deliver the site energy). These conversion factors account for the energy used at power plants to generate electricity and losses in transmission and distribution, as well as for natural gas losses from pipeline leakage and energy used for pumping. For electricity, the conversion factors vary over time due to projected changes in generation sources (*i.e.,* the power plant types projected to provide electricity to the country). The factors that DOE developed are marginal values, which represent the response of the system to an incremental decrease in consumption associated with appliance standards.

In the preliminary analysis, DOE used annual site-to-source conversion factors based on the version of NEMS that corresponds to *AEO2009.* For today's NOPR, DOE updated its conversion factors based on *AEO2010,* which provides energy forecasts through 2035. For 2036–2043, DOE used conversion factors that remain constant at the 2035 values.

In response to a request from DOE's Office of Energy Efficiency and Renewable Energy (EERE), the National Research Council (NRC) appointed a committee on "Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards" to conduct a study required by section 1802 of the Energy Policy Act of 2005 (Pub. L. 109–58 (August 8, 2005)). The fundamental task before the committee was to evaluate the methodology used for setting energy efficiency standards and to comment on whether site (point-of-use) or source (full-fuel-cycle) measures of energy savings would better support rulemaking efforts to achieve energy conservation goals. The NRC committee defined site (point-of-use) energy consumption as reflecting the use of electricity, natural gas, propane, and/or fuel oil by an appliance at the site where the appliance is operated. Full-fuel-cycle energy consumption was defined as including, in addition to site energy use, the following: energy consumed in the extraction, processing, and transport of primary fuels such as coal, oil, and natural gas; energy losses in thermal combustion in power generation plants; and energy losses in transmission and distribution to homes and commercial buildings.[38]

In evaluating the merits of using point-of-use and full-fuel-cycle measures, the NRC committee noted that DOE uses what the committee referred to as "extended site" energy consumption to assess the impact of energy use on the economy, energy security, and environmental quality. The extended site measure of energy consumption includes the energy consumed during the generation, transmission, and distribution of electricity but, unlike the full-fuel-cycle measure, does not include the energy consumed in extracting, processing, and transporting primary fuels. A majority of the NRC committee concluded that extended site energy consumption understates the total energy consumed to make an appliance operational at the site. As a result, the NRC committee recommended that DOE consider shifting its analytical approach over time to use a full-fuel-cycle measure of energy consumption when assessing national and environmental impacts, especially with respect to the calculation of greenhouse gas emissions. The NRC committee also recommended that DOE provide more comprehensive information to the public through labels and other means, such as an enhanced Web site. For those appliances that use multiple fuels (*e.g.,* water heaters), the NRC committee indicated that measuring full-fuel-cycle energy consumption would provide a more complete picture of energy consumed and permit comparisons across many different appliances, as well as an improved assessment of impacts. The NRC committee also acknowledged the complexities inherent in developing a full-fuel-cycle measure of energy use and stated that a majority of the committee recommended a gradual transition from extended site to full-fuel-cycle measurement.

DOE acknowledges that its site-to-source conversion factors do not capture all of the energy consumed in extracting, processing, and transporting primary fuels. DOE also agrees with the NRC committee's conclusion that developing site-to-source conversion factors that capture the energy associated with the extraction, processing, and transportation of primary fuels is inherently complex and difficult. However, in implementing the NRC committee's recommendation to gradually shift its analytical approach, DOE has performed some preliminary evaluation of a full-fuel-cycle measure of energy use.

Based on two studies completed by the National Renewable Energy Laboratory (NREL) in 1999 and 2000, DOE estimated the ratio of the energy used upstream to the energy content of the coal or natural gas delivered to power plants. For coal, the NREL analysis considered typical mining practices and mine-to-plant transportation distances, and used data for the State of Illinois. Based on data in this report, the estimated multiplicative factor for coal is 1.08 (*i.e.,* it takes approximately 1.08 units of coal energy equivalent to provide 1 unit of coal to a power plant). A similar analysis of the energy consumed in upstream processes needed to produce and deliver natural gas to a power plant yielded a multiplicative factor of 1.19.[39]

While the above factors are indicative of the magnitude of the impacts of using full-fuel-cycle measures of energy use, there are two issues that warrant further study. The first is refinement of the estimates of the multiplicative factors, particularly to incorporate regional variation. The second is developing forecasts of the multiplicative factors over the time frames used in the rulemaking analyses, typically ten to fifty years. The existing NEMS forecast of power plant electricity generation by fuel type can be used to estimate the impact of a changing mix of fuels. However, NEMS provides no information on potential changes to the relative ease with which the different fuels can be extracted and processed, which shape the multiplicative factors.

[38] The National Academies, Board on Energy and Environmental Systems, Letter to Dr. John Mizroch, Acting Assistant Secretary, U.S. DOE, Office of EERE from James W. Dally, Chair, Committee on Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards, May 15, 2009.

[39] For further information on the NREL studies, please see: Spath, Pamela L., Margaret K. Mann, and Dawn Kerr, Life Cycle Assessment of Coal-fired Power Production, NREL/TP–570–25119, June 1999; and Spath, Pamela L. and Margaret K. Mann, Life Cycle Assessment of a Natural Gas Combined-Cycle Power Generation System, NREL/TP–570–27715, September 2000.

DOE intends to further evaluate the viability of using full-fuel-cycle measures of energy consumption for assessment of national and environmental impacts of appliance standards.

4. Discount Rates

DOE multiplies monetary values in future years by the discount factor to determine the present value. For the preliminary analysis and today's NOPR, DOE estimated the NPV of appliance consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (OMB) to Federal agencies on the development of regulatory analysis (OMB Circular A–4 (Sept. 17, 2003), section E, "Identifying and Measuring Benefits and Costs").

5. Benefits From Effects of Standards on Energy Prices

Reduction in electricity consumption associated with amended standards for refrigeration products could reduce the electricity prices charged to consumers in all sectors of the economy and thereby reduce their electricity expenditures. In chapter 2 of the preliminary TSD, DOE explained that, because the power industry is a complex mix of fuel and equipment suppliers, electricity producers and distributors, it did not plan to estimate the value of potentially reduced electricity costs for all consumers associated with amended standards for refrigeration products.

Commenting on this decision, NRDC urged DOE to not ignore the benefits to consumers from reduced electricity rates and avoided new capacity construction due to amended standards for refrigeration products. (NRDC, No. 39 at pp. 5–6) Earthjustice, NEEP, and the IOUs stated that DOE should account for the economic value of avoided investments in electric utility capacity resulting from the standards under consideration. (Earthjustice, No. 35 at p. 6; NEEP, No. 38 at p. 2; IOUs, No. 36 at pp. 12–13) Similarly, NPCC stated that DOE should estimate the economic benefits of the reduced need for new electric power plants and infrastructure and include these in its utility impacts analysis. (NPCC, No. 33 at pp. 4–5)

For the NOPR, DOE incorporated the same approach that it did in the recently-promulgated final rule for residential heating products. 75 FR 20112 (April 16, 2010). As part of the utility impact analysis (described in section IV.K below), DOE used NEMS–BT to assess the impacts of the reduced need for new electric power plants and infrastructure projected to result from standards. In NEMS–BT, changes in power generation infrastructure affect utility revenue requirements, which in turn affect electricity prices. DOE estimated the impact on electricity prices associated with each considered TSL.

Although the aggregate benefits for all electricity users are potentially large, there may be negative effects on the actors involved in electricity supply. The electric power industry is a complex mix of power plant providers, fuel suppliers, electricity generators, and electricity distributors. While the distribution of electricity is regulated everywhere, the institutional structure of the power sector varies, and has changed over time. For these reasons, an assessment of impacts on the actors involved in electricity supply from reduction in electricity demand associated with energy conservation standards is beyond the scope of this rulemaking.

In considering the potential benefits to electricity users, DOE takes under advisement the guidance provided by OMB on the development of regulatory analysis. Specifically, at page 38, Circular A–4 instructs that transfers should be excluded from the estimates of the benefits and costs of a regulation. Because there is uncertainty about the extent to which the calculated impacts from reduced electricity prices are a transfer from the actors involved in electricity supply to electricity consumers, DOE has concluded that, at present, it should not give a heavy weight to this factor in its consideration of the economic justification of standards on refrigeration products. DOE is continuing to investigate the extent to which electricity price changes projected to result from standards represent a net gain to society.

H. Consumer Subgroup Analysis

In analyzing the potential impact of new or amended standards on consumers, DOE evaluates the impact on identifiable sub-groups of consumers that may be disproportionately affected by a national standard. DOE evaluates impacts on particular sub-groups of consumers primarily by analyzing the LCC impacts and PBP for those particular consumers from alternative standard levels. For the NOPR, DOE analyzed the impacts of the considered standard levels on low-income consumers and senior citizens. DOE did not estimate impacts for compact refrigeration products because the household sample sizes were not large enough to yield meaningful results.

Chapter 2 of the preliminary TSD notes that did not plan to analyze renters as a sub-group. NRDC disagreed with DOE's view that renters do not warrant a sub-group analysis, as they may be more positively affected by higher standards than the population of all consumers. (NRDC, No. 39 at pp. 4–5) NRDC provided no supporting data for its assertion. DOE notes that, in most cases, renters pay the electricity bill but do not own the refrigerator in their home. To some extent, the higher cost of a more-efficient refrigerator-freezer incurred by the building owner would likely be passed on to the renter through increased rent. Because DOE is not aware of information that would allow it to reliably assess the extent to which such "pass-through" would occur, it is not able to quantitatively analyze the impacts of alternative standard levels on renters. To the extent that "pass-through" of the incremental cost of of a more-efficient refrigerator-freezer does not occur, DOE acknowledges that renters would likely experience more favorable LCC impacts than non-renters.

Chapter 11 in the NOPR describes the consumer sub-group analysis.

I. Manufacturer Impact Analysis

The following sections address the various steps taken to analyze the impacts of standards on manufacturers. These steps include conducting a series of analyses, interviewing manufacturers, and evaluating the comments received from interested parties up to this point during the course of this rulemaking.

1. Overview

In determining whether an amended energy conservation standard for residential refrigeration products subject to this rulemaking is economically justified, the Secretary is required to consider "the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard." (42 U.S.C. 6295(o)(2)(B)(i)(I)) The statute also calls for an assessment of the impact of any lessening of competition as determined by the Attorney General that is likely to result from the adoption of a standard. (42 U.S.C. 6295(o)(2)(B)(i)(V)) DOE conducted the MIA to estimate the financial impact of amended energy conservation standards on manufacturers of residential refrigeration products, and to assess the impacts of such standards on employment and manufacturing capacity.

The MIA is both a quantitative and qualitative analysis. The quantitative

part of the MIA relies on the Government Regulatory Impact Model (GRIM), an industry cash-flow model customized for the residential refrigeration products covered in this rulemaking. *See* section IV.I.2, below, for details on the GRIM analysis. The qualitative part of the MIA addresses factors such as product characteristics, characteristics of particular firms, and market trends. The qualitative discussion also includes an assessment of the impacts of standards on manufacturer subgroups. The complete MIA is discussed in chapter 12 of the NOPR TSD. DOE conducted the MIA in the three phases described below.

a. Phase 1: Industry Profile

In Phase 1 of the MIA, DOE prepared a profile of the residential refrigeration industry based on the market and technology assessment prepared for this rulemaking. Before initiating the detailed impact studies, DOE collected information on the present and past structure and market characteristics of each industry. This information included market share data, product shipments, manufacturer markups, and the cost structure for various manufacturers. The industry profile includes: (1) Further detail on the overall market and product characteristics; (2) estimated manufacturer market shares; (3) financial parameters such as net plant, property, and equipment; selling, general and administrative (SG&A) expenses; cost of goods sold, *etc.;* and (4) trends in the number of firms, market, and product characteristics. The industry profile included a top-down cost analysis of residential refrigeration manufacturers that DOE used to derive preliminary financial inputs for the GRIM (*e.g.,* revenues, depreciation, SG&A, and research and development (R&D) expenses). DOE also used public sources of information to further calibrate its initial characterization of each industry, including Security and Exchange Commission 10–K filings (available at *http://www.sec.gov*), Standard & Poor's stock reports (available at *http://www2.standardandpoors.com*), and corporate annual reports. DOE supplemented this public information with data released by privately held companies.

b. Phase 2: Industry Cash-Flow Analysis

Phase 2 focused on the financial impacts of potential amended energy conservation standards on the industry as a whole. More stringent energy conservation standards can affect manufacturer cash flows in three distinct ways: (1) By creating a need for increased investment, (2) by raising production costs per unit, and (3) by altering revenue due to higher per-unit prices and/or possible changes in sales volumes. To quantify these impacts, DOE used the GRIM to perform a cash-flow analysis for residential refrigerators, freezers, and refrigerator-freezers. In performing these analyses, DOE used the financial values derived during Phase 1 and the shipment scenarios used in the NIA.

c. Phase 3: Subgroup Impact Analysis

Using average cost assumptions to develop an industry-cash-flow estimate may not adequately assess differential impacts of amended energy conservation standards among manufacturer subgroups. For example, small manufacturers, niche players, or manufacturers exhibiting a cost structure that differs significantly from the industry average could be more negatively affected. To address this possible impact, DOE used the results of the industry characterization analysis in Phase 1 to group manufacturers that exhibit similar production and cost structure characteristics. During the manufacturer interviews, DOE discussed financial topics specific to each manufacturer and obtained each manufacturer's view of the industry as a whole.

DOE reports the MIA impacts of amended energy conservation standards by grouping together the impacts on manufacturers of certain product classes. DOE presents the industry impacts by the major product types (*i.e.,* standard size refrigerator-freezers, standard size freezers, compact refrigerators and freezers, and built-in refrigeration products). These product groupings represent markets that are served by the same manufacturers. By segmenting the results into these product types, DOE is able to discuss how these subgroups of manufacturers will be impacted by amended energy conservation standards.

DOE also investigated whether small business manufacturers should be analyzed as a manufacturer subgroup. During its research, DOE identified only one company which manufactures products covered by this rulemaking and qualifies as a small business under the applicable Small Business Administration (SBA) definition. DOE did not analyze a separate subgroup of small business manufacturer for this NOPR because this rulemaking will not have a significant economic impact on a substantial number of small entities. See section VI.B of today's NOPR, below, for more information on this determination.

A second potential subgroup would be manufacturers of built-in refrigeration products. However, because DOE is establishing separate product classes for built-in products, DOE is already presenting separate results and impacts for this potential manufacturer subgroup. The impacts on the manufacturers of these niche products are therefore already characterized in the broader MIA and do not require an explicit subgroup analysis.

2. GRIM Analysis

DOE uses the GRIM to quantify the changes in cash flow that result in a higher or lower industry value. The GRIM analysis is a standard, annual cash-flow analysis that incorporates manufacturer costs, manufacturer selling prices, shipments, and industry financial information as inputs, and models changes in costs, distribution of shipments, investments, and manufacturer margins that would result from amended energy conservation standards. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning with the base year of the analysis, 2010 (which accounts for the investments needed to bring products into compliance by 2014), and continuing to 2043. DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. For residential refrigeration products, DOE uses a real discount rate of 7.2 percent for all products.

DOE used the GRIM to calculate cash flows using standard accounting principles and to compare changes in INPV between a base case and various TSLs (the standards cases). The difference in INPV between the base and standards cases represents the financial impact of the amended standard on manufacturers. DOE collected this information from a number of sources, including publicly available data and interviews with a number of manufacturers (described in the next section). Additional details about the GRIM can be found in chapter 12 of the NOPR TSD.

In conducting its analysis, DOE treated certain product classes of residential refrigeration products separately. For example, DOE created specialized interview guides for different groups of product classes: one for standard-size products, one for compact products, and one for all products. Additionally, DOE grouped product classes made by the same manufacturers; this allowed DOE to better understand the impacts on manufacturers of these product classes.

Similarly, in this notice, DOE presents the MIA results for standard-size refrigerator-freezers, standard-size freezers, compact refrigerators and freezers, and built-in refrigeration products separately. Each of the four groups of product classes and results is based on a unique set of considered TSLs. DOE describes the TSLs in section V.A of today's NOPR, below. Because the combinations of efficiency levels that compose a TSL can make it more difficult to discuss the required efficiencies for each product class, DOE presents the MIA results in section V.B.2 of today's NOPR, below and chapter 12 of the NOPR TSD by groups of manufacturers that make the covered products. DOE presents the MIA results for standard-size refrigerator-freezers, standard-size freezers, compact refrigerators and freezers, and built-in refrigeration products separately.

a. GRIM Key Inputs

i. Manufacturer Production Costs

Manufacturing a higher-efficiency product is typically more expensive than manufacturing a baseline product due to the use of more complex components and higher-cost raw materials. The changes in the MPCs of the analyzed products can affect revenues, gross margins, and cash flow of the industry, making these product cost data key GRIM inputs for DOE's analysis.

DOE used the MPCs calculated in the engineering analysis for the residential refrigeration products, as described in section IV.C, above, and further detailed in chapter 5, section 5.9, of the NOPR TSD.

To calculate baseline MPCs, DOE followed a three step process. First, DOE derived each of the baseline products' retail price from the NPD market data described in section IV.F.1, above. Next, DOE discounted these baseline retail prices by the sales tax and retail markup to arrive at the baseline MSPs. Next, DOE discounted the baseline MSPs by the manufacturer markup to arrive at the average baseline MPCs. For all non-built-in product classes, DOE used a 1.26 manufacturer markup to calculate baseline MPCs and MSPs. (DOE received comments on the manufacturer markup and DOE describes the methodology used to calculate this figure in section IV.I.3.d, below.) Because built-in product classes are high-end products that are made in much lower production volumes, DOE used a different cost structure for these products than for the other product classes. DOE used information submitted during manufacturer interviews to estimate that a typical baseline manufacturer markup for built-in products is 1.40. To calculate baseline MPCs for the built-in product classes, DOE discounted the NPD baseline retail prices by the 1.40 manufacturer markup and a distributor markup to account for products sold through that distribution chain.

DOE also used the information from its tear-down analysis to verify the accuracy of the markup information and cost data for the units it tore down. In addition, DOE used the tear-down cost data to disaggregate the MPCs into material, labor, and overhead costs. To calculate the MPCs for products above the baseline, DOE added the incremental material, labor, and overhead costs from the engineering cost efficiency curves to the baseline MPCs.

ii. Base-Case Shipments Forecast

The GRIM estimates manufacturer revenues based on total unit shipment forecasts and the distribution of these values by efficiency level. Changes in the efficiency mix at each standard level affect manufacturer finances. For this analysis, the GRIM uses the NIA shipments forecasts from 2010 to 2043, the end of the analysis period. In the shipments analysis, DOE also estimated the distribution of efficiencies in the base case for all product classes. *See* section IV.G.1, above, for additional details.

iii. Product and Capital Conversion Costs

Amended energy conservation standards will cause manufacturers to incur one-time conversion costs to bring their production facilities and product designs into compliance. For the MIA, DOE classified these one-time conversion costs into two major groups: (1) Product conversion costs and (2) capital conversion costs. Product conversion costs are one-time investments in research, development, testing, marketing, and other non-capitalized costs focused on making product designs comply with the amended energy conservation standard. Capital conversion costs are one-time investments in property, plant, and equipment to adapt or change existing production facilities so that new product designs can be fabricated and assembled.

DOE based its estimates of the product conversion costs that would be required to meet each TSL on information obtained from manufacturer interviews, the design pathways analyzed in the engineering analysis, and market information about the number of platform and product families for each manufacturer. DOE assigned estimates for the total product development required for each design option based on the necessary engineering resources required to implement each design option across a product platform. DOE multiplied the estimate by the number of platforms and product families for each manufacturer. DOE also assumed that VIP use and/or wall thickness increases would require more significant changes to existing platforms than other design options that amount to component swaps. For wall thickness increases, DOE used product development efforts that were analogous to designing a new platform. For VIPs, which are not yet common on large-scale production lines for most products in the industry, DOE assumed more substantial product development costs than required for component swaps. However, DOE also assumed that manufacturers' recent experience with the technology would indicate that less effort would be required for incorporating VIPs than for designing completely new products. Finally, DOE estimated industry product conversion costs by extrapolating the interviewed manufacturers' product conversion costs for each product class to account for the market share of companies that were not interviewed. DOE's estimates of the product conversion costs for all of the refrigeration products addressed in this rulemaking can be found in section V.B.2, below, of today's NOPR and in chapter 12 of the NOPR TSD. Chapter 12 of the NOPR TSD also contains more detail on the assumptions DOE used to calculate the product conversion costs for each design option and other details about the product conversion costs.

As discussed above, to calculate industry cash flow impacts DOE also estimated the capital conversion costs manufacturers would incur to comply with potential amended energy conservation standards. During interviews, DOE asked manufacturers to estimate the capital conversion costs required to expand the production of higher-efficiency products or to quantify the required tooling and plant changes if product lines meeting the potential required efficiency level do not currently exist. As with product conversion costs, DOE based its capital conversion cost estimates on these interviews and assumptions from the engineering analysis. DOE assumed that most component changes, while requiring moderate product conversion costs, would not require changes to existing production lines and equipment, and therefore not require

additional capital expenditures because one-for-one component swaps would not require changes to existing production equipment.

However, DOE calculated and included in its analysis the capital conversion costs required for design options that involved VIPs, wall thickness increases, and changes to heat exchangers. For changes to heat exchangers, DOE estimated the tooling investment required for the fabrication equipment and the consequent slight changes to the internal dimensions of the existing products. These tooling changes would likely include purchasing new dies or plastic molds for a small change in internal dimensions or shelving. For VIPs and wall thickness increases, DOE estimated the cost of the equipment required to manufacture new product lines because DOE assumed that these design changes would be extremely disruptive to current operations. Because the changes required to implement these design options would greatly change existing products, DOE expects that the capital conversion costs would be closer to purchasing new production equipment. DOE also used the assumptions from the engineering analysis regarding the incremental depreciation costs for adding additional VIPs and manufacturer market shares to calculate incremental equipment necessary for adding more VIPs.

DOE's estimates of the capital conversion costs for all of the residential refrigeration products can be found in section V.B.2, below, of today's NOPR and in chapter 12 of the NOPR TSD.

b. GRIM Scenarios

i. Residential Refrigeration Shipment Forecasts

The GRIM used the shipments developed in the NIA for standard-size refrigerator-freezers, standard-size freezers, compact refrigerators and freezers, and built-in refrigeration products. To determine efficiency distributions for the standards case, DOE used a "roll-up + market shift" scenario for 2014, the year that revised standards are assumed to become effective, through 2043. DOE assumed that product efficiencies in the base case that did not meet the standard under consideration would roll up to meet the new standard in 2014. DOE further assumed that revised standards would result in a market shift such that market shares of products with efficiency better than the standard would gradually increase because the ENERGY STAR program would continue to promote efficient appliances after revised standards are introduced in 2014. See section IV.G.1 of this NOPR, above, and chapter 10 of the NOPR TSD for more information on the residential refrigeration standards-case shipment scenarios.

ii. Markup Scenarios

As discussed above, manufacturer selling prices (MSPs) include direct manufacturing production costs (*i.e.,* labor, material, and overhead estimated in DOE's MPCs) and all non-production costs (*i.e.,* SG&A, R&D, and interest), along with profit. To calculate the MSPs in the GRIM, DOE applied markups to the MPCs estimated in the engineering analysis for each product class and efficiency level. Modifying these markups in the standards case yields different sets of impacts on manufacturers. For the MIA, DOE modeled two standards-case markup scenarios to represent the uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of amended energy conservation standards: (1) A flat markup scenario, and (2) a preservation of operation profit scenario. These scenarios lead to different markups values, which, when applied to the inputted MPCs, result in varying revenue and cash flow impacts.

The flat markup scenario assumes that the cost of goods sold for each product is marked up by a flat percentage to cover standard SG&A expenses, R&D expenses, and profit. The flat markup scenario uses the baseline manufacturer markup (discussed in chapter 6 of the TSD) for all products in both the base case and the standards case. To derive this percentage, DOE evaluated publicly available financial information for manufacturers of white goods. DOE also requested feedback on this value during manufacturer interviews. This scenario represents the upper bound of industry profitability in the standards case because manufacturers are able to fully pass through additional costs due to standards to their customers.

DOE also modeled a lower bound profitability scenario. During interviews, multiple manufacturers stated that higher production costs could severely harm profitability. Because of the highly competitive market, several manufacturers suggested that the additional costs required at higher efficiencies could not be fully passed through to customers. In particular, several manufacturers noted their customer base is composed of a limited number of retailers that have substantial buying power. They also noted that the average costs of refrigeration products within product categories have been fairly constant or fallen even as new products and additional features have been added. Finally, manufacturers noted that their retail customers price products at fixed (or "sticky") price points with step-increases to premium price points reflecting different bundles of features.

Because of the market dynamics among manufacturers and retailers, and because of the pressure to keep the current price points fixed for a given bundle of features, DOE also modeled the preservation of operating profit markup scenario. In this scenario, the manufacturer markups are lowered such that, in the standards case, manufacturers are only able to maintain the base-case total operating profit in absolute dollars, despite higher product costs and investment. DOE implemented this scenario in GRIM by lowering the manufacturer markups at each TSL to yield approximately the same earnings before interest and taxes in the standards case in the year after the compliance date of the amended standards as in the base case. This scenario represents the lower bound of industry profitability following amended energy conservation standards because higher production costs and the investments required to comply with the amended energy conservation standard do not yield additional operating profit.

3. Discussion of Comments

During the December 2009 public meeting, interested parties commented on the assumptions and results of the preliminary analysis. Oral and written comments discussed several topics, including pending legislation resulting in a phase-down of HFCs, manufacturer tax credits, the cumulative regulatory burden on manufacturers, and standards-driven investments. DOE addresses these comments below.

a. Potential Regulation of HFCs

Several manufacturers expressed concern about the impact of a potential phase-down of HFCs, a possible scenario in light of pending climate legislation contained in the bill proposing enactment of the American Clean Energy and Security Act of 2009 (H.R. 2454). GE stated that if DOE did not recognize the trend toward HFC limits in its analysis, the department would risk creating a disincentive for manufacturers to employ low-GWP foams and refrigerants. GE noted the industry's concern about HFC limits reflects not only the pending climate legislation but also regulation from the EPA as well as the Montreal Protocol.

As such, GE argued DOE should evaluate the impact of the potential phase-down on the industry from a technical and economic perspective. (GE, No. 37 at p. 2; GE, Public Meeting Transcript, No. 28 at p. 47–48) AHAM reiterated that the phase-down of HFCs would have a substantial cost impact on the industry. (AHAM, Public Meeting Transcript, No. 28 at p. 18) Sub Zero added that the capital investment of the potential switch to hydrocarbons (*i.e.,* non-HFCs) should be considered in DOE's analysis. (Sub Zero, Public Meeting Transcript, No. 28 at p. 50).

DOE acknowledges that an HFC phase-out or similar legislation requiring a refrigerant or blowing agent change could necessitate substantial changes for residential refrigeration products. DOE has monitored legislation and rulemakings from UL, EPA, and Congress to understand what HFC limitations might go into effect in the near term and what changes are being proposed for use of alternatives. EPA has proposed allowing use of isobutane refrigerant in residential refrigeration products up to a charge limit of 57 grams. 75 FR 25803 (May 10, 2010). DOE has included this refrigerant as a design option where appropriate and is prepared to evaluate the impact of HFC phase-out legislation, if it is enacted.

b. Manufacturer Tax Credits

ACEEE stated that manufacturer tax credits in the pending climate legislation for higher efficiency products should be taken into account in DOE's analysis. (ACEEE, Public Meeting Transcript, No. 28 at p. 209) NEEP also stated that manufacturer tax credits and market pull programs reduce transition costs for manufacturers as they help build the demand and manufacturing capabilities at the higher end efficiencies. (NEEP, No. 38 at pp. 2–3)

DOE agrees that manufacturer tax credits help offset the costs of developing higher efficiency products. DOE includes the benefit of tax credits earned by the industry in 2010 under the provisions of the Energy Improvement and Extension Act of 2008 (EIEA 2008), Pub. L. 110–343, Div. B, Sec. 305 (October 3, 2008), in the GRIM calculations. Using publicly available information and recent SEC filings, DOE estimated manufacturers' market shares and shipment projections in 2010 and calculated the Federal production tax credits based on shipments of 30-percent efficiency level units—those units which qualified for the tax credit in 2010. DOE's analysis suggests that manufacturers will collect approximately $37 million in Federal production tax credits in 2010 from the provisions of EIEA 2008. In the GRIM, DOE accounts for the Federal production tax credit as a direct cash benefit in the base and standards cases that directly increases INPV. Because 2010 is the base year to which industry cash flows are discounted, any Federal production tax credits received prior to 2010 fall outside of the analysis period. These tax credits are consequently not considered in the INPV analysis. However, any tax benefit received in 2010 falls within the analysis period and, hence, increases industry value (potentially mitigating the impacts on manufacturers due to energy conservation standards). The estimated $37 million benefit to manufacturers does not significantly impact the INPV calculated by DOE.

DOE believes that ACEEE, in its comments related to pending legislation, was referring to the tax credits that would impact manufacturers of residential refrigerators in the American Clean Energy and Security Act of 2009 that passed the House of Representatives on June 26, 2009. That bill (H.R. 2454) contained provisions that provide bonus payments for the production of superefficient best-in-class products for years 2011–2013. The impacts of these tax credit provisions under H.R. 2454 are not quantified in the GRIM, as the legislation is still pending. It would be highly speculative to try to predict the passage of such legislation, much less the details of its provisions, all of which are highly uncertain. Appendix 12–C of the NOPR TSD discusses in detail the tax credits currently available to residential refrigeration product manufacturers and their impacts.

DOE research suggests that Federal production tax credits and other market pull programs such as ENERGY STAR have helped spur the development and market acceptance of more advanced technologies in residential refrigeration products. However, such tax credits and other market pull programs would not substantially defray the capital conversion costs required if all products were required to employ a given technology. Much higher production volumes would be required under a national standard and would require manufacturers to upgrade each of their production lines, rather than selectively improve the products that could reach the qualifying level most economically.

Furthermore, the actual design pathway manufacturers may take to achieve the proposed efficiency levels on a national scale could vary from those pathways manufacturers have taken to produce the much smaller subset of tax-credit qualifying products today. For example, if manufacturers no longer received a production credit for products under a national standard, any of the additional costs that could not be passed to consumers could cause manufacturers to consider more capital intense design pathways that would result in lower per unit costs. Therefore, the tax credits have helped to alleviate a portion of the product conversion costs required by amended energy conservation standards by providing manufacturers with experience implementing more efficient technology. DOE has taken this experience using advanced technology into account in its methodology for calculating product conversion costs. However, the production tax credits have not driven wholesale adoption of the new technology or caused manufacturers to make substantial changes to their production facilities to use these technologies on a wide scale.

c. Standards-Induced Versus Normal Capital Conversion Costs

ASAP noted that not all capital investments that manufacturers would make to comply with potential amended standards should be directly attributed to the standards, since a certain amount of investment in plants and equipment is a necessary cost of doing business. ASAP urged DOE to be careful to disaggregate incremental impacts due to the standards in the MIA. (ASAP, Public Meeting Transcript, No. 28 at pp. 209–11)

In its analysis, DOE separates capital conversion costs that are directly attributable to standards from normal capital expenditures. The equipment with remaining useful life that is not repurposed is counted as stranded assets (*i.e.,* net plant, property, and equipment that have not been fully depreciated that can no longer be used in the production of standards-compliant products). DOE estimates that capital conversion costs at today's proposed level are $895 million out of a net PPE of $1,529 million. Typical capital expenditures in the base year are $252 million. DOE also notes that the promulgation of a standard that would require VIPs or wall thickness increases could be extremely disruptive to existing facilities. These types of capital costs would not be attributed to ongoing capital expenses (to replace worn equipment and tooling for new products, for example). These plant modification and equipment changes would be attributable to a potential amended energy conservation standard. A discussion of DOE's methodology in developing capital and product conversion costs for residential

refrigeration manufacturers is located in section IV.I.2.a, above, of today's NOPR and in chapter 12 of the NOPR TSD.

d. Manufacturer Markups

AHAM stated that DOE did not show any empirical support for the manufacturer markup used in the preliminary TSD and requested that DOE provide more information with respect to how the manufacturer markup was determined. (AHAM, No. 34 at p. 14) GE and Sub Zero also requested that DOE qualify how it determined its markups, including the manufacturer markups. (GE, No. 37 at p. 2–3; Sub Zero, No. 40 at p. 9; Sub Zero, Public Meeting Transcript, No. 28 at p. 112)

In developing the baseline manufacturer markup of 1.26 used in DOE's analysis, DOE began by researching the annual 10–K reports filed with the Securities and Exchange Commission by residential white goods manufacturers to determine an industry-wide market-share weighted markup. This baseline manufacturer markup was used for the 2009 final rule for cooking products and the 2010 commercial clothes washers final rule. 74 FR 16040 (April 8, 2009); 75 FR 1122 (January 8, 2010). Because all publicly traded companies that manufacture residential refrigeration equipment also manufacture a number of other appliances, and because the 1.26 baseline manufacturer markup had already been vetted during the rulemakings for these other products and equipment, DOE used the same baseline manufacturer markup as an initial estimate for residential refrigeration products. A description of the methodology used to calculate this baseline manufacturer markup can be found in the NOPR and NOPR TSD for these rulemakings. *See* 73 FR 62034 (October 17, 2008) and the related TSD, available at *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/clothes_washers.html.* DOE requested manufacturer feedback on the accuracy of this estimate and other financial assumptions during DOE's confidential manufacturer impact analysis interviews.

Finally, as discussed above in section IV.I.2.b, above, in the standards case, DOE modeled manufacturers' concerns about potential profitability impacts due to amended energy conservation standards in its preservation of operating profit markup scenario. DOE continues to welcome feedback on any of the assumptions it used for its baseline manufacturer markups and its markup scenarios.

4. Manufacturer Interviews

DOE interviewed manufacturers representing more than 95 percent of standard-size refrigerator-freezer sales, approximately 95 percent of standard-size freezer sales, about 75 percent of compact refrigerator and freezer sales, and more than 95 percent of built-in refrigeration products. These interviews were in addition to those DOE conducted as part of the engineering analysis. DOE contacted companies from its database of manufacturers, which provided a representative sample of each industry. DOE used these interviews to tailor the GRIM to incorporate unique financial characteristics for the residential refrigeration industry. All interviews provided information that DOE used to evaluate the impacts of potential amended energy conservation standards on manufacturer cash flows, manufacturing capacities, and employment levels. Before each telephone interview or site visit, DOE provided company representatives with an interview guide that included the topics for which DOE sought input. The MIA interview topics included: (1) Key issues to this rulemaking; (2) a company overview and organizational characteristics; (3) engineering analysis and life cycle cost analysis follow-up; (4) manufacturer markups and profitability; (5) shipment projections; (6) financial parameters; (7) conversion costs; (8) cumulative regulatory burden; (9) possible impacts from potential HFC regulations; (10) direct employment impact assessment; (11) exports, foreign competition, and outsourcing; (12) consolidation; and (13) impacts on small business. Appendix 12–A of the NOPR TSD contains the three interview guides DOE used to conduct the MIA interviews.

In the manufacturer interviews, DOE asked manufacturers to describe their major concerns about this rulemaking. The following sections describe the most significant issues identified by manufacturers. These summaries are provided in aggregate to protect manufacturer confidentiality. DOE also includes additional concerns in chapter 12 of the NOPR TSD.

a. Potential for Significant Changes to Manufacturing Facilities

A number of manufacturers indicated that conversion costs would be exponentially greater if the adopted standards require significant rather than incremental increases in efficiency. While DOE does not analyze design options that would lower consumer utility, manufacturers indicated that for some product classes they would consider wall thickness increases if they resulted in lower per unit costs. However, manufacturers also indicated that wall thickness increases in response to more stringent energy standards would be extremely capital intensive. Changing the wall thickness of refrigeration products would require extensive investments to completely replace injection molding equipment, interior fabrication feeder lines and equipment, and foaming fixtures on every production line. Such substantial changes would require many times the investment required for incremental efficiency improvements. For example, the design and implementation of a new heat exchanger design would only require new fabrication tooling for the component and slight adjustments to production line tooling but would leave most of the existing production equipment intact. Smaller manufacturers were generally concerned that conversion costs would disproportionately impact their operations since comparable product and capital conversion costs would be spread over a smaller shipment volume.

Additionally, several manufacturers stated that new standards could increase the total steady state invested capital necessary to maintain current production levels. As an example, many plants leverage economies of scale by utilizing a shared front end of production (cabinet and door bending, for example) to serve multiple product lines. These economies would be forfeited if amended standards disproportionately affected one product class utilizing the shared front end. As such, manufacturing plants could have relatively lower capital intensity following standards.

b. VIPs

Manufacturers were also concerned about potential issues with a standard that effectively required the widespread adoption of VIPs. In particular, the material costs of VIPs would add significant costs to the products, especially at the retail level. Manufacturers were concerned that using this design option in product classes that historically have been low-cost options could have unintended consequences such as inducing consumers to prolong the life of the products or switch to less profitable products. Manufacturers were also concerned about the additional labor that is required to install VIPs. Additional production steps would be required with VIPs, which involve greater care in handling to prevent damaging the components. While less of

a concern on lower volume products, the additional production steps on high-speed production lines would add tremendous complexity. The additional production steps and slower line rates would lengthen the production lines and require additional equipment.

Manufacturers were also concerned about the ability of VIP suppliers to ramp up production to meet necessary demand from more stringent standards.

Finally, manufacturers indicated that their experience with VIPs has revealed a range of efficiency improvements—all of which point to lower benefits than the theoretical potential of VIPs. They also expressed concern about the degradation of the panels over the lifetime of their products. Because of the range of efficiency improvements in practice, some manufacturers indicated they could elect to employ other design pathways that would eliminate these potential problems with the technology.

c. Impact on U.S. Production and Jobs

Manufacturers generally agreed that potential standards that would require substantial capital conversion costs would lower U.S. production and employment. Depending on the level of these expenditures, some manufacturers stated that new investments would not be made in the U.S., given the lower labor costs overseas. Margins are already thin for certain product classes, and manufacturers believed that higher standards could further reduce profitability. The lower labor costs available overseas could offset some of the impact on profitability, especially for their lower margin product lines. Some manufacturers stated they could also choose to source or drop altogether certain product lines they currently manufacture if they did not believe they could recoup the capital investments required to meet amended energy conservation standards on those lines. Any decision to drop or source more product lines would also lead to less domestic production and fewer domestic jobs.

d. Impacts to Product Utility

Several manufacturers expressed concern that more stringent energy standards could impact the utility of their products. Most residential kitchens have standardized size openings for refrigerators, which would force any wall thickness growth inward and decrease internal volume. While this scenario was not analyzed as a design option for all products, manufacturers indicated some in the industry could elect to use thicker walls to meet new standards for full size refrigerator-freezers. Finally, several manufacturers indicated that other product features currently available may have to be removed in order to both meet new standard levels and maintain product prices that would be acceptable to consumers. Examples of these features that industry cited included ice and water dispensers, glass doors, soda can dispensers, crisper compartments, anti-sweat features, and food preservation capabilities.

Manufacturers also expressed concern that the energy savings from more stringent energy conservation standards would not be great enough to justify passing through the added costs to consumers. Currently, manufacturers bundle higher efficiency with other desirable features to justify higher prices for those ENERGY STAR models. According to manufacturers, if amended standards cause prices to rise even higher, the lower operating costs would not justify higher prices, since the savings as a percentage of the purchase price would be very low. Therefore, the increased cost of meeting more stringent efficiency requirements may cause manufacturers to reduce the number of other features bundled with these products in order to retain a reasonable price point, causing consumer utility to decline.

The value of future ENERGY STAR levels is also a concern for manufacturers. Many retailers and other distribution channels require ENERGY STAR products. Since the features bundled with ENERGY STAR products are the greatest justification for the added costs, manufacturers were concerned that a higher ENERGY STAR level after potentially stricter standards would offer less value to consumers. Consumers would save less energy relative to the added efficiency costs or would have a product with fewer features.

Manufacturers also stated that the financial burden of developing products to meet amended energy conservation standards has an opportunity cost due to limited capital and R&D dollars. Investments incurred to meet amended standards reflect foregone investments in innovation and the development of new features that consumers value and on which manufacturers earn a premium.

e. Technical Difficulties Associated With Higher Efficiency Levels

Many manufacturers expressed concerns about the technical difficulties involved in achieving new standards that are significantly more stringent than current levels. Manufacturers were concerned there might not be adequate supplies of particular components. In particular they were concerned about supplies of high efficiency compressors and VIPs, for all product classes, and especially at higher efficiency levels that would increase the demand for these components many times over current levels. Manufacturers also stated that there are fewer low-cost technology improvements available than there were during past rulemakings. Compact units, in general, pose an additional challenge because there are fewer low-capacity compressors with sufficiently high EER ratings. Specifically, compact freezers were cited as a product class in which it would be especially difficult to make significant energy improvements. Current standards for compact freezers are already more stringent relative to capacity than are standards for compact refrigerators.

f. Changes in Consumer Behavior

Several manufacturers noted that higher consumer prices resulting from amended energy conservation standards could result in product switching between lines of standard-size refrigerator-freezers. Currently, top-mount refrigerator-freezers are inexpensive commodity products, on which manufacturers said they make little to no profit margin. Instead, manufacturers earn a profit on more expensive and more feature-loaded side-mount and bottom-mount refrigerator-freezers. Manufacturers are concerned that if amended energy conservation standards cause retail prices to increase across product classes, many consumers will no longer be willing to pay the premium for side-mount and bottom-mount refrigerator-freezers and will switch to buying the less expensive and less profitable top-mount refrigerator-freezers.

Similarly, a number of manufacturers expressed concern that higher retail prices could alter consumers' decisions to repair or replace their standard-size refrigerator-freezers. Many consumers who in the base case would buy a new refrigerator when their current unit fails would instead opt to repair their existing unit in the potential standards case due to the higher cost of purchasing a new unit. This decision would result in lower shipments for manufacturers and would leave less efficient units in the existing stock.

g. Separate Product Classes for Built-Ins

Most manufacturers expressed their support for separate product classes for built-in refrigerators and freezers. Manufacturers stated that built-in units are inherently less efficient than their free-standing counterparts for several reasons, including more limited air

flow. Because of such limitations, the incremental costs of improving efficiency are higher at every efficiency level. Built-in manufacturers also believed that their components costs per unit were higher than for conventional products due to less bulk purchasing power. Built-in manufacturers also argued that their products offer distinct utility (*i.e.,* the ability to build products into the kitchen cabinetry), justifying the need for separate product classes for built-ins. Without separate product classes for built-ins, depending on the stringency of new standards, some or all built-in models could disappear from the market because of the designs' inability to satisfy the proposed standards for free-standing equivalent models. Built-in manufacturers also suggested that an average correction based on conventional free-standing products could be an appropriate means of accounting for the inherently lower efficiency of built-in products.

h. Test Procedure Concerns

Many manufacturers expressed concerns over the test procedures for refrigerators and freezers. Several stated that icemaking energy use, which represents a large portion of unit energy consumption, should be included in the amended test procedure to reward more efficient icemakers. However, manufacturers acknowledged that testing icemaker energy use is difficult. All manufacturers wanted to ensure that tests for icemaking energy are repeatable and could be implemented correctly. Manufacturers also did not want a test for icemaking energy use to result in the elimination of TTD units.

J. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting a proposed standard. Employment impacts consist of direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the appliance products which are the subject of this rulemaking, their suppliers, and related service firms. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more-efficient appliances. The MIA addresses the direct employment impacts that concern manufacturers of refrigeration products. The employment impact analysis addresses the indirect employment impacts.

Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, due to: (1) Reduced spending by end users on energy; (2) reduced spending on new energy supply by the utility industry; (3) increased spending on new products to which the new standards apply; and (4) the effects of those three factors throughout the economy. DOE expects the net monetary savings from standards to be redirected to other forms of economic activity. DOE also expects these shifts in spending and economic activity to affect the demand for labor in the short term, as explained below.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sectoral employment statistics developed by the Labor Department's Bureau of Labor Statistics (BLS).[40] The BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy. There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital intensive and less labor intensive than other sectors.[41]

Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and service sectors). Thus, based on the BLS data alone, DOE believes net national employment will increase due to shifts in economic activity resulting from amended standards for refrigeration products.

For the standards considered in today's NOPR, DOE estimated indirect national employment impacts using an input/output model of the U.S. economy called Impact of Sector Energy Technologies (ImSET). ImSET is a spreadsheet model of the U.S. economy that focuses on 187 sectors most relevant to industrial, commercial, and residential building energy use.[42] ImSET is a special purpose version of the "U.S. Benchmark National Input-Output" (I–O) model, which has been designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model with structural coefficients to characterize economic flows among the 187 sectors. ImSET's national economic I–O structure is based on a 2002 U.S. benchmark table, specially aggregated to the 187 sectors. DOE estimated changes in expenditures using the NIA spreadsheet. Using ImSET, DOE then estimated the net national, indirect employment impacts by sector of potential amended efficiency standards for refrigeration products.

For more details on the employment impact analysis, see TSD chapter 13.

K. Utility Impact Analysis

The utility impact analysis estimates several important effects on the utility industry that would result from the adoption of new or amended standards. For this analysis, DOE used the NEMS–BT model to generate forecasts of electricity consumption, electricity generation by plant type, and electric generating capacity by plant type, that would result from each TSL. DOE obtained the energy savings inputs associated with efficiency improvements to considered products from the NIA. DOE conducts the utility impact analysis as a scenario that departs from the latest *AEO2010* Reference case. In other words, the estimated impacts of a proposed standard are the differences between values forecasted by NEMS–BT and the values in the *AEO2010* Reference case.

As part of the utility impact analysis, DOE used NEMS–BT to assess the impacts on electricity prices of the reduced need for new electric power plants and infrastructure projected to result from the considered standards. In NEMS–BT, changes in power generation infrastructure affect utility revenue requirements, which in turn affect electricity prices. DOE estimated the change in electricity prices projected to result over time from each TSL.

[40] Data on industry employment, hours, labor compensation, value of production, and the implicit price deflator for output for these industries are available upon request by calling the Division of Industry Productivity Studies (202–691–5618) or by sending a request by e-mail to *dipsweb@bls.gov.* Available at: *http://www.bls.gov/news.release/prin1.nr0.htm.*

[41] See Bureau of Economic Analysis, *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II).* Washington, DC. U.S. Department of Commerce, 1992.

[42] J. M. Roop, M. J. Scott, and R. W. Schultz, *ImSET 3.1: Impact of Sector Energy Technologies,* PNNL–18412, Pacific Northwest National Laboratory, 2009. Available at: *http://www.pnl.gov/main/publications/external/technical_reports/PNNL-18412.pdf.*

Chapter 14 of the TSD accompanying this notice describes the utility impact analysis.

L. Environmental Analysis

Pursuant to the National Environmental Policy Act of 1969 and the requirements of 42 U.S.C. 6295(o)(2)(B)(i)(VI) and 6316(a), DOE has prepared a draft environmental assessment (EA) of the impacts of the potential standards for refrigeration products in today's proposed rule, which it has included as chapter 15 of the NOPR TSD.

In the EA, DOE estimated the reduction in power sector emissions of CO_2, NO_X, and Hg using the NEMS–BT computer model. In the EA, NEMS–BT is run similarly to the AEO NEMS, except that refrigeration product energy use is reduced by the amount of energy saved (by fuel type) due to each TSL. The inputs of national energy savings come from the NIA spreadsheet model, and the output is the forecasted physical emissions. NEMS–BT tracks CO_2 emissions using a detailed module that provides results with broad coverage of all sectors and inclusion of interactive effects. The net benefit of the standards in today's proposed rule is the difference between the forecasted emissions estimated by NEMS–BT at each TSL and the *AEO2010* Reference Case. For the final rule, DOE intends to revise the emissions analysis using the most current AEO.

DOE has preliminarily determined that sulfur dioxide (SO_2) emissions from affected Electric Generating Units (EGUs) are subject to nationwide and regional emissions cap and trading programs that create uncertainty about the standards' impact on SO_2 emissions. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for all affected EGUs. SO_2 emissions from 28 eastern States and the District of Columbia (DC) are also limited under the Clean Air Interstate Rule (CAIR). Published in the **Federal Register** on May 12, 2005, CAIR creates an allowance-based trading program that will gradually replace the Title IV program in those States and DC. 70 FR 25162. (The recent legal history surrounding CAIR is discussed below.) The attainment of the emissions caps is flexible among EGUs and is enforced through the use of emissions allowances and tradable permits. Under existing EPA regulations, any excess SO_2 emission allowances resulting from the lower electricity demand caused by the imposition of an efficiency standard could be used to permit offsetting increases in SO_2 emissions by any regulated EGU. However, if the standard resulted in a permanent increase in the quantity of unused emission allowances, there would be an overall reduction in SO_2 emissions from the standards. While there remains some uncertainty about the ultimate effects of efficiency standards on SO_2 emissions covered by the existing cap and trade system, the NEMS–BT modeling system that DOE uses to forecast emissions reductions currently indicates that no physical reductions in power sector emissions would occur for SO_2.

NEMS–BT also has an algorithm for estimating NO_X emissions from power generation. The impact of these emissions, however, will be affected by the CAIR. Much like SO_2, NO_X emissions from 28 eastern States and DC are limited under the CAIR. Although CAIR has been remanded to EPA by the DC Circuit, it will remain in effect until it is replaced by a rule consistent with the Court's July 11, 2008, opinion in *North Carolina* v. *EPA,* 531 F.3d 896 (DC Cir. 2008); *see* also *North Carolina* v. *EPA,* 550 F.3d 1176 (DC Cir. 2008). Because all States covered by CAIR opted to reduce NO_X emissions through participation in cap-and-trade programs for electric generating units, emissions from these sources are capped across the CAIR region.

In the 28 eastern States and DC where CAIR is in effect, DOE's forecasts indicate that because of the permanent cap no NO_X emissions reductions will occur due to energy conservation standards. If their impact on electricity demand is large enough energy conservation standards have the potential to produce an environmentally-related economic impact in the form of lower prices for NO_X emissions allowances. However, DOE has preliminarily concluded the proposed standard would not have such an effect because the estimated reduction in NO_X emissions or the corresponding allowance credits in States covered by the CAIR cap would be too small to affect allowance prices for NO_X under the CAIR. The proposed standards would reduce NO_X emissions in those 22 States not affected by the CAIR. As a result, DOE used NEMS–BT to forecast emission reductions from the standards that are considered in today's NOPR.

Similar to emissions of SO_2 and NO_X, future emissions of Hg would have been subject to emissions caps. The Clean Air Mercury Rule (CAMR) would have permanently capped emissions of mercury for new and existing coal-fired plants in all States beginning in 2010. 70 FR 28606 (May 18, 2005). However, the CAMR was vacated by the DC Circuit in its decision in *New Jersey* v. *Environmental Protection Agency.* 517 F 3d 574 (DC Cir. 2008) Thus, DOE was able to use the NEMS–BT model, which reflects the fact that CAMR was vacated and does not incorporate CAMR emission caps, to estimate the changes in Hg emissions resulting from the proposed rule. However, DOE continues to review the impact of rules that reduce energy consumption on Hg emissions, and may revise its assessment of Hg emission reductions in future rulemakings.

Commenting on the preliminary analysis, Whirlpool stated that analysis of CO_2 emissions is only complete if the changes in CO_2 emissions resulting from manufacturing and transporting the higher efficiency products are also included. (Whirlpool, No. 31 at p. 5) AHAM made a similar point. (AHAM, No. 34 at p. 15) In response, DOE notes that the inputs to the EA for national energy savings come from the NIA. In the NIA, DOE only accounts for primary energy savings associated with considered standards. In so doing, EPCA directs DOE to consider (when determining whether a standard is economically justified) "the total projected amount of energy * * * savings likely to result directly from the imposition of the standard." 42 U.S.C. 6295(o)(2)(B)(i)(III) DOE interprets "directly from the imposition of the standard" to include energy used in the generation, transmission, and distribution of fuels used by appliances. In addition, DOE is evaluating the full-fuel-cycle measure, which includes the energy consumed in extracting, processing, and transporting primary fuels (*see* section IV.G.3). Both DOE's current accounting of primary energy savings and the full-fuel-cycle measure are directly linked to the energy used by appliances. In contrast, energy used in manufacturing and transporting appliances is a step removed from the energy used by appliances. Thus, DOE did not consider such energy use in either the NIA or the EA.

M. Monetizing Carbon Dioxide and Other Emissions Impacts

As part the development of this proposed rule, DOE considered the estimated monetary benefits likely to result from the reduced emissions of CO_2 and other pollutants that are expected to result from each of the TSLs considered. This section summarizes the basis for the estimated monetary values used for each of these emissions and presents the benefits estimates considered.

For today's NOPR, DOE is relying on a set of values for the social cost of carbon (SCC) that were developed by an

interagency process. A summary of the basis for these new values is provided below, and a more detailed description of the methodologies used is provided in appendix 15–A of the NOPR TSD.

1. Social Cost of Carbon

Under Executive Order 12866, agencies must, to the extent permitted by law, "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." The purpose of the SCC estimates presented here is to allow agencies to incorporate the social monetized benefits of reducing CO_2 emissions into cost-benefit analyses of regulatory actions that have small, or "marginal," impacts on cumulative global emissions. The estimates are presented with an acknowledgement of the many uncertainties involved and with a clear understanding that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts.

As part of the interagency process that developed these SCC estimates, technical experts from numerous agencies met on a regular basis to consider public comments, explore the technical literature in relevant fields, and discuss key model inputs and assumptions. The main objective of this process was to develop a range of SCC values using a defensible set of input assumptions grounded in the existing scientific and economic literatures. In this way, key uncertainties and model differences transparently and consistently inform the range of SCC estimates used in the rulemaking process.

The interagency group selected four SCC values for use in regulatory analyses. Three values are based on the average SCC from three integrated assessment models, at discount rates of 2.5, 3, and 5 percent. The fourth value, which represents the 95th percentile SCC estimate across all three models at a 3 percent discount rate, is included to represent higher-than-expected impacts from temperature change further out in the tails of the SCC distribution. For emissions (or emission reductions) that occur in later years, these values grow in real terms over time, as depicted in Table IV.16.

TABLE IV.16—SOCIAL COST OF CO_2, 2010–2050

[In 2007 dollars per metric ton]

	Discount rate			
	5% Avg	3% Avg	2.5% Avg	3% 95th
2010	4.7	21.4	35.1	64.9
2015	5.7	23.8	38.4	72.8
2020	6.8	26.3	41.7	80.7
2025	8.2	29.6	45.9	90.4
2030	9.7	32.8	50.0	100.0
2035	11.2	36.0	54.2	109.7
2040	12.7	39.2	58.4	119.3
2045	14.2	42.1	61.7	127.8
2050	15.7	44.9	65.0	136.2

a. Monetizing Carbon Dioxide Emissions

The SCC is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services. Estimates of the social cost of carbon are provided in dollars per metric ton of carbon dioxide.

When attempting to assess the incremental economic impacts of carbon dioxide emissions, the analyst faces a number of serious challenges. A recent report from the National Research Council[43] points out that any assessment will suffer from uncertainty, speculation, and lack of information about (1) Future emissions of greenhouse gases, (2) the effects of past and future emissions on the climate system, (3) the impact of changes in climate on the physical and biological environment, and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional.

Despite the serious limits in the areas of both quantification and monetization, SCC estimates can be useful in estimating the social benefits of reducing carbon dioxide emissions. Under Executive Order 12866, agencies are required, to the extent permitted by law, "to assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." The purpose of the SCC estimates presented here is to make it possible for agencies to incorporate the social benefits from reducing carbon dioxide emissions into cost-benefit analyses of regulatory actions that have small, or "marginal," impacts on cumulative global emissions. Most Federal regulatory actions can be expected to have marginal impacts on global emissions.

For such policies, the benefits from reduced (or costs from increased) emissions in any future year can be estimated by multiplying the change in emissions in that year by the SCC value appropriate for that year. The net present value of the benefits can then be calculated by multiplying each of these future benefits by an appropriate discount factor and summing across all affected years. This approach assumes that the marginal damages from increased emissions are constant for small departures from the baseline emissions path, an approximation that is reasonable for policies that have effects on emissions that are small relative to cumulative global carbon dioxide emissions. For policies that have a large (non-marginal) impact on global cumulative emissions, there is a separate question of whether the SCC is an appropriate tool for calculating the benefits of reduced emissions. DOE does not attempt to answer that question here.

At the time of the preparation of this notice, the most recent interagency estimates of the potential global benefits resulting from reduced CO_2 emissions in 2010 were $4.7, $21.4, $35.1, and $64.9 per metric ton in 2007 dollars. These values were adjusted to 2009$ using the standard GDP deflator value for 2008 and 2009. For emissions (or emission reductions) that occur in later years, these values grow in real terms over time. Additionally, the interagency group determined that a range of values from 7 percent to 23 percent should be used to adjust the global SCC to calculate domestic effects, although preference is given to consideration of the global benefits of reducing CO_2 emissions.

It is important to emphasize that the interagency process is committed to updating these estimates as the science and economic understanding of climate change and its impacts on society improves over time. Specifically, the interagency group has set a preliminary goal of revisiting the SCC values within two years or at such time as substantially updated models become available, and to continue to support research in this area. In the meantime,

[43] National Research Council. *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use.* National Academies Press: Washington, DC. 2009.

the interagency group will continue to explore the issues raised by this analysis and consider public comments as part of the ongoing interagency process.

b. Social Cost of Carbon Values Used in Past Regulatory Analyses

To date, economic analyses for Federal regulations have used a wide range of values to estimate the benefits associated with reducing carbon dioxide emissions. In the final model year 2011 CAFE rule, the Department of Transportation (DOT) used both a "domestic" SCC value of $2 per ton of CO_2 and a "global" SCC value of $33 per ton of CO_2 for 2007 emission reductions (in 2007 dollars), increasing both values at 2.4 percent per year. It also included a sensitivity analysis at $80 per ton of CO_2. A domestic SCC value is meant to reflect the value of damages in the United States resulting from a unit change in carbon dioxide emissions, while a global SCC value is meant to reflect the value of damages worldwide.

A 2008 regulation proposed by DOT assumed a domestic SCC value of $7 per ton CO_2 (in 2006 dollars) for 2011 emission reductions (with a range of $0 – $14 for sensitivity analysis), also increasing at 2.4 percent per year. A regulation finalized by DOE in October of 2008 used a domestic SCC range of $0 to $20 per ton CO_2 for 2007 emission reductions (in 2007 dollars). In addition, EPA's 2008 Advance Notice of Proposed Rulemaking for Greenhouse Gases identified what it described as "very preliminary" SCC estimates subject to revision. EPA's global mean values were $68 and $40 per ton CO_2 for discount rates of approximately 2 percent and 3 percent, respectively (in 2006 dollars for 2007 emissions).

In 2009, an interagency process was initiated to offer a preliminary assessment of how best to quantify the benefits from reducing carbon dioxide emissions. To ensure consistency in how benefits are evaluated across agencies, the interagency group sought to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced CO_2 emissions. The interagency group did not undertake any original analysis. Instead, it combined SCC estimates from the existing literature to use as interim values until a more comprehensive analysis could be conducted.

The outcome of the preliminary assessment by the interagency group was a set of five interim values: global SCC estimates for 2007 (in 2006 dollars) of $55, $33, $19, $10, and $5 per ton of CO_2. The $33 and $5 values represented model-weighted means of the published estimates produced from the most recently available versions of three integrated assessment models—DICE, PAGE, and FUND—at approximately 3 and 5 percent discount rates. The $55 and $10 values were derived by adjusting the published estimates for uncertainty in the discount rate (using factors developed by Newell and Pizer (2003)) at 3 and 5 percent discount rates, respectively. The $19 value was chosen as a central value between the $5 and $33 per ton estimates. All of these values were assumed to increase at 3 percent annually to represent growth in incremental damages over time as the magnitude of climate change increases.

These interim values represent the first sustained interagency effort within the U.S. government to develop an SCC for use in regulatory analysis. The results of this preliminary effort were presented in several proposed and final rules and were offered for public comment in connection with proposed rules, including the joint EPA–DOT fuel economy and CO_2 tailpipe emission proposed rules.

c. Current Approach and Key Assumptions

Since the release of the interim values, the interagency group reconvened on a regular basis to generate improved SCC estimates. Specifically, the group considered public comments and further explored the technical literature in relevant fields.

It is important to recognize that a number of key uncertainties remain, and that current SCC estimates should be treated as provisional and revisable since they will evolve with improved scientific and economic understanding. The interagency group also recognizes that the existing models are imperfect and incomplete. The National Research Council report mentioned above points out that there is tension between the goal of producing quantified estimates of the economic damages from an incremental ton of carbon and the limits of existing efforts to model these effects. There are a number of concerns and problems that should be addressed by the research community, including research programs housed in many of the agencies participating in the interagency process to estimate the SCC.

The U.S. Government will periodically review and reconsider estimates of the SCC used for cost-benefit analyses to reflect increasing knowledge of the science and economics of climate impacts, as well as improvements in modeling. In this context, statements recognizing the limitations of the analysis and calling for further research take on exceptional significance. The interagency group offers the new SCC values with all due humility about the uncertainties embedded in them and with a sincere promise to continue work to improve them.

In summary, in considering the potential global benefits resulting from reduced CO_2 emissions, DOE used the most recent values identified by the interagency process, adjusted to 2009$ using the standard GDP deflator values for 2008 and 2009. For each of the four cases specified, the values used for emissions in 2010 were $4.9, $22.1, $36.3, and $67.1 per metric ton avoided (expressed in 2009$). To monetize the CO_2 emissions reductions expected to result from amended standards for refrigeration products in 2014–2043, DOE used the values identified in Table A1 of the "Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866," which is reprinted in appendix 15–A of the NOPR TSD for the full range of annual SCC estimates from 2010 to 2050. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the discount rates that had been used to obtain the SCC values in each case.

2. Valuation of Other Emissions Reductions

As previously stated, DOE's analysis assumed the presence of nationwide emission caps on SO_2 and caps on NO_X emissions in the 28 States covered by the CAIR. In the presence of these caps, the NEMS–BT modeling system that DOE used to forecast emissions reduction indicated that no physical reductions in power sector emissions would occur for SO_2, but that the standards could put slight downward pressure on the prices of emissions allowances in cap-and-trade markets. Estimating this effect is very difficult because such factors as credit banking can change the trajectory of prices. From its modeling to date, DOE is unable to estimate a benefit from SO_2 emissions reductions at this time. *See* the environmental assessment, chapter 15 in the NOPR TSD for further details.

DOE also investigated the potential monetary benefit of reduced NO_X emissions from the TSLs it considered. As noted above, new or amended energy conservation standards would reduce NO_X emissions in those 22 States that are not affected by the CAIR, in addition to the reduction in site NO_X emissions nationwide. DOE estimated the monetized value of NO_X emissions reductions resulting from each of the TSLs considered for today's NOPR

based on environmental damage estimates from the available literature. Available estimates suggest a very wide range of monetary values, ranging from $370 per ton to $3,800 per ton of NO_X from stationary sources, measured in 2001$ (equivalent to a range of $447 to $4,591 per ton in 2009$).[44] In accordance with U.S. Office of Management and Budget (OMB) guidance,[45] DOE conducted two calculations of the monetary benefits derived using each of the economic values used for NO_X, one using a real discount rate of 3 percent and another using a real discount rate of 7 percent.

DOE is aware of multiple agency efforts to determine the appropriate range of values to use in evaluating the potential economic benefits of reduced Hg emissions. DOE has decided to await further guidance regarding consistent valuation and reporting of Hg emissions before it once again monetizes Hg in its rulemakings.

N. Demand Response

This section discusses comments received regarding demand response or smart grid controls. These are controls that can react to signals from utilities or other external organizations and adapt the product operation. This capability might be used to allow utilities to reduce energy use during peak demand hours by reducing the power input of many connected appliances.

DOE received comments from LG urging consideration of smart grid controls for refrigeration products when setting standards. LG commented that the investment required to meet new energy standards may displace the investment to develop and implement smart grid refrigeration products, thus limiting the potential to meet DOE's goals for establishment of a smart grid. (LG, No. 41 at p. 5) DOE received some additional information regarding smart grid issues during NOPR phase interviews with manufacturers. This information did not clearly indicate that smart grid controls could provide significant benefits when used in refrigeration products that are comparable to the benefits associated with energy use reductions that are proposed in this notice. Some of the potential benefits, such as the initiation of defrost only during off-peak periods could be implemented without the use of smart grid controls. Because of the uncertain value of the smart grid benefits, DOE did not consider the possible offset of smart grid development investment when selecting proposed standard levels.

The U.S. Navy (USN) commented that DOE should consider implementing a credit or other form of encouragement for demand response technologies in the energy conservation standard or other standards, or in voluntary programs such as ENERGY STAR. (USN, No. FDMS Draft 0022.1 at p. 2) IOU commented that DOE should include as part of any standard a requirement that refrigeration products include a demand response feature. (IOU, No. 36 at p. 13) IOU asked for a response to this comment and requested that the response indicate whether States would be allowed to implement demand response requirements if DOE does not do so. (*Id.*)

The requirement to include demand response capability in a product constitutes a design requirement that a product include such a feature. EPCA allows establishment of design requirements, but only for certain products. EPCA defines "energy conservation standard" as:

> (A) a performance standard which prescribes a minimum level of energy efficiency or a maximum quantity of energy use, or, in the case of showerheads, faucets, water closets, and urinals, water use, for a covered product, determined in accordance with test procedures prescribed under section 6293 of this title; or
>
> (B) a design requirement for the products specified in paragraphs (6), (7), (8), (10), (15), (16), (17), and (19) of section 6292(a) of this title * * *

42 U.S.C. 6291(6)

Refrigeration products do not belong to the group of products for which DOE can set design requirements (such as demand response capability) under 6291(6)(B). Based on this limitation and the available facts, it is DOE's tentative view that a demand response requirement cannot be included as part of today's NOPR.

DOE next considered whether a credit may be allowed for demand response features. DOE understands that such features, when applied to refrigeration products, could be used to reduce energy costs by shifting portions of the energy use associated with defrost or icemaking to times when the electricity cost is lower, but that they would not contribute significantly to reduction of energy use. EPCA does not allow establishment of energy conservation standards if, "the establishment of such standard will not result in significant conservation of energy" (42 U.S.C. 6295(o)(3)(B)). Hence, DOE cannot consider implementing a credit in the energy conservation standards for refrigeration products to encourage use of this technology.

DOE and other agencies are not prohibited from developing voluntary programs to encourage use of demand response technology. However, such programs are not the subject matter of this notice.

EPCA's requirement on preemption on or after the compliance date for Federal energy conservation standards for a given product states that "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product * * *" (42 U.S.C. 6297(c)). EPCA provides a number of exceptions to this requirement, but none of these apply to refrigeration products. DOE interprets "regulation concerning energy use" to be equivalent to "energy conservation standard". The title of section 6297(c), "General rule of preemption for energy conservation standards when Federal standard becomes effective for product," further clarifies that this section addresses energy conservation standards, which would mean, in this instance, a performance-based standard. Based on the limited facts made available to DOE, a design requirement would not likely meet this requirement. Preemption under these conditions would not likely apply.

V. Analytical Results

The following section addresses the results from DOE's analyses with respect to potential energy efficiency standards for the various product classes examined as part of this rulemaking. Issues discussed include the trial standard levels examined by DOE, the projected impacts of each of these levels if adopted as energy efficiency standards for refrigeration products, and the standards levels that DOE is tentatively proposing in today's NOPR. Additional details regarding the analyses conducted by the agency are contained in the publicly available NOPR TSD supporting this notice.

A. Trial Standard Levels

DOE analyzed the benefits and burdens of a number of TSLs for the refrigeration products that are the subject of today's proposed rule. A description of each TSL DOE analyzed is provided below. DOE attempted to limit the number of TSLs considered for the NOPR by excluding efficiency levels that do not exhibit significantly different economic and/or engineering characteristics from the efficiency levels

[44] Refer to the OMB, Office of Information and Regulatory Affairs, "2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," Washington, DC, for additional information.

[45] OMB, Circular A–4: Regulatory Analysis (Sept. 17, 2003).

already selected as a TSL. While DOE only presents the results for those efficiency levels in TSL combinations in today's NOPR, DOE presents the results for all efficiency levels that it analyzed in the NOPR TSD.

Table V.1 presents the TSLs and the corresponding product class efficiencies for standard-size refrigerator-freezers. TSL 1 consists of those efficiency levels that meet current ENERGY STAR criteria. TSL 2 consists of the highest efficiency levels for which the consumer NPV is positive, using a 7-percent discount rate. TSL 3 consists of the highest efficiency levels for which the consumer NPV is positive, using a 3-percent discount rate, as well as the levels recommended in the Joint Comments. TSL 4 consists of those efficiency levels that yield energy use 30 percent below the baseline products. TSL 5 consists of the max-tech efficiency levels.

TABLE V.1—TRIAL STANDARD LEVELS FOR STANDARD-SIZE REFRIGERATOR-FREEZERS

Trial standard level	Top-mount refrigerator-freezers	Bottom-mount refrigerator-freezers	Side-by-side refrigerator-freezers
	Product classes 1, 1A, 2, 3, 3A, 3I and 6	Product classes 5, 5A, and 5I	Product classes 4, 4I, and 7
	Efficiency Level (% less than baseline energy use)		
1	3 (20)	3 (20)	3 (20)
2	3(20)	3 (20)	4 (25)
3	4 (25) *	3 (20)	4 (25)
4	5 (30)	5 (30)	5 (30)
5	6 (36)	6 (36)	6 (33)

* Level for product classes 1, 1A, and 2 is 20%.

Table V.2 presents the TSLs and the corresponding product class efficiencies for standard-size freezers. TSL 1 consists of those efficiency levels that yield energy use 20 percent below the baseline products. TSL 2 consists of the levels recommended in the Joint Comments. TSL 3 consists of incrementally higher efficiency levels than the preceding TSL. TSL 4 consists of the efficiency levels for which the consumer NPV is positive, using a 7-percent discount rate. TSL 5 consists of the max-tech efficiency levels, which are also the efficiency levels for which the consumer NPV is positive, using a 3-percent discount rate.

TABLE V.2—TRIAL STANDARD LEVELS FOR STANDARD-SIZE FREEZERS

Trial standard level	Upright freezers		Chest freezers
	Product class 9	Product class 8	Product classes 10 and 10A
	Efficiency Level (% less than baseline energy use)		
1	3 (20)	3 (20)	3 (20)
2	5 (30)	4 (25)	*4 (25)
3	6 (35)	5 (30)	5 (30)
4	7 (40)	6 (35)	6 (35)
5	8 (44)	7 (41)	7 (41)

* Level for product class 10A is 30%.

Table V.3 presents the TSLs and the corresponding product class efficiencies for compact refrigeration products. TSL 1 consists of efficiency levels that meet current ENERGY STAR criteria for some compact refrigerators (product classes 11, 11A, 12 and 13A), and efficiency levels that are 10 percent below the baseline energy use for other compact refrigerators (product classes 13, 14, and 15) and compact freezers (product classes 16, 17, and 18). TSL 2 consists of the levels recommended in the Joint Comments. TSL 3 consists of the highest efficiency levels for which the consumer NPV is positive, using both a 3-percent and a 7-percent discount rate. TSL 4 consists of incrementally higher efficiency levels than TSL 3. TSL 5 consists of the max-tech efficiency levels.

TABLE V.3—TRIAL STANDARD LEVELS FOR COMPACT REFRIGERATION PRODUCTS

Trial standard level	Compact refrigerators and refrigerator-freezers		Compact freezers
	Product classes 11, 11A, 12, and 13A	Product classes 13, 14, and 15	Product classes 16, 17, 18
	Efficiency Level (% less than baseline energy use)		
1	3 (20)	1 (10)	1 (10)
2	4 (25)	*2 (15)	1 (10)
3	5 (30)	2 (15)	2 (15)
4	7 (40)	4 (25)	4 (25)

TABLE V.3—TRIAL STANDARD LEVELS FOR COMPACT REFRIGERATION PRODUCTS—Continued

Trial standard level	Compact refrigerators and refrigerator-freezers		Compact freezers
	Product classes 11, 11A, 12, and 13A	Product classes 13, 14, and 15	Product classes 16, 17, 18
5	10 (59)	7 (42)	7 (42)

* Level for product class 14 is 20%.

Table V.4 presents the TSLs and the corresponding product class efficiencies for built-in refrigeration products. TSL 1 consists of the efficiency levels that are 10 percent better than the current standard. TSL 2 consists of the highest efficiency levels for which the consumer NPV is positive, using both a 3-percent and a 7-percent discount rate. TSL 3 consists of the levels recommended in the Joint Comments. TSL 4 consists of incrementally higher efficiency levels than TSL 3. TSL 5 consists of the max-tech efficiency levels.

TABLE V.4—TRIAL STANDARD LEVELS FOR BUILT-IN REFRIGERATION PRODUCTS

Trial standard level	Built-in all-refrigerators	Built-in bottom-mount refrigerator-freezers	Built-in side-by-side refrigerator-freezers	Built-in upright freezers
	Product class 3A–BI	Product classes 5–BI and 5I–BI	Product classes 4–BI, 4I–BI and 7–BI	Product class 9–BI
	Efficiency Level (% less than baseline energy use)			
1	1 (10)	1 (10)	1 (10)	1 (10)
2	2 (15)	2 (15)	1 (10)	3 (20)
3	3 (20)	2 (15)	3 (20)	4 (25)
4	4 (25)	4 (25)	3 (20)	4 (25)
5	5 (29)	5 (27)	4 (22)	5 (27)

B. Economic Justification and Energy Savings

1. Economic Impacts on Individual Consumers

a. Life-Cycle Cost and Payback Period

Consumers affected by new or amended standards usually experience higher purchase prices and lower operating costs. DOE evaluates these impacts on individual consumers by calculating changes in life-cycle costs (LCC) and the payback period (PBP) associated with potential standard levels. Using the approach described in section IV.F, DOE calculated the LCC impacts and PBPs for the efficiency levels considered in this rulemaking. For each representative product class, DOE's analysis provided several outputs for each TSL, which are reported in Table V.5 through Table V.15. Each table includes the average total LCC and the average LCC savings, as well as the fraction of product consumers for which the LCC will either decrease (net benefit), increase (net cost), or exhibit no change (no impact) relative to the product purchased in the base case. The last output in the tables is the median PBP for the consumer purchasing a design that complies with a given TSL. The results for each TSL are relative to the energy efficiency distribution in the base case (no amended standards). DOE based the LCC and PBP analyses on energy consumption under conditions of actual product use, whereas it based the rebuttable presumption PBPs on energy consumption under conditions prescribed by the DOE test procedure, as required by EPCA. (42 U.S.C. 6295(o)(2)(B)(iii))

TABLE V.5—PRODUCT CLASS 3, TOP-MOUNT REFRIGERATOR-FREEZERS: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of households that experience			Median
						Net cost	No impact	Net benefit	
	Baseline	$543	$750	$1,293					
	1 (10)	555	696	1,251	$42	1.7%	21.6%	76.8%	2.7
	2 (15)	563	668	1,231	62	2.3	17.4	80.3	3.0
1, 2	3 (20)	624	640	1,264	29	42.3	8.1	49.6	9.2
3	4 (25)	667	605	1,272	22	54.9	0.0	45.1	10.9
4	5 (30)	759	571	1,330	−37	73.8	0.0	26.2	15.4
5	6 (36)	892	535	1,427	−133	85.4	0.0	14.6	20.5

TABLE V.6—PRODUCT CLASS 5, BOTTOM-MOUNT REFRIGERATOR-FREEZERS: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of households that experience			Median
						Net cost	No impact	Net benefit	
	Baseline ...	$945	$917	$1,862					
	1 (10)	947	908	1,856	$8	0.2	86.9	12.9	2.5
	2 (15)	949	904	1,853	12	0.3	86.9	12.9	2.7
1, 2, 3	3 (20)	955	892	1,847	19	4.5	67.8	27.7	4.9
	4 (25)	1,020	853	1,873	−8	75.0	0.0	25.0	17.5
4	5 (30)	1,127	817	1,945	−79	88.2	0.0	11.8	24.8
5	6 (36)	1,276	770	2,046	−180	93.3	0.0	6.7	29.0

TABLE V.7—PRODUCT CLASS 7, SIDE-BY-SIDE REFRIGERATOR-FREEZERS WITH THROUGH-THE-DOOR ICE SERVICE: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of households that experience			Median
						Net cost	No impact	Net benefit	
	Baseline ...	$1,152	$1,178	$2,330					
	1 (10)	1,155	1,156	2,310	$20	0.1	78.1	21.8	1.5
	2 (15)	1,160	1,132	2,292	40	0.5	51.7	47.8	2.4
1	3 (20)	1,179	1,100	2,279	53	7.3	36.9	55.8	4.8
2, 3	4 (25)	1,244	1,051	2,295	37	50.8	0.0	49.2	10.9
4	5 (30)	1,385	1,002	2,387	−55	77.7	0.0	22.3	18.6
5	6 (33)	1,496	970	2,466	−134	86.2	0.0	13.9	22.6

TABLE V.8—PRODUCT CLASS 9, UPRIGHT FREEZERS: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of households that experience			Median
						Net cost	No impact	Net benefit	
	Baseline ...	$560	$969	$1,529					
	1 (10)	571	897	1,468	$62	1.7	19.9	78.5	2.3
	2 (15)	592	852	1,445	85	9.7	1.7	88.6	4.3
1	3 (20)	611	807	1,418	111	11.7	0.6	87.8	4.8
	4 (25)	640	760	1,401	128	16.2	0.4	83.4	5.8
2	5 (30)	667	714	1,381	148	18.7	0.2	81.1	6.2
3	6 (35)	727	673	1,399	130	30.8	0.0	69.2	8.4
4	7 (40)	810	632	1,442	87	45.0	0.0	55.0	11.0
5	8 (44)	994	599	1,593	−63	70.2	0.0	29.8	17.4

TABLE V.9—PRODUCT CLASS 10, CHEST FREEZER: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of households that experience			Median
						Net cost	No impact	Net benefit	
	Baseline ...	$407	$578	$985					
	1 (10)	414	533	946	$38	0.0	16.2	83.8	2.1
	2 (15)	424	506	930	55	0.7	1.2	98.1	3.4
1	3 (20)	436	479	915	70	1.6	0.2	98.2	4.2
2	4 (25)	483	451	935	50	25.8	0.2	74.0	8.7
3	5 (30)	504	424	928	56	28.3	0.2	71.5	9.1
4	6 (35)	565	404	968	17	53.5	0.0	46.5	13.1
5	7 (41)	687	369	1,055	−71	79.0	0.0	21.0	19.3

TABLE V.10—PRODUCT CLASS 11, COMPACT REFRIGERATORS: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of households that experience			
						Net cost	No impact	Net benefit	Median
	Baseline ...	$146	$165	$311					
	1 (10)	151	150	301	$10	11.9	1.6	86.5	2.0
	2 (15)	156	142	297	13	17.0	1.4	81.6	2.3
1	3 (20)	162	134	296	15	24.4	1.4	74.2	2.8
2	4 (25)	174	126	300	10	43.3	1.0	55.7	3.9
3	5 (30)	184	118	302	8	50.6	0.9	48.5	4.4
	6 (35)	212	111	324	−13	77.2	0.0	22.8	6.7
4	7 (40)	221	103	324	−13	76.1	0.0	23.9	6.5
	8 (45)	255	97	351	−41	87.4	0.0	12.6	8.6
	9 (50)	274	88	362	−51	88.8	0.0	11.2	9.0
5	10 (59)	341	75	416	−105	93.8	0.0	6.2	11.6

TABLE V.11—PRODUCT CLASS 18, COMPACT FREEZERS: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of households that experience			
						Net cost	No impact	Net benefit	Median
	Baseline ...	$202	$200	$402					
1, 2	1 (10)	209	182	391	$11	9.9	4.7	85.4	2.5
3	2 (15)	223	172	395	7	40.6	0.0	59.4	4.6
	3 (20)	268	163	430	−29	91.1	0.0	8.9	10.9
4	4 (25)	279	153	432	−30	88.5	0.0	11.5	10.0
	5 (30)	312	146	458	−57	94.6	0.0	5.4	12.6
	6 (35)	320	137	457	−55	92.7	0.0	7.3	11.5
5	7 (42)	399	124	523	−121	97.8	0.0	2.3	15.9

TABLE V.12—PRODUCT CLASS 3A–BI, BUILT-IN ALL-REFRIGERATORS: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of households that experience			
						Net cost	No impact	Net benefit	Median
	Baseline ...	$4,676	$776	$5,451					
1	1 (10)	4,683	721	5,404	$47	0.3	22.6	77.2	1.6
2	2 (15)	4,696	693	5,388	63	2.6	18.4	79.0	3.0
3	3 (20)	4,826	660	5,486	−34	69.1	9.1	21.9	15.9
4	4 (25)	5,017	629	5,646	−195	94.5	0.0	5.5	29.7
5	5 (29)	5,162	607	5,769	−318	97.2	0.0	2.8	36.7

TABLE V.13—PRODUCT CLASS 5–BI, BUILT-IN BOTTOM-MOUNT REFRIGERATOR-FREEZERS: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of Households that experience			
						Net cost	No impact	Net benefit	Median
	Baseline	$5,386	$908	$6,294					
1	1 (10)	5,390	899	6,289	$7	1.2	87.1	11.7	4.4
2, 3	2 (15)	5,401	906	6,307	0	8.2	87.0	4.8	12.9
	3 (20)	5,435	892	6,328	−21	29.3	67.5	3.3	26.2
4	4 (25)	5,607	864	6,471	−164	99.0	0.0	1.1	62.8
5	5 (27)	5,706	845	6,551	−244	99.3	0.0	0.7	61.8

TABLE V.14—PRODUCT CLASS 7–BI, BUILT-IN SIDE-BY-SIDE REFRIGERATOR-FREEZERS WITH THROUGH-THE-DOOR ICE SERVICE: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of Households that experience			
						Net cost	No impact	Net benefit	Median
	Baseline	$7,887	$1,293	$9,180					
1, 2	1 (10)	7,902	1,276	9,178	$7	8.0	78.5	13.5	8.7
	2 (15)	7,947	1,261	9,208	−18	39.8	52.4	7.8	21.0
3, 4	3 (20)	8,078	1,228	9,306	−116	60.2	37.2	2.5	36.7
5	4 (22)	8,197	1,211	9,409	−219	98.8	0.0	1.2	60.0

TABLE V.15—PRODUCT CLASS 9–BI, BUILT-IN UPRIGHT FREEZERS: LCC AND PBP RESULTS

Trial standard level	Efficiency level (% less than baseline energy use)	Life-cycle cost 2009$			Life-cycle cost savings				Payback period (years)
		Installed cost	Discounted operating cost	LCC	Average savings 2009$	% of Households that experience			
						Net cost	No impact	Net benefit	Median
	Baseline	$4,383	$947	$5,330					
1	1 (10)	4,400	876	5,276	$54	4.3	19.9	75.8	3.4
	2 (15)	4,415	834	5,249	82	8.6	1.7	89.7	4.3
2	3 (20)	4,509	797	5,306	24	53.1	0.6	46.3	12.8
3, 4	4 (25)	4,657	752	5,409	−78	78.2	0.5	21.3	21.1
5	5 (27)	4,770	730	5,500	−169	87.1	0.3	12.6	26.8

b. Consumer Subgroup Analysis

As described in section IV.H, DOE determined the impact of the considered TSLs on low-income households and senior-only households. DOE did not estimate impacts for compact refrigeration products because the household sample sizes were not large enough to yield meaningful results.

Table V.16 through Table V.18 compare the average LCC savings at each efficiency level for the two consumer subgroups with the average LCC savings for the entire sample for each representative product class. In general, the average LCC savings for low-income households and senior-only households at the considered efficiency levels are not substantially different from the average for all households. Chapter 11 of the NOPR TSD presents the complete LCC and PBP results for the two subgroups.

TABLE V.16—STANDARD-SIZE REFRIGERATOR-FREEZERS: COMPARISON OF AVERAGE LCC SAVINGS FOR CONSUMER SUBGROUPS AND ALL HOUSEHOLDS

Efficiency level (% less than baseline energy use)	Top-mount refrigerator-freezers			Bottom-mount refrigerator-freezers			Side-by-side refrigerator-freezers		
	Product class 3			Product class 5			Product class 7		
	Senior	Low-income	All	Senior	Low-income	All	Senior	Low-income	All
1 (10)	$40	$44	$42	$53	$9	$8	$20	$21	$20
2 (15)	58	65	61	77	13	12	40	41	40
3 (20)	22	32	28	90	20	19	53	55	53
4 (25)	12	25	20	62	−7	−8	37	36	37
5 (30)	−49	−33	−38	−2	−78	−79	−55	−59	−55
6 (36/36/33)	−149	−129	−135	−29	−180	−180	−134	−140	−134

TABLE V.17—STANDARD-SIZE FREEZERS: COMPARISON OF AVERAGE LCC SAVINGS FOR CONSUMER SUBGROUPS AND ALL HOUSEHOLDS

Efficiency level (% less than baseline energy use)	Upright freezers			Chest freezers		
	Product class 9			Product class 10		
	Senior	Low-income	All	Senior	Low-income	All
1 (10)	$62	$58	$61	$38	$37	$38
2 (15)	85	79	83	55	53	55
3 (20)	111	102	109	70	68	70
4 (25)	128	117	126	50	47	50
5 (30)	148	134	146	56	53	56
6 (35)	130	113	127	17	12	17
7 (40/41)	87	68	84	−71	−76	−71
8 (44)	−63	−85	−71			

TABLE V.18—BUILT-IN REFRIGERATION PRODUCTS: COMPARISON OF AVERAGE LCC SAVINGS FOR CONSUMER SUBGROUPS AND ALL HOUSEHOLDS

Efficiency level (% less than baseline energy use)	Built-in all refrigerators			Built-in bottom-mount refrigerator-freezers			Built-in side-by-side refrigerator-freezers			Built-in upright freezers		
	Product class 3A–BI			Product class 5–BI			Product class 7–BI			Product class 9–BI		
	Senior	Low-income	All	Senior	Low-income	All	Senior	Low-income	All	Senior	Low-income	All
1 (10)	$44	$49	$47	$6	$7	$7	$7	$6	$7	$54	$50	$54
2 (15)	58	65	63	−3	−1	0	−18	−24	−18	82	74	82
3 (20)	−47	−37	−34	−26	−24	−21	−116	−135	−116	24	13	24
4 (25)	−211	−198	−195	−173	−167	−164	−219	−239	−219	−78	−93	−78
5 (29/27/22/27)	−337	−321	−318	−255	−247	−244	.....	.....	.....	−169	−185	−169

c. Rebuttable Presumption Payback

As discussed in section III.D.2, EPCA provides a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. In calculating a rebuttable presumption payback period for the considered standard levels, DOE used discrete values rather than distributions for input values, and, as required by EPCA, based the energy use calculation on the DOE test procedures for refrigeration products. As a result, DOE calculated a single rebuttable presumption payback value, and not a distribution of payback periods, for each efficiency level. Tables V.19 through V.22 present the average rebuttable presumption payback periods for those efficiency levels where the increased purchase cost for a product that meets a standard at that level is less than three times the value of the first-year energy savings resulting from the standard.

TABLE V.19—STANDARD-SIZE REFRIGERATOR-FREEZERS: EFFICIENCY LEVELS WITH REBUTTABLE PAYBACK PERIOD LESS THAN THREE YEARS

Product class 3: Top-mount refrigerator-freezer		Product class 5: Bottom-mount refrigerator-freezer		Product class 7: Side-by-side refrigerator-freezer with TTD*	
Efficiency level (% less than baseline energy use)	PBP years	Efficiency level (% less than baseline energy use)	PBP years	Efficiency level (% less than baseline energy use)	PBP years
1 (10)	2.4	1 (10)	2.1	1 (10)	1.4
2 (15)	2.6	2 (15)	2.4	2 (15)	1.7
	.....	.....	.....	3 (20)	2.9

* Through-the-door ice service.

TABLE V.20—STANDARD-SIZE FREEZERS: EFFICIENCY LEVELS WITH REBUTTABLE PAYBACK PERIOD LESS THAN THREE YEARS

Product class 9: upright freezer		Product class 10: chest freezer	
Efficiency level (% less than baseline energy use)	PBP years	Efficiency level (% less than baseline energy use)	PBP years
1 (10)	1.9	1 (10)	1.8
	.....	2 (15)	2.7

TABLE V.21—COMPACT REFRIGERATION PRODUCTS: EFFICIENCY LEVELS WITH REBUTTABLE PAYBACK PERIOD LESS THAN THREE YEARS

Product class 11: compact refrigerator		Product class 18: compact freezer	
Efficiency level (% less than baseline energy use)	PBP years	Efficiency level (% less than baseline energy use)	PBP years
1 (10)	1.8	1 (10)	2.0
2 (15)	2.1	.....	.....
3 (20)	2.7	.....	.....

TABLE V.22—BUILT-IN REFRIGERATION PRODUCTS: EFFICIENCY LEVELS WITH REBUTTABLE PAYBACK PERIOD LESS THAN THREE YEARS

Product class 3A–BI: built-in all-refrigerator		Product class 5–BI: built-in bottom-mount refrigerator-freezer		Product class 7–BI: built-in side-by-side refrigerator-freezer with TTD *		Product class 9–BI: built-in upright freezer	
Efficiency level (% less than baseline energy use)	PBP years	Efficiency level (% less than baseline energy use)	PBP years	Efficiency level (% less than baseline energy use)	PBP years	Efficiency level (% less than baseline energy use)	PBP years
1 (10)	1.5	1 (10)	.....	1 (10)	.....	1 (10)	2.7
2 (15)	2.6	.....	.....	.....	.....	.....	.....

* Through-the-door ice service.

While DOE examined the rebuttable-presumption criterion, it considered whether the standard levels considered for today's rule are economically justified through a more detailed analysis of the economic impacts of these levels pursuant to 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification).

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of amended energy conservation standards on manufacturers of residential refrigeration products. The section below describes the expected impacts on manufacturers at each potential TSL.

a. Cash-Flow Analysis Results

The tables below depict the financial impacts on manufacturers (represented by changes in INPV) and the conversion costs DOE estimates manufacturers would incur at each TSL. DOE shows four sets of results, corresponding to the four sets of TSLs considered in this rulemaking. Each set of TSLs reflect the impacts on manufacturers of a certain group of product classes.

The INPV results refer to the difference in industry value between the base case and the standards case, which DOE calculated by summing the discounted industry cash flows from the base year (2010) through the end of the analysis period. The discussion also notes the difference in cash flow between the base case and the standards case in the year before the compliance date of potential amended energy conservation standards. This figure provides a proxy for the magnitude of the required conversion costs, relative to the cash flow generated by the industry in the base case. In its discussion of the MIA results, DOE frequently references the common technology options that achieve the efficiencies required by a given TSL in the relevant representative product classes. To find to a complete description of technology options and the required efficiencies at each TSL, see section IV.B.2 of today's NOPR and appendix 5–A of the TSD.

Each set of results below shows two tables of INPV impacts: The first table reflects the lower (less severe) bound of impacts and the second represents the upper bound. To evaluate this range of cash-flow impacts on the residential refrigeration products industry, DOE modeled two different scenarios using different markup assumptions. These assumptions correspond to the bounds of a range of market responses that DOE anticipates could occur in the standards case. Each scenario results in a unique set of cash flows and corresponding industry value at each TSL.

To assess the lower (less severe) end of the range of potential impacts, DOE modeled the flat markup scenario. The flat markup scenario assumes that in the standards case manufacturers would be able to pass the higher production costs required for more efficient products on to their customers. Specifically, the industry would be able to maintain its average base-case gross margin, as a percentage of revenue, despite higher product costs. In general, the larger the product price increases, the less likely manufacturers are to achieve the cash flow from operations calculated in this scenario because the less likely it is that manufacturers would be able to fully markup these larger cost increases.

Through its discussions with manufacturers, DOE found that overall profit is driven more by bundles of product features, such as stainless steel exteriors, ice dispensers, and digital displays, than by energy efficiency characteristics. In other words, more efficient products command higher prices, but these prices are driven by the many other features that are also bundled with efficiency. However, the overall profit margin percentage does widely vary even if the dollar profit per unit increases for products with these additional features. Manufacturers are skeptical that customers would accept higher prices for increased energy efficiency because it does not command higher margins in the current market. Under such a scenario, it follows that the large retailers that compose the relatively concentrated customer base of the industry would not accept manufacturers fully passing through the additional cost of improved efficiency because consumers would be wary of higher prices without additional features. Therefore, to assess the higher (more severe) end of the range of potential impacts, DOE modeled the preservation of operating profit markup scenario in which higher energy conservation standards result in lower manufacturer markups. This scenario models manufacturers' concerns that the higher costs of more efficient technology would harm profitability if the full cost increases cannot be passed on. The scenario represents the upper end of the range of potential impacts on manufacturers because no additional operating profit is earned on the investments required to meet the proposed amended energy conservation standards, while higher production costs erode profit margins and result in lower cash flows from operations.

DOE used the main NIA shipment scenario for both the lower- and higher-bound MIA scenarios that were used to characterize the potential INPV impacts. The shipment forecast is an important driver of the INPV results below. The main NIA shipment scenario includes a price elasticity effect, meaning higher prices in the standards case result in lower shipments. Lower shipments also reduce industry revenue, and, in turn, INPV.

i. Cash-Flow Analysis Results for Standard-Size Refrigerator-Freezers

TABLE V.23—MANUFACTURER IMPACT ANALYSIS FOR STANDARD-SIZE REFRIGERATOR-FREEZERS—FLAT MARKUP SCENARIO

	Units	Base case	Trial standard level				
			1	2	3	4	5
INPV	(2009$ millions)	3,173	3,088	2,997	2,886	2,530	2,344
Change in INPV	(2009$ millions)		(84.8)	(175.9)	(287.5)	(643.0)	(828.9)
	(%)		−2.7%	−5.5%	−9.1%	−20.3%	−26.1%
Product Conversion Costs	(2009$ millions)		153	197	229	348	406
Capital Conversion Costs	(2009$ millions)		229	393	620	1,405	2,013
Total Conversion Costs.	(2009$ millions)		382	590	848	1,753	2,419

TABLE V.24—MANUFACTURER IMPACT ANALYSIS FOR STANDARD-SIZE REFRIGERATOR-FREEZERS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	Base case	Trial standard level				
			1	2	3	4	5
INPV	(2009$ millions)	3,173	2,871	2,713	2,511	1,676	1,018
Change in INPV	(2009$ millions)		(301.7)	(459.8)	(662.1)	(1,496.8)	(2,154.7)
	(%)		−9.5%	−14.5%	−20.9%	−47.2%	−67.9%
Product Conversion Costs	(2009$ millions)		153	197	229	348	406
Capital Conversion Costs	(2009$ millions)		229	393	620	1,405	2,013
Total Conversion Costs.	(2009$ millions)		382	590	848	1,753	2,419

TSL 1 represents the current ENERGY STAR level for standard-size refrigerator-freezers or a 20 percent reduction in measured energy consumption over the current energy conservation standards for the analyzed product class 3 (automatic defrost with top-mounted freezer without through-the-door ice service), product class 5 (automatic defrost with bottom-mounted freezer without through-the-door ice service), and product class 7 (automatic defrost with side-mounted freezer with through-the-door ice service). At TSL 1, DOE estimates impacts on INPV to range −$84.8 million to -$301.7 million, or a change in INPV of −2.7 percent to −9.5 percent. At this proposed level, industry free cash flow is estimated to decrease by approximately 64.8 percent to $71.3 million, compared to the base-case value of $202.6 million in the year leading up to the proposed energy conservation standards.

The INPV impacts at TSL 1 are relatively minor, in part because the vast majority of manufacturers produce ENERGY STAR units in significant volumes, particularly for product class 5 and 7. Approximately 42 percent of product class 7 shipments and 47 percent of product class 5 shipments currently meet this TSL. By contrast, the vast majority of product class 3 shipments are baseline units. Additionally, most of the design options DOE analyzed at this proposed level are one-for-one component swaps, including more efficient compressors and brushless DC condenser and evaporator fan motors, which require only modest changes to the manufacturing process at TSL 1. As such, DOE estimated total product conversion costs of $153 million and capital conversion costs of $229 million.

While substantial on a nominal basis, the total conversion costs are relatively low compared to the industry value of $3.2 billion. The total conversion costs at TSL 1 are mostly driven by the design options that manufacturers could use to improve the efficiency of the smaller-sized units of the product classes analyzed. For example, the analyzed design options for the 22 cubic foot product class 7 unit included a VIP in the freezer door, while the 26 cubic foot product class 7 unit only analyzed less costly component swaps. VIP implementation would require significant capital and product conversion costs because additional production steps are required to hold and bind each panel in its location before the product is foamed. Each additional step requires more equipment to lengthen production lines and, because of lower throughput, more production lines for each manufacturer to maintain similar shipment volumes. Some manufacturers have experience with VIPs, but DOE expects substantial engineering and testing resources would be required for their use in new platforms and/or at higher production volumes.

Similarly, the 16 cubic foot product class 3 unit uses a variable speed compressor as a design option. While not a capital intensive solution, variable speed compressors would require substantial engineering time to integrate the complex component, especially if electronic control systems would also be required. Because these changes are more complex than the other analyzed design options, more than three-quarters of the conversion costs for TSL 1 are attributable to the use of the VIPs and variable speed compressors in the smaller-volume product class 7 and product class 3 units, respectively.

The flat markup scenario shows slightly negative impacts at TSL 1, indicating that the outlays for conversion costs marginally outweigh any additional profit earned on incrementally higher variable costs. On a shipment-weighted basis, the average MPC for standard-size refrigerator-freezers increases by 10 percent at TSL 1. These small component cost changes are not significant enough to fully recoup these investments even if manufacturers earn additional profit on these costs, as the flat markup scenario assumes. Hence, there is a slight negative impact, even in the upper-bound scenario, at TSL 1.

The efficiency requirements for product class 3 and product class 5 refrigerator-freezers are the same at TSL 2 as TSL 1. However, the efficiency requirements for product class 7 increase to a 25 percent reduction in measured energy consumption from current energy conservation standards. DOE estimates the INPV impacts at TSL 2 range from −$175.9 million to −$459.8 million, or a change in INPV of −5.5 percent to −14.5 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately 102.8 percent to −$5.7 million, compared to the base-case value of $202.6 million in the year leading up to the proposed energy conservation standard.

The additional impacts at TSL 2 relative to TSL 1 result from the further improvements manufacturers must make to product class 7 refrigerator-freezers to achieve a 25 percent energy reduction, as very few shipments of product class 7 currently exceed the ENERGY STAR level. Specifically, for the 22-cubic foot product, the design options DOE analyzed include a variable speed compressor and a VIP in the freezer cabinet, instead of the door as in TSL 1. For the 26-cubic foot product class 7 unit, the design options analyzed include a VIP in the freezer door in addition to additional component swaps and the component swaps needed to meet TSL 1. Total conversion costs increase by $208 million compared to TSL 1, which is largely driven by the initial use of VIPs in the 26-cubic foot product class 7 unit. Besides these specific changes to side-by-side units, at TSL 2 most production lines of standard-size refrigerator-freezers do not use of VIPs or other very costly components, mitigating some of the disruption to current facilities. Consequently, the INPV impacts, while greater than at TSL 1, are still relatively moderate compared to the value of the industry.

At TSL 2, the INPV in the flat markup is lower than at TSL 1, which means the additional conversion costs to add more VIPs leaves manufacturers worse off even if they can earn additional profit on these costly components. In the preservation of operating profit markup scenario, the industry earns no additional profit on this greater investment, lowering cash flow from operations in the standards case and resulting in greater INPV impacts.

The efficiency requirements for product class 5 and product class 7 refrigerator-freezers are the same at TSL 3 as TSL 2. However, the efficiency requirements for product class 3 increase to a 25 percent reduction in measured energy consumption from current energy conservation standards. TSL 3 represents a 25 percent reduction in measured energy consumption over the current energy conservation standards both product class 3 and product class 7. In addition, TSL 3 represents a 20 percent reduction in measured energy consumption for the unanalyzed product classes 1, 1A, and 2. DOE estimates the INPV impacts at TSL 3 to range from −$287.5 million to −$662.1 million, or a change in INPV of −9.1 percent to −20.9 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately 151.6 percent to −$104.5 million, compared to the base-case value of $202.6 million in the year leading up to the standards.

The additional negative impacts on industry cash flow result from the changes to product class 3 refrigerator-freezers to reach a 25 percent reduction in energy use (side-by-side products met this proposed level at TSL 2). Specifically, the design options DOE analyzes at TSL 3 for 16 cubic foot top-mount refrigerator-freezers include the use of VIPs for the first time (in the freezer cabinet), in addition to the component swaps discussed above. In total, DOE estimates product conversion costs of $229 million and capital conversion costs of $620 million at TSL 3. The high cost to purchase new production equipment and the large engineering effort to manufacture new platforms for these smaller-sized product class 3 units drive the vast majority of this additional $258 million in conversion costs that DOE estimates manufacturers would incur at TSL 3. Because the smaller size top-mounts account for a large percentage of total shipments, the production equipment necessary to implement new platforms for these products is costly.

While production of units meeting TSL 3 is fairly limited, several manufacturers have introduced products that meet this proposed level in response to Federal production tax credits. This experience mitigates some of the product conversion costs by giving manufacturers some experience with the newer technologies. However, the more severe impacts at TSL 3, relative to TSL 2, are due to the incremental outlays for conversion costs to make the changes described above. In particular, any experience with VIPs on some products does not lower the substantial capital conversion necessary to purchase production equipment necessary to manufacture products that are substantially different from existing products.

As mentioned above, the preservation of operating profit markup scenario assumes no additional profit is earned on the higher production costs, which lower profit margins as a percentage of revenue and leads to worse impacts on INPV. In the flat markup scenario, the impact of the investments is mitigated by the assumption that manufacturers can earn a similar profit margin as a percentage of revenues on their higher variable costs. At TSL 3 MPCs increase by an average of 16 percent over the base case, leading to additional per-unit profit in this scenario. However, the magnitude of the conversion investments still leads to negative INPV impacts even if additional profit is earned on the incremental manufacturing costs. The lower industry shipments driven by the relative price elasticity assumption account for approximately 19 percent of the impact in the flat markup scenario.

TSL 4 represents a 30 percent reduction in measured energy consumption over the current energy conservation standards for product class 3, product class 5, and product class 7. DOE estimates the INPV impacts at TSL 4 to range from −$643.0 million to −$1,496.8 million, or a change in INPV of −20.3 percent to −47.2 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately a factor of 3.2 to −$449.6 million, compared to the base-case value of $202.6 million in the year leading up to the proposed energy conservation standards.

At TSL 4, significant changes to the manufacturing process are necessary for all refrigerator-freezers. A 30 percent reduction in energy consumption is the max available top-mount on the market; the maximum available side-by-side and bottom-mount only slightly exceed a 30 percent reduction. The design options DOE analyzed for all standard-size products—with the exception of the 25 cubic foot product class 5 unit—use multiple VIPs in the fresh food compartment, freezer doors, and cabinets to reach 30 percent efficiency level. The design options also include the use of variable speed compressors for all units analyzed except the 21 cubic foot product class 3 unit. These product changes substantially increase the variable costs across nearly all platforms at this TSL.

While products that meet the efficiency requirements of TSL 4 are not in widespread production, several manufacturers produce units at these efficiencies due to tax credit incentives. However, at TSL 4 most manufacturers expect to completely redesign existing production lines if the proposed energy

conservation standards were set at levels that necessitated these changes across most or all of their products. Manufacturers would need to purchase injection molding equipment, cabinet bending equipment, and other equipment for interior tooling as they would need to create new molds for these production lines. These changes drive DOE's estimate of the large product and capital conversion costs at TSL 4 ($348 million and $1,405 million, respectively). The significant incremental investment relative to TSL 3 results, in large part, from the design option of adding VIPs to the 21 cubic foot analyzed product class 3 unit. This top-mounted refrigerator-freezer represents a substantial portion of the market and manufacturers would have to completely redesign these platforms.

As a result of the large investment necessary to meet this proposed level, some manufacturers could move production to Mexico or other lower-labor-costs countries to achieve cost savings for labor expenditures. (More information on employment impacts is provided in section V.B.2.b.) In addition to the large capital conversion costs, the shipment-weighted average MPC increases by approximately 36 percent at TSL 4 compared to the base case. However, the magnitude of the conversion costs at TSL 4 are so large that even if manufacturers can reap additional profit from these higher product costs (as in the flat markup scenario), they would still be substantially impacted, as shown by the negative INPV results in the flat markup scenario. Additionally, the 36 percent increase in MPC drives shipments lower due to the price elasticity. Lower industry volume due to the decline in shipments accounts for approximately one-quarter of the change in industry value in the flat markup scenario. The large, negative impact on INPV is even greater under the preservation of operating profit markup scenario due to the inability to pass on the higher costs of expensive design options such as variable speed compressors and VIPs.

TSL 5 represents max tech for all standard-size refrigerator-freezers. The max-tech level corresponds to reductions in measured energy consumption of 36 percent, 36 percent, and 33 percent over the current energy conservation standards for product class 3, product class 5, and product class 7, respectively. DOE estimates the INPV impacts at TSL 5 to range from −$828.9 million to −$2,154.7 million, or a change in INPV of −26.1 percent to −67.9 percent. At this proposed level, the industry cash flow is estimated to decrease by a factor of approximately 4.5 to −$707.8 million, compared to the base-case value of $202.6 million in the year leading up to the proposed energy conservation standards.

No products that meet TSL 5 are currently offered on the U.S. market. At TSL 5, the changes required to meet this proposed level are similar to those at TSL 4, as complete redesigns of all platforms would be required.TSL 5 requires much more extensive use of VIPs, however. The higher conversion costs at TSL 5 are primarily due to the use of VIPs in additional locations in the door, cabinet and freezer, whereas at TSL 4 some of the analyzed design options of the larger-sized units included limited or no VIP use. This would require manufacturers to further lengthen assembly lines and even modify or move their entire facilities, driving the $2,419 million conversion cost estimate at this proposed level. As with TSL 4, at TSL 5 some manufacturers could elect to move production out of the U.S. to offset some of the addition product costs. At TSL 5, DOE estimates MPCs increase by approximately 58 percent compared to the base case. Similar to TSL 4, this substantially reduces shipments due to the price elasticity effect and exacerbates the industry impacts in both markup scenarios.

As with other TSLs, the impact on INPV is mitigated under the flat markup scenario because manufacturers are able to fully pass on the large increase in MPC to consumers, thereby increasing manufacturers' gross profit in absolute terms. However, even assuming manufacturers could earn the same gross margin percentage per unit on those higher costs, the capital and product conversion costs cause negative INPV impacts, as shown by the 26.15 percent decline in INPV in the flat markup scenario. This large impact even in the lower bound scenario demonstrates that the large conversion costs to redesign all existing platforms results in substantial harm even if manufacturers earn a historical margin on these additional costs. Due to the extremely large cost increases at the max-tech level, it is more unlikely at TSL 5 that manufacturers could fully pass through the increase production costs. If margins are impacted, TSL 5 would result in a substantial INPV loss under this scenario.

ii. Cash-Flow Analysis Results for Standard-Size Freezers

TABLE V.25—MANUFACTURER IMPACT ANALYSIS FOR STANDARD-SIZE FREEZERS—FLAT MARKUP SCENARIO

	Units	Base case	Trial standard level				
			1	2	3	4	5
INPV	(2009$ millions)	403	378	292	308	344	300
Change in INPV	(2009$ millions)		(24.9)	(110.6)	(94.5)	(59.0)	(102.4)
	(%)		−6.2%	−27.5%	−23.5%	−14.6%	−25.4%
Product Conversion Costs	(2009$ millions)		22	51	55	63	70
Capital Conversion Costs	(2009$ millions)		50	175	182	183	320
Total Conversion Costs.	(2009$ millions)		72	226	237	247	390

TABLE V.26—MANUFACTURER IMPACT ANALYSIS FOR STANDARD-SIZE FREEZERS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	Base case	Trial standard level				
			1	2	3	4	5
INPV	(2009$ millions)	403	345	217	202	184	37
Change in INPV	(2009$ millions)		(57.3)	(186.0)	(201.1)	(218.9)	(365.1)

TABLE V.26—MANUFACTURER IMPACT ANALYSIS FOR STANDARD-SIZE FREEZERS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO—Continued

	Units	Base case	Trial standard level				
			1	2	3	4	5
	(%)		−14.2%	−46.2%	−49.9%	−54.4%	−90.7%
Product Conversion Costs	(2009$ millions)		22	51	55	63	70
Capital Conversion Costs	(2009$ millions)		50	175	182	183	320
Total Conversion Costs.	(2009$ millions)		72	226	237	247	390

TSL 1 represents a 20 percent reduction in measured energy use over the current energy conservation standards for the analyzed product class 9 (upright freezers with automatic defrost) and product class 10 (chest freezers and all other freezers except compact freezers). DOE estimates the INPV impacts at TSL 1 to range from −$24.9 million to −$57.3 million, or a change in INPV of −6.2 percent to −14.2 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately 100.4 percent to −$0.1 million, compared to the base-case value of $25.7 million in the year leading up to the proposed energy conservation standards.

While products meeting TSL 1 are only currently produced in limited volumes, the changes in the manufacturing process would not require completely new platforms to meet the energy requirements at this TSL. For most standard-size freezer platforms, the design options DOE analyzed include the use of brushless DC evaporator fan motors and compressors with higher EERs. However, the design options to meet this efficiency level also include increasing door insulation thickness for all analyzed products except the 20 cubic foot product class 10 unit. Increasing door insulation thickness drives the majority of the conversion cost outlay DOE estimates manufacturers would incur at TSL 1. To increase door insulation thickness, manufacturers would need to purchase new equipment tooling equipment for their door assembly. DOE estimates that these changes would result in product conversion costs of $22 million and capital conversion costs of $50 million at TSL 1. However, the conversion costs are somewhat mitigated at TSL 1 because the design options analyzed would not change the production equipment for the cabinet.

At TSL 1, variable costs increase by approximately 10 percent relative to base case MPCs. The flat markup scenario shows less severe impacts because it assumes manufacturers can pass on these substantially higher product costs and maintain gross margin percentages. Additionally, the reduction in shipments due to the price elasticity has only a marginally negative effect at this proposed level. The relatively large conversion costs decrease industry value under both markup scenarios and account for a substantial portion of the INPV impacts especially if manufacturers are not able to earn any additional profit on the higher production costs (the preservation of operating profit scenario).

TSL 2 represents a 30 percent reduction in measured energy consumption over the current energy conservation standards for product class 9 and 25 percent for product class 10. TSL 2 also represents a 25 percent reduction in measured energy consumption for the unanalyzed product class 8 (upright freezers with manual defrost) and a 30 percent reduction for the analyzed product class 10A (chest freezers with automatic defrost). DOE estimates the INPV impacts at TSL 2 to range from −$110.6 million to −186.0 million, or a change in INPV of −27.5 percent to −46.2 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately a factor of 3.2 to −$57.5 million, compared to the base-case value of $25.7 million in the year leading up to the proposed energy conservation standards.

The vast majority of the standard-size freezer market does not currently meet the efficiency requirements at TSL 2. DOE's design options assume that, in addition to the component swaps noted above, manufacturers would increase the insulation thickness of both the door and cabinet. As a result, product redesigns are expected across most platforms, which could substantially disrupting current manufacturing processes. These changes account for the majority of DOE's estimates for total product conversion costs of $51 million and capital conversion costs of $175 million, an increase over TSL 1 of $29 million and $125 million, respectively. The magnitude of the investments, relative to the industry value, results in severe INPV impacts. Even if manufacturers are able to pass on the estimated 24 percent increase in product costs onto their customers, the large product and capital conversion costs resulting from increased insulation thickness decrease INPV. If manufacturers are not able to pass on these costs, as shown by the preservation of operating profit scenario, INPV impacts are projected to be severe.

TSL 3 represents a 35 percent reduction in measured energy use over the current energy conservation standards for product class 9 and a 30 percent reduction for product class 10. DOE estimates the INPV impacts at TSL 3 to range from −$94.5 million to −$201.1 million, or a change in INPV of −23.5 percent to −49.9 percent. At this proposed level, the industry cash flow is estimated to decrease by a factor of approximately 3.4 to −$61.3 million, compared to the base-case value of $25.7 million in the year leading up to the proposed energy conservation standards.

The efficiency requirements at TSL 3 are more stringent than the max available products in the market for product class 9 and product class 10. The impacts at TSL 3 are similar to those at TSL 2 because the design options analyzed by DOE already required platform redesigns at TSL 2. However, the additional design options analyzed at TSL 3 also include a variable speed compressor in the 14-cubic foot product class 9 unit and VIPs in the bottom wall of the 20-cubic foot product class 10 unit. These design options substantially increase the variable costs associated with these products but do not greatly change the product and capital conversion costs. The average MPC of a standard-size freezer shipped at TSL 3 is estimated to be approximately 34 percent more expensive than in the base case, leading to a 9 percent decline in shipments due

to the price elasticity assumption in 2014 alone.

The impacts at TSL 3 under the flat markup scenario become less severe than at TSL 2 because the scenario assumes manufacturers can fully pass on the added cost to consumers, while investments do not significantly increase from TSL 2 to TSL 3. However, under the preservation of operating profit markup scenario, manufacturers do not receive any extra profit on units of higher cost, resulting in worse INPV impacts at TSL 3 than at TSL 2.

TSL 4 represents a 40 percent reduction in measured energy use over the current energy conservation standards for product class 9 and a 35 percent reduction for product class 10. DOE estimates the INPV impacts at TSL 4 to range from −$59.0 million to −$218.9 million, or a change in INPV of −14.6 percent to −54.4 percent. At this proposed level, the industry cash flow is estimated to decrease by a factor of approximately 3.5 to −$64.0 million, compared to the base-case value of $25.7 million in the year leading up to the proposed energy conservation standards.

At TSL 4, the design options DOE analyzed include the addition of a variable speed compressor for the 20-cubic foot product class 9 unit, the 15-cubic foot product class 10 unit, and the 20-cubic foot product class 10 unit. For the 14 cubic foot product class 9 unit, the design options analyzed were even thicker wall cabinet insulation and the implementation of VIPs.

The relative impacts at TSL 4 are also caused by the incremental MPCs compared to the conversion costs to implement these design options. Outlays for conversion costs increase only slightly at TSL 4 (by 4 percent, compared to TSL 3) while variable costs increase substantially (by approximately 50 percent compared to the baseline) due to the addition of variable speed compressors and VIPs. Because manufacturers earn incrementally more profit on each unit at TSL 4 compared to TSL 3 in the flat markup scenario—without substantial changes to conversion costs—further declines in industry value, though still substantial, are mitigated in this scenario. However, manufacturers expressed skepticism that such large cost increases could be passed on. This view is reflected by the severely negative results in the preservation of operating profit scenario.

TSL 5 represents max tech for the standard-size freezer product classes. This TSL reflects a 44 percent reduction in measured energy use for product class 9 and a 41 percent reduction for product class 10. DOE estimates the INPV impacts at TSL 5 to range from −$102.4 million to −$365.1 million, or a change in INPV of −25.4 percent to −90.7 percent. At this proposed level, the industry cash flow is estimated to decrease by a factor of approximately 5.7 to −$120.3 million, compared to the base-case value of $25.7 million in the year leading up to the proposed energy conservation standards.

To achieve the max-tech level at TSL 5, DOE analyzed design options that include the widespread implementation of multiple VIPs on all standard-size freezers, in addition to the use of more efficient components and thicker insulation already necessary to achieve the efficiency requirements at TSL 4. DOE estimated that TSL 5 would require product and capital conversion costs of $70 million and $320 million, respectively. These large conversion costs result from the changes associated with multiple VIP implementation and wall thickness increases. In addition, DOE estimates that product costs would almost double base-case MPCs, driven by the use of variable speed compressors and VIPs in the doors and cabinet of all product lines. As a result, INPV decreases substantially from TSL 4 to TSL 5.

iii. Cash-Flow Analysis Results for Compact Refrigeration Products

TABLE V.27—MANUFACTURER IMPACT ANALYSIS FOR COMPACT REFRIGERATION PRODUCTS—FLAT MARKUP SCENARIO

	Units	Base case	Trial standard level				
			1	2	3	4	5
INPV	(2009$ millions)	200	185	169	143	170	67
Change in INPV	(2009$ millions)		(14.3)	(30.8)	(56.8)	(29.6)	(133.0)
	(%)		−7.2%	−15.4%	−28.4%	−14.8%	−66.6%
Product Conversion Costs	(2009$ millions)		15	35	41	48	67
Capital Conversion Costs	(2009$ millions)		24	46	76	71	220
Total Conversion Costs.	(2009$ millions)		39	80	118	119	287

TABLE V.28—MANUFACTURER IMPACT ANALYSIS FOR COMPACT REFRIGERATION PRODUCTS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	Base Case	Trial Standard Level				
			1	2	3	4	5
INPV	(2009$ millions)	200	168	133	101	85	(96)
Change in INPV	(2009$ millions)		(32.1)	(66.7)	(99.2)	(114.4)	(295.6)
	(%)		−16.1%	−33.4%	−49.6%	−57.3%	−148.0%
Product Conversion Costs	(2009$ millions)		15	35	41	48	67
Capital Conversion Costs	(2009$ millions)		24	46	76	71	220
Total Conversion Costs.	(2009$ millions)		39	80	118	119	287

TSL 1 represents a 20 percent reduction in measured energy use over the current energy conservation standards for product class 11 (compact refrigerators and refrigerator-freezers with manual defrost) and a 10 percent

reduction for product class 18 (compact chest freezers). DOE estimates the INPV impacts at TSL 1 to range from −$14.3 million to −$32.1 million, or a change in INPV of −7.2 percent to −16.1 percent. At this proposed level, industry cash flow is estimated to decrease by approximately 112.9 percent to −$1.5 million, compared to the base-case value of $11.9 million in the year leading up to the proposed energy conservation standards. A small percentage of product class 18 shipments currently meet this TSL, but most product class 11 shipments are baseline units.

The design options analyzed by DOE at TSL 1 assumed that more significant changes in the manufacturing process would be required for product class 11, while product class 18 would only require increased compressor efficiency. For product class 11, DOE analyzed several design options that represent component changes, such as a more efficient compressor and increased heat exchanger area, which do not have a significant impact on consumer prices or conversion costs. However, DOE also analyzed increasing door insulation thickness for product class 11, which drives the bulk of the estimated $15 million and $24 million outlays for product conversion and capital conversion costs, respectively. As described for standard-size refrigerator-freezers and standard-size freezers, increasing insulation thickness requires manufacturers to invest in injection molding equipment and other equipment for interior tooling to manufacturer products with different door dimensions. The overall impacts at TSL 1 are relatively moderate because the conversion costs are still small compared to the industry value of $200 million.

The higher production costs at TSL 1 do not have a substantial impact on INPV at TSL 1. The MPC of compact refrigeration products on a shipment-weighted basis increases 11 percent over the base case at TSL 1. The combined INPV impacts are greater under the preservation of operating profit scenario since manufacturers cannot pass on any of the added cost to consumers under that scenario, resulting in lower cash flows from operations. However, because production costs do not greatly increase at TSL 1, the impacts on INPV are relatively low under this scenario as well.

TSL 2 represents a 25 percent reduction in measured energy use over the current energy conservation standards for product class 11 and a 10 percent reduction for product class 18. TSL 2 also represents a 15 percent reduction in measured energy consumption for the analyzed product classes 13 and 15, and a 20 percent reduction for the unanalyzed product class 14. DOE estimates the INPV impacts at TSL 2 to range from −$30.8 million to −$66.7 million, or a change in INPV of −15.4 percent to −33.4 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately 230.1 percent to −$15.4 million, compared to the base-case value of $11.9 million in the year leading up to the proposed energy conservation standards.

At TSL 2, further changes are required for product class 11. In addition to component swaps, the design options analyzed by DOE also include thicker cabinet insulation. As discussed for TSL 1, increasing insulation thickness significantly impacts product and capital conversion costs, but much more so when adding insulation to the cabinet (as opposed to the door). To increase the insulation thickness of the cabinet, manufacturers must replace virtually all stamping equipment which greatly increases the capital conversion costs. Additionally, DOE analyzed the use of isobutane refrigerant as a design option for the 4-cubic foot product class 11 unit. At TSL 2, a substantial portion of the investment to reach TSL 2 would likely go towards training service technicians to handle the explosive refrigerant. As a result of thicker cabinet insulation and conversion to isobutane, product conversion and capital conversion costs roughly double at TSL 2 (to $35 million for product conversion costs and $46 million for capital conversion costs). The shipment-weighted MPC increased 22 percent at TSL 2 compared to baseline costs, which also contributed to the more severe impacts projected under the preservation of operation profit scenario if manufacturers do not earn additional profit on these higher costs.

TSL 3 represents a 30 percent reduction in measured energy use over the current energy conservation standards for product class 11 and a 15 percent reduction for product class 18. DOE estimates the INPV impacts at TSL 3 to range from −$56.8 million to −$99.2 million, or a change in INPV of −28.4 percent to −49.6 percent. At this proposed level, the industry cash flow is estimated to decrease by a factor of approximately 3.5 to −$29.4 million, compared to the base-case value of $11.9 million in the year leading up to the proposed energy conservation standards.

At TSL 3, the design options analyzed for both product class 18 units include thicker door insulation, which further increases the capital conversion costs over TSL 1 and TSL 2, where this was not analyzed as a design option. The additional impacts at TSL 3 are also due to more stringent requirements for product class 11. A 30 percent reduction for product class 11 is greater than the most efficient units on the market today. For both analyzed sizes of product class 11, DOE analyzed the design option of thicker insulation in the cabinet for both units analyzed. The net effect is a large increase in conversion costs due to the much higher cost of the equipment necessary to manufacture the cabinet. At TSL 3, DOE estimated total product conversion costs of $41 million and capital conversion costs of $76 million, a 46 percent total increase in conversion costs over TSL 2. The effect of the design changes at TSL 3 on shipment-weighted unit cost is a 27 percent increase over the baseline MPC. The magnitude of the investments relative to the industry value leads to significant impacts, although they are moderated somewhat in the flat markup because manufacturers earn additional profit on the investments.

TSL 4 represents a 40 percent reduction in measured energy use over the current energy conservation standards for product class 11 and a 25 percent reduction for product class 18. DOE estimates the INPV impacts at TSL 4 to range from −$29.6 million to −$114.4 million, or a change in INPV of −14.8 percent to −57.3 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately 344.1 percent to −$29.0 million, compared to the base-case value of $11.9 million in the year leading up to the proposed energy conservation standards.

The design options analyzed at TSL 4 would also severely disrupt current manufacturing processes. For the 1.7-cubic foot product class 11 unit, DOE analyzed a variable speed compressor and isobutane refrigerant as design options. For the 4 cubic foot product class 11 unit and the 7-cubic foot product class 18 unit, DOE analyzed thicker insulation in the cabinets. For 3.4-cubic foot product class 18 unit, DOE analyzed both an increase to cabinet insulation thickness and VIPs in the bottom wall as design options. Although increasing insulation thickness, converting to isobutane, and implementing VIPs all would necessitate large conversion costs, capital conversion costs decrease slightly from TSL 3 to TSL 4 because of the removal of all previous design options in the 1.7-cubic foot unit. In other words, the design options analyzed for this unit cause less

substantial changes to existing production equipment, but would also require a large investment by manufacturers to train service technicians to deal with the explosive refrigerant. Because this would require a large outlay for product conversion costs, total conversion costs are roughly the same at TSL 3 and TSL 4. The addition of a variable speed compressor in the smaller product class 11 unit analyzed also has a substantial impact on unit price because of its high component cost. At TSL 4, the shipment-weighted MPC is 60 percent higher than the baseline MPC. These cost increases are projected to cause a 16 percent decrease in shipments at TSL 4 in 2014 alone. Over time, the decline in shipments is a big contributor to the negative impacts on INPV in both markup scenarios.

The large conversion costs and higher prices leading to lower shipments cause a decrease in INPV from TSL 3 to TSL 4 under the preservation of operating profit markup scenario (since this scenario assumes higher production costs are not passed on to consumers). However, under the flat markup scenario, manufacturers are able to earn additional profit on the new high-cost components such as variable speed compressors, resulting in an increase in INPV from TSL 3 to TSL 4.

TSL 5 represents max tech for both product classes 11 and 18. The max-tech level corresponds to a 59 percent and 42 percent reduction in measured energy use for product class 11 and product class 18, respectively. DOE estimates the INPV impacts at TSL 5 to range from −$133.0 million to −$295.6 million, or a change in INPV of −66.6 percent to −148.0 percent. At this proposed level, the industry cash flow is estimated to decrease approximately nine-fold to −$95.7 million, compared to the base-case value of $11.9 million in the year leading up to the proposed energy conservation standards.

The design options DOE analyzed include the use of VIPs for all analyzed product class 11 and 18 units to reach max-tech efficiency levels. Additionally, the design options analyzed for some products also included other costly changes. For the 1.7-cubic foot product class 11 unit, the design options analyzed included multiple VIPs, a larger heat exchanger, and thicker insulation. The design options analyzed for the 4-cubic foot product class 11 unit also included a variable speed compressor and thicker insulation. For product class 18, DOE assumed that manufacturers would remove the design options necessary to meet TSLs 1 through 4 and add a variable speed compressor and thicker insulation for both analyzed products. These significant changes greatly increase the investment required to manufacture standards-compliant products. DOE estimated that product conversion costs would be $67 million at TSL 5, an increase of almost 40 percent over TSL 4. DOE also estimated that capital conversion costs would be $220 million, a more than three-fold increase over TSL 4. This drastic increase in conversion costs demonstrates the significant investments required by implementing widespread use of VIPs and increasing wall thickness.

At TSL 5, the shipment-weighted MPC increases by over 150 percent over the baseline due to the high material costs of VIPs and variable speed compressors. These large jumps cause shipments to decrease by 42 percent due to the price elasticity in 2014 alone. As a result of lower industry shipments and extremely high conversion costs, INPV decreases substantially from TSL 4 to TSL 5 and becomes negative under the preservation of operating profit scenario, which indicates the industry loses more than its base-case value in the standards case under this scenario.

iv. Cash-Flow Analysis Results for Built-In Refrigeration Products

TABLE V.29—MANUFACTURER IMPACT ANALYSIS FOR BUILT-IN REFRIGERATION PRODUCTS—FLAT MARKUP SCENARIO

	Units	Base case	Trial standard level				
			1	2	3	4	5
INPV	(2009$ millions)	658	607	604	593	579	574
Change in INPV	(2009$ millions)		(51.7)	(54.7)	(65.8)	(79.7)	(84.9)
	(%)		−7.9%	−8.3%	−10.0%	−12.1%	−12.9%
Product Conversion Costs	(2009$ millions)		41	51	65	75	87
Capital Conversion Costs	(2009$ millions)		40	38	55	74	84
Total Conversion Costs.	(2009$ millions)		81	89	119	149	171

TABLE V.30—MANUFACTURER IMPACT ANALYSIS FOR BUILT-IN REFRIGERATION PRODUCTS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	Base case	Trial standard level				
			1	2	3	4	5
INPV	(2009$ millions)	658	606	601	578	555	538
Change in INPV	(2009$ millions)		(52.9)	(57.0)	(80.5)	(103.0)	(120.3)
	(%)		−8.0%	−8.7%	−12.2%	−15.6%	−18.3%
Product Conversion Costs	(2009$ millions)		41	51	65	75	87
Capital Conversion Costs	(2009$ millions)		40	38	55	74	84
Total Conversion Costs.	(2009$ millions)		81	89	119	149	171

TSL 1 represents a 10 percent reduction in measured energy use over the current energy conservation standards for product class 3A–BI (built-in all-refrigerators—automatic defrost), product class 5–BI (built-in refrigerator-

freezers—automatic defrost with bottom-mounted freezer without an automatic icemaker), product class 7–BI (built-in refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service), and product class 9–BI (built-in upright freezers with automatic defrost without an automatic icemaker). DOE estimates the INPV impacts at TSL 1 to range from −$51.7 million to −$52.9 million, or a change in INPV of −7.9 percent to −8.0 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately 63.9 percent to $15.0 million, compared to the base-case value of $41.5 million in the year leading up to the proposed energy conservation standards.

At TSL 1, the design options that DOE analyzes result in moderate changes in the manufacturing process for built-in refrigeration products. For product classes 3A–BI and 9–BI, the design options that DOE analyzed to reach TSL 1 included the use of more efficient components that do not require significant changes to the manufacturing process. However, for product class 5–BI and product class 7–BI, the design options DOE analyzed also include the use of VIPs in the freezer door. While these components add to the overall costs of production, the added costs represent a small percentage of the total cost of a built-in refrigeration product. These cost deltas are low compared to the overall cost of the products and result in small impacts even if no additional profit is earned on the incremental MPCs. The estimated product conversion costs for all built-in refrigeration products at TSL 1 are $41 million and the estimated capital conversion costs are $40 million. The implementation of VIPs represents a substantial part of the conversion costs, but several built-in refrigeration manufacturers have products that use similar technology, which helps to mitigate some of the product conversion costs that would be required to design products from the ground up.

TSL 2 represents a 15 percent reduction in measured energy use for product class 3A–BI and product class 5–BI. For product classes 7–BI and 9–BI, TSL 2 represents a reduction of 10 percent and 20 percent, respectively. DOE estimates the INPV impacts at TSL 2 to range from −$54.7 million to −$57.0 million, or a change in INPV of −8.3 percent to −8.7 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately 68.0 percent to $13.3 million, compared to the base-case value of $41.5 million in the year leading up to the proposed energy conservation standards.

The efficiency requirements for product class 7–BI refrigerator-freezers do not change from TSL 1 to TSL 2, but the efficiency requirements for all other analyzed built-in product classes increase. The design options that DOE analyzes at TSL 2 for product classes 3A–BI and 7–BI still only include component swaps to reach a 15 percent efficiency improvement. Product class 5–BI uses a variable speed compressor in the freezer with a brushless DC condenser fan motor, but no longer use the VIPs used to reach TSL 1. The design options analyzed for product class 9–BI include a brushless DC evaporator and condenser fan motor, a larger condenser, a variable speed compressor, and a VIP in the upper door. Because product class 5–BI no longer uses VIPs and fewer changes to existing products are necessary, the overall impact is a slight decrease in capital conversion costs from $40 million at TSL 1 to $38 million at TSL 2. Product conversion costs increase to $51 million at TSL 2 because additional engineering time would be required to implement the additional component changes. However, because the complexity of the changes to the products and production facilities are similar at TSL 1 and TSL 2, there is only a small decrease in INPV from TSL 1 to TSL 2.

TSL 3 represents a 20 percent reduction in measured energy use for product class 3A–BI and product class 7–BI. For product classes 5–BI and 9–BI, TSL 2 represents a reduction of 15 percent and 25 percent, respectively. DOE estimates the INPV impacts at TSL 3 to range from −$65.8 million to −$80.5 million, or a change in INPV of −10.0 percent to −12.2 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately 93.0 percent to $2.9 million, compared to the base-case value of $41.5 million in the year leading up to the proposed energy conservation standards.

The efficiency requirements for product class 5–BI do not change from TSL 2 to TSL 3. However, the design options for all other built-in refrigeration products at TSL 3 include the implementation of VIPs. The widespread implementation of VIPs increases product and capital conversion costs, which are estimated to be $65 million and $55 million at TSL 3, respectively. Substantial changes to existing production facilities would be required to manufacture products that meet the required efficiencies at TSL 3. Most of the capital conversion costs involve purchasing new production equipment and would result in high stranded assets. The extensive changes that manufacturers would be required to make to existing facilities and the projected erosion of profitability if the additional production cost of implementing VIPs does not yield additional profit result in a projected decrease in INPV from TSL 3 to TSL 4. However, the industry value is high relative to the required capital conversion costs and the cost of the additional VIP panels is relatively small compared to the overall cost of the products, which helps to mitigate some of the negative impacts caused by these changes.

TSL 4 represents a 25 percent reduction in measured energy use over the current energy conservation standards for the following product classes: 3A–BI, 5–BI, and 9–BI. For product class 7–BI, TSL 4 represents a 20 percent reduction in measured energy use from current energy conservation standards. DOE estimates the INPV impacts at TSL 4 to range from −$79.7 million to −$103.0 million, or a change in INPV of −12.1 percent to −15.6 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately 117.8 percent to −$7.4 million, compared to the base-case value of $41.5 million in the year leading up to the proposed energy conservation standards.

The efficiency requirements for product class 7–BI do not change from TSL 3 to TSL 4. The design options for the other built-in refrigeration products all include the addition of more VIPs to reach TSL 4. The design options analyzed for product classes 3A–BI and 5–BI also include using a variable speed compressor. The complexity of implementing multiple component swaps and the additional production equipment necessary to use additional VIPs increases both the product and capital conversion costs. These costs are estimated to be $75 million and $74 million at TSL 4, respectively, and result in a decrease in INPV from TSL 3 to TSL 4.

TSL 5 represents max tech for the four built-in product classes. This proposed level represents a reduction in measured energy use of 29 percent, 27 percent, 22 percent, and 27 percent, respectively, for product classes 3A–BI, 5–BI, 7–BI, and 9–BI. DOE estimates the INPV impacts at TSL 5 to range from −$84.9 million to −$120.3 million, or a change in INPV of −12.9 percent to −18.3 percent. At this proposed level, the industry cash flow is estimated to decrease by approximately 135.1 percent to −$14.6 million, compared to

the base-case value of $41.5 million in the year leading up to the proposed energy conservation standards.

The design options analyzed by DOE include the widespread use of VIPs to achieve the max-tech efficiency levels at TSL 5. Additionally, product class 3A–BI uses multiple variable speed compressors. Since the implementation of VIPs is both research and capital intensive, product and capital conversion costs increase to $87 million and $84 million, respectively. The complexity of implementing multiple component swaps and the additional production equipment necessary to use additional VIPs increases both the product and capital costs.

b. Impacts on Employment

DOE quantitatively assessed the impacts of potential amended energy conservation standards on employment. DOE used the GRIM to estimate the domestic labor expenditures and number of domestic production workers in the base case and at each TSL from 2010 to 2043. DOE used statistical data from the most recent U.S. Census Bureau's 2007 Economic Census, the results of the engineering analysis, and interviews with manufacturers to determine the inputs necessary to calculate industry-wide labor expenditures and domestic employment levels. Labor expenditures involved with the manufacture of the product are a function of the labor intensity of the product, the sales volume, and an assumption that wages remain fixed in real terms over time.

In each GRIM, DOE used the labor content of each product and the manufacturing production costs from the engineering analysis to estimate the annual labor expenditures in the residential refrigeration product industry. DOE used Census data and interviews with manufacturers to estimate the portion of the total labor expenditures that is attributable to U.S. (*i.e.,* domestic) labor.

The production worker estimates in this section only cover workers up to the line-supervisor level who are directly involved in fabricating and assembling a product within an Original Equipment Manufacturer (OEM) facility. Workers performing services that are closely associated with production operations, such as material handing with a forklift, are also included as production labor. DOE's estimates only account for production workers who manufacture the specific products covered by this rulemaking. For example, a worker on a wine cooler line would not be included with the estimate of the number of residential refrigeration workers.

The employment impacts shown in Table V.31 through Table V.34 represent the potential production employment that could result following amended energy conservation standards. The upper end of the results in these tables estimates the maximum change in the number of production workers after amended energy conservation standards must be met. The upper end of the results assumes manufacturers would continue to produce the same scope of covered products in the same production facilities. The upper end of the range also assumes that domestic production does not shift to lower-labor-cost countries. Because there is a real risk of manufacturers evaluating sourcing decisions in response to amended energy conservation standards, the lower end of the range of employment results in Table V.31 through Table V.34 includes the estimated total number of U.S. production workers in the industry who could lose their jobs if all existing production were moved outside of the U.S. While the results present a range of employment impacts following the compliance date of amended energy conservation standards, the discussion below also includes a qualitative discussion of the likelihood of negative employment impacts at the various TSLs. Finally, the employment impacts shown are independent of the employment impacts from the broader U.S. economy, which are documented in chapter 13, Employment Impact Analysis, of the NOPR TSD.

i. Standard-Size Refrigerator-Freezer Employment Impacts

Using the GRIM, DOE estimates that in the absence of amended energy conservation standards, there would be 8,517 domestic production workers involved in manufacturing standard-size refrigerator-freezers in 2014. Using 2007 Census Bureau data and interviews with manufacturers, DOE estimates that approximately 42 percent of standard-size refrigerator-freezers sold in the United States are manufactured domestically. Table V.31 shows the range of the impacts of potential amended energy conservation standards on U.S. production workers in the standard-size refrigerator-freezer market.

TABLE V.31—POTENTIAL CHANGES IN THE TOTAL NUMBER OF DOMESTIC STANDARD-SIZE REFRIGERATOR-FREEZER PRODUCTION WORKERS IN 2014

	Trial standard level					
	Base case	1	2	3	4	5
Total Number of Domestic Production Workers in 2014 (without changes in production locations)	8,517	8,300	8,258	8,309	8,236	8,088
Potential Changes in Domestic Production Workers in 2014 *	.....	(217)–(8,517)	(259)–(8,517)	(208)–(8,517)	(281)–(8,517)	(429)–(8,517)

* DOE presents a range of potential employment impacts. Numbers in parentheses indicate negative numbers.

All examined TSLs show relatively minor impacts on domestic employment levels at the lower end of the range. Most of the design options used in the engineering analysis involve the swapping of components in baseline units with more efficient parts for top-mounted, side-by-side, and bottom-mounted refrigerator-freezers. These component swaps for these design options add primarily material costs and do not greatly impact the labor content of the baseline products. The relatively small decreases in domestic production employment for the lower end of the range of the employment impacts arise from higher product prices lowering shipments the year the standard becomes effective. At these higher TSLs, the effects of lower shipments more than offset the additional product labor that is required to manufacture products that use VIP panels.

During interviews, manufacturers indicated that their domestic employment levels could be impacted under two scenarios: (1) The

widespread adoption of VIPs or (2) significant capital conversion costs that would force them to consider non-domestic manufacturing locations once the compliance date for the amended energy conservation standards arrive. The widespread adoption of VIPs would increase the labor content of today's products. The labor content of products with VIPs increases because of the extra handling steps that would be required to ensure that VIPs are not damaged during production. Because of the competitive nature of the industry, manufacturers believed the extra labor costs could force them to move their remaining domestic production to Mexico to take advantage of the cheaper labor.

Manufacturers also indicated that large conversion costs would likely force them to consider investing in lower-labor-cost countries. For most product categories, there is a range of efficiency levels that can be met with relatively low-cost components (as analyzed in the engineering analysis). Beyond these levels, manufacturers would need to decide to follow the MPC design options analyzed in the engineering analysis for each product category. Manufacturers indicated the analyzed design options that use multiple VIPs would involve significant capital conversion costs and add very large material costs to their products that would likely result in the relocation of their production facilities abroad. However, manufacturers indicated they would face even larger capital conversion costs at lower efficiencies if they redesigned their products with thicker walls. While not analyzed as a design option for standard-size refrigerator-freezers, increasing wall thickness would likely result in moving domestic production outside of the U.S. at lower efficiency levels.

ii. Standard-Size Freezer Employment Impacts

Using the GRIM, DOE estimates that, in the absence of amended energy conservation standards, there would be 1,904 standard-size freezer production workers in the U.S. in 2014. Using the 2007 Census data and interviews with manufacturers, DOE estimates that approximately 80 percent of standard-size freezers sold in the United States are manufactured domestically. Table V.32 shows the impacts of amended energy conservation standards on U.S. production workers in the standard-size freezer market.

TABLE V.32—POTENTIAL CHANGES IN THE TOTAL NUMBER OF DOMESTIC STANDARD-SIZE FREEZER PRODUCTION WORKERS IN 2014

	Trial standard level					
	Base case	1	2	3	4	5
Total Number of Domestic Production Workers in 2014 (without changes in production locations)	1,904	1,850	1,781	1,734	1,634	1,508
Potential Changes in Domestic Production Workers in 2014 *		(54)–(1,904)	(123)–(1,904)	(170)–(1,904)	(270)–(1,904)	(396)–(1,904)

* DOE presents a range of potential employment impacts. Numbers in parentheses indicate negative numbers.

Similar to standard-size refrigerator-freezers, there are relatively small decreases in employment at the lower end of the range of employment impacts. These slight declines are caused by higher prices that drive lower shipments once manufacturers must meet the amended energy conservation standard. Standard-size freezer manufacturers also indicated that domestic production could be shifted abroad with any efficiency level that required large capital conversion costs. At TSL 1, DOE does not expect substantial changes to domestic employment in the standard-size freezer market if manufacturers use the design options listed in the engineering analysis to reach the efficiency requirements at this TSL.

However, at TSL 2 through TSL 5, manufacturers indicated that there could be domestic employment impacts depending on the design pathway used to reach the required efficiencies. At TSL 2 and above, the engineering analysis assumes that manufacturers would have to use wall thickness changes to reach the required efficiencies. Manufacturers indicated that because these products are typically low-end, they would likely follow the design pathways in the engineering analysis and increase the wall insulation thickness to reach higher efficiencies in order to avoid having to pass large price increases on to consumers. While this would result in extremely large conversion costs and would more likely lead to manufacturers moving production abroad, manufacturers believed this strategy would help to maintain sales volumes.

iii. Compact Refrigeration Product Employment Impacts

DOE's research suggests that a limited percentage of compact refrigerators and refrigerator-freezers are made domestically (see Table V.33). The overwhelming majority of products are imported. Manufacturers with domestic manufacturing facilities tend to source or import their compact products. The small employment numbers are mostly from remaining domestic production of compact chest freezers. As a result, amended energy conservation standards for compact refrigerators or refrigerator-freezers are unlikely to noticeably alter domestic employment levels.

TABLE V.33—POTENTIAL CHANGES IN THE TOTAL NUMBER OF DOMESTIC COMPACT REFRIGERATION PRODUCT PRODUCTION WORKERS IN 2014

	Trial standard level					
	Base case	1	2	3	4	5
Total Number of Domestic Production Workers in 2014 (without changes in production locations)	31	30	29	29	28	46

TABLE V.33—POTENTIAL CHANGES IN THE TOTAL NUMBER OF DOMESTIC COMPACT REFRIGERATION PRODUCT PRODUCTION WORKERS IN 2014—Continued

	Trial standard level					
	Base case	1	2	3	4	5
Potential Changes in Domestic Production Workers in 2014*	.....	(1)–(31)	(2)–(31)	(2)–(31)	(3)–(31)	15–(31)

*DOE presents a range of potential employment impacts. Numbers in parentheses indicate negative numbers.

iv. Built-In Refrigeration Product Employment Impacts

Using the GRIM, DOE estimates that, in the absence of amended energy conservation standards, there would be 1,320 U.S. workers manufacturing built-in refrigeration products in 2014. Using the 2007 Census data and interviews with manufacturers, DOE estimates that approximately 94 percent of the built-in refrigeration products sold in the United States are manufactured domestically. Table V.34 shows the impacts of amended energy conservation standards on U.S. production workers in the built-in refrigeration market.

TABLE V.34—POTENTIAL CHANGES IN THE TOTAL NUMBER OF DOMESTIC BUILT-IN REFRIGERATION PRODUCT PRODUCTION WORKERS IN 2014

	Trial standard level					
	Base case	1	2	3	4	5
Total Number of Domestic Production Workers in 2014 (without changes in production locations)	1,320	1,320	1,319	1,327	1,331	1,357
Potential Changes in Domestic Production Workers in 2014*	.....	0–(1,320)	(1)–(1,320)	7–(1,320)	11–(1,320)	37–(1,320)

*DOE presents a range of potential employment impacts. Numbers in parentheses indicate negative numbers.

Employment in the built-in refrigeration market follows a pattern similar to that seen in the market for standard-size refrigerator-freezers and standard-size freezers at lower TSLs. At TSL 1 and TSL 2, higher prices result in fewer shipments, and a consequent reduction in labor expenditures that more than offsets the additional labor required to manufacture products with VIPs. However, at TSL 3 and above, the use of additional VIPs in built-in refrigeration products requires enough additional labor to cause a slight increase in the number of domestic production workers. Because built-in products are high-end products with far fewer shipments, it is less likely that manufacturers would choose to move all production facilities in response to amended energy conservation standards. The higher margins and profit earned in this market also make it more likely that manufacturers could earn a return on the investments required to reach the amended energy conservation standards and invest in existing facilities rather than move production abroad.

c. Impacts on Manufacturing Capacity

Manufacturers indicated that design changes involving thicker walls or multiple VIP panels would require substantial changes to their current manufacturing process. While these technologies would require the purchase of millions of dollars of production equipment, most manufacturers indicated they would likely be able to make the required changes in between the announcement of the final rule and compliance date of an amended energy conservation standard. For most product classes, the design changes and investments required by the proposed rule are similar in magnitude to the introduction of a new product line. Manufacturers have experience with the design options involving VIPs, but not at the scale that would be required if the proposed rule's provisions are adopted. The primary capacity concern of manufacturers is the ability of their suppliers, particularly manufacturers of VIPs and more efficient compressors, to ramp up production in time to meet the amended energy conservation standard. DOE analyzed VIP supply issues in section IV.B.1.c. Issues associated with supply of compressors are discussed in section IV.B.1, above.

d. Impacts on Sub-Group of Manufacturers

As discussed in section IV.I.1.c, using average cost assumptions to develop an industry cash-flow estimate is inadequate for assessing differential impacts among manufacturer subgroups. Small manufacturers, niche equipment manufacturers, and manufacturers that exhibit a cost structure substantially different from the industry average could be affected disproportionately. For this rulemaking, DOE used the results of the industry characterization to identify any subgroups of refrigerator manufacturers that exhibit similar characteristics different from the industry as a whole. The only such subgroup DOE identified was built-in manufacturers.

However, as discussed previously, DOE is proposing to establish separate product classes for built-in products and is presenting separate analytical results for those products classes. Therefore, the MIA results DOE presents for those product classes already allow DOE to examine the MIA impacts on this potential manufacturer subgroup. Section V.B.2 presents a more detailed discussion of the results for built-in product classes.

e. Cumulative Regulatory Burden

While any one regulation may not impose a significant burden on manufacturers, the combined effects of several impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Assessing the impact of a single regulation may overlook this cumulative regulatory burden. In addition to energy

conservation standards, other regulations can significantly affect manufacturers' financial health. Multiple regulations affecting the same manufacturer can strain profits and can lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

During previous stages of this rulemaking DOE identified a number of requirements with which manufacturers of these refrigeration products must comply and which take effect within three years of the anticipated effective date of the amended standards. The following section briefly addresses comments DOE received with respect to cumulative regulatory burden and summarizes other key related concerns manufacturers raised during interviews.

Sub Zero stated that the cumulative regulatory burden is a serious concern for appliance manufacturers. Sub Zero recommended that DOE include the cost and burden of these upcoming requirements when assessing manufacturers' capacity to meet proposed new standards. (Sub Zero, No. 40 at p. 9)

DOE notes that it routinely assesses the cumulative regulatory burden on manufacturers in its analysis and the results of this assessment are discussed in this section of today's NOPR and in chapter 12 of the NOPR TSD. The cumulative regulatory burden section of the TSD shows that manufacturers of residential refrigeration products also have significant market shares of other products will be affected by either ongoing or pending rulemakings that will establish amended energy conservation standards. These parallel rulemakings will likely require manufacturers to comply with amended standards within three years of the anticipated compliance date for residential refrigeration products.

Part of this assessment included investigating and tracking what manufacturers expressed during interviews as one of the most critical potential elements of regulatory burden—the near-term possibility of changes to HFC availability. As stated in section IV.B.1.b, DOE is prepared to address this issue by evaluating the efficiency improvement and trial standard levels for products using alternative foam insulation materials, if legislation or some other legal requirements banning HFCs should be enacted or otherwise effective. A further complication that DOE tracked was the use of isobutane refrigerant as a design option. Isobutane could be used as an alternative refrigerant to the HFC-based refrigerants currently used by the industry. The current limit for an isobutane charge appears to be sufficient as a design option only for smaller products (see the discussion in section IV.B.1.a).

Several manufacturers also expressed concern during interviews about the overall volume of DOE energy conservation standards with which they must comply. Most refrigerator manufacturers also make a full range of appliances and share engineering and other resources with these other internal manufacturing divisions for different appliances (including certification testing for regulatory compliance). Many of these other appliances, such as kitchen ranges and ovens, clothes washers, clothes dryers, and microwave ovens, are also subject to recently amended or soon-to-be amended Federal energy conservation standards. Some of the test procedures for these other products are also currently being amended through ongoing rulemakings that would, if adopted, incorporate standby and off mode energy consumption measurements.[46] Manufacturers were concerned that the other products facing amended or new energy conservation standards would compete for the same engineering and financial resources, especially if the proposed refrigeration product standards would cause manufacturers to build new production lines instead of repurposing existing ones.

While DOE acknowledges that rulemakings for other covered products could affect the resources available to residential refrigeration manufacturers, DOE has not included manufacturers' conversion costs related to complying with other rulemakings as a cash outflow in the GRIM. This method is consistent with how DOE treats revenue generated from sales of those products. However, DOE addresses the residential refrigeration manufacturers' conversion costs related to complying with other DOE rulemakings that have compliance dates falling within three years of the anticipated compliance date of this rulemaking in chapter 12 of the NOPR TSD. DOE has quantified these other conversion costs where applicable and considered those costs in its decision to propose the levels presented in today's rulemaking.

Manufacturers also expressed concern about the increasing stringency of international energy efficiency standards and materials requirements. Specifically, changing energy standards in Canada and elsewhere abroad also increase the regulatory burden on manufacturers by duplicating testing requirements. Many manufacturers would prefer more global standardization and harmonization of standards and testing. Variations among testing requirements often require that manufacturers refit or redesign test facilities so that tests tailored for specific testing requirements can be performed. The resources expended on these refits or redesigns could have been used for new product development. Examples of European standards that create additional compliance costs for manufacturers that compete in Europe include the Restriction on the use of Hazardous Substances (RoHS), Waste Electrical and Electronic Equipment (WEEE), and the Registration, Evaluation, Authorization, and restriction of Chemicals (REACH).

DOE discusses these and other requirements, and includes the full details of the cumulative regulatory burden, in chapter 12 of the NOPR TSD.

3. National Impact Analysis

a. Significance of Energy Savings

To estimate the national energy savings attributable to potential standards for refrigeration products, DOE compared the energy consumption of these products under the base case to their anticipated energy consumption under each TSL. Tables V.35 through V.38 present DOE's forecasts of the national energy savings for each TSL, which were calculated using the approach described in section IV.G. Chapter 10 of the NOPR TSD presents tables that also show the magnitude of the energy savings if the savings are discounted at rates of seven and three percent. Discounted energy savings represent a policy perspective in which energy savings realized farther in the future are less significant than energy savings realized in the nearer term.

[46] The schedule for all DOE rulemakings can be found at *http://www1.eere.energy.gov/buildings/appliance_standards/schedule_setting.html.*

TABLE V.35—STANDARD-SIZE REFRIGERATOR-FREEZERS: CUMULATIVE NATIONAL ENERGY SAVINGS IN QUADS

Trial standard level	Top-mount refrigerator-freezers	Bottom-mount refrigerator-freezers	Side-by-side refrigerator-freezers
	Product classes 1, 1A, 2, 3, 3A, 3I and 6	Product classes 5, 5A, and 5I	Product classes 4, 4I, and 7
1	1.62	0.09	0.54
2	1.62	0.09	0.88
3	2.07	0.09	0.88
4	2.49	0.45	1.20
5	2.90	0.65	1.39

TABLE V.36—STANDARD-SIZE FREEZERS: CUMULATIVE NATIONAL ENERGY SAVINGS IN QUADS

Trial standard level	Upright freezers	Chest freezers
	Product classes 8 and 9	Product classes 10 and 10A
1	0.43	0.28
2	0.66	0.36
3	0.77	0.43
4	0.86	0.49
5	0.89	0.56

TABLE V.37—COMPACT REFRIGERATION PRODUCTS: CUMULATIVE NATIONAL ENERGY SAVINGS IN QUADS

Trial standard level	Compact refrigerators	Compact freezers
	Product classes 11, 11A, 12, 13, 13A, 14, and 15	Product classes 16, 17, 18
1	0.27	0.03
2	0.34	0.03
3	0.39	0.04
4	0.47	0.07
5	0.50	0.09

TABLE V.38—BUILT-IN REFRIGERATION PRODUCTS: CUMULATIVE NATIONAL ENERGY SAVINGS IN QUADS

Trial standard level	Built-in all refrigerators	Built-in bottom-mount refrigerator-freezers	Built-in side-by-side refrigerator-freezers	Built-in upright freezers
	Product class 3A–BI	Product classes 5–BI and 5I–BI	Product classes 4–BI, 4I–BI and 7–BI	Product class 9–BI
1	0.00	0.00	0.01	0.00
2	0.01	0.00	0.01	0.01
3	0.01	0.00	0.03	0.01
4	0.01	0.01	0.03	0.01
5	0.01	0.02	0.04	0.01

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV to the Nation of the total costs and savings for consumers that would result from particular standard levels for refrigeration products. In accordance with the OMB's guidelines on regulatory analysis (OMB Circular A–4, section E, September 17, 2003), DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. The 7-percent rate is an estimate of the average before-tax rate of return on private capital in the U.S. economy, and reflects the returns on real estate and small business capital as well as corporate capital. DOE used this discount rate to approximate the opportunity cost of capital in the private sector, since recent OMB analysis has found the average rate of return on capital to be near this rate. In addition, DOE used the 3-percent rate to capture the potential effects of standards on private consumption (*e.g.,* through higher prices for products and the purchase of reduced amounts of energy). This rate represents the rate at which society discounts future consumption flows to their present value. It can be approximated by the real rate of return on long-term government debt (*i.e.,* yield on Treasury notes minus annual rate of change in the Consumer Price Index), which has averaged about 3 percent on a pre-tax basis for the last 30 years.

Tables V.39 through V.46 show the consumer NPV results for each TSL DOE considered for refrigeration products, using both a 7-percent and a 3-percent discount rate. In each case, the impacts cover the lifetime of products purchased in 2014–2043. See

chapter 10 of the NOPR TSD for more detailed NPV results.

TABLE V.39—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR STANDARD-SIZE REFRIGERATOR-FREEZERS, 3-PERCENT DISCOUNT RATE

Trial standard level	Top-mount refrigerator-freezers	Bottom-mount refrigerator-freezers	Side-by-side refrigerator-freezers
	Product class 1, 1A, 2, 3, 3A, 3I and 6	Product classes 5, 5A, and 5I	Product classes 4, 4I, and 7
	billion 2009 dollars		
1	6.68	0.79	4.37
2	6.68	0.79	3.62
3	6.00	0.79	3.62
4	(1.95)	(3.22)	(2.35)
5	(14.63)	(7.32)	(7.38)

TABLE V.40—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR STANDARD-SIZE REFRIGERATOR-FREEZERS, 7-PERCENT DISCOUNT RATE

Trial standard level	Top-mount refrigerator-freezers	Bottom-mount refrigerator-freezers	Side-by-side refrigerator-freezers
	Product classes 1, 1A, 2, 3, 3A, 3I and 6	Product classes 5, 5A, and 5I	Product classes 4, 4I, and 7
	billion 2009 dollars		
1	0.85	0.27	1.42
2	0.85	0.27	0.46
3	(0.32)	0.27	0.46
4	(5.36)	(2.43)	(3.26)
5	(12.86)	(4.95)	(6.26)

TABLE V.41—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR STANDARD-SIZE FREEZERS, 3-PERCENT DISCOUNT RATE

Trial standard level	Upright freezers	Chest freezers
	Product classes 8 and 9	Product classes 10 and 10A
	billion 2009 dollars	
1	3.91	2.74
2	5.42	2.37
3	5.13	2.75
4	4.20	1.82
5	0.67	(0.16)

TABLE V.42—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR STANDARD-SIZE FREEZERS, 7-PERCENT DISCOUNT RATE

Trial standard level	Upright freezers	Chest freezers
	Product classes 8 and 9	Product classes 10 and 10A
	billion 2009 dollars	
1	1.25	0.90
2	1.57	0.54
3	1.22	0.59
4	0.55	0.00
5	(1.42)	(1.21)

TABLE V.43—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR COMPACT REFRIGERATION PRODUCTS, 3-PERCENT DISCOUNT RATE

Trial standard level	Compact refrigerators	Compact freezers
	Product classes 11, 11A, 12, 13, 13A, 14, and 15	Product classes 16, 17, 18
	billion 2009 dollars	
1	1.25	0.17
2	0.69	0.17
3	0.82	0.14
4	(0.64)	(0.25)
5	(4.49)	(0.96)

TABLE V.44—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR COMPACT REFRIGERATION PRODUCTS, 7-PERCENT DISCOUNT RATE

Trial standard level	Compact refrigerators	Compact freezers
	Product classes 11, 11A, 12, 13, 13A, 14, and 15	Product classes 16, 17, 18
	billion 2009 dollars	
1	0.50	0.07
2	0.18	0.07
3	0.22	0.04
4	(0.59)	(0.19)
5	(2.68)	(0.60)

TABLE V.45—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR BUILT-IN REFRIGERATION PRODUCTS, 3-PERCENT DISCOUNT RATE

Trial standard level	Built-in all refrigerators	Built-in bottom-mount refrigerator-freezers	Built-in side-by-side refrigerator-freezers	Built-in upright freezers
	Product class 3A–BI	Product classes 5–BI and 5I–BI	Product classes 4–BI, 4I–BI and 7–BI	Product class 9–BI
	billion 2009 dollars			
1	0.03	0.02	0.04	0.04
2	0.05	0.00	0.04	0.04
3	(0.01)	0.00	(0.43)	(0.02)
4	(0.10)	(0.36)	(0.43)	(0.02)
5	(0.17)	(0.54)	(0.83)	(0.07)

TABLE V.46—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR BUILT-IN REFRIGERATION PRODUCTS, 7-PERCENT DISCOUNT RATE

Trial standard level	Built-in all refrigerators (3A–BI)	Built-in bottom-mount refrigerator-freezers	Built-in side-by-side refrigerator-freezers	Built-in upright freezers (9–BI)
	Product class 3A–BI	Product classes 5–BI and 5I–BI	Product classes 4–BI, 4I–BI and 7–BI	Product class 9–BI
	billion 2009 dollars			
1	0.01	0.01	0.01	0.02
2	0.02	(0.00)	0.01	0.00
3	(0.02)	(0.00)	(0.28)	(0.03)
4	(0.07)	(0.21)	(0.28)	(0.03)
5	(0.11)	(0.32)	(0.51)	(0.06)

c. Indirect Impacts on Employment

DOE develops estimates of the indirect employment impacts of potential standards on the economy in general. As discussed above, DOE expects amended energy conservation standards for refrigeration products to reduce energy bills for consumers and the resulting net savings to be redirected to other forms of economic activity. These expected shifts in spending and economic activity could affect the demand for labor. As described in section IV.J, above, to estimate these effects DOE used an input/output model of the U.S. economy. Table V.47 presents the estimated net indirect employment impacts in 2020 and 2043 for the TSLs that DOE considered in this rulemaking. Chapter 13 of the NOPR TSD presents more detailed results.

TABLE V.47—NET INCREASE IN JOBS FROM INDIRECT EMPLOYMENT EFFECTS UNDER REFRIGERATION PRODUCT TSLS

	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
	thousands				
Standard-Size Refrigerator-Freezers:					
2020	1.30	1.07	0.74	−2.87	−7.16
2043	10.99	12.05	13.49	12.95	10.34
Standard-Size Freezers:					
2020	0.72	0.69	0.69	0.18	−0.97
2043	4.34	5.79	5.79	6.77	5.80
Compact Refrigeration Products:					
2020	0.46	0.43	0.49	0.29	−0.45
2043	1.24	1.26	1.44	1.21	0.14
Built-In Refrigeration Products:					
2020	0.02	0.01	−0.10	−0.18	−0.31
2043	0.10	0.13	0.08	0.01	−0.13

The input/output model suggests that today's proposed standards are likely to increase the net demand for labor in the economy. However, the model suggests that the projected gains are very small relative to total national employment (currently approximately 120 million). Moreover, neither the BLS data nor the input/output model DOE uses includes the quality or wage level of the jobs. Therefore, because the analysis indicates an increased demand for labor would likely result from the amended energy conservation standards under consideration in this rulemaking, DOE has tentatively concluded that the proposed standards are likely to produce employment benefits sufficient to offset fully any adverse impacts on employment in the manufacturing industry for the refrigeration products that are the subject of this rulemaking.

4. Impact on Utility or Performance of Products

As presented in section III.D.1.d of this notice, DOE concluded that none of the TSLs considered in this notice would substantially reduce the utility or performance of the products under consideration in this rulemaking. However, manufacturers may reduce the availability of features that increase energy use, such as multiple drawers. Manufacturers currently offer refrigeration products that meet or exceed the proposed standards for most of the product classes. (42 U.S.C. 6295(o)(2)(B)(i)(IV))

5. Impact of Any Lessening of Competition

DOE has also considered any lessening of competition that is likely to result from amended standards. The Attorney General determines the impact, if any, of any lessening of competition likely to result from a proposed standard, and transmits such determination to the Secretary, together with an analysis of the nature and extent of such impact. (42 U.S.C. 6295(o)(2)(B)(i)(V) and (B)(ii))

To assist the Attorney General in making such determination, DOE has provided DOJ with copies of this NOPR and the TSD for review. DOE will consider DOJ's comments on the proposed rule in preparing the final rule, and DOE will publish and respond to DOJ's comments in that document.

6. Need of the Nation to Conserve Energy

An improvement in the energy efficiency of the products subject to today's rule is likely to improve the security of the Nation's energy system by reducing overall demand for energy. Reduced electricity demand may also improve the reliability of the electricity system. As a measure of this reduced demand, Table V.48 presents the estimated reduction in generating capacity in 2043 for the TSLs that DOE considered in this rulemaking.

TABLE V.48—REDUCTION IN ELECTRIC GENERATING CAPACITY IN 2043 UNDER REFRIGERATION PRODUCT TSLS

	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
	Gigawatts				
Standard-Size Refrigerator-Freezers	2.28	2.63	3.10	4.23	5.07
Standard-Size Freezers	0.740	0.740	1.25	1.42	1.53
Compact Refrigeration Products	0.271	0.324	0.383	0.475	0.506
Built-In Refrigeration Products	0.019	0.027	0.054	0.067	0.080

DOE used NEMS–BT to assess the impacts on electricity prices of the reduced need for new electric power plants and infrastructure projected to result from standards. The projected impacts on prices, and their value to

electricity consumers, are presented in chapter 14 and chapter 10, respectively, of the NOPR TSD. Although the aggregate benefits for all electricity users are potentially large, there may be negative effects on the actors involved in electricity supply. Because there is uncertainty about the extent to which the calculated impacts from reduced electricity prices would be a transfer from the actors involved in electricity supply to electricity consumers, DOE has concluded that, at present, it should not assign a heavy weight to this factor in considering the economic justification of standards on refrigeration products.

Energy savings from amended standards for refrigeration products could also produce environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases associated with electricity production. Table V.49 provides DOE's estimate of cumulative CO_2, NO_X, and Hg emissions reductions projected to result from the TSLs considered in this rulemaking. DOE reports annual CO_2, NO_X, and Hg emissions reductions for each TSL in chapter 15 of the NOPR TSD.

As discussed in section IV.M, DOE did not report SO_2 emissions reductions from power plants because there is uncertainty about the effect of energy conservation standards on the overall level of SO_2 emissions in the United States due to SO_2 emissions caps. DOE also did not include NO_X emissions reduction from power plants in States subject to CAIR because an energy conservation standard would not affect the overall level of NO_X emissions in those States due to the emissions caps mandated by CAIR.

TABLE V.49—SUMMARY OF EMISSIONS REDUCTION ESTIMATED FOR REFRIGERATION PRODUCT TSLS (CUMULATIVE FOR 2014 THROUGH 2043)

	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Standard-Size Refrigerator-Freezers:					
CO2 (Mt)	154	177	208	283	338
NOX (kt)	124	142	168	228	272
Hg (t)	0.79	0.91	1.07	1.45	1.73
Standard-Size Freezers:					
CO2 (Mt)	48	69	81	92	99
NOX (kt)	39	55	65	74	79
Hg (t)	0.24	0.34	0.41	0.47	0.50
Compact Refrigeration Products:					
CO2 (Mt)	20	24	28	35	39
NOX (kt)	16	19	23	28	31
Hg (t)	0.10	0.12	0.15	0.19	0.21
Built-In Refrigeration Products:					
CO2 (Mt)	1.23	1.79	3.58	4.45	5.32
NOX (kt)	0.99	1.44	2.88	3.58	4.28
Hg (t)	0.01	0.01	0.02	0.02	0.03

As part the analysis for this proposed rule, DOE estimated monetary benefits likely to result from the reduced emissions of CO_2 and NO_X that DOE estimated for each of the TSLs considered. As discussed in section IV.M, DOE used values for the SCC developed by an interagency process. The four values for CO_2 emissions reductions resulting from that process (expressed in 2007$) are $4.7/ton (the average value from a distribution that uses a 5-percent discount rate), $21.4/ton (the average value from a distribution that uses a 3-percent discount rate), $35.1/ton (the average value from a distribution that uses a 2.5-percent discount rate), and $64.9/ton (the 95th-percentile value from a distribution that uses a 3-percent discount rate). These values correspond to the value of emission reductions in 2010; the values for later years are higher due to increasing damages as the magnitude of climate change increases.

Table V.50 through Table V.53 present the global values of CO_2 emissions reductions at each TSL. For each of the four cases, DOE calculated a present value of the stream of annual values using the same discount rate as was used in the studies upon which the dollar-per-ton values are based. DOE calculated domestic values as a range from 7 percent to 23 percent of the global values, and these results are presented in Table V.54 through Table V.57.

TABLE V.50—STANDARD-SIZE REFRIGERATOR-FREEZERS: ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTION IN 2014–2043 UNDER TRIAL STANDARD LEVELS

TSL	*Million 2009$*			
	5% discount rate, average *	3% discount rate, average *	2.5% discount rate, average *	3% discount rate, 95th percentile *
1	526	2,696	4,570	8,223
2	605	3,104	5,261	9,465
3	713	3,653	6,192	11,140
4	970	4,975	8,432	15,170
5	1,160	5,947	10,080	18,135

* Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC over time.

TABLE V.51—STANDARD-SIZE FREEZERS: ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTION IN 2014–2043 UNDER TRIAL STANDARD LEVELS

TSL	*Million 2009$*			
	5% discount rate, average *	3% discount rate, average *	2.5% discount rate, average *	3% discount rate, 95th percentile *
1	164	840	1,425	2,562
2	234	1,205	2,043	3,673
3	277	1,421	2,409	4,332
4	314	1,615	2,738	4,923
5	337	1,733	2,938	5,283

* Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC over time.

TABLE V.52—COMPACT REFRIGERATION PRODUCTS: ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTION IN 2014–2043 UNDER TRIAL STANDARD LEVELS

TSL	*Million 2009$*			
	5% discount rate, average *	3% discount rate, average *	2.5% discount rate, average *	3% discount rate, 95th percentile *
1	65	333	564	1,015
2	78	400	678	1,220
3	93	475	804	1,448
4	117	598	1,013	1,823
5	130	665	1,126	2,029

* Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC over time.

TABLE V.53—BUILT-IN REFRIGERATION PRODUCTS: ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTION IN 2014–2043 UNDER TRIAL STANDARD LEVELS

TSL	*Million 2009$*			
	5% discount rate, average *	3% discount rate, average *	2.5% discount rate, average *	3% discount rate, 95th percentile *
1	4	22	37	66
2	6	31	53	96
3	12	63	106	191
4	15	78	132	238
5	18	93	158	284

* Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC over time.

TABLE V.54—STANDARD-SIZE REFRIGERATOR-FREEZERS: ESTIMATES OF DOMESTIC PRESENT VALUE OF CO_2 EMISSIONS REDUCTION IN 2014–2043 UNDER TRIAL STANDARD LEVELS

TSL	*Million 2009$**			
	5% discount rate, average **	3% discount rate, verage **	2.5% discount rate, average **	3% discount rate, 95th percentile **
1	37 to 121	189 to 620	320 to 1,051	576 to 1,891.
2	42 to 139	217 to 714	368 to 1,210	663 to 2,177.
3	50 to 164	256 to 840	433 to 1,424	780 to 2,562.
4	68 to 223	348 to 1,144	590 to 1,939	1,062 to 3,489.
5	81 to 267	416 to 1,368	706 to 2,318	1,269 to 4,171.

* Domestic values are presented as a range between 7% and 23% of the global values.

** Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC over time.

TABLE V.55—STANDARD-SIZE FREEZERS: ESTIMATES OF DOMESTIC PRESENT VALUE OF CO_2 EMISSIONS REDUCTION IN 2014–2043 UNDER TRIAL STANDARD LEVELS

TSL	*Million 2009$**			
	5% discount rate, average**	3% discount rate, average**	2.5% discount rate, average**	3% discount rate, 95th percentile**
1	11 to 38	59 to 193	100 to 328	179 to 589.
2	16 to 54	84 to 277	143 to 470	257 to 845.
3	19 to 64	99 to 327	169 to 554	303 to 996.
4	22 to 72	113 to 371	192 to 630	345 to 1,132.
5	24 to 78	121 to 398	206 to 676	370 to 1,215.

* Domestic values are presented as a range between 7% and 23% of the global values.
** Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC over time.

TABLE V.56—COMPACT REFRIGERATION PRODUCTS: ESTIMATES OF DOMESTIC PRESENT VALUE OF CO_2 EMISSIONS REDUCTION IN 2014–2043 UNDER TRIAL STANDARD LEVELS

TSL	*Million 2009$**			
	5% discount rate, average**	3% discount rate, average**	2.5% discount rate, average**	3% discount rate, 95th percentile**
1	5 to 15	23 to 77	39 to 130	71 to 233.
2	5 to 18	28 to 92	47 to 156	85 to 281.
3	6 to 21	33 to 109	56 to 185	101 to 333.
4	8 to 27	42 to 137	71 to 233	128 to 419.
5	9 to 30	47 to 153	79 to 259	142 to 467.

* Domestic values are presented as a range between 7% and 23% of the global values.
** Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC over time.

TABLE V.57—BUILT-IN REFRIGERATION PRODUCTS: ESTIMATES OF DOMESTIC PRESENT VALUE OF CO_2 EMISSIONS REDUCTION IN 2014–2043 UNDER TRIAL STANDARD LEVELS

TSL	*Million 2009$ **			
	5% discount rate, average**	3% discount rate, average**	2.5% discount rate, average**	3% discount rate, 95th percentile**
1	0 to 1	2 to 5	3 to 8	5 to 15.
2	0 to 1	2 to 7	4 to 12	7 to 22.
3	1 to 3	4 to 14	7 to 24	13 to 43.
4	1 to 4	5 to 18	9 to 30	17 to 55.
5	1 to 4	7 to 21	11 to 36	20 to 65.

* Domestic values are presented as a range between 7% and 23% of the global values.
** Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC over time.

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other GHG emissions to changes in the future global climate and the potential resulting damages to the world economy continues to evolve rapidly. Thus, any value placed in this rulemaking on reducing CO_2 emissions is subject to change. DOE, together with other Federal agencies, will continue to review various methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. However, consistent with DOE's legal obligations, and taking into account the uncertainty involved with this particular issue, DOE has included in this NOPR the most recent values and analyses resulting from the ongoing interagency review process.

DOE also estimated a range for the cumulative monetary value of the economic benefits associated with NO_X emissions reductions anticipated to result from amended standards for refrigeration products. The dollar-per-ton values that DOE used are discussed in section IV.M. Table V.58 presents the cumulative present values for each TSL calculated using seven-percent and three-percent discount rates.

TABLE V.58—ESTIMATES OF PRESENT VALUE OF NO_X EMISSIONS REDUCTION IN 2014–2043 UNDER REFRIGERATION PRODUCT TRIAL STANDARD LEVELS

	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
	million 2009$				
Standard-Size Refrigerator-Freezers:					
Using 7% discount rate.	11 to 117	13 to 135	15 to 159	21 to 217	25 to 260.
Using 3% discount rate.	27 to 278	31 to 320	37 to 376	50 to 513	60 to 614.
Standard-Size Freezers:					
Using 7% discount rate.	3.5 to 36	5.0 to 52	5.9 to 61	6.8 to 69	7.3 to 75.
Using 3% discount rate.	8.4 to 86	12 to 123	14 to 146	16 to 166	17 to 178.
Compact Refrigeration Products:					
Using 7% discount rate.	1.3 to 13	1.5 to 16	1.8 to 19	2.3 to 24	2.7 to 28.
Using 3% discount rate.	3.3 to 33	3.9 to 40	4.7 to 48	5.9 to 60	6.6 to 68.
Built-In Refrigeration Products:					
Using 7% discount rate.	0.1 to 0.9	0.1 to 1.4	0.3 to 2.7	0.3 to 3.4	0.4 to 4.0.
Using 3% discount rate.	0.2 to 2.2	0.3 to 3.2	0.6 to 6.5	0.8 to 8.0	0.9 to 9.6.

The NPV of the monetized benefits associated with emissions reductions can be viewed as a complement to the NPV of the consumer savings calculated for each TSL considered in this rulemaking. Table V.59 shows an example of the calculation of the combined NPV including benefits from emissions reductions for the case of TSL 3 for standard-size refrigerator-freezers. Table V.60 and Table V.61 present the NPV values that would result if DOE were to add the estimates of the potential economic benefits resulting from reduced CO_2 and NO_X emissions in each of four valuation scenarios to the NPV of consumer savings calculated for each TSL considered in this rulemaking, at both a seven-percent and three-percent discount rate. The CO_2 values used in the columns of each table correspond to the four scenarios for the valuation of CO_2 emission reductions presented in section IV.M.

TABLE V.59—ADDING NET PRESENT VALUE OF CONSUMER SAVINGS TO PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TSL 3 FOR STANDARD-SIZE REFRIGERATOR-FREEZERS

Category	Present value *billion 2009$*	Discount rate (in percent)
Benefits:		
Operating Cost Savings	13.62	7
	34.75	3
CO_2 Reduction Monetized Value (at $4.7/Metric Ton)*	0.713	5
CO_2 Reduction Monetized Value (at $21.4/Metric Ton)*	3.65	3
CO_2 Reduction Monetized Value (at $35.1/Metric Ton)*	6.19	2.5
CO_2 Reduction Monetized Value (at $64.9/Metric Ton)*	11.14	3
NO_X Reduction Monetized Value (at $2,519/Ton)*	0.087	7
	0.206	3
Total Monetary Benefits**	17.36	7
	38.61	3
Costs:		
Total Incremental Installed Costs	13.21	7
	24.35	3
Net Benefits/Costs:		
Including CO_2 and NO_X**	4.15	7
	14.26	3

*These values represent global values (in 2007$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.7, $21.4, and $35.1 per ton are the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The value of $64.9 per ton represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. *See* section IV.M for details. The value for NO_X (in 2009$) is the average of the low and high values used in DOE's analysis.

**Total Monetary Benefits for both the 3% and 7% cases utilize the central estimate of social cost of CO_2 emissions calculated at a 3% discount rate, which is equal to $21.4/ton in 2010 (in 2007$).

TABLE V.60—ESTIMATES OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS (AT 7% DISCOUNT RATE) TO NET PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TRIAL STANDARD LEVELS FOR REFRIGERATION PRODUCTS

TSL	Consumer NPV at 7% discount rate added with:			
	SCC value of $4.7/metric ton CO_2* and low value for NO_X** *billion 2009$*	SCC value of $21.4/metric ton CO_2* and medium value for NO_X** *billion 2009$*	SCC value of $35.1/metric ton CO_2* and Medium Value for NO_X** *billion 2009$*	SCC value of $64.9/metric ton CO_2* and High Value for NO_X** *billion 2009$*
1	6.07	9.28	11.98	17.33
2	5.03	8.94	12.24	18.75
3	3.27	7.90	11.81	19.52
4	(10.43)	(4.43)	0.62	10.60
5	(29.30)	(22.33)	(16.47)	(4.86)

* These label values represent the global SCC of CO_2 in 2010, in 2007$. Their present values have been calculated with scenario-consistent discount rates. *See* section IV.M for a discussion of the derivation of these values.

** Low Value corresponds to $447 per ton of NO_X emissions. Medium Value corresponds to $2,519 per ton of NO_X emissions. High Value corresponds to $4,591 per ton of NO_X emissions.

TABLE V.61—ESTIMATES OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS (AT 3% DISCOUNT RATE) TO NET PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TRIAL STANDARD LEVELS FOR REFRIGERATION PRODUCTS

TSL	Consumer NPV at 3% discount rate added with:			
	SCC value of $4.7/metric ton CO_2* and low value for NO_X** *billion 2009$*	SCC value of $21.4/metric ton CO_2* and medium value for NO_X** *billion 2009$*	SCC value of $35.1/metric ton CO_2* and Medium Value for NO_X** *billion 2009$*	SCC value of $64.9/metric ton CO_2* and High Value for NO_X** *billion 2009$*
1	20.82	24.14	26.85	32.30
2	21.04	25.09	28.39	35.04
3	19.93	24.72	28.62	36.49
4	(1.80)	4.40	9.45	19.65
5	(34.16)	(26.96)	(21.09)	(9.25)

* These label values represent the global SCC of CO_2 in 2010, in 2007$. Their present values have been calculated with scenario-consistent discount rates. *See* section IV.M for a discussion of the derivation of these values.

** Low Value corresponds to $447 per ton of NO_X emissions. Medium Value corresponds to $2,519 per ton of NO_X emissions. High Value corresponds to $4,591 per ton of NO_X emissions.

Although adding the value of consumer savings to the values of emission reductions provides a valuable perspective, two issues should be considered. First, the national operating savings are domestic U.S. consumer monetary savings that occur as a result of market transactions while the value of CO_2 reductions is based on a global value. Second, the assessments of operating cost savings and CO_2 savings are performed with different methods that use quite different time frames for analysis. The national operating cost savings is measured for the lifetime of refrigeration products shipped in 2014–2043. The SCC values, on the other hand, reflect the present value of all future climate-related impacts resulting from the emission of one ton of carbon dioxide in each year. These impacts go well beyond 2100.

7. Other Factors

The Secretary, in determining whether a standard is economically justified, may consider any other factors that he deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VI))) DOE is aware of pending legislation that proposes to phase out substances with significant GWP and that HFCs are included in the list of substances to be phased out. DOE recognizes the significance that such legislation would have to the refrigeration products industry and the impact it would have on the ability of manufacturers to meet energy conservation standards. Given the uncertainty regarding such legislation, however, DOE did not factor the impact of potential HFC limitations in developing the proposed levels presented in today's NOPR.

C. Proposed Standards

When considering proposed standards, the new or amended energy conservation standard that DOE adopts for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens to the greatest extent practicable, in light of the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also "result in significant conservation of energy." (42 U.S.C. 6295(o)(3)(B))

For today's NOPR, DOE considered the impacts of standards at each trial standard level, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the most efficient level that is both technologically feasible and economically justified and saves a significant amount of energy.

For ease of presentation, DOE separately discusses the benefits and/or

burdens of each trial standard level for standard-size refrigerator-freezers, standard-size freezers, compact refrigeration products, and built-in refrigeration products. To aid the reader as DOE discusses the benefits and/or burdens of each trial standard level, tables present a summary of the results of DOE's quantitative analysis for each TSL.

In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers, such as low-income households and seniors, who may be disproportionately affected by a national standard. Section V.B.1 presents the estimated impacts of each TSL for these subgroups.

DOE notes that the proposed standards set forth in the Joint Comments were also carefully considered by the agency. These suggested standards, along with the comments from all interested parties and the agency's analytical work developed in preparation of today's NOPR, were considered during the development of the standards being proposed today. DOE is giving serious consideration to these suggested standards as well as alternative standards that differ from them. As with other aspects of this proposal, the agency solicits comments from interested parties on these proposed standards as well as any other issues commenters believe merit consideration.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. This undervaluation suggests that regulation that promotes energy efficiency can produce significant net private gains (as well as producing social gains by, for example, reducing pollution). There is evidence that consumers undervalue future energy savings as a result of (1) A lack of information, (2) a lack of sufficient savings to warrant delaying or altering purchases (e.g. an inefficient ventilation fan in a new building or the delayed replacement of a water pump), (3) inconsistent (e.g. excessive short-term) weighting of future energy cost savings relative to available returns on other investments, (4) computational or other difficulties associated with the evaluation of relevant tradeoffs, and (5) a divergence in incentives (e.g. renter versus owner; builder v. purchaser). Other literature indicates that with less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher than expected rate between current consumption and uncertain future energy cost savings. While DOE is not prepared at present to provide a fuller quantifiable framework for this discussion at this time, DOE seeks comments on how to assess these possibilities.

1. Standard-Size Refrigerator-Freezers

Table V.62 presents a summary of the quantitative impacts estimated for each TSL for standard-size refrigerator-freezers. The efficiency levels contained in each TSL are described in section V.A.

TABLE V.62—SUMMARY OF RESULTS FOR STANDARD-SIZE REFRIGERATOR-FREEZERS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
National Energy Savings (quads).	2.25	2.59	3.05	4.14	4.94
NPV of Consumer Benefits (2009$ billion):					
3% discount rate	11.83	11.08	10.40	(7.51)	(29.33)
7% discount rate	2.53	1.58	0.41	(11.05)	(24.08)
Industry Impacts:					
Standard-Size Refrigerator-Freezers:					
Industry NPV (2009$ million).	(84.8) to (301.7)	(175.9) to (459.8)	(287.5) to (662.1)	(643.0) to (1,496.8)	(828.9) to (2,154.7)
Industry NPV (% change).	(2.7) to (9.5)	(5.5) to (14.5)	(9.1) to (20.9)	(20.3) to (47.2)	(26.1) to (67.9)
Cumulative Emissions Reduction:					
CO_2 (Mt)	154	177	208	283	338
NO_X (kt)	124	142	168	228	272
Hg (t)	0.79	0.91	1.07	1.45	1.73
Value of Cumulative Emissions Reduction:					
CO_2 (2009$ billion)*	0.53 to 8.22	0.61 to 9.47	0.71 to 11.14	0.97 to 15.17	1.16 to 18.14
NO_X—3% discount rate (2009$ million).	27 to 278	31 to 320	37 to 376	50 to 513	60 to 614
NO_X—7% discount rate (2009$ million).	11 to 117	13 to 135	15 to 159	21 to 217	25 to 260
Mean LCC Savings** (2009$):					
Top-Mount Refrigerator-Freezers.	29	29	22	(37)	(133)
Bottom-Mount Refrigerator-Freezers.	19	19	19	(79)	(180)
Side-by-Side Refrigerator-Freezers.	53	37	37	(55)	(134)
Median PBP (years):					
Top-Mount Refrigerator-Freezers	9.2	9.2	10.9	15.4	20.5
Bottom-Mount Refrigerator-Freezers.	4.9	4.9	4.9	24.8	29.0

TABLE V.62—SUMMARY OF RESULTS FOR STANDARD-SIZE REFRIGERATOR-FREEZERS—Continued

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Side-by-Side Refrigerator-Freezers.	4.8	10.9	10.9	18.6	22.6
Distribution of Consumer LCC Impacts:					
Top-Mount Refrigerator-Freezers:					
Net Cost (%)	42.3	42.3	54.9	73.8	85.4
No Impact (%)	8.1	8.1	0.0	0.0	0.0
Net Benefit (%)	49.6	49.6	45.1	26.2	14.6
Bottom-Mount Refrigerator-Freezers:					
Net Cost (%)	4.5	4.5	4.5	88.2	93.3
No Impact (%)	67.8	67.8	67.8	0.0	0.0
Net Benefit (%)	27.7	27.7	27.7	11.8	6.7
Side-by-Side Refrigerator-Freezers:					
Net Cost (%)	7.3	50.8	50.8	77.7	86.2
No Impact (%)	36.9	0.0	0.0	0.0	0.0
Net Benefit (%)	55.8	49.2	49.2	22.3	13.9
Generation Capacity Reduction (GW).†	2.28	2.63	3.10	4.23	5.07
Employment Impacts:					
Total Potential Changes in Domestic Production Workers in 2014 (thousands).	(0.22) to (8.52)	(0.26) to (8.52)	(0.21) to (8.52)	(0.28) to (8.52)	(0.43) to (8.52)
Indirect Domestic Jobs (thousands).†	10.99	12.05	13.49	12.95	10.34

Parentheses indicate negative (−) values.
* Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
** For LCCs, a negative value means an increase in LCC by the amount indicated.
† Changes in 2043.

DOE first considered TSL 5, which represents the max-tech efficiency levels. TSL 5 would save 4.94 quads of energy, an amount DOE considers significant. Under TSL 5, the NPV of consumer benefit would be –$24.08 billion, using a discount rate of 7 percent, and –$29.33 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 338 Mt of CO_2, 272 kt of NO_X, and 1.73 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 5 ranges from $1.16 billion to $18.14 billion. Total generating capacity in 2043 is estimated to decrease by 5.07 GW under TSL 5.

At TSL 5, the average LCC impact is a cost (LCC increase) of $133 for top-mount refrigerator-freezers, a cost of $180 for bottom-mount refrigerator-freezers, and a cost of $134 for side-by-side refrigerator-freezers. The median payback period is 21 years for top-mount refrigerator-freezers, 29 years for bottom-mount refrigerator-freezers, and 23 years for side-by-side refrigerator-freezers. The fraction of consumers experiencing an LCC benefit is 15 percent for top-mount refrigerator-freezers, 7 percent for bottom-mount refrigerator-freezers, and 14 percent for side-by-side refrigerator-freezers. The fraction of consumers experiencing an LCC cost is 85 percent for top-mount refrigerator-freezers, 93 percent for bottom-mount refrigerator-freezers, and 86 percent for side-by-side refrigerator-freezers.

At TSL 5, the projected change in INPV ranges from a decrease of $828.9 million to a decrease of $2,154.7 million. At TSL 5, DOE recognizes the risk of very large negative impacts if manufacturers' expectations concerning reduced profit margins are realized. If the high end of the range of impacts is reached as DOE expects, TSL 5 could result in a net loss of 68 percent in INPV to standard-size refrigerator-freezer manufacturers.

The Secretary tentatively concludes that at TSL 5 for standard-size refrigerator-freezers, the benefits of energy savings, generating capacity reductions, emission reductions, and the estimated monetary value of the CO_2 emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on a significant fraction of consumers due to the large increases in product cost, and the capital conversion costs and profit margin impacts that could result in a very large reduction in INPV for the manufacturers. Consequently, the Secretary has tentatively concluded that TSL 5 is not economically justified.

DOE then considered TSL 4. TSL 4 would save 4.14 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be −$11.05 billion, using a discount rate of 7 percent, and −$7.51 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 283 Mt of CO_2, 228 kt of NO_X, and 1.45 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 4 ranges from $0.97 billion to $15.17 billion. Total generating capacity in 2043 is estimated to decrease by 4.23 GW under TSL 4.

At TSL 4, DOE projects that the average LCC impact is a cost (LCC increase) of $37 for top-mount refrigerator-freezers, a cost of $79 for bottom-mount refrigerator-freezers, and a cost of $55 for side-by-side refrigerator-freezers. The median payback period is 15 years for top-mount refrigerator-freezers, 25 years for bottom-mount refrigerator-freezers, and 19 years for side-by-side refrigerator-freezers. The fraction of consumers experiencing an LCC benefit is 26 percent for top-mount refrigerator-freezers, 12 percent for bottom-mount

refrigerator-freezers, and 22 percent for side-by-side refrigerator-freezers. The fraction of consumers experiencing an LCC cost is 74 percent for top-mount refrigerator-freezers, 88 percent for bottom-mount refrigerator-freezers, and 78 percent for side-by-side refrigerator-freezers.

At TSL 4, the projected change in INPV ranges from a decrease of $643.0 million to a decrease of $1,496.8 million. DOE recognizes the risk of large negative impacts if manufacturers' expectations concerning reduced profit margins are realized. If the high end of the range of impacts is reached as DOE expects, TSL 4 could result in a net loss of 47 percent in INPV to standard-size refrigerator-freezer manufacturers.

The Secretary tentatively concludes that at TSL 4 for standard-size refrigerator-freezers, the benefits of energy savings, generating capacity reductions, and emission reductions and the estimated monetary value of the CO_2 emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on a significant fraction of consumers due to the large increases in product cost, and the capital conversion costs and profit margin impacts that could result in a substantial reduction in INPV for the manufacturers. Consequently, the Secretary has tentatively concluded that TSL 4 is not economically justified.

DOE then considered TSL 3. TSL 3 would save 3.05 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would be $0.41 billion, using a discount rate of 7 percent, and $10.40 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 208 Mt of CO_2, 168 kt of NO_X, and 1.07 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 3 ranges from $0.71 billion to $11.14 billion. Total generating capacity in 2043 is estimated to decrease by 3.10 GW under TSL 3.

At TSL 3, the average LCC impact is a gain (consumer savings) of $22 for top-mount refrigerator-freezers, a gain of $19 for bottom-mount refrigerator-freezers, and a gain of $37 for side-by-side refrigerator-freezers. The median payback period is 11 years for top-mount refrigerator-freezers, 5 years for bottom-mount refrigerator-freezers, and 11 years for side-by-side refrigerator-freezers. The fraction of consumers experiencing an LCC benefit is 45 percent for top-mount refrigerator-freezers, 28 percent for bottom-mount refrigerator-freezers, and 49 percent for side-by-side refrigerator-freezers. The fraction of consumers experiencing an LCC cost is 55 percent for top-mount refrigerator-freezers, 5 percent for bottom-mount refrigerator-freezers, and 51 percent for side-by-side refrigerator-freezers.

At TSL 3, the projected change in INPV ranges from a decrease of $287.5 million to a decrease of $662.1 million. DOE recognizes the risk of negative impacts if manufacturers' expectations concerning reduced profit margins are realized. If the high end of the range of impacts is reached as DOE expects, TSL 3 could result in a net loss of 21 percent in INPV to standard-size refrigerator-freezer manufacturers.

The Secretary tentatively concludes that at TSL 3 for standard-size refrigerator-freezers, the benefits of energy savings, positive NPV of consumer benefits, generating capacity reductions, emission reductions, and the estimated monetary value of the CO_2 emissions reductions outweigh the economic burden on a significant fraction of consumers due to the increases in product cost, and the capital conversion costs and profit margin impacts that could result in a reduction in INPV for the manufacturers. In addition to the aforementioned benefits of the proposed standards, DOE notes that the efficiency levels in TSL 3 correspond to the recommended levels in the Joint Comments.

After considering the analysis, comments to the November 2009 notice and the preliminary TSD, and the benefits and burdens of TSL 3, the Secretary tentatively concludes that this trial standard level will offer the maximum improvement in efficiency that is technologically feasible and economically justified, and will result in the significant conservation of energy. Therefore, DOE today proposes to adopt TSL 3 for standard-size refrigerator-freezers. The proposed amended energy conservation standards for standard-size refrigerator-freezers, expressed as equations for maximum energy use, are shown in Table V.63.

TABLE V.63—PROPOSED STANDARDS FOR STANDARD-SIZE REFRIGERATORS AND REFRIGERATOR-FREEZERS

Product class	Equations for maximum energy use (kWh/yr)	
	based on AV (ft^3)	based on av (L)
1. Refrigerators and refrigerator-freezers with manual defrost	7.99AV + 225.0	0.282av + 225.0
1A. All-refrigerators—manual defrost	6.79AV + 193.6	0.240av + 193.6
2. Refrigerator-freezers—partial automatic defrost	7.99AV + 225.0	0.282av + 225.0
3. Refrigerator-freezers—automatic defrost with top-mounted freezer without an automatic icemaker	8.04AV + 232.7	0.284av + 232.7
3I. Refrigerator-freezers—automatic defrost with top-mounted freezer with an automatic icemaker without through-the-door ice service.	8.04AV + 316.7	0.284av + 316.7
3A. All-refrigerators—automatic defrost	7.07AV + 201.6	0.250av + 201.6
4. Refrigerator-freezers—automatic defrost with side-mounted freezer without an automatic icemaker	8.48AV + 296.5	0.299av + 296.5
4I. Refrigerator-freezers—automatic defrost with side-mounted freezer with an automatic icemaker without through-the-door ice service.	8.48AV + 380.5	0.299av + 380.5
5. Refrigerator-freezers—automatic defrost with bottom-mounted freezer without an automatic icemaker	8.80AV + 315.4	0.311av + 315.4
5I. Refrigerator-freezers—automatic defrost with bottom-mounted freezer with an automatic icemaker without through-the-door ice service.	8.80AV + 399.4	0.311av + 399.4
5A. Refrigerator-freezer—automatic defrost with bottom-mounted freezer with through-the-door ice service.	9.15AV + 471.3	0.323av + 471.3
6. Refrigerator-freezers—automatic defrost with top-mounted freezer with through-the-door ice service	8.36AV + 384.1	0.295av + 384.1
7. Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service	8.50AV + 431.1	0.300av + 431.1

AV = adjusted volume in cubic feet; av = adjusted volume in liters.

2. Standard-Size Freezers

Table V.64 presents a summary of the quantitative impacts estimated for each TSL for standard-size freezers. The efficiency levels contained in each TSL are described in section V.A.

TABLE V.64—SUMMARY OF RESULTS FOR STANDARD-SIZE FREEZERS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
National Energy Savings (quads).	0.71	1.01	1.19	1.35	1.45
NPV of Consumer Benefits (2009$ billion):					
3% discount rate	6.64	7.78	7.87	6.02	0.51
7% discount rate	2.14	2.12	1.81	0.55	(2.63)
Industry Impacts:					
Standard-Size Freezers:					
Industry NPV (2009$ million).	(24.9) to (57.3)	(110.6) to (186.0)	(94.5) to (201.1)	(59.0) to (218.9)	(102.4) to (365.1)
Industry NPV (% change).	(6.2) to (14.2)	(27.5) to (46.2)	(23.5) to (49.9)	(14.6) to (54.4)	(25.4) to (90.7)
Cumulative Emissions Reduction:					
CO_2 (Mt)	48	69	81	92	99
NO_X (kt)	39	55	65	74	79
Hg (t)	0.24	0.34	0.41	0.47	0.50
Value of Cumulative Emissions Reduction:					
CO_2 (2009$ billion)*	0.16 to 2.56	0.23 to 3.67	0.27 to 4.33	0.31 to 4.92	0.33 to 5.28
NO_X—3% discount rate (2009$ million).	8.4 to 86	12 to 123	14 to 143	16 to 166	17 to 178
NO_X—7% discount rate (2009$ million).	3.5 to 36	5.0 to 52	5.9 to 61	6.8 to 69	7.3 to 75
Mean LCC Savings** (2009$):					
Upright Freezers	111	148	130	87	(63)
Chest Freezers	70	50	56	17	(71)
Median PBP (years):					
Upright Freezers	4.8	6.2	8.4	11.0	17.4
Chest Freezers	4.2	8.7	9.1	13.1	19.3
Distribution of Consumer LCC Impacts:					
Upright Freezers:					
Net Cost (%)	11.7	18.7	30.8	45.0	70.2
No Impact (%)	0.6	0.2	0.0	0.0	0.0
Net Benefit (%)	87.8	81.1	69.2	55.0	29.8
Chest Freezers:					
Net Cost (%)	1.6	25.8	28.3	53.5	79.0
No Impact (%)	0.2	0.2	0.2	0.0	0.0
Net Benefit (%)	98.2	74.0	71.5	46.5	21.0
Generation Capacity Reduction (GW)†.	0.74	0.74	1.25	1.42	1.53
Employment Impacts:					
Total Potential Changes in Domestic Production Workers in 2014 (thousands).	(0.05) to (1.90)	(0.12) to (1.90)	(0.17) to (1.90)	(0.27) to (1.90)	(0.40) to (1.90)
Indirect Domestic Jobs (thousands)†.	4.34	5.79	5.79	6.77	5.80

Parentheses indicate negative (−) values.
*Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
**For LCCs, a negative value means an increase in LCC by the amount indicated.
† Changes in 2043.

DOE first considered TSL 5, which represents the max-tech efficiency levels. TSL 5 would save 1.45 quads of energy, an amount DOE considers significant. Under TSL 5, the NPV of consumer benefit would be –$2.63 billion, using a discount rate of 7 percent, and $0.51 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 99 Mt of CO_2, 79 kt of NO_X, and 0.50 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 5 ranges from $0.33 billion to $5.28 billion. Total generating capacity in 2043 is estimated to decrease by 1.53 GW under TSL 5.

At TSL 5, the average LCC impact is a cost (LCC increase) of $63 for upright freezers, and a cost of $71 for chest freezers. The median payback period is 17 years for upright freezers and 19 years for chest freezers. The fraction of consumers experiencing an LCC benefit is 30 percent for upright freezers and 21 percent for chest freezers. The fraction of consumers experiencing an LCC cost is 70 percent for upright freezers and 79 percent for chest freezers.

At TSL 5, the projected change in INPV ranges from a decrease of $102.4 million to a decrease of $365.1 million. DOE recognizes the risk of very large negative impacts if manufacturers' expectations concerning reduced profit margins are realized. Standards at TSL 5 would require efficiency levels that are far higher than the most efficient products currently available on the market. Manufacturing products to meet standards at TSL 5 would require large investments in product redesign and conversion of facilities. Because standard-size freezers are currently low-cost, low-margin products, there is a limited ability to pass on to consumers the required conversion costs and added product costs associated with efficiency-improving technologies for freezers. If the high end of the range of impacts is reached as DOE expects, TSL 5 could result in a net loss of 91 percent in INPV to standard-size freezer manufacturers.

The Secretary tentatively concludes that at TSL 5 for standard-size freezers, the benefits of energy savings, positive NPV of consumer benefits, generating capacity reductions, emission reductions, and the estimated monetary value of the CO_2 emissions reductions would be outweighed by the economic burden on a significant fraction of consumers due to the large increases in product cost, and the capital conversion costs and profit margin impacts that could result in a very large reduction in INPV for the manufacturers. Consequently, the Secretary has tentatively concluded that TSL 5 is not economically justified.

DOE then considered TSL 4. TSL 4 would save 1.35 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be $0.55 billion, using a discount rate of 7 percent, and $6.02 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 92 Mt of CO_2, 74 kt of NO_X, and 0.47 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 4 ranges from $0.31 billion to $4.92 billion. Total generating capacity in 2043 is estimated to decrease by 1.42 GW under TSL 4.

At TSL 4, the average LCC impact is a gain (consumer savings) of $87 for upright freezers and a gain of $17 for chest freezers. The median payback period is 11 years for upright freezers and 13 years for chest freezers. The fraction of consumers experiencing an LCC benefit is 55 percent for upright freezers and 47 percent for chest freezers. The fraction of consumers experiencing an LCC cost is 45 percent for upright freezers and 54 percent for chest freezers.

At TSL 4, the projected change in INPV ranges from a decrease of $59.0 million to a decrease of $218.9 million. DOE recognizes the risk of very large negative impacts if manufacturers' expectations concerning reduced profit margins are realized. Standards at TSL 4 would require efficiency levels that are substantially higher than the most efficient products currently available on the market. Manufacturing products to meet standards at TSL 4 would require large investments in product redesign and conversion of facilities. Because standard-size freezers are currently low-cost, low-margin products, there is a limited ability to pass on to consumers the required conversion costs and added product costs associated with efficiency-improving technologies for freezers. If the high end of the range of impacts is reached as DOE expects, TSL 4 could result in a net loss of 54 percent in INPV to standard-size freezer manufacturers.

The Secretary tentatively concludes that at TSL 4 for standard-size freezers, the benefits of energy savings, positive NPV of consumer benefits, generating capacity reductions, emission reductions, the estimated monetary value of the cumulative CO_2 emissions reductions, and the economic benefit on a significant fraction of upright freezer consumers would be outweighed by the economic burden on a significant fraction of chest freezer consumers due to the increase in product cost, and the large capital conversion costs and margin impacts that could result in a large reduction in INPV for the manufacturers.

DOE then considered TSL 3. TSL 3 would save 1.19 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would be $1.81 billion, using a discount rate of 7 percent, and $7.87 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 81 Mt of CO_2, 65 kt of NO_X, and 0.41 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 3 ranges from $0.27 billion to $4.33 billion. Total generating capacity in 2043 is estimated to decrease by 1.25 GW under TSL 3.

At TSL 3, the average LCC impact is a gain (consumer savings) of $130 for upright freezers and a gain of $56 for chest freezers. The median payback period is 8 years for upright freezers and 9 years for chest freezers. The fraction of consumers experiencing an LCC benefit is 69 percent for upright freezers and 72 percent for chest freezers. The fraction of consumers experiencing an LCC cost is 31 percent for upright freezers and 28 percent for chest freezers.

At TSL 3, the projected change in INPV ranges from a decrease of $94.5 million to a decrease of $201.1 million. DOE recognizes the risk of very large negative impacts if manufacturers' expectations concerning reduced profit margins are realized. Standards at TSL 3 would require efficiency levels that are substantially higher than the most efficient products currently available on the market. Similar to the case of TSL 4, manufacturing products to meet standards at TSL 3 would require large investments in product redesign and conversion of facilities. Because standard-size freezers are currently low-cost, low-margin products, there is a limited ability to pass on to consumers the required conversion costs and added product costs associated with efficiency-improving technologies for freezers. If the high end of the range of impacts is reached as DOE expects, TSL 3 could result in a net loss of 50 percent in INPV to standard-size freezer manufacturers.

The Secretary tentatively concludes that at TSL 3 for standard-size freezers, the benefits of energy savings, positive NPV of consumer benefits, generating capacity reductions, emission reductions, the estimated monetary value of the cumulative CO_2 emissions reductions, and the economic benefit for a significant fraction of freezer consumers would be outweighed by the large capital conversion costs and profit margin impacts that could result in a large reduction in INPV for the manufacturers.

DOE then considered TSL 2. TSL 2 would save 1.01 quads of energy, an amount DOE considers significant. Under TSL 2, the NPV of consumer benefit would be $2.12 billion, using a discount rate of 7 percent, and $7.78 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 2 are 69 Mt of CO_2, 55kt of NO_X, and 0.34 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 2 ranges from $0.23 billion to $3.67 billion. Total generating capacity in 2043 is estimated to decrease by 0.74 GW under TSL 2.

At TSL 2, the average LCC impact is a gain (consumer savings) of $148 for upright freezers and a gain of $50 for chest freezers. The median payback period is 6 years for upright freezers and 9 years for chest freezers. The fraction of consumers experiencing an LCC benefit is 81 percent for upright freezers and 74 percent for chest freezers. The fraction of consumers experiencing an LCC cost is 19 percent for upright

freezers and 26 percent for chest freezers.

DOE estimated the projected change in INPV ranges from a decrease of $110.6 million to a decrease of $186.0 million. At TSL 2, DOE recognizes the risk of negative impacts if manufacturers' expectations concerning reduced profit margins are realized. Standards at TSL 2 would pose many of the same issues as discussed above for TSL3, but the projected negative impacts are somewhat less. If the high end of the range of impacts is reached as DOE expects, TSL 2 could result in a net loss of 46 percent in INPV to standard-size freezer manufacturers.

The Secretary tentatively concludes that at TSL 2 for standard-size freezers, the benefits of energy savings, positive NPV of consumer benefits, generating capacity reductions, emission reductions, the estimated monetary value of the cumulative CO_2 emissions reductions, and the economic benefit for a significant fraction of freezer consumers would outweigh the capital conversion costs and profit margin impacts that could result in a reduction in INPV for the manufacturers. In addition to the aforementioned benefits of the proposed standards, DOE notes that the efficiency levels in TSL 2 correspond to the recommended levels in the Joint Comments.

After considering the analysis, comments on the November 2009 notice and the preliminary TSD, and the benefits and burdens of TSL 2, the Secretary tentatively concludes that this trial standard level will offer the maximum improvement in efficiency that is technologically feasible and economically justified, and will result in significant conservation of energy. Therefore, DOE today proposes to adopt TSL 2 for standard-size freezers. The proposed amended energy conservation standards for standard-size freezers, expressed as equations for maximum energy use, are shown in Table V.65.

TABLE V.65—PROPOSED STANDARDS FOR STANDARD-SIZE FREEZERS

Product class	Equations for maximum energy use (kWh/yr)	
	based on AV (ft^3)	based on av (L)
8. Upright freezers with manual defrost	5.57AV + 193.7	0.197av + 193.7
9. Upright freezers with automatic defrost without an automatic icemaker	8.62AV + 228.3	0.305av + 228.3
10. Chest freezers and all other freezers except compact freezers	7.29AV + 107.8	0.257av + 107.8
10A. Chest freezers with automatic defrost	10.24AV + 148.1	0.362av + 148.1

AV= adjusted volume in cubic feet; av = adjusted volume in liters.

3. Compact Refrigeration Products

Table V.66 presents a summary of the quantitative impacts estimated for each TSL for compact refrigeration products. The efficiency levels contained in each TSL are described in section V.A.

TABLE V.66—SUMMARY OF RESULTS FOR COMPACT REFRIGERATION PRODUCTS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
National Energy Savings (quads).	0.30	0.37	0.43	0.54	0.59
NPV of Consumer Benefits (2009$ billion):					
3% discount rate	1.42	0.86	0.96	(0.89)	(5.45)
7% discount rate	0.58	0.25	0.27	(0.78)	(3.28)
Industry Impacts					
Compact Refrigeration Products:					
Industry NPV (2009$ million).	(14.3) to (32.1)	(30.8) to (66.7)	(56.8) to (99.2)	(29.6) to (114.4)	(133.0) to (295.6)
Industry NPV (% change)	(7.2) to (16.1)	(15.4) to (33.4)	(28.4) to (49.6)	(14.8) to (57.3)	(66.6) to (148.0)
Cumulative Emissions Reduction:					
CO_2 (Mt)	20	24	28	35	39
NO_X (kt)	16	19	23	28	31
Hg (t)	0.10	0.12	0.15	0.19	0.21
Value of Cumulative Emissions Reduction:					
CO_2 (2009$ billion)*	0.07 to 1.02	0.08 to 1.22	0.10 to 1.45	0.12 to 1.82	0.13 to 2.03
NO_X—3% discount rate (2009$ million).	3.3 to 33	3.9 to 40	4.7 to 48	5.9 to 60	6.6 to 68
NO_X—7% discount rate (2009$ million).	1.3 to 13	1.5 to 16	1.8 to 19	2.3 to 24	2.7 to 28
Mean LCC Savings** (2009$):					
Compact Refrigerators	15	10	8	(13)	(105)
Compact Freezers	11	11	7	(30)	(121)
Median PBP (years):					
Compact Refrigerators	2.8	3.9	4.4	6.5	11.6
Compact Freezers	2.5	2.5	4.6	10.0	15.9
Distribution of Consumer LCC Impacts:					

TABLE V.66—SUMMARY OF RESULTS FOR COMPACT REFRIGERATION PRODUCTS—Continued

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Compact Refrigerators					
Net Cost (%)	24.4	43.3	50.6	76.1	93.8
No Impact (%)	1.4	1.0	0.9	0.0	0.0
Net Benefit (%)	74.2	55.7	48.5	23.9	6.2
Compact Freezers					
Net Cost (%)	9.9	9.9	40.6	88.5	97.8
No Impact (%)	4.7	4.7	0.0	0.0	0.0
Net Benefit (%)	85.4	85.4	59.4	11.5	2.3
Generation Capacity Reduction (GW) †.	0.02	0.32	0.38	0.48	0.51
Employment Impacts:					
Total Potential Changes in Domestic Production Workers in 2014 (thousands).	(0.00) to (0.03)	(0.00) to (0.03)	(0.00) to (0.03)	(0.00) to (0.03)	(0.02) to (0.03)
Indirect Domestic Jobs (thousands) †.	1.24	1.26	1.44	1.21	0.14

Parentheses indicate negative (−) values.
* Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
** For LCCs, a negative value means an increase in LCC by the amount indicated.
† Changes in 2043.

DOE first considered TSL 5, which represents the max-tech efficiency levels. TSL 5 would save 0.59 quads of energy, an amount DOE considers significant. Under TSL 5, the NPV of consumer benefit would be −$3.28 billion, using a discount rate of 7 percent, and −$5.45 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 39 Mt of CO_2, 31 kt of NO_X, and 0.21 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 5 ranges from $0.13 billion to $2.03 billion. Total generating capacity in 2043 is estimated to decrease by 0.51 GW under TSL 5.

At TSL 5, the average LCC impact is a cost (LCC increase) of $105 for compact refrigerators and a cost of $121 for compact freezers. The median payback period is 12 years for compact refrigerators and 16 years for compact freezers. The fraction of consumers experiencing an LCC benefit is 6 percent for compact refrigerators and 2 percent for compact freezers. The fraction of consumers experiencing an LCC cost is 94 percent for compact refrigerators and 98 percent for compact freezers.

At TSL 5, the projected change in INPV ranges from a decrease of $133.0 million to a decrease of $295.6 million. DOE recognizes the risk of very large negative impacts if manufacturers' expectations concerning reduced profit margins are realized. Manufacturing products to meet standards at TSL 5 would require large investments in product redesign and conversion of facilities. Because compact refrigeration products are currently low-cost, low-margin products, there is a limited ability to pass on to consumers the required conversion costs and added product costs associated with efficiency-improving technologies. If the high end of the range of impacts is reached as DOE expects, TSL 5 could result in a net loss of 148.0 percent in INPV to compact refrigeration product manufacturers.

The Secretary tentatively concludes that at TSL 5 for compact refrigeration products, the benefits of energy savings, generating capacity reductions, emission reductions, and the estimated monetary value of the CO_2 emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on a significant fraction of consumers due to the increases in product cost, the capital conversion costs and profit margin impacts that could result in a large reduction in INPV for the manufacturers. Consequently, the Secretary has tentatively concluded that TSL 5 is not economically justified.

DOE then considered TSL 4. TSL 4 would save 0.54 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be −$0.78 billion, using a discount rate of 7 percent, and −$0.89 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 35 Mt of CO_2, 28 kt of NO_X, and 0.19 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 4 ranges from $0.12 billion to $1.82 billion. Total generating capacity in 2043 is estimated to decrease by 0.48 GW under TSL 4.

At TSL 4, the average LCC impact is a cost (LCC increase) of $13 for compact refrigerators and a cost of $30 for compact freezers. The median payback period is 7 years for compact refrigerators and 10 years for compact freezers. The fraction of consumers experiencing an LCC benefit is 24 percent for compact refrigerators and 12 percent for compact freezers. The fraction of consumers experiencing an LCC cost is 76 percent for compact refrigerators and 89 percent for compact freezers.

At TSL 4, the projected change in INPV ranges from a decrease of $29.6 million to a decrease of $114.4 million. DOE recognizes the risk of very large negative impacts if manufacturers' expectations about reduced profit margins are realized. Manufacturing products to meet standards at TSL 4 would require large investments in product redesign and conversion of facilities. Because compact refrigeration products are currently low-cost, low-margin products, there is a limited ability to pass on to consumers the required conversion costs and added product costs associated with efficiency-improving technologies. If the high end of the range of impacts is reached as DOE expects, TSL 4 could result in a net loss of 57 percent in INPV to compact refrigeration product manufacturers.

The Secretary tentatively concludes that at TSL 4 for compact refrigeration products, the benefits of energy savings, generating capacity reductions, emission reductions, and the estimated monetary value of the CO_2 emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on a significant fraction of consumers due to the increases in product costs, and the capital conversion costs and profit

margin impacts that could result in a large reduction in INPV for the manufacturers. Consequently, the Secretary has tentatively concluded that TSL 4 is not economically justified.

DOE then considered TSL 3. TSL 3 would save 0.43 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would be $0.27 billion, using a discount rate of 7 percent, and $0.96 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 28 Mt of CO_2, 23 kt of NO_X, and 0.15 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 3 ranges from $0.10 billion to $1.45 billion. Total generating capacity in 2043 is estimated to decrease by 0.38 GW under TSL 3.

At TSL 3, the average LCC impact is a gain (consumer savings) of $8 for compact refrigerators and a gain of $7 for compact freezers. The median payback period is 4 years for compact refrigerators and 5 years for compact freezers. The fraction of consumers experiencing an LCC benefit is 49 percent for compact refrigerators and 59 percent for compact freezers. The fraction of consumers experiencing an LCC cost is 51 percent for compact refrigerators and 41 percent for compact freezers.

At TSL 3, the projected change in INPV ranges from a decrease of $56.8 million to a decrease of $99.2 million. DOE recognizes the risk of large negative impacts if manufacturers' expectations about reduced profit margins are realized. Manufacturing products to meet standards at TSL 3 would require large investments in product redesign and conversion of facilities. Because compact refrigeration products are currently low-cost, low-margin products, there is a limited ability to pass on to consumers the required conversion costs and added product costs associated with efficiency-improving technologies. If the high end of the range of impacts is reached as DOE expects, TSL 3 could result in a net loss of 50 percent in INPV to compact refrigeration product manufacturers.

The Secretary tentatively concludes that at TSL 3 for compact refrigeration products, the benefits of energy savings, positive NPV of consumer benefits, generating capacity reductions, emission reductions, and the estimated monetary value of the cumulative CO_2 emissions reductions would be outweighed by the economic burden on a significant fraction of consumers due to the increases in product costs, and by the capital conversion costs and profit margin impacts that could result in a large reduction in INPV for the manufacturers. Consequently, the Secretary has tentatively concluded that TSL 3 is not economically justified.

DOE then considered TSL 2. TSL 2 would save 0.37 quads of energy, an amount DOE considers significant. Under TSL 2, the NPV of consumer benefit would be $0.25 billion, using a discount rate of 7 percent, and $0.86 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 2 are 24 Mt of CO_2, 19 kt of NO_X, and 0.12 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 2 ranges from $0.08 billion to $1.22 billion. Total generating capacity in 2043 is estimated to decrease by 0.32 GW under TSL 2.

At TSL 2, the average LCC impact is a gain (consumer savings) of $10 for compact refrigerators and a gain of $11 for compact freezers. The median payback period is 4 years for compact refrigerators and 3 years for compact freezers. The fraction of consumers experiencing an LCC benefit is 56 percent for compact refrigerators and 85 percent for compact freezers. The fraction of consumers experiencing an LCC cost is 43 percent for compact refrigerators and 10 percent for compact freezers.

At TSL 2, the projected change in INPV ranges from a decrease of $30.8 million to a decrease of $66.7 million. DOE recognizes the risk of negative impacts if manufacturers' expectations about reduced profit margins are realized. Manufacturing products to meet standards at TSL 2 would require investments in product redesign and conversion of facilities. Because compact refrigeration products are currently low-cost, low-margin products, there is a limited ability to pass on to consumers the required conversion costs and added product costs associated with efficiency-improving technologies. If the high end of the range of impacts is reached as DOE expects, TSL 2 could result in a net loss of 33 percent in INPV to compact refrigeration product manufacturers.

The Secretary tentatively concludes that at TSL 2 for compact refrigeration products, the benefits of energy savings, positive NPV of consumer benefits, generating capacity reductions, emission reductions, the estimated monetary value of the cumulative CO_2 emissions reductions, and the economic benefit to a significant fraction of consumers would outweigh the capital conversion costs that could result in a reduction in INPV for the manufacturers. In addition to the aforementioned benefits of the proposed standards, DOE notes that the efficiency levels in TSL 2 correspond to the recommended levels in the Joint Comments.

After considering the analysis, comments on the November 2009 notice and the preliminary TSD, and the benefits and burdens of TSL 2, the Secretary tentatively concludes that this trial standard level will offer the maximum improvement in efficiency that is technologically feasible and economically justified, and will result in significant conservation of energy. Therefore, DOE today proposes to adopt TSL 2 for compact refrigeration products. The proposed amended energy conservation standards for compact refrigeration products, expressed as equations for maximum energy use, are shown in Table V.67.

TABLE V.67—PROPOSED STANDARDS FOR COMPACT REFRIGERATION PRODUCTS

Product class	Equations for maximum energy use (kWh/yr)	
	based on AV (ft^3)	based on av (L)
11. Compact refrigerators and refrigerator-freezers with manual defrost	9.03AV + 252.3	0.319av + 252.3
11A. Compact refrigerators and refrigerator-freezers with manual defrost	7.84AV + 219.1	0.277av + 219.1
12. Compact refrigerator-freezers—partial automatic defrost	5.91AV + 335.8	0.209av + 335.8
13. Compact refrigerator-freezers—automatic defrost with top-mounted freezer	11.80AV + 339.2	0.417av + 339.2
13A. Compact all-refrigerator—automatic defrost	9.17AV + 259.3	0.324av + 259.3
14. Compact refrigerator-freezers—automatic defrost with side-mounted freezer	6.82AV + 456.9	0.241av + 456.9
15. Compact refrigerator-freezers—automatic defrost with bottom-mounted freezer	12.88AV + 368.7	0.455av + 368.7
16. Compact upright freezers with manual defrost	8.65AV + 225.7	0.306av + 225.7
17. Compact upright freezers with automatic defrost	10.17AV + 351.9	0.359av + 351.9

TABLE V.67—PROPOSED STANDARDS FOR COMPACT REFRIGERATION PRODUCTS—Continued

Product class	Equations for maximum energy use (kWh/yr)	
	based on AV (ft^3)	based on av (L)
18. Compact chest freezers	9.25AV + 136.8	0.327av + 136.8

AV = adjusted volume in cubic feet; av = adjusted volume in liters

4. Built-In Refrigeration Products

Table V.68 presents a summary of the quantitative impacts estimated for each TSL for built-in refrigeration products. The efficiency levels contained in each TSL are described in section V.A.

TABLE V.68—SUMMARY OF RESULTS FOR BUILT-IN REFRIGERATION PRODUCTS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
National Energy Savings (quads).	0.02	0.03	0.05	0.07	0.08
NPV of Consumer Benefits (2009$ billion):					
3% discount rate	0.13	0.12	(0.46)	(0.91)	(1.62)
7% discount rate	0.04	0.02	(0.34)	(0.60)	(1.00)
Industry Impacts:					
Built-in Refrigeration Products:					
Industry NPV (2009$ million).	(51.7) to (52.9)	(54.7) to (57.0)	(65.8) to (80.5)	(79.7) to (103.0)	(84.9) to (120.3)
Industry NPV (% change).	(7.9) to (8.0)	(8.3) to (8.7)	(10.0) to (12.2)	(12.1) to (15.6)	(12.9) to (18.3)
Cumulative Emissions Reduction:					
CO_2 (Mt)	1	2	4	5	5
NO_X (kt)	1	1	3	4	4
Hg (t)	0.01	0.01	0.02	0.02	0.03
Value of Cumulative Emissions Reduction					
CO_2 (2009$ billion)*	0.00 to 0.07	0.01 to 0.10	0.01 to 0.19	0.02 to 0.24	0.02 to 0.28
NO_X—3% discount rate (2009$ million).	0 to 2	0 to 3	1 to 7	1 to 8	1 to 10
NO_X—7% discount rate (2009$ million).	0 to 1	0 to 1	0 to 3	0 to 3	0 to 4
Mean LCC Savings** (2009$):					
Built-in All-Refrigerators:	47	63	(34)	(195)	(318)
Built-in Bottom-Mount Refrigerator-Freezers:	7	0	0	(164)	(244)
Built-in Side-by-Side Refrigerator-Freezers:	7	7	(116)	(116)	(219)
Built-in Upright Freezers:	54	24	(78)	(78)	(169)
Median PBP (years):					
Built-in All-Refrigerators	1.6	3.0	15.9	29.7	36.7
Built-in Bottom-Mount Refrigerator-Freezers.	4.4	12.9	12.9	62.8	61.8
Built-in Side-by-Side Refrigerator-Freezers.	8.7	8.7	36.7	36.7	60.0
Built-in Upright Freezers	3.4	12.8	21.1	21.1	26.8
Distribution of Consumer LCC Impacts:					
Built-in All-Refrigerators					
Net Cost (%)	0.3	2.6	69.1	94.5	97.2
No Impact (%)	22.6	18.4	9.1	0.0	0.0
Net Benefit (%)	77.2	79.0	21.9	5.5	2.8
Built-in Bottom-Mount Refrigerator-Freezers					
Net Cost (%)	1.2	8.2	8.2	99.0	99.3
No Impact (%)	87.1	87.0	87.0	0.0	0.0
Net Benefit (%)	11.7	4.8	4.8	1.1	0.7
Built-in Side-by-Side Refrigerator-Freezers					
Net Cost (%)	8.0	8.0	60.2	60.2	98.8
No Impact (%)	78.5	78.5	37.2	37.2	0.0
Net Benefit (%)	13.5	13.5	2.5	2.5	1.2
Built-in Upright Freezers					

TABLE V.68—SUMMARY OF RESULTS FOR BUILT-IN REFRIGERATION PRODUCTS—Continued

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Net Cost (%)	4.3	53.1	78.2	78.2	87.1
No Impact (%)	19.9	0.6	0.5	0.5	0.3
Net Benefit (%)	75.8	46.3	21.3	21.3	12.6
Generation Capacity Reduction (GW) †.	0.02	0.03	0.05	0.07	0.08
Employment Impacts:					
Total Potential Changes in Domestic Production Workers in 2014 (thousands).	0.00 to (1.32)	(0.00) to (1.32)	0.01 to (1.32)	0.01 to (1.32)	0.04 to (1.32)
Indirect Domestic Jobs (thousands) †.	0.10	0.13	0.08	0.01	(0.13)

Parentheses indicate negative (−) values.
* Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
** For LCCs, a negative value means an increase in LCC by the amount indicated.
† Changes in 2043.

DOE first considered TSL 5, which represents the max-tech efficiency levels. TSL 5 would save 0.08 quads of energy, an amount DOE considers significant. Under TSL 5, the NPV of consumer benefit would be −$1.00 billion, using a discount rate of 7 percent, and −$1.62 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 5 Mt of CO_2, 4 kt of NO_X, and 0.03 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 5 ranges from $0.02 billion to $0.28 billion. Total generating capacity in 2043 is estimated to decrease by 0.08 GW under TSL 5.

At TSL 5, the average LCC impact is a cost (LCC increase) of $318 for built-in all-refrigerators, a cost of $244 for built-in bottom-mount refrigerator-freezers, a cost of $219 for built-in side-by-side refrigerator-freezers, and a cost of $169 for built-in upright freezers. The median payback period is 37 years for built-in all-refrigerators, 62 years for built-in bottom-mount refrigerator-freezers, 60 years for built-in side-by-side refrigerator-freezers, and 27 years for built-in upright freezers. The fraction of consumers experiencing an LCC benefit is 3 percent for built-in all-refrigerators, 1 percent for built-in bottom-mount refrigerator-freezers, 1 percent for built-in side-by-side refrigerator-freezers, and 13 percent for built-in upright freezers. The fraction of consumers experiencing an LCC cost is 97 percent for built-in all-refrigerators, 99 percent for built-in bottom-mount refrigerator-freezers, 99 percent for built-in side-by-side refrigerator-freezers, and 87 percent for built-in upright freezers.

At TSL 5, the projected change in INPV ranges from a decrease of $84.9 million to a decrease of $120.3 million. If the high end of the range of impacts is reached as DOE expects, TSL 5 could result in a net loss of 18 percent in INPV to built-in refrigeration product manufacturers.

The Secretary tentatively concludes that at TSL 5 for built-in refrigeration products, the benefits of energy savings, generating capacity reductions, emission reductions, and the estimated monetary value of the CO_2 emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on a significant fraction of consumers due to the large increases in product cost, and the capital conversion costs and profit margin impacts that could result in a reduction in INPV for the manufacturers. Consequently, the Secretary has tentatively concluded that TSL 5 is not economically justified.

DOE then considered TSL 4. TSL 4 would save 0.07 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be −$0.60 billion, using a discount rate of 7 percent, and −$0.91 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 5 Mt of CO_2, 4 kt of NO_X, and 0.02 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 4 ranges from $0.02 billion to $0.24 billion. Total generating capacity in 2043 is estimated to decrease by 0.07 GW under TSL 4.

At TSL 4, DOE projects that the average LCC impact is a cost (LCC increase) of $195 for built-in all-refrigerators, a cost of $164 for built-in bottom-mount refrigerator-freezers, a cost of $116 for built-in side-by-side refrigerator-freezers, and a cost of $78 for built-in upright freezers. The median payback period is 30 years for built-in all-refrigerators, 63 years for built-in bottom-mount refrigerator-freezers, 37 years for built-in side-by-side refrigerator-freezers, and 21 years for built-in upright freezers. The fraction of consumers experiencing an LCC benefit is 6 percent for built-in all-refrigerators, 1 percent for built-in bottom-mount refrigerator-freezers, 3 percent for built-in side-by-side refrigerator-freezers, and 21 percent for built-in upright freezers. The fraction of consumers experiencing an LCC cost is 95 percent for built-in all-refrigerators, 99 percent for built-in bottom-mount refrigerator-freezers, 60 percent for built-in side-by-side refrigerator-freezers, and 78 percent for built-in upright freezers.

At TSL 4, the projected change in INPV ranges from a decrease of $79.7 million to a decrease of $103.0 million. If the high end of the range of impacts is reached as DOE expects, TSL 4 could result in a net loss of 16 percent in INPV to built-in refrigeration product manufacturers.

The Secretary tentatively concludes that at TSL 4 for built-in refrigeration products, the benefits of energy savings, generating capacity reductions, emission reductions, and the estimated monetary value of the CO_2 emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on a significant fraction of consumers due to the increases in product cost, and the capital conversion costs and profit margin impacts that could result in a reduction in INPV for the manufacturers. Consequently, the Secretary has tentatively concluded that TSL 4 is not economically justified.

DOE then considered TSL 3. TSL 3 would save 0.05 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would be −$0.34 billion, using a discount rate of 7 percent, and −$0.46

billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 4 Mt of CO_2, 3 kt of NO_X, and 0.02 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reduction at TSL 3 ranges from $0.01 billion to $0.19 billion. Total generating capacity in 2043 is estimated to decrease by 0.05 GW under TSL 3.

At TSL 3, the average LCC impact is a cost (LCC increase) of $34 for built-in all-refrigerators, a cost of $0 for built-in bottom-mount refrigerator-freezers, a cost of $116 for built-in side-by-side refrigerator-freezers, and a cost of $78 for built-in upright freezers. The median payback period is 16 years for built-in all-refrigerators, 13 years for built-in bottom-mount refrigerator-freezers, 37 years for built-in side-by-side refrigerator-freezers, and 21 years for built-in upright freezers. The fraction of consumers experiencing an LCC benefit is 22 percent for built-in all-refrigerators, 5 percent for built-in bottom-mount refrigerator-freezers, 3 percent for built-in side-by-side refrigerator-freezers, and 21 percent for built-in upright freezers. The fraction of consumers experiencing an LCC cost is 69 percent for built-in all-refrigerators, 8 percent for built-in bottom-mount refrigerator-freezers, 60 percent for built-in side-by-side refrigerator-freezers, and 78 percent for built-in upright freezers. Although a significant fraction of consumers would experience an LCC cost, in the majority of cases the cost as a percentage of the purchase price (which ranges from approximately $4,500 to $8,000) is small.

At TSL 3, the projected change in INPV ranges from a decrease of $65.8 million to a decrease of $80.5 million. If the high end of the range of impacts is reached as DOE expects, TSL 3 could result in a net loss of 12 percent in INPV to built-in refrigeration product manufacturers.

The Secretary tentatively concludes that at TSL 3 for built-in refrigeration products, the benefits of energy savings, generating capacity reductions, emission reductions, and the estimated monetary value of the CO_2 emissions reductions would outweigh the negative NPV of consumer benefits, the slight economic burden on a significant fraction of consumers due to the increases in product cost, and the capital conversion costs and profit margin impacts that could result in a reduction in INPV for the manufacturers. In addition to the aforementioned benefits of the proposed standards, DOE notes that the efficiency levels in TSL 3 correspond to the recommended levels in the Joint Comments.

After considering the analysis, comments on the November 2009 notice and the preliminary TSD, and the benefits and burdens of TSL 3, the Secretary tentatively concludes that this trial standard level will offer the maximum improvement in efficiency that is technologically feasible and economically justified, and will result in significant conservation of energy. Therefore, DOE today proposes to adopt TSL 3 for built-in refrigeration products. The proposed amended energy conservation standards for built-in refrigeration products, expressed as equations for maximum energy use, are shown in Table V.69.

DOE requests comment on the considerations leading to the above conclusion, particularly regarding the negative net consumer impacts of the proposed standards for built-in refrigeration products. (*See* Issue 20 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR, below.)

TABLE V.69—PROPOSED STANDARDS FOR BUILT-IN REFRIGERATION PRODUCTS

Product class	Equations for maximum energy use (kWh/yr)	
	Based on AV (ft^3)	Based on av (L)
3–BI. Built-in refrigerator-freezer—automatic defrost with top-mounted freezer without an automatic icemaker.	8.57AV + 248.2	0.303av + 248.2
3I–BI. Built-in refrigerator-freezers—automatic defrost with top-mounted freezer with an automatic icemaker without through-the-door ice service.	8.57AV + 332.2	0.303av + 332.2
3A–BI. Built-in all-refrigerators—automatic defrost	7.55AV + 215.1	0.266av + 215.1
4–BI. Built-in refrigerator-freezers—automatic defrost with side-mounted freezer without an automatic icemaker.	9.04AV + 316.2	0.319av + 316.2
4I–BI. Built-in refrigerator-freezers—automatic defrost with side-mounted freezer with an automatic icemaker without through-the-door ice service.	9.04AV + 400.2	0.319av + 400.2
5–BI. Built-in refrigerator-freezers—automatic defrost with bottom-mounted freezer without an automatic icemaker.	9.35AV + 335.1	0.330av + 335.1
5I–BI. Built-in refrigerator-freezers—automatic defrost with bottom-mounted freezer with an automatic icemaker without through-the-door ice service.	9.35AV + 419.1	0.330av + 419.1
5A–BI. Built-in refrigerator-freezer—automatic defrost with bottom-mounted freezer with through-the-door ice service.	9.72AV + 495.5	0.343av + 495.5
7–BI. Built-in refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.	9.07AV + 454.3	0.320av + 454.3
9–BI. Built-in upright freezers with automatic defrost without an automatic icemaker	9.24AV + 244.6	0.326av + 244.6

AV = adjusted volume in cubic feet; av = adjusted volume in liters

5. Summary of Benefits and Costs (Annualized) of Proposed Standards

The benefits and costs of today's proposed standards can also be expressed in terms of annualized values over the 2014–2043 period. Estimates of annualized values are shown in Table V.70. The annualized monetary values are the sum of (1) the annualized national economic value, expressed in 2009$, of the benefits from operating products that meet the proposed standards (consisting primarily of operating cost savings from using less energy, minus increases in equipment purchase costs, which is another way of representing consumer NPV), and (2) the monetary value of the benefits of emission reductions, including CO_2 emission reductions.[47] The value of the

[47] DOE used a two-step calculation process to convert the time-series of costs and benefits into annualized values. First, DOE calculated a present value for the time-series of costs and benefits using a discount rate of either three or seven percent.

Continued

CO_2 reductions, otherwise known as the Social Cost of Carbon (SCC), is calculated using a range of values per metric ton of CO_2 developed by a recent interagency process. The monetary costs and benefits of cumulative emissions reductions are reported in 2009$ to permit comparisons with the other costs and benefits in the same dollar units.

Although combining the values of operating savings and CO_2 reductions provides a useful perspective, two issues should be considered. First, the national operating savings are domestic U.S. consumer monetary savings that occur as a result of market transactions while the value of CO_2 reductions is based on a global value. Second, the assessments of operating cost savings and CO_2 savings are performed with different methods that use quite different timeframes for analysis. The national operating cost savings is measured for the lifetime of refrigeration products shipped in 2014–2043. The SCC values, on the other hand, reflect the present value of all future climate-related impacts resulting from the emission of one ton of carbon dioxide in each year. These impacts go well beyond 2100.

Using a 7-percent discount rate and the SCC value of $21.40/ton in 2010 (in 2007$), the cost of the standards proposed in today's rule is $1,841 million per year in increased equipment costs, while the annualized benefits are $2,112 million per year in reduced equipment operating costs, $316 million in CO_2 reductions, and $7 million in reduced NO_X emissions. In this case, the net benefit amounts to $594 million per year. Using a 3-percent discount rate and the SCC value of $21.40/ton in 2010 (in 2007$), the cost of the standards proposed in today's rule is $1,849 million per year in increased equipment costs, while the benefits are $2,929 million per year in reduced operating costs, $316 million in CO_2 reductions, and $33 million in reduced NO_X emissions. At a 3-percent discount rate, the net benefit amounts to $1,429 million per year.

TABLE V.70—ANNUALIZED BENEFITS AND COSTS OF PROPOSED STANDARDS FOR REFRIGERATION PRODUCTS FOR 2014–2043 PERIOD

	Discount rate	Primary estimate *	Low estimate *	High estimate *
		Monetized (million 2009$/year)		
Benefits:				
Operating Cost Savings	7%	2112	1852	2377
	3%	2929	2520	3335
CO_2 Reduction at $4.7/t **	5%	85	85	85
CO_2 Reduction at $21.4/t **	3%	316	316	316
CO_2 Reduction at $35.1/t **	2.5%	492	492	492
CO_2 Reduction at $64.9/t **	3%	963	963	963
NO_X Reduction at $2,519/t **	7%	7	7	7
	3%	33	33	33
Total †	7% plus CO_2 range	2204–3082	1944–2822	2469–3348
	7%	2435	2175	2700
	3%	3278	2869	3684
	3% plus CO_2 range	3047–3925	2638–3516	3453–4331
Costs:				
Incremental Product Costs	7%	1841	1733	1950
	3%	1849	1729	1969
Net Benefits/Costs:				
Total †	7% plus CO_2 range	363–1241	211–1089	519–1397
	7%	594	442	750
	3%	1429	1140	1714
	3% plus CO_2 range	1198–2076	909–1787	1483–2362

* The Primary, Low, and High Estimates utilize forecasts of energy prices and housing starts from the AEO2010 Reference case, Low Economic Growth case, and Low Economic Growth case, respectively.

** The CO_2 values represent global values (in 2007$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.70, $21.40, and $35.10 per ton are the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The value of $64.90 per ton represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The value for NO_X (in 2009$) is the average of the low and high values used in DOE's analysis. NO_X savings are in addition to the regulatory emissions reductions modeled in the Annual Energy Outlook forecast.

† Total Benefits for both the 3% and 7% cases are derived using the SCC value calculated at a 3% discount rate, which is $21.40/ton in 2010 (in 2007$). In the rows labeled as "7% plus CO_2 range" and "3% plus CO_2 range," the operating cost and NO_X benefits are calculated using the labeled discount rate, and those values are added to the full range of CO_2 values with the $4.70/ton value at the low end, and the $64.90/ton value at the high end.

6. Energy Standard Round-Off

The rounding off of energy use measurements for refrigeration products is discussed in the test procedure NOPR published on May 27, 2010. 75 FR 29824, 29849. Comments received from stakeholders during the test procedure rulemaking comment period support rounding off such measurements to the nearest kWh per year. (Whirlpool, Refrigerator Test Procedure Rulemaking No. 12 at p. 7; AHAM, Refrigerator Test Procedure Rulemaking No. 16 at pp. 10, 11) The test procedure NOPR mentions that, if the test procedure calls for such round off, the energy standard would also need to include round off, in order to avoid noncompliance associated with inconsistency between the two rules. For example, if the energy standard was 500.7 kWh for a product whose energy use measurement was 500.6 kWh, rounding the measurement to 501 kWh might appear to show energy use higher

From the present value, DOE then calculated the fixed annual payment over the analysis time period (2014 through 2043) that yielded the same present value. The fixed annual payment is the annualized value. Although DOE calculated annualized values, this does not imply that the time-series of cost and benefits from which the annualized values were determined is a steady stream of payments.

than the maximum allowable under the standard.

DOE expects to implement rounding off of energy use measurements in the refrigeration product test procedure. Hence, DOE also proposes such round off for the energy standard. DOE proposes to implement this by including in 10 CFR part 430.32(a) the following statement: "The energy standards as determined by the equations of the following table shall be rounded off to the nearest kWh per year."

DOE requests comment on this proposal for round off of the energy standard. (See Issue 21 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR, below.)

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

Section 1(b)(1) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993), requires each agency to identify the problem that it intends to address, including, where applicable, the failures of private markets or public institutions that warrant new agency action, as well as to assess the significance of that problem. The problems that today's standards address are as follows:

(1) There is a lack of consumer information and/or information processing capability about energy efficiency opportunities in the home appliance market.

(2) There is asymmetric information (one party to a transaction has more and better information than the other) and/or high transactions costs (costs of gathering information and effecting exchanges of goods and services).

(3) There are external benefits resulting from improved energy efficiency of heating products that are not captured by the users of such equipment. These benefits include externalities related to environmental protection and energy security that are not reflected in energy prices, such as reduced emissions of greenhouse gases.

In addition, DOE has determined that today's regulatory action is an "economically significant regulatory action" under section 3(f)(1) of Executive Order 12866. Accordingly, section 6(a)(3) of the Executive Order requires that DOE prepare a regulatory impact analysis (RIA) on today's rule and that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) review this rule. DOE presented to OIRA for review the draft rule and other documents prepared for this rulemaking, including the RIA, and has included these documents in the rulemaking record. The assessments prepared pursuant to Executive Order 12866 can be found in the technical support document (Chapter 16) for this rulemaking. They are available for public review in the Resource Room of DOE's 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.

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

For manufacturers of residential refrigerators, refrigerator-freezers, and freezers, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as "small businesses" for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30850 (May 15, 2000), as amended at 65 FR 53533, 53545 (September 5, 2000) and codified at 13 CFR part 121. The size standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf*. Residential refrigeration product manufacturing is classified under NAICS 335222, "Household Refrigerator and Home Freezer Manufacturing." The SBA sets a threshold of 1,000 employees or less for an entity to be considered as a small business for this category.

DOE reviewed the potential standard levels considered in today's NOPR under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. To better assess the potential impacts of this rulemaking on small entities, DOE conducted a more focused inquiry of the companies that could be small business manufacturers of products covered by this rulemaking. During its market survey, DOE used all available public information to identify potential small manufacturers. DOE's research involved industry trade association membership directories (including AHAM), product databases (*e.g.,* FTC, The Thomas Register, CEC, and ENERGY STAR databases), individual company Web sites, and marketing research tools (*e.g.,* Dunn and Bradstreet reports) to create a list of every company that manufactures or sells residential refrigeration products covered by this rulemaking. DOE also asked stakeholders and industry representatives if they were aware of any additional small manufacturers during manufacturer interviews and at DOE public meetings. DOE reviewed all publicly-available data and contacted various companies on its complete list of manufacturers, as necessary, to determine whether they met the SBA's definition of a small business manufacturer of covered residential refrigeration products. DOE screened out companies that do not offer products covered by this rulemaking, do not meet the definition of a "small business," or are foreign owned and operated.

DOE initially identified at least 65 distinct brands of residential refrigeration products sold in the U.S. by 47 parent companies. Out of these 47 companies, DOE determined that the majority (31 of 47) were distributors or resellers of branded products rather than original equipment manufacturers. Of the 16 manufacturers, DOE found 15 to be either large manufacturers or foreign-owned and operated. Thus, DOE identified one small residential refrigeration product manufacturer that produces covered products and can be considered a small business. Next, DOE contacted this potential small business manufacturer to request an interview about the possible impacts on small business manufacturers generally. From these discussions, DOE determined the expected impacts of the rule on affected small entities and whether an initial regulatory flexibility analysis was needed (*i.e.,* whether DOE could certify that this rulemaking would not have a significant economic impact on a substantial number of small entities).

The majority of residential refrigeration products are currently manufactured in the United States, though production for the domestic market has increasingly been relocated

to Mexico. For standard-size refrigerator-freezers, three large manufacturers control the overwhelming majority of sales. Many foreign-owned manufacturers of standard-size refrigerator-freezers offer products for sale in the United States and constitute part of the remaining domestic standard-size refrigerator-freezer market. These products are either manufactured domestically or imported depending on the specific manufacturer. Additionally, several domestic companies focus on premium built-in standard-size refrigerator-freezers, which represent the remainder of the market. None of the standard-size refrigerator manufacturers DOE identified are small business manufacturers.

For standard-size freezers, one large manufacturer controls the majority of the market. Another domestic manufacturer with a significant standard-size freezer market share recently went out of business, but its market share is expected to be taken by other large manufacturers of refrigeration products. The remaining market share is spread in small percentages across foreign-owned and foreign-operated manufacturers and some of the same niche manufacturers that produce premium built-in standard-size refrigerator-freezers. None of the standard-size freezer manufacturers identified by DOE are small business manufacturers.

The majority of compact refrigeration products are imported, and market share is divided among many domestic and foreign manufacturers. Several manufacturers who still produce compact products domestically focus on the premium niche market of undercounter refrigerators and freezers. Undercounter refrigerator and freezers are high-end products that are meant to be either free-standing or recessed. Based on its market research, the one small business manufacturer of residential refrigeration products identified by DOE is a niche manufacturer that produces these premium undercounter units. The company manufactures primarily products that are covered by this rulemaking, such as undercounter refrigerators and refrigerator-freezers, plus several products outside of the scope of coverage for this rulemaking, such as ice makers and wine coolers. The small business manufacturer currently offers five basic ENERGY STAR models (13 individual products) but many of its product lines may need upgrading or may be discontinued in response to the proposed energy conservation standards.

DOE does not believe the small business manufacturer will be differentially impacted by the proposed energy conservation standard. The small business manufacturer has the largest market share of undercounter refrigerator and freezers. Since undercounter units are a very small segment of compact refrigerators and freezers, the small business manufacturer is the market leader of a very small segment of compact products. The company represents an even smaller percentage of total shipments of covered products. Many of the other undercounter manufacturers, while not technically small businesses by the SBA definition, also have low overall production volumes. Finally, the undercounter market is a niche market that does not compete with overall compact refrigeration sales. Undercounter products are luxury items purchased by consumers that are typically less concerned about first costs compared to purchasers of other residential refrigeration products. While most compact sales are inexpensive products with retail prices in the low hundreds of dollars, undercounter products typically cost many times that. Despite the small size of this niche market, the much higher sales price and lower volumes indicate that profit margins are likely higher.

Since only one small business manufacturer would potentially be impacted by the proposed energy conservation standards in today's rule and that manufacturer represents a small percentage of covered products is a leader in a niche market, DOE believes that these combined factors make it likely that the manufacturer would not be differentially impacted compared to its competition. As a result, DOE certifies that the standards for residential refrigeration products set forth in the proposed rule, if promulgated, 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 Small Business Administration for review under 5 U.S.C. 605(b).

DOE requests comment on the above analysis, as well as any information concerning small businesses that could be impacted by this rulemaking and the nature and extent of those potential impacts of the proposed energy conservation standards on small residential refrigeration product manufacturers. (*See* Issue 22 under "Issues on Which DOE Seeks Comment" in section VII.E of this NOPR, below.)

C. Review Under the Paperwork Reduction Act

This rulemaking will impose no new information or record keeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

D. Review Under the National Environmental Policy Act of 1969

DOE has prepared a draft environmental assessment (EA) of the impacts of the proposed rule pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and DOE's regulations for compliance with the National Environmental Policy Act of 1969 (10 CFR part 1021). This assessment includes an examination of the potential effects of emission reductions likely to result from the rule in the context of global climate change, as well as other types of environmental impacts. The draft EA has been included as chapter 15 of the NOPR TSD. Before issuing a final rule for refrigeration products, DOE will consider public comments and, as appropriate, determine whether to issue a finding of no significant impact (FONSI) as part of a final EA or to prepare an environmental impact statement (EIS) for this rulemaking.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 10, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. 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 it will follow in the development of such regulations. 65 FR 13735. 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) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 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; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. 61 FR 4729 (February 7, 1996). Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, 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) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). 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 a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The 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 small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://www.gc.doe.gov.*

Although today's proposed rule does not contain a Federal intergovernmental mandate, it may impose expenditures of $100 million or more on the private sector. Specifically, the proposed rule will likely result in a final rule that could impose expenditures of $100 million or more. Such expenditures may include (1) investment in research and development and in capital expenditures by refrigeration product manufacturers in the years between the final rule and the compliance date for the new standard, and (2) incremental additional expenditures by consumers to purchase higher-efficiency refrigeration products, starting in 2014.

Section 202 of UMRA authorizes an agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the proposed rule. 2 U.S.C. 1532(c). The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of the notice of proposed rulemaking and the "Regulatory Impact Analysis" section of the TSD for this proposed rule respond to those requirements.

Under section 205 of UMRA, the Department is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. 2 U.S.C. 1535(a). DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise or the selection of such an alternative is inconsistent with law. As required by 42 U.S.C. 6295(h) and (o), 6313(e), and 6316(a), today's proposed rule would establish energy conservation standards for residential refrigeration products that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified. A full discussion of the alternatives considered by DOE is presented in the "Regulatory Impact Analysis" section of the TSD for today's proposed rule.

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. This 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 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 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's NOPR under the 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 at OMB, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that 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 should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has tentatively concluded that today's regulatory action, which sets forth energy conservation standards for refrigeration products, is not a significant energy action because the proposed standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on the proposed rule.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (January 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are "influential scientific information," which the Bulletin defines as "scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The "Energy Conservation Standards Rulemaking Peer Review Report" dated February 2007 has been disseminated and is available at the following Web site: *http://www1.eere.energy.gov/buildings/appliance_standards/peer_review.html.*

VII. Public Participation

A. Attendance at Public Meeting

The time, date and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this document. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945 or *Brenda.Edwards@ee.doe.gov.* 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 NOPR, 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. Such persons may hand-deliver requests to speak, along with a computer diskette or CD in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format, to the address shown in the **ADDRESSES** section at the beginning between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Requests may also be sent by mail, or by e-mail to: *Brenda.Edwards@ee.doe.gov.*

Persons requesting an opportunity to speak should briefly describe the nature of their interest in this rulemaking and provide a telephone number for contact. 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. At its discretion, DOE may permit any person who cannot supply an advance copy of their statement to participate, if that person has made advance alternative arrangements with the Building Technologies Program. The request to give an oral presentation should ask for such alternative arrangements.

C. Conduct of Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with 5 U.S.C. 553 and section 336 of EPCA, 42 U.S.C. 6306. A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, allow time for presentations by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a prepared general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning 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, Resource Room of the Building Technologies Program, 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. Any person may buy a copy of the transcript 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 NOPR. Comments, data, and other 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 carry the electronic signature of the author. Absent an electronic signature, comments submitted electronically must be followed and authenticated by submitting a signed original paper document to the address provided at the beginning of this notice. 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.

According 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 including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

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 has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which 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

In addition to the issues that DOE has identified throughout the earlier portions of this preamble, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. DOE requests comment on its baseline treatment of regulatory emissions reductions.

2. DOE requests comment on the max-tech levels identified, and on the combinations of design options considered applicable to achieve max-tech designs. DOE requests that comments also address as appropriate the differences in applicable design options for different product classes.

3. DOE requests comments on the establishment of product classes for refrigeration products with automatic icemakers, including comment on the approach DOE proposes to use to account for icemakers in the product class structure.

4. DOE requests comment on the proposal to establish separate product classes for built-in refrigeration products. DOE also requests comment on the proposed definition for built-in products, including what changes could be made to further strengthen it while not disqualifying any true built-in products, and whether any adjustment of the 24-inch dimension specified in the proposed definition should be made.

5. DOE requests comment on whether any additional product classes are required to fully address icemaking and built-in products.

6. DOE requests comment on the proposal to combine product class 2 (refrigerator-freezer—partial automatic defrost) with product class 1 (refrigerators and refrigerator-freezers with manual defrost) and the proposal to combine product class 12 (compact refrigerator-freezer—partial automatic defrost) with product class 11 (compact refrigerators and refrigerator-freezers with manual defrost).

7. DOE requests comment on the proposal to eliminate the current 36-inch height limitation for compact products.

8. DOE requests comment on DOE's findings regarding projections regarding supply of high-efficiency and variable-speed compressors. In particular, DOE seeks information that would confirm or cast doubt on DOE's conclusions regarding compressor supply.

9. DOE requests comment on the consideration of use of isobutane refrigerant as a design option only for compact refrigerators.

10. DOE requests comment and information on aspects of VIP technology that affect its suitability for consideration as a design option. DOE in particular seeks any new information not already discussed or considered in the rulemaking.

11. DOE requests comment on the approach used to develop Proposed Procedure Reduced Baseline Energy Use equations with adjusted slopes for product classes 4 (refrigerator-freezers—automatic defrost with side-mounted freezer without through-the-door ice service), 5 (refrigerator-freezers—automatic defrost with bottom-mounted freezer without through-the-door ice service), and 5A (refrigerator-freezers—automatic defrost with bottom-mounted freezer with through-the-door ice service). DOE also seeks relevant data that would allow adjustment of the curve intercept so that the shipment-weighted average impact of the slope change would be neutral (*i.e.,* zero change) with respect to energy use. DOE also seeks any additional information that would support similar development of adjusted-slope baseline energy curves for other product classes.

12. DOE requests comment on its treatment of design options in the engineering analysis.

13. DOE requests comments, information, and data that would inform adjustment of energy modeling input and/or results that would allow more accurate representation of the energy use impacts of design options using the ERA energy model.

14. DOE requests information regarding the response of retailers to incremental change in the CGS of appliances associated with proposed energy conservation standards.

15. DOE requests comment on the weighting of the 2005 RECS sample using income relationships and volume scaling.

16. DOE requests comments on its approach for developing UAFs using field-metered data.

17. DOE requests comment on the approach used for estimating repair costs.

18. DOE requests comments on its approach for estimating base-case efficiency distributions.

19. DOE requests comments on its approach for forecasting base-case and standards-case efficiency distributions.

20. DOE requests comment on its considerations leading to the proposed standards for built-in refrigeration products, particularly regarding the negative net consumer impacts of the proposed standards.

21. DOE requests comment on the proposal for round off of the energy standard.

22. DOE requests comment on the regulatory flexibility determination, as well as any information concerning small businesses that could be impacted by this rulemaking and the nature and extent of those potential impacts of the proposed energy conservation standards on small residential refrigeration product manufacturers.

VIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's proposed rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements, and Small businesses.

Issued in Washington, DC, on August 27, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE proposes to amend chapter II, subchapter D, of title 10 of the Code of Federal Regulations, 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. In § 430.2, add the definition for "Built-in refrigerator/refrigerator-freezer/freezer," in alphabetical order, and revise the definition for "Compact refrigerator/refrigerator-freezer/freezer" to read as follows:

§ 430.2 Definitions.

* * * * *

Built-in refrigerator/refrigerator-freezer/freezer means any refrigerator, refrigerator-freezer or freezer with 7.75 cubic feet or greater total volume and 24 inches or less depth not including handles and not including custom front panels; is designed to be encased on the sides and rear by cabinetry; is designed to be securely fastened to adjacent cabinetry, walls or floor; and has sides which are not fully finished and are not designed to be visible after installation.

* * * * *

Compact refrigerator/refrigerator-freezer/freezer means any refrigerator, refrigerator-freezer or freezer with total volume less than 7.75 cubic foot (220 liters) (rated volume as determined in appendix A1 and B1 of subpart B of this part).

* * * * *

3. In § 430.32 revise paragraph (a) to read as follows:

§ 430.32 Energy and water conservation standards and their effective dates.

* * * * *

(a) *Refrigerators/refrigerator-freezers/freezers.* These standards do not apply to refrigerators and refrigerator-freezers with total refrigerated volume exceeding 39 cubic foot (1104 liters) or freezers with total refrigerated volume exceeding 30 cubic foot (850 liters). The energy standards as determined by the equations of the following table shall be rounded off to the nearest kWh per year.

Product class	Equations for maximum energy use (kWh/yr)	
	based on AV (ft^3)	based on av (L)
1. Refrigerators and refrigerator-freezers with manual defrost	7.99AV + 225.0	0.282av + 225.0
1A. All-refrigerators—manual defrost	6.79AV + 193.6	0.240av + 193.6
2. Refrigerator-freezers—partial automatic defrost	7.99AV + 225.0	0.282av + 225.0
3. Refrigerator-freezers—automatic defrost with top-mounted freezer without an automatic icemaker	8.04AV + 232.7	0.284av + 232.7
3–BI. Built-in refrigerator-freezer—automatic defrost with top-mounted freezer without an automatic icemaker.	8.57AV + 248.2	0.303av + 248.2
3I. Refrigerator-freezers—automatic defrost with top-mounted freezer with an automatic icemaker without through-the-door ice service.	8.04AV + 316.7	0.284av + 316.7
3I–BI. Built-in refrigerator-freezers—automatic defrost with top-mounted freezer with an automatic icemaker without through-the-door ice service.	8.57AV + 332.2	0.303av + 332.2
3A. All-refrigerators—automatic defrost	7.07AV + 201.6	0.250av + 201.6
3A–BI. Built-in All-refrigerators—automatic defrost	7.55AV + 215.1	0.266av + 215.1
4. Refrigerator-freezers—automatic defrost with side-mounted freezer without an automatic icemaker	8.48AV + 296.5	0.299av + 296.5
4–BI. Built-In Refrigerator-freezers—automatic defrost with side-mounted freezer without an automatic icemaker.	9.04AV + 316.2	0.319av + 316.2
4I. Refrigerator-freezers—automatic defrost with side-mounted freezer with an automatic icemaker without through-the-door ice service.	8.48AV + 380.5	0.299av + 380.5
4I–BI. Built-In Refrigerator-freezers—automatic defrost with side-mounted freezer with an automatic icemaker without through-the-door ice service.	9.04AV + 400.2	0.319av + 400.2
5. Refrigerator-freezers—automatic defrost with bottom-mounted freezer without an automatic icemaker	8.80AV + 315.4	0.311av + 315.4
5–BI. Built-In Refrigerator-freezers—automatic defrost with bottom-mounted freezer without an automatic icemaker.	9.35AV + 335.1	0.330av + 335.1
5I. Refrigerator-freezers—automatic defrost with bottom-mounted freezer with an automatic icemaker without through-the-door ice service.	8.80AV + 399.4	0.311av + 399.4
5I–BI. Built-In Refrigerator-freezers—automatic defrost with bottom-mounted freezer with an automatic icemaker without through-the-door ice service.	9.35AV + 419.1	0.330av + 419.1
5A. Refrigerator-freezer—automatic defrost with bottom-mounted freezer with through-the-door ice service.	9.15AV + 471.3	0.323av + 471.3
5A–BI. Built-in refrigerator-freezer—automatic defrost with bottom-mounted freezer with through-the-door ice service.	9.72AV + 495.5	0.343av + 495.5
6. Refrigerator-freezers—automatic defrost with top-mounted freezer with through-the-door ice service	8.36AV + 384.1	0.295av + 384.1
7. Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service	8.50AV + 431.1	0.300av + 431.1
7–BI. Built-In Refrigerator-freezers—automatic defrost with side-mounted freezer with through-the-door ice service.	9.07AV + 454.3	0.320av + 454.3
8. Upright freezers with manual defrost	5.57AV + 193.7	0.197av + 193.7
9. Upright freezers with automatic defrost without an automatic icemaker	8.62AV + 228.3	0.305av + 228.3
9–BI. Built-In Upright freezers with automatic defrost without an automatic icemaker	9.24AV + 244.6	0.326av + 244.6
10. Chest freezers and all other freezers except compact freezers	7.29AV + 107.8	0.257av + 107.8
10A. Chest freezers with automatic defrost	10.24AV + 148.1	0.362av + 148.1
11. Compact refrigerators and refrigerator-freezers with manual defrost	9.03AV + 252.3	0.319av + 252.3
11A. Compact refrigerators and refrigerator-freezers with manual defrost	7.84AV + 219.1	0.277av + 219.1
12. Compact refrigerator-freezers—partial automatic defrost	5.91AV + 335.8	0.209av + 335.8
13. Compact refrigerator-freezers—automatic defrost with top-mounted freezer	11.80AV + 339.2	0.417av + 339.2
13A. Compact all-refrigerator—automatic defrost	9.17AV + 259.3	0.324av + 259.3
14. Compact refrigerator-freezers—automatic defrost with side-mounted freezer	6.82AV + 456.9	0.241av + 456.9
15. Compact refrigerator-freezers—automatic defrost with bottom-mounted freezer	12.88AV + 368.7	0.455av + 368.7

Product class	Equations for maximum energy use (kWh/yr)	
	based on AV (ft^3)	based on av (L)
16. Compact upright freezers with manual defrost	8.65AV + 225.7	0.306av + 225.7
17. Compact upright freezers with automatic defrost	10.17AV + 351.9	0.359av + 351.9
18. Compact chest freezers	9.25AV + 136.8	0.327av + 136.8

AV = Total adjusted volume, expressed in ft^3, as determined in Appendices A and B of subpart B of this part.
av = Total adjusted volume, expressed in Liters.

* * * * *

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September 27, 2010

Part V

Department of Transportation

Federal Railroad Administration

49 CFR Part 220

Restrictions on Railroad Operating Employees' Use of Cellular Telephones and Other Electronic Devices Late Season; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 220

[Docket No. FRA–2009–0118]

RIN 2130–AC21

Restrictions on Railroad Operating Employees' Use of Cellular Telephones and Other Electronic Devices

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule; rescission of Emergency Order No. 26.

SUMMARY: FRA is amending its railroad communications regulations by restricting use of mobile telephones and other distracting electronic devices by railroad operating employees. This rule codifies most of the requirements of FRA Emergency Order No. 26, which is supplanted by this final rule on the date it becomes effective. FRA has revised some of the substantive requirements of that Emergency Order as well as its scope to accommodate changes that FRA believes are appropriate based upon its experience with the Emergency Order and in response to public comments submitted in response to the proposed rule.

DATES: Effective March 28, 2011.

FOR FURTHER INFORMATION CONTACT: Douglas H. Taylor, Staff Director-Operating Practices, Office of Railroad Safety, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*telephone:* (202) 493–6255); Ann M. Landis, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20950 (*telephone:* (202) 493–6064); or Joseph St. Peter, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20950 (*telephone:* (202) 493–6047).

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I. Background

A. Notice of Proposed Rulemaking

On May 18, 2010, FRA published a notice of proposed rulemaking (NPRM) in the **Federal Register** proposing to restrict the use of mobile telephones and other distracting electronic devices by railroad operating employees. 75 FR 27672 (May 18, 2010). The NPRM proposed to codify many of the requirements of Emergency Order 26 (Order or EO 26, 73 FR 58702 (Oct. 7, 2008)), but proposed certain changes to it in response to a letter challenging certain provisions of the Order. FRA asked for public comment on the NPRM, and received 15 comments in response. FRA has reviewed those comments and as a result has made changes for this final rule. These changes are described below.

B. Effective Date

This final rule will take effect 180 days after its publication date. FRA has chosen this implementation schedule for several reasons. This implementation schedule will ensure no gaps in safety regulation occur, no gaps in examination or instruction on the requirements of the governing safety regulation occur, and will also accommodate traditional industry practices for the instruction schedule of operating employees.

First, EO 26 is currently in effect, and will remain so until this final rule supplants it upon its effective date. All railroad operating employees were already required to have been trained on the restrictions established by EO 26. EO 26 provides no less measure of safety of than does this final rule, which only modifies certain requirements of the Order.

Next, in response to the NPRM, the Association of American Railroads (AAR) submitted a comment to FRA that requested adequate time for railroads to implement their programs of instruction and to then provide that required instruction to their operating employees. As discussed below, this final rule allows railroads 90 days to implement a program of instruction, and then an additional 90 days to actually instruct their employees. Allowing railroads this period of time to implement the instruction requirements of this final rule will result in reduced implementation and instruction costs. As AAR's comment indicated, the industry practice is for railroads to finalize their annual rules instruction programs in the fourth quarter of the calendar year, and then to actually instruct their employees on those annual rules instruction programs in the first quarter of the next calendar year. Thus, based on the implementation date FRA has chosen, railroads should not have to alter the timing of their instruction programs or require their employees to attend additional instruction sessions outside of those already planned during the first quarter of 2011.

As EO 26 will remain in effect until this final rule becomes effective, railroad operating employees will not be subject to this final rule until they have already been instructed on its requirements. This implementation schedule also ensures there will be no gap in time where a new railroad operating employee will perform work subject to the requirements of this final rule, but will not have yet been trained on its requirements or the requirements of a supplanted EO 26.

In sum, this implementation schedule does not allow for any gap in safety regulation, as employees have been trained on the requirements of EO 26 and will be subject to its requirements until the final rule takes effect. Upon the final rule taking effect, all new and current railroad employees will have already been instructed on the rule's requirements. Finally, as discussed above, this schedule also accommodates a large segment of the railroad industry's traditional rules instruction practices.

C. Background Information

The increasing number of distractions for drivers has led to increasing safety risks. The distractions caused by cell phones (mobile phones/cellular phones) have been a concern for years. In addition, each day, drivers are distracted by eating, conversations with passengers, using portable electronic

devices, or some other type of multitasking. This type of behavior results in vehicle accidents and significant costs to our nation's economy. Parallels are easily drawn between distracted driving and the operation of trains while using distracting electronic devices, as evidenced by the examples discussed below.

In response to this growing problem, DOT hosted a Distracted Driving Summit in Washington, DC (*http://www.distraction.gov/dot/*). At the Summit, DOT brought together safety and law enforcement experts as well as young adults whose distracted driving had tragic consequences. Attendees heard the testimony of families who lost loved ones because someone else had chosen to send a text message, dial a phone, or become occupied with another activity while driving. In addition to hosting the Summit, DOT has reviewed recent research and has decided to take a more systematic look at the issue and its many dimensions. Another Distracted Driving Summit is scheduled for September 21, 2010.

D. Justification for the Rulemaking

FRA has discovered numerous examples of the dangers posed by distracting electronic devices. These examples indicate the necessity of restrictions on the use of such electronic devices. Five of these accidents are described below, though all of these and more can be found in the full text of the Order.

1. On June 8, 2008, a Union Pacific Railroad Company (UP) brakeman was struck and killed by the train to which he was assigned. FRA's investigation indicated that the brakeman instructed the locomotive engineer via radio to back the train up and that the brakeman subsequently walked across the track, into the path of the moving train. The brakeman was talking on his cell phone at the time of the accident.

2. On July 1, 2006, a northward BNSF Railway Company (BNSF) freight train collided with the rear of a standing BNSF freight train at Marshall, Texas. Although there were no injuries, there were estimated damages of $413,194. Both trains had two-person crews. The striking train had passed a "Stop and Proceed at Restricted Speed" signal indication and was moving at 20 mph. FRA determined that the collision was caused by the failure by the locomotive engineer on the striking train to comply with restricted speed and that he was engaged in cell phone conversations immediately prior to the accident.

3. On December 21, 2005, a contractor working on property of The Kansas City Southern Railway Company at Copeville, Texas was struck and killed when he stepped into the path of an approaching freight train. FRA's investigation disclosed that the contractor was talking on a cell phone at the time of the accident.

4. One locomotive engineer died and a train conductor suffered serious burns when two BNSF freight trains collided head-on near Gunter, Texas on May 19, 2004. The collision resulted in the derailment of 5 locomotives and 28 cars, with damages estimated at $2,615,016. Approximately 3,000 gallons of diesel fuel were released from the locomotives, which resulted in a fire. The National Transportation Safety Board (NTSB) investigators obtained records that showed the number and duration of cell phone calls made by crewmembers on both trains between 1:50 p.m. and the time of the accident, approximately 5:46 p.m. During this time, a total of 22 personal cell phone calls were made and/or received by the five crewmembers on both trains while the trains were in motion.

5. At 8:57 a.m. on May 28, 2002, an eastbound BNSF coal train collided head on with a westbound BNSF intermodal train near Clarendon, Texas. The conductor and engineer of the coal train received critical injuries. The engineer of the intermodal train was killed. The cost of the damages exceeded $8,000,000. The NTSB found that all four crewmembers involved in this accident had personal cell phones. It also found that the use of a cell phone by the engineer of one of the trains may have distracted him to the extent that he was unaware of the dispatcher's instructions that he stop his train at a designated point.

On October 1, 2008, FRA issued EO 26 restricting the use of cellular telephones and other electronic devices while on duty. (73 FR 58702, Oct. 7, 2008). This FRA action was in part a response to the accidents discussed above and in part a response to the September 12, 2008 head-on collision between a Southern California Regional Rail Authority (Metrolink) commuter train and a UP freight train in Chatsworth, California. This accident resulted in 25 deaths, numerous injuries, and more than $7 million in damages. Information discovered during the NTSB investigation indicates that the locomotive engineer of the Metrolink commuter train passed a stop signal. NTSB stated that a cell phone owned by the commuter train engineer was being used to send a text message within 30 seconds of the time of the accident.

In the period from the effective date of the Order, October 27, 2008, through August 2010, FRA inspectors discovered approximately 249 instances in which the Order may have been violated. FRA's Office of Railroad Safety recommended enforcement action against the employee or railroad in 56 of these instances. Forty-nine of these actions were based on a railroad employee's using an electronic device, failing to have its earpiece removed from the employee's ear, or failing to have the device turned off in a potentially unsafe situation. In addition, 48 of the incidents recommended for enforcement action involved personal, as opposed to railroad-supplied, devices. These incidents begin to illustrate the hazards of using distracting electronic devices while on duty. For this reason, FRA is compelled to promulgate enforceable regulations to prevent the unsafe use of electronic devices by on-duty railroad employees.

FRA has considered the costs and benefits of this rule. Relative to the current requirements of EO 26, the only additional burden produced by the requirements of this rule is that related to revising programs and initial instruction focused on the exceptions that this rule will introduce as well as the additional potential cost for purchasing or carrying cameras or calculators. This added burden will total approximately $696,000 (PV, 3%) or $613,000 (PV, 7%) over a 20-year period. The exceptions to the existing restrictions on the use of electronic devices will allow for greater flexibility with respect to the use of certain electronic devices while maintaining the safety benefits intended. Thus, when compared to the existing requirements, the added flexibility will justify the relatively minor cost burden.

In an effort to also evaluate the requirements that will be transferred from EO 26 to Part 220, FRA examined costs and benefits relative to conditions prior to issuance of EO 26 in the format of break-even analyses, which can be relied upon to indicate likely net benefit outcomes. Applying highly conservative assumptions, 20-year direct and indirect costs could total as much as $31.9 million (discounted at 7%) or $42.9 million (discounted at 3%). The break-even analyses for the rule and EO 26 show that, in all scenarios considered, it will not require an unreasonable decrease in the probability of an accident in order to at least break even. As discussed more completely in the Regulatory Impact Analysis accompanying this rule, the frequency and severity of accidents together with the observed rising incidence of

improper use of cell phones and other electronic devices strongly suggest that the elimination of improper electronic device usage by railroad operating employees, as required by this rule, will prevent more than one fatality every two years, and therefore, that the monetized benefits of the requirements will likely outweigh the monetized costs.

SUMMARY OF COSTS OF EO 26 AND THIS RULE

[In millions]

	Twenty-year total (3% discount rate)	Twenty-year total (7% discount rate)
Total direct costs	$12.7	$9.5
Total indirect costs	30.2	22.4
Total costs	42.9	31.9
Costs attributable to this rule	0.7	0.6

E. Legal Basis for the Rulemaking

Congress required the Secretary to complete a study on the safety impact of the use of personal electronic devices by safety-related railroad employees by October 16, 2009, and to report to Congress on the results of the study within six months after its completion. *See* Sec. 405(a) and (c) of the Rail Safety Improvement Act of 2008 (RSIA), Public Law 110–432, Div. A, 122 Stat. 4848, Oct. 16, 2008 (122 Stat. 4885, 49 U.S.C. 20103 note). Sec. 405(d) of the RSIA authorizes the Secretary to prohibit the use of personal electronic devices that may distract employees from safely performing their duties based on the conclusions of the required study. The Secretary, in turn, has delegated the responsibility to carry out these duties and to exercise this authority to the Federal Railroad Administrator. 49 CFR 1.49(oo). *See* also 49 CFR 1.49(m) for further rail safety related delegations, including general rulemaking authority, to the Federal Railroad Administrator.

The required study, titled "The Impact of Distracting Electronic Devices on the Safe Performance of Duties by Railroad Operating Employees" [1] was completed and submitted to Congress on May 27, 2010. The study stated that FRA found that railroad operating employees were increasingly using distracting electronic devices in a manner that created hazards. As such, FRA intervention was warranted.FRA will continue to monitor compliance regarding the use of electronic devices by railroad employees.

F. Distracted Driving Impacts All Transportation Modes

The use of cell phones and other electronic devices has become ubiquitous in American society. There is strong evidence that people permit electronic devices to distract them from driving all kinds of vehicles and that such distractions can have serious safety consequences.

1. Aviation

On October 21, 2009, Northwest Airlines Flight 188 was enroute from San Diego to Minneapolis-St. Paul International/Wold-Chamberlain Airport with 144 passengers. Flight 188 overflew its destination airport by approximately 150 miles before air traffic controllers were able to contact the crew via radio. After the incident, the pilot and first officer told the NTSB that they had lost track of the plane's location because they had been distracted in the cockpit while using personal laptop computers and discussing airline crew scheduling procedures. Using personal laptop computers in the cockpit was a violation of airline policy, and the Federal Aviation Administration suspended the certificates of both the pilot and first officer on October 27, 2009.

2. Rail

See the discussion above.

3. Motorcoach

On November 14, 2004, a bus struck a bridge on the George Washington Parkway in Alexandria, Virginia, a serious accident that destroyed the roof of the motorcoach and injured 11 students, including one seriously. As determined by an NTSB investigation, the bus driver said he had been talking on a hands-free cell phone at the time of the accident. Records from the bus driver's personal cell phone service provider showed that the bus driver initiated a 12-minute call on the morning of the accident. The driver said that he saw neither the warning signs nor the bridge itself before the impact. Evidence indicates that he did not apply any brakes before impacting the bridge. The NTSB concluded that the bus driver's cell phone conversation at the time of the accident diverted his attention from driving.

This crash resulted in the NTSB recommendation H–06–27 that commercial driver's license (CDL) holders with a passenger-carrying or school bus endorsement be prohibited from using cell phones or other personal electronic devices while driving those vehicles.

Statistics show that distraction from the primary task of driving presents a serious and potentially deadly danger. In 2008, 5,870 people lost their lives and an estimated 515,000 people were injured in police-reported crashes in which at least one form of driver distraction was reported on the crash report. While these numbers are significant, they may not state the true size of the problem, since it is difficult to identify distraction and its role in a crash. *See http://www.dot.gov/affairs/DOT%20HS%20811%20216.pdf.*

First, the data are based largely on police accident reports that are conducted after the crash has occurred. These reports vary across police jurisdictions, thus creating potential inconsistencies in reporting. Some police accident reports identify distraction as a distinct reporting field, while others identify distraction from the narrative portion of the report. Further, the data includes only those crashes in which at least one form of driver distraction was actually reported by law enforcement, thus creating the potential for an undercount.

In addition to, and contributing to, inconsistent reporting of distraction on police accident reports, there are challenges in determining whether the driver was distracted at the time of the crash. Self-reporting of negative behavior, such as distracted driving, is likely lower than actual occurrence of that behavior. Law enforcement must also rely on crash investigation information to determine if distraction

[1] FRA Report "The Impact of Distracting Electronic Devices on the Safe Performance of Duties by Railroad Operating Employees" (May 27, 2010). Available online at: *http://www.fra.dot.gov/downloads/safety/CellPhoneReport4510.pdf.*

was involved in those crashes with a driver death. The information available to law enforcement may not indicate distraction even where it was a cause of or a factor in the accident. For these additional reasons, reported crashes involving distraction may be undercounted.

G. Studies

Due to differences in methodology and definitions of distraction, any study or survey conducted may arrive at different results and conclusions with respect to the involvement of driver distraction in causing a crash. A 2008 research paper sponsored by the National Highway Traffic Safety Administration (NHTSA) entitled, *Driver Distraction: A Review of the Current State-of-Knowledge,* discusses multiple means of measuring the effects of driver distraction including observational studies of driver behavior, crash-based studies, and experimental studies of driving performance. Each type of study has its own set of advantages and disadvantages.[2]

1. National Motor Vehicle Crash Causation Survey (NMVCCS)

NHTSA recently conducted a nationwide survey of crashes involving light passenger vehicles with a focus on factors related to pre-crash events.[3] The NMVCCS investigated a total of 6,950 crashes during the three-year period from January 2005 to December 2007. The report used a nationally representative sample of 5,471 crashes that were investigated during a two-and-a-half-year period from July 3, 2005, to December 31, 2007. Based on the sampling method of the survey, findings were representative of the nation as a whole.

Survey researchers were able to assess the critical event that preceded the crash, the reason for this event, and any other associated factors that might have played a role. Examples of the critical event preceding the crash include running off the edge of the road, failure to stay in the proper lane, or loss of control of the vehicle. Researchers assessed the reason underlying this critical event and attributed that reason to either the driver, the condition of the vehicle, failure of the vehicle systems, adverse environmental conditions, or roadway design. Each of these areas was further broken down to determine more specific critical reasons. For the driver, critical reasons included facets of driver distraction and, therefore, NMVCCS was able to quantify driver distraction involvement in crashes. The percentages included in this discussion are based on 5,471 crashes.

In addition to reporting distraction as the critical reason for the pre-crash event, NMVCCS also reported crash-associated factors. These are factors such as interior distractions that likely added to the probability of a crash occurrence. In cases where the researchers attributed the critical reason of the pre-crash event to a driver, researchers also attempted to determine the role and type of distraction. Of the crashes studied, about 18 percent of the drivers were engaged in at least one interior (*i.e.,* in-vehicle) non-driving activity (*e.g.,* looking at other occupants, dialing or hanging up a phone, or conversing with a passenger). For the most part, that activity was conversing either with other passengers or on a cell phone, as a total of about 12 percent of drivers in these crashes were engaged in conversation. Drivers between ages of 16 and 25 demonstrated the highest rate of being engaged in at least one interior non-driving activity.

2. 100-Car Naturalistic Driving Study

The 100-Car Naturalistic Driving Study was an observational study—via instrumented vehicles—to provide details on driver performance, behavior, environment, and other factors associated with critical incidents, near-crashes, and crashes for 100 cars over a one-year period.[4] This exploratory study was conducted to determine the feasibility of a larger-scale study that would be more representative of the nation's driving behavior. Despite the small scale of the 100-Car study, extensive information was obtained on 241 primary and secondary drivers over a 12- to 13-month period occurring between January 2003, and July 2004. The data covered approximately 2 million vehicle miles driven and 43,000 hours of driving. As stated in *An Overview of the 100-Car Naturalistic Study and Findings,* "the goal of this study was to maximize the potential to record crash or near crash events through the selection of subjects with higher than average crash or near crash risk exposure."[5] In order to achieve this goal, the 100-car study selected a larger sample of drivers who were 18–25 years of age and who drove more than average.

Additionally, the subjects were selected from the Northern Virginia/Washington, DC metropolitan area which offers primarily urban and suburban driving conditions, often in moderate to heavy traffic. This type of purposive sample served well the intentions of the study; however, it also created limitations on the application of the findings. The findings of the 100-car study cannot be generalized to represent the behavior of the nation's population or the potential causal factors for the crashes that occur across the nation's roadways.

During the 100-car study, complete information was collected on 69 crashes, 761 near-crashes, and 8,295 incidents. The encompassing term *inattention* was classified during this study as (1) secondary task involvement, (2) fatigue, (3) driving-related inattention to the forward roadway, and (4) non-specific eye glance away from the forward roadway. Secondary task involvement is defined for the study as driver behavior that diverts the driver's attention away from the driving task; this may include talking on a cell phone, eating, talking to a passenger, and other distracting tasks. Results of the 100-car study indicate that secondary task distraction contributed to over 22 percent of all the crashes *and* near-crashes recorded during the study period.[6] This study found that when a secondary task took the driver's eyes off of the road for more than 2.0 seconds (out of a 6.0-second time interval), the odds of a crash or near-crash event occurring significantly increased.

[2] Ranney, Thomas A. (2008). "Driver Distraction: A Review of the Current State-of-Knowledge." DOT HS 810 787. Available online at: *http://www.scribd.com/doc/12073978/Driver-Distraction-A-Review-of-the-Current-StateofKnowledge.* A more comprehensive listing of research on distracted driving, which includes links to many of the reports discussed in this analysis, can be found online at: *http://www.nhtsa.dot.gov/portal/site/nhtsa/template.MAXIMIZE/menuitem.8f0a414414e99092b477cb30343c44cc/?javax.portlet.tpst=4670b93a0b088a006bc1d6b760008a0c_ws_MX&javax.portlet.prp_4670b93a0b088a006bc1d6b760008a0c_viewID=detail_view&itemID=97b964d168516110VgnVCM1000002fd17898RCRD&overrideViewName=Article.*

[3] NHTSA (2009). "National Motor Vehicle Crash Causation Survey: Report to Congress." DOT HS 811 059. Available online at: *http://www-nrd.nhtsa.dot.gov/Pubs/811059.PDF.*

[4] Dingus, T.A. *et al.* (2006). "The 100-Car Naturalistic Driving Study, Phase II—Results of the 100-Car Field Experiment." DOT HS 810–593. Available online at: *http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/100CarMain.pdf.* Neale *et al.* (2005). "An Overview of the 100-Car Naturalistic Study and Findings." NHTSA Paper Number 05–0400. Available online at: *http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/100Car_ESV05summary.pdf.*

[5] Neale *et al.,supra* note 3.

[6] Klauer *et al.* (2006). "The Impact of Driver Inattention on Near-Crash/Crash Risk: An Analysis Using the 100-Car Naturalistic Driving Study Data." DOT HS 810 594. Available online at: *http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/810594.pdf.*

3. National Occupant Protection Use Survey (NOPUS)

NHTSA's annual survey of occupant protection also collects data on electronic device use. NOPUS provides the only probability-based observed data on driver electronic device use in the United States.[7] Based on the sampling method of the survey, findings are representative of the nation as a whole. In 2008, it was estimated that about 6 percent of all drivers were using hand-held cell phones while driving during daylight hours. This finding means that about 812,000 vehicles on the road at any given daylight moment were being driven by someone using a hand-held cell phone in 2008. Survey data from the previous year yielded an even higher figure: according to NOPUS, in 2007 about 1,005,000 vehicles were being driven by someone using a hand-held cell phone at any given daylight moment.[8] Another finding was that in both 2007 and 2008 an estimated 11 percent of vehicles in a typical daylight moment were driven by someone who was using some type of electronic device, either hand-held or hands-free.[9]

4. Motor Vehicle Occupant Safety Survey (MVOSS)

The MVOSS is a periodic national telephone survey on occupant protection issues. The most recent administration of the survey was in 2007. *Volume 4, Crash Injury and Emergency Medical Services Report,* includes discussion of questions pertaining to wireless phone use in the vehicle.[10] According to the report summarizing the 2007 data, 81 percent of drivers age 16 and older usually have a wireless phone in the vehicle with them when they drive. Drivers over the age of 54 were less likely than younger drivers to have them—87 percent of 16- to 54-year olds, 74 percent of 55-to 64-year-olds, and 63 percent of drivers age 65 and older. Of those drivers who usually have a wireless phone in the vehicle, 85 percent said they keep the phone on during all or most of their trips. Among drivers who keep the phone turned on when they drive, 64 percent always or usually answer incoming phone calls.

Of the drivers who usually have a wireless phone in the vehicle with them when they drive, 16 percent said they talk while driving during most or all of their trips, and 17 percent said they talk on their wireless phone during about half of their trips. On the other hand, 22 percent of individuals reported never talking on their phone while driving. When driving and wanting to dial the phone, 32 percent of those who at least occasionally talk on the phone while driving tend to dial the phone while driving the vehicle. An additional 37 percent tend to wait until they are temporarily stopped, and 19 percent tend to pull over to a stop to place the call. Ten percent stated they never dial while driving.

H. Other Efforts

1. State Action

Texting while driving is prohibited in 30 States, the District of Columbia, the Virgin Islands, and Guam. A list of States and Territories that have taken such actions can be found at the following DOT *Web site: http://www.distraction.gov/state-laws.* Many other States have instituted even stricter prohibitions on the use of cell phones for other functions, including voice communications, while driving.

2. Federal Action

On October 1, 2009, during DOT's Distracted Driving Summit, the President issued Executive Order 13513 on "Federal Leadership on Reducing Text Messaging While Driving." Among other things, the Order prohibits all Federal employees from engaging in text messaging while—

- Driving Government-owned, -leased, or -rented vehicles;
- Driving privately-owned vehicles while on official Government business; and
- Using electronic equipment supplied by the Government (including, but not limited to, cell phones, BlackBerries, or other electronic devices) while driving any vehicle.

On April 1, 2010, the Federal Motor Carrier Safety Administration published a notice of proposed rulemaking which proposed to prohibit texting by commercial motor vehicle (CMV) drivers while operating in interstate commerce. 75 FR 16391 (April 1, 2010). The rule was proposed to improve safety on the Nation's highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of commercial motor vehicles.

On April 26, 2010, the Federal Aviation Administration issued Information for Operators (InFO) guidance[11] on cockpit distractions, urging crewmembers to refrain from engaging in distracting tasks not related to flight duties, such as using personal electronic devices. The guidance highlighted recent incidents in which pilots had engaged in the use of distracting personal electronic devices while performing required flight duties, and called on air carriers to create policies limiting pilot distraction.

The Pipeline and Hazardous Material Safety Administration (PHMSA) issued "Safety Advisory Notice: Personal Electronic Device Related Distractions (Safety Advisory Notice No.10–5)" to alert the hazardous materials community to the dangers associated with the use of electronic devices while operating a commercial motor vehicle. 75 FR 45697 (Aug. 3, 2010). In the notice, PHMSA stressed the heightened risk of transportation incidents involving hazardous materials when drivers are distracted by electronic devices. The notice urges motor carriers that transport hazardous materials to institute policies and provide awareness instruction to discourage the use of mobile telephones and electronic devices by motor vehicle drivers.

II. Response to Public Comment

FRA received 15 comments in response to the NPRM. Comments were submitted by a wide variety of affected parties, including the American Association for Justice (AAJ); AAR; five labor organizations that submitted a joint comment, (including the United Transportation Union, Brotherhood of Locomotive Engineers and Trainmen, Brotherhood of Railroad Signalmen, Brotherhood of Maintenance of Way Employes, and the American Train Dispatchers Association (collectively referred to as the Labor Organizations)); the National Railroad Passenger Corporation (Amtrak); the National Transportation Safety Board (NTSB); the National Safety Council; the Peninsula Corridor Joint Powers Board (Caltrain); the Utah Transit Authority; and seven individuals. In addition, New Jersey Transit (NJT) contacted FRA and had a brief conversation that was summarized and documented in a memorandum, which is posted in the public docket for this rule. FRA staff extensively reviewed

[7] NHTSA (2009). "Driver Electronic Device Use in 2008." DOT HS 811 184. Available online at: *http://www-nrd.nhtsa.dot.gov/Pubs/811184.PDF.*

[8] NHTSA (2008). "Driver Electronic Device Use in 2007." DOT HS 810 963. Available online at: *http://www-nrd.nhtsa.dot.gov/Pubs/810963.PDF.*

[9] NHTSA (2008) *supra* note 7 and NHTSA (2009) *supra* note 6.

[10] Boyle, J.M. and C. Lampkin (2008). "2007 Motor Vehicle Occupant Safety Survey Volume 4: Crash Injury and Emergency Medical Services Report." DOT HS 810 977. *See* report summary dated March 2009 online at: *http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Communication%208%20Consumer%20Information/Traffic%20Tech%20Publications/Associated%20Files/tt371.pdf.*

[11] InFo 10003 "Cockpit distractions" (April 26, 2010). Available online at: *http://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/info/all_infos/media/2010/InFO10003.pdf.*

and evaluated the comments. In this section, FRA will respond to comments regarding locomotive engineer certification; access to personal cell phone records; personal emergencies; exceptions regarding personal devices such as GPS and cameras; electronic devices to document violations of safety laws; minimum standards, authorized business purposes; passenger train considerations; accident reduction; instruction; operational tests; regulatory impact analysis; and other general comments. FRA will also respond to some of the smaller concerns within the Section-by-Section Analysis below.

In the NPRM, FRA requested comments on four issues: (1) Whether violations should be the basis for revoking a locomotive engineer's certification; (2) whether railroads should require railroad access to personal cell phone records if the employee was involved in an accident; (3) whether devices or uses other than those specified should be subject to only limited restrictions; and (4) whether FRA should allow electronic devices to be used more liberally for personal emergencies.

Locomotive Engineer Certification Revocation

FRA received five comments in response to our request for information on whether to amend 49 CFR part 240 (part 240). FRA specifically requested comment on whether violations of this final rule should be added as a basis for revoking a locomotive engineer's certification. Both the NTSB and AAR submitted comments in support of this proposal, stating that it would provide a deterrent to the improper use of electronic devices and also that such violations should be incorporated as the basis for revoking a conductor's certification in the forthcoming conductor certification regulation. The Utah Transit Authority commented that if part 240 were amended, that it should be at the discretion of the individual railroad to decide whether electronic device violations should be cause for decertification.

The Labor Organizations' joint comment and a railroad employee both commented that they opposed amending part 240. The railroad employee stated that the current revocable offenses found at 49 CFR 240.117(e) (§ 240.117(e)) are absolute rules, but that this final rule contains numerous exceptions where it is permissible for operating employees to use electronic devices. The Labor Organizations' comment stated that accident information does not support adding violations to § 240.117(e). The comment stated that unlike the current provisions of that section, a significant portion of train accidents do not result from use of electronic devices. These commenters also expressed concern that revoking an engineer's certification merely because he or she may have forgotten to turn a device off would be an overly harsh penalty. The commenters also pointed out that FRA has numerous other enforcement tools at its disposal should it discover violations of this regulation. Finally, they commented that if FRA were to amend part 240 to include violations of this rule as offenses mandating revocation of a locomotive engineer's certification, that revocation should be limited to instances in which a violation has occurred that contributed to one of the events identified in FRA's provision on post-accident toxicological testing (49 CFR 219.201(a)), such as a major train accident or a fatality.

After reviewing the comments, and based on the serious railroad incidents that have occurred as a result of electronic device use, FRA believes that it may be appropriate to amend part 240 to allow for decertification in certain instances. However, FRA wishes to further review the issue, and to consider how it would appropriately implement such an amendment. Further, FRA would like to allow for this regulation to first take effect before making a final decision as to whether action to amend part 240 is necessary. As such, FRA may amend part 240 in a future rulemaking; for example, in a rulemaking where the agency could simultaneously implement a consistent provision in the forthcoming conductor certification rule.

Access to Employees' Personal Cell Phone Records

FRA has decided that a provision mandating that railroads require operating employees to provide access to personal cell phone records in the event of an accident is unnecessary for FRA purposes. As noted in the NPRM, FRA currently uses its investigative authority under 49 U.S.C. 20107 and 49 U.S.C. 20902 to obtain personal cell phone records when appropriate.

Personal Emergencies

FRA has decided that an exception for personal emergencies would present significant obstacles to enforcing this subpart. An employee who has just been found with a cell phone turned on while on a moving train could easily say that the phone was on because of a sick family member, whether true or not. Railroads have been able to contact crewmember for years in the event of emergencies before cell phones by using the locomotive radio. In addition, if there is genuine evidence of a personal emergency, FRA inspectors have discretion not to recommend a penalty. No FRA inspector, for example, would recommend a penalty against a railroad operating employee who called 911 because an employee was having a heart attack. FRA expects railroads to also use reasonable discretion in the event of extenuating circumstances. If this proves not to be the case, FRA will revisit this issue.

GPS Devices

After publication of EO 26, FRA received a letter challenging certain provisions of the Order. That letter urged FRA to amend EO 26 to allow for the use of personal GPS devices. However, in the NPRM, FRA did not propose to allow any exemptions for use of personal GPS devices that would otherwise be in violation of the prohibitions set forth in the proposed regulation. In response to the NPRM, two comments addressed GPS devices. Amtrak commented that it understood the NPRM to mean that while personal GPS devices would be prohibited from being utilized outside the circumstances set forth in § 220.305, that § 220.307 of the proposed regulation would still allow for use of a GPS feature included in a railroad-supplied multifunctional device for an authorized business purpose. The Labor Organizations urged FRA to adopt a provision allowing for the use of GPS devices. The comment states that FRA should do so as GPS devices can aid in determining train speed and can help a crew more accurately determine where physical characteristics are located, especially during severe weather when visibility might be limited. The comment also states that GPS technology will be part of positive train control systems that will be able to prevent train incursions into working limits and other relevant operating restrictions that may be present. The comment alluded that personal GPS devices could help provide these same safeguards.

In response, FRA points out that both proposed and final Subpart C do not prohibit the use of railroad-supplied GPS technology. First, railroads are free to issue railroad-supplied devices that utilize GPS technology. So long as those devices are used for an authorized business purpose in accordance with written instructions, the use of those devices is permissible during periods of time not otherwise prohibited by § 220.307. Thus, Amtrak's understanding of the proposed regulation is correct. If railroads feel

that such devices are necessary for operations, they may issue them for use.

However, FRA has opted not to include personal GPS devices in the exemptions listed in § 220.309. Thus, a personal GPS device is not permitted to be used by a railroad operating employee in violation of the prohibitions set forth in § 220.305. There are several reasons why FRA has decided such. First, locomotive engineers are required to be familiar with the physical characteristics of the routes over which they operate. This knowledge is required by both railroad operating rules and by part 240. Thus, engineers should already be aware of where sidings, road crossings, and other physical characteristics are located. Second, there are other suitable means that FRA has already accounted for in this final rule with which to determine a train's speed or location. Railroad mileposts along the right of way currently help denote a train's exact location. Measured mile markers along the right of way are often used along with stopwatches, which are permitted to be used by this regulation, to determine the accuracy of a train's speed indicator. Calculators are permitted to be used under this final rule, and can be used to determine formulas such as train stopping calculations. Locomotive foot-counter devices (sometimes in conjunction with calculators) are often used to determine when a train is clear of a speed restriction, interlocking, or working limits. Also, by nature, GPS devices are sometimes complicated devices to operate that could distract employees from safety-related functions. Finally, as noted above, if such devices are needed, the railroad is free to supply such devices for business purposes. FRA has not been presented with sufficient justification that these devices enhance railroad safety, especially because the above-listed means to determine train speed and location are already available to operating employees. Accordingly, FRA has chosen not to allow for the use of personal GPS devices in this final rule.

Cameras

In § 220.309(c) of the NPRM, FRA proposed allowing the use of "stand-alone" cameras to document a safety hazard or a violation of a rail safety law, regulation, order, or standard. The proposed text allowed for that use if the camera was not a part of a cell phone or other multi-functional electronic device. Further, the proposed text did not allow for the use of that device by a locomotive engineer on a moving train. In response to this proposal, FRA received four comments, which are addressed in detail below.

After reviewing all of the comments, FRA declines to expand this provision to allow for the use of personal cameras that are part of a multi-function device during the periods of time prohibited by this rule. However, the agency is expanding the exception to allow for the use of *railroad-supplied* multi-functional devices as a camera. In other words, if a railroad issues a multi-functional device that includes a camera feature, the camera may be utilized by operating employees for an authorized business purpose as specified by the railroad in writing in accordance with this exception. Those purposes must be approved by FRA. FRA has chosen to allow such use to account for devices that may be used in the future as part of evolving technologies that railroads may utilize that could enhance safety. FRA has also chosen to amend the proposed exception as there may be less temptation to improperly use a railroad-supplied device as opposed to an employee's personal device.

Finally, FRA has changed the provision to eliminate reference to the use of video to document safety hazards. Many locomotives are already equipped with forward facing locomotive video recorders, and FRA is unaware of any sufficient justification to allow railroad operating employees an exemption to use video cameras during any additional periods of time outside those prohibited under §§ 220.303–220.305. Next, the language of the camera exemption was also changed to remove any reference to videos to prevent confusion. FRA realizes that some cameras intended for use as a camera have a video function, and believes those devices should be able to be used under this exception to take photographs. A number of cell phones, however, also have camera functions. By limiting this exemption to prohibit those devices unless they are railroad-provided and used for an authorized business purpose stated in writing by the railroad and approved by FRA, FRA avoids situations where those devices could be used outside these parameters by a railroad operating employee who claims to be documenting a safety hazard.

AAJ commented that FRA should also allow for the use of cell phones to photograph safety hazards. AAJ reasoned that it was unreasonable to expect railroad employees to carry stand-alone cameras, and proposed allowing for the use of cell phone cameras if the device were turned off immediately after documenting the hazard. AAJ further asserted that railroads underreport accident and injury data and employees are thus at a disadvantage in ensuring safe working conditions. AAJ also discounted that the use of cell phone cameras presented enforceability problems for FRA.

In response to AAJ's comment, FRA notes that AAJ acknowledged that the proposed NPRM exemption regarding use of cameras would be an expansion of the current allowances under EO 26. Section 220.309(c) of this final rule will allow for the expanded use of cameras to document safety hazards. However, by prohibiting cell-phone cameras except in narrow circumstances, FRA enhances its goal of attempting to eliminate the use of distracting electronic devices by railroad operating employees. In FRA's experience, personal cell phones account for the vast majority of documented instances where electronic device distraction contributed to railroad accidents. By disallowing the use of a camera that is part of a personal cell phone, the agency hopes to minimize use of cell phones during safety-critical times, and therefore prevent future accidents. Further, even outside the expanded ability to photograph safety hazards that this rule grants, railroad employees can always report these hazards to FRA or to the railroad. Lastly, FRA is not prohibiting employees from carrying stand-alone cameras. Whether an employee chooses to carry a personal camera to document potential safety hazards is at his or own discretion subject to railroad rules. Further, during the periods of time when electronic devices are not prohibited from being used by this regulation, employees are free to use their personal cell phones in any manner they wish, including the camera function, provided that use is in accordance with any applicable railroad operating rules.

AAR requested that FRA delete this proposed camera exemption as unnecessary and compromising to security. AAR first reasoned, that even without the use of potentially distracting cameras, operating employees have other means of reporting safety issues to both the railroad itself and to FRA. Second, AAR asserted that for security reasons FRA should not allow for the use of cameras at all, as employees could then post pictures of security-sensitive locations. In response to AAR's comment, FRA declines to delete § 220.309(c) from the final rule. As discussed in the NPRM, FRA realizes the importance of being able to document violations of railroad safety laws and potential hazardous conditions, and FRA does not want to infringe upon that usefulness. The provision in the final rule, while

limiting the use of electronic devices, still allows for hazardous conditions to be documented safely. Further, FRA has no information that railroad employees distributing what could potentially be security-sensitive pictures has been an issue in the past, and this regulation only exempts cameras for the purposes of documenting safety hazards, and not for any other circumstances.

Amtrak also commented on the use of cameras, and, similar to their comment on GPS devices, wanted to ensure that the proposed regulation would not curtail its authority to issue railroad-supplied electronic devices that contain a camera feature, so that its employees would be able to utilize that function for authorized business purposes. Amtrak stated that it envisioned the use of the camera function on railroad-supplied devices being utilized to document an equipment defect or hazard. Amtrak stated that such use could help expedite repair requests and forward safety hazard information to the railroad. In response to Amtrak's comment, such use of a railroad-supplied device would be permissible under this final regulation, as is explained above.

Finally, the Labor Organizations' joint comment stated that the proposed text should be expanded in the final rule to allow for the use of the camera feature of a cellular telephone. They stated that any device used to document a hazard should be permitted to be used, reasoning that the word of railroad employees is not usually sufficient for FRA to initiate investigations and that if employees do not have the ability to document a hazard in realtime, railroads could repair these conditions before an investigation can begin. Finally, the comment stated that it is unnecessary to require employees to carry several separate electronic devices in order to perform their duties.

In response, FRA often receives complaints from railroad employees, and investigates them if they allege on their face a violation of a railroad safety regulation, law, or order. When FRA finds that those complaints have merit, FRA often takes enforcement action as a result. Next, the Labor Organizations' comment states that if a safety hazard is not documented at the time the employee is present, that the condition is often repaired. However, the goal of documenting hazards is that such conditions would be repaired and made safe in a timely fashion. Thus, FRA does not find that argument persuasive. Finally, as stated above in response to AAJ's comment, FRA does not require operating employees to carry any devices. This regulation merely sets the requirements for the permissible uses of certain electronic devices in order to eliminate distractions that have in the past had severe consequences. If operating employees choose to carry such devices, this regulation merely sets forth certain prohibitions on their use.

Comment Proposing (1) New Exception for Electronic Devices Necessary To Document Violations of Safety Laws or (2) Amendments to Locomotive Safety Standards

The Labor Organizations' comment requests a general exception for "[o]ther electronic devices that are necessary to adequately document a safety hazard or a violation of a rail safety law, regulation, order, or standard, provided that the devices are turned off immediately after the documentation has been made." The Labor Organizations expressed their concern that a carbon monoxide detector would be subject to the restrictions in this subpart. In particular, FRA would consider a carbon monoxide detector to be excluded from the definition of "electronic device". A carbon monoxide detector does not perform any specifically prohibited functions, and it does not entail the risk of distracting an employee from a safety-related task while being unnecessary for the employee's health and safety. In addition, FRA does not believe this proposed exception is necessary in general. Every FRA region has a toll-free phone number to report safety hazards and violations. As discussed above, employees can report safety hazards to FRA. Accordingly, no general exception for devices necessary to document safety hazards will be included in Subpart C.

The Labor Organizations recommended that if FRA denied the request for this general exception that it instead amend 49 CFR part 229, Railroad Locomotive Safety Standards. Their suggestion was to allow an employee to refuse to operate a locomotive if the employee makes a good-faith determination that it does not comply with certain regulatory requirements, such as § 229.119(d), requiring proper ventilation, and § 229.121, locomotive cab noise. This suggestion is outside of the scope of the NPRM and thus will not be addressed by this final rule.

Minimum Standards

The Labor Organizations comment requested that FRA prohibit railroads from imposing more restrictions on the use of electronic devices than those of this rule. FRA declines to do so. Specifically, the Labor Organizations were concerned that railroad operating rules would prohibit using calculators and the use of cameras to take pictures of safety hazards. FRA finds it unlikely that a railroad would prohibit the use of a calculator. There is also a significant possibility that some, if not all, railroads will allow the use of cameras to take pictures of safety hazards. Amtrak, for example, argued that FRA's proposed exception be expanded to allow cameras on cell phones and other multi-functional devices to be used. Railroads have a vested interest in safety and discovering and remedying safety repairs. Train accidents are generally expensive. In addition, even if a railroad prohibited the use of cameras for this, employees will be more likely to report such defects to FRA. FRA declines to refuse railroads the right to impose more restrictive use of electronic devices.

That railroads may impose more restrictions than Subpart C allows is the primary reason why FRA did not delete § 220.311 (standards for use by deadheading employees) as AAR requested. AAR voiced its concern that a deadheading employee would unsafely use an electronic device while walking through a yard. This conduct would be prohibited under § 220.311 as it would be interfering with the employee's personal safety. Nevertheless, railroads may choose to amend their operating rules to prohibit deadheading employees from using electronic devices. FRA declines to do so, noting that another commenter objected to any restrictions for deadheading employees.

Authorized Business Purpose

An "authorized business purpose" is necessary for railroad operating employees to use an electronic device under the less restrictive circumstances of § 220.307, as opposed to § 220.305 which governs personal electronic devices. The Labor Organizations stated their concern that a railroad would unreasonably expand the definition of "authorized business purpose," and proposed a definition of "authorized business purpose" that, among other things, would require approval by FRA and would include language stating that an "authorized business purpose" is one that "is necessary to report, document, or prevent an imminent safety hazard * * * " We believe this suggested definition is unnecessarily restrictive, but are persuaded by the Labor Organization's argument that a railroad might consider requiring a railroad operating employee to answer questions regarding incidents from previous duty tours to be an "authorized business purpose." Accordingly, FRA has defined the term as "a purpose directly related

to the tasks that a crewmember is expected to perform during the current tour of duty as specified by the railroad in writing."

Passenger Trains and Considerations Related to Use of Railroad-Supplied Phones

Three commenters (Caltrain, Amtrak, and an anonymous commenter) were specifically concerned about the use of electronic devices by passenger train railroad operating employees. Caltrain, a commuter rail service, requested that FRA incorporate a provision of EO 26 that was not included in the proposed rule. The provision Caltrain referred to was paragraph (d)(3) of the Order, which allows operating employees to use railroad-supplied devices within the body of passenger trains. Caltrain was concerned that the exclusion of this provision would limit its ability to continue to use Nextel two-way communication systems. Those devices can receive texts from its centralized control facility but cannot transmit text messages or make or receive phone calls. Caltrain requested that paragraph (d)(3) of EO 26 be incorporated into Subpart C. That provision reads as follows:

> A railroad operating employee may use a railroad-supplied electronic or electrical device for an approved business purpose while on duty within the body of a passenger train or railroad business car. Use of the device shall not excuse the individual using the device from the responsibility to call or acknowledge any signal, inspect any passing train, or perform any other safety-sensitive duty assigned under the railroad's operating rules and special instructions.

When EO 26 was drafted, FRA considered that it would be appropriate and necessary for conductors of passenger trains to use cell phones or other electronic devices as they dealt with passengers. For this reason, the only restrictions on that use when the employee was outside of the cab of the locomotive were that the use had to be for an approved business purpose and it could not interfere with the performance safety-sensitive duties. Subpart C does not explicitly address conductors or other railroad operating employees of passenger trains using railroad-supplied electronic devices; however, Subpart C retains the substantive restrictions as set forth in EO 26. Conductors of passenger trains wanting to use railroad-supplied electronic devices outside the locomotive must comply with § 220.307, requiring the use to be for an authorized business purpose, as well as § 220.305, which states that the employee may not use an electronic device if it would interfere with the employee's safety-related duties. Subpart C does not otherwise restrict the use of railroad-supplied electronic devices of conductors or assistant conductors.

Caltrain did not specify whether its locomotive engineers currently use its Nextel system while in the cab. Subpart C kept the restrictions of EO 26 regarding a locomotive engineer using railroad-supplied electronic devices; engineers may not use them while on a moving train, when any member of the crew is on the ground or riding rolling equipment during a switching operation, or when any railroad employee is assisting in preparation of the train for movement. Assuming Caltrain does not fall under the exception of § 220.309(f), Caltrain must apply for and receive a waiver for its locomotive engineers to use its Nextel system in other circumstances. FRA believes the way that the rule is currently written adequately balances the needs of passenger train operations and safety. Subpart C does not prohibit conductors on passenger trains from communication channels for purposes relating to railroad operations as one anonymous commenter, concerned about a recent commuter train's lack of air conditioning, implied.

As previously discussed, Amtrak submitted a comment expressing its desire for FRA to clarify whether its conductors may use GPS technology, possibly within the cab of a controlling locomotive. Amtrak also requested that FRA explicitly allow railroad operating employees to use the cameras of a multifunctional device to take pictures of safety hazards. Amtrak plans to distribute conductor handheld electronic devices nationally in 2011. Subpart C will allow Amtrak employees on passenger trains to use both GPS technology and cameras to take pictures of safety hazards, provided that these uses are specified in writing and do not interfere with an employee's safety-related duties.

If the employee is located inside the cab of a passenger train, then a conductor may use a GPS application or a camera function on a railroad-supplied handheld device if the crew has held a safety briefing and all crewmembers have unanimously agreed that it is safe to use the device. If a passenger crewmember is outside the cab of a locomotive, a conductor may use such a device to photograph a safety hazard if the employee complies with both § 220.307, requiring the use to be for an authorized business purpose, and § 220.303, which states that the employee must not use an electronic device if it would interfere with the employee's safety-related duties.

Operational Tests

Section 220.315 of the NPRM contained proposed requirements related to operational tests. In response, FRA received three comments from AAR, NTSB, and the Labor Organizations. AAR's comment stated that it was not clear on the meaning of proposed § 220.315(c) and questioned whether FRA implied that employees were supposed to be aware that operational tests were occurring. AAR asked for clarification from FRA on this point. In response, FRA did not intend that railroad employees must be notified that an operations test will occur or is occurring under proposed § 220.315(c). The explanation for that proposed provision was intended to convey that once railroad employees became aware that an operations test was occurring, that even if use of electronic devices was otherwise permissible under the proposed regulation, that they refrain from use of any devices until the completion of the test. This provision was intended to help ensure that employees could achieve the maximum learning benefit from operational tests. However, in light of AAR's comment that the provision was confusing, and after further review, FRA has decided to delete proposed § 220.315(c) from this final rule. FRA decided to do so as in most circumstances, other than a banner test, employees are not even aware an operational test is underway until after the test is completed. Thus, the proposed provision may not have been of much practical utility, and could have led to additional confusion.

The NTSB's comment stated that FRA should provide more guidance to develop uniform standards of guidance across the railroad industry. NTSB stated that the use of in-cab audio and image recordings could be used as a deterrent, and reiterated a recommendation published as a result of the Chatsworth, California, Metrolink crash. That recommendation is that FRA require the installation of inward-facing video cameras and also require that railroads regularly review the images recorded on these cameras.

In response to NTSB's comment, FRA has left to the railroads' discretion how to conduct operational tests on the requirements of this subpart, but has required that those tests shall be included in a railroad's program of tests under 49 CFR part 217. FRA has also required that a railroad's program be revised to include a minimum number of tests that must be performed. This is consistent with FRA's approach to

allowing railroads the discretion to best tailor testing to their specific operating situations and needs. FRA currently does not have regulations mandating inward-facing video cameras on locomotives to monitor employee's actions while operating trains. As NTSB's comment mentioned, requiring such cameras could raise potential privacy concerns. Further, no FRA regulations preclude railroads from installing inward-facing cameras at their own discretion should they want to monitor their employees actions, as some railroads currently do. Also, requiring inward-facing video cameras was outside the scope of the NPRM. Finally, 49 CFR 229.135 currently requires that most controlling locomotives be equipped with event recorders. Event recorders allow railroads to monitor how trains are operated by their employees.

The Labor Organizations' comment requested that FRA expand the proposed § 220.315(b) prohibition on calling the device of a locomotive engineer on a moving train. The comment proposed text that would prohibit railroad managers from calling the devices of all crewmembers during additional periods. In response to the Labor Organizations' comment, FRA has decided to amend the text of proposed § 220.315(b) in this final rule. FRA has included all railroad operating employees rather than just locomotive engineers, expanded the provision to prohibit railroad managers from calling the devices of employees during additional safety-critical times rather than only when on a moving train, and limited the prohibition to calls when the manager knew or should have known that the crew was occupied with safety-critical duties. FRA has chosen to make these changes because structured operational tests are supposed to be fail-safe tests that do not create dangerous situations. The periods of time this final rule mandates that an employee's personal device must be turned off signify that the employee is performing a safety-sensitive function. Therefore, calling the operating employee's cell phone during those periods of time could create a distraction that the operational testing officer cannot control if the device is not turned off. As such, the rule has been expanded to include those times when operating employees on riding moving equipment, on the ground, or assisting in the preparation of their train for movement. By expanding this provision, FRA intends to reduce the risk of operational tests creating potentially dangerous situations.

Instruction

Section 220.313 of the NPRM contained the proposed instruction requirements for this regulation. AAR commented that the proposed schedule in that section was impractical and that the instruction requirements were unnecessary. AAR stated that because EO 26 has been in place since October 2008, railroads and their employees have experience with prohibitions on electronic devices, and thus do not need any further instruction. The comment stated that there has not been a showing that employees do not understand the existing prohibitions, and also that a formal approval process for instruction programs is not needed. AAR also commented that it was counterproductive to train employees on both relevant railroad operating rules and on the requirements of this new subpart, stating that this could lead to confusion among employees. AAR stated that because of this potential confusion, that proposed § 220.313(a)(2)(iii) is unnecessary. AAR's comment proposed an alternate § 220.313 for FRA to consider adopting.

After reviewing AAR's comment, FRA continues to believe that the proposed instruction section for this regulation is necessary. This final rule is substantively different from EO 26, and thus railroad operating employees should be properly apprised of its updated provisions and of the consequences for non-compliance. If employees are going to be operationally tested on the requirements of this subpart as § 220.315 requires, then FRA must also require that employees be instructed on these requirements. The instruction requirements found in § 220.313(a)(2) are minimal, as FRA only specifically requires that employees be instructed on when personal devices must be turned off, when railroad-supplied devices may be used, and the distinction between possible penalties for violations of this new subpart and corresponding railroad operating rules. FRA specifically mentioned these three points to emphasize their urgent importance. As discussed in the NPRM, employees need to be made aware of the distinction between the consequences of violating railroad operating rules and the consequences of violating FRA's regulation, as the potential consequences of violation of this regulation, in terms of liability, are quite different from those of the railroad's system of sanctions. Other than these listed minimal requirements, railroads are free to use their discretion in instructing their employees on the requirements of this subpart. AAR's comment did not elaborate why it believes that no further instruction is necessary on this subject, other than that EO 26 has been in place since October 2008 and railroads already have rules in place regarding electronic device use. FRA's response is that it continues to find that violations of EO 26 are occurring, and, that incidents continue to occur where electronic device use is a contributing factor. FRA believes that instruction on the requirements of this subpart could help to alleviate some future incidents, especially when the consequences of non-compliance with FRA regulations are explained. In the future, should FRA add violations of this subpart as revocable violations for locomotive engineers and conductors as it is contemplating, it is critical that employees have been instructed on these distinctions.

Next, FRA is not requiring that railroads submit their programs under this section for approval, but merely reserves the right to review a railroad's program. The recordkeeping requirement is present so that FRA has a mechanism to ensure that instruction is indeed being performed as required, similar to other similar provisions found in FRA's safety regulations. FRA has built flexibility into the recordkeeping requirement to allow for the use of electronic records. Also, the dates that FRA has decided on for implementing § 220.313 fall in line with those suggested by AAR in its comment. This final rule will be published in advance of when AAR states most railroads finalize their instruction schedules. The regulation will also allow for sufficient time for employees to be instructed in the first quarter of 2011, which AAR indicates is industry norm.

Regulatory Impact Analysis

In its comment, AAR takes issue with FRA's assertion that, "by virtue of FRA promulgating prohibitions on the use of electronic devices, the use of such devices at inappropriate times and the number of accidents attributable to such use would decrease." AAR believes that FRA's assertion is unsubstantiated, that railroad operating rules go further in restricting the use of electronic devices than the proposal, and that "there is no evidence that FRA prohibitions on the use of electronic devices will have a greater effect than railroad operating rules on the use of electronic devices or accidents attributable to their use."

FRA clarifies that the safety impact of promulgating Federal restrictions on the use of electronic devices is incremental in nature. This safety impact is largely

attributable to the restrictions instituted by EO 26. FRA believes that Federal restrictions on the use of electronic devices taken together with existing railroad operating rules will have a greater effect than solely railroad operating rules on the use of electronic devices or accidents attributable to their use. FRA is not claiming that the additional or incremental impact of Federal restrictions is greater than the impact of the railroad operating rules. This rule does not, of course, supplant railroad operating rules; it complements railroad operating rules. The deterrent effect of the Federal restrictions is cumulative with that of railroad operating rules. That is, operating rules presumably already have some deterrent effect on the improper use of electronic devices because of the implicit or explicit threat of punitive actions, such as dismissal from employment, that employers could take in response to violations of its operating rules prohibiting the improper use of electronic devices. Federal intervention adds yet another possible consequence to the improper use of electronic devices: Possible sanctions. These sanctions would not exist absent Federal regulatory action. Thus, prior to Emergency Order 26 and this rule, the possible consequences of being observed improperly using an electronic device equaled whatever action the employer took against the offending employee. Conversely, after the issuance of Emergency Order 26 and with this rulemaking, the possible consequences of being observed improperly using an electronic device equal the actions taken by the railroad plus any FRA sanctions, which may include civil penalties, the removal from safety-sensitive service, and disqualification from safety-sensitive service on *any* railroad.[12]

The existence of a Federal rule may also serve to raise general employee awareness and signal the importance of the safety implications of improper usage of electronic devices. However, as a point of further clarification, it is not necessarily solely the act of restriction or the existence of a Federal rule alone that would be expected to incrementally affect individual behavior. A principal mechanism for effecting change in employee behavior is the possibility of sanctions for the inappropriate use of electronic devices. As the RIA that accompanied the NPRM states, by including the possibility of individual sanctions for the inappropriate use of electronic devices, "FRA effectively increased the cost of performing railroad operations while distracted by electronic devices. FRA believes, in accordance with economic theory, that such an increase in the cost of performing railroad operations while distracted by electronic devices will lead individuals to choose to engage in such activities less often, resulting in safer railroad operations."

Furthermore, by creating Federal restrictions on the unsafe use of electronic devices with EO 26 and codifying the restrictions with this rule, FRA increases the probability of FRA inspectors observing, and thereby documenting, an employee who chooses to improperly use an electronic device in disregard of railroad operating rules and Federal regulations. This is because FRA inspectors have limited enforcement capability with respect to railroad operating rules that are not based on Federal regulations. Inspectors may write defects for observations of failure to follow railroad operating rules, but defects do not carry any sort of civil penalties on either the railroad or its employees. Furthermore, although inspectors generally write defects when they observe violations of railroad operating rules, inspectors may not be as focused on observing non-compliance with railroad operating rules, compared to observing non-compliance with Federal rules and emergency orders. In contrast, FRA inspectors have definite enforcement capabilities with respect to Federal regulations and emergency orders. Through the promulgation of Federal restrictions on the improper use of electronic devices, FRA inspectors become active enforcers of these restrictions, and such enforcement becomes a high priority for inspectors. As a result, the probability of FRA's observing an employee improperly using an electronic device increases.

FRA also notes that railroad operating rules are subject to change at the railroad's discretion, without notice to FRA, and can vary from railroad to railroad. A Federal regulation limiting the use of electronic devices would ensure a uniform minimum standard that could only be revised with opportunity for notice and comment. A Federal regulation would also apply to new railroads.

FRA asserts that issuance of this regulation will further reduce risk and incrementally raise safety levels. The magnitude of the decrease in risk is uncertain due to the lack of empirical data regarding electronic device usage in railroad operations. To address this uncertainty, the RIA contained a multitude of break-even analyses that inform decision-makers as to how much of a decrease in the probability of an accident caused by electronic device usage would be necessary for the expected benefits of the rule to exactly equal the expected costs.

Other Comments

FRA received other comments that may not have addressed a specific provision of the NPRM, or that are not addressed in this section or in the Section-by-Section Analysis below. Five of those comments came from individuals, with a sixth submitted by the National Safety Council. The National Safety Council submitted a white paper dated March 2010, titled *Understanding the Distracted Brain.* This document addresses the distracted driving problem, and contains an in-depth discussion explaining that the use of even hands-free cell phones does not eliminate driver distraction. The document further explains that multitasking impairs a driver's performance. FRA is appreciative that the National Safety Council submitted this document, as it helps further illustrate the necessity of regulations prohibiting the use of distracting electronic devices while performing safety-critical functions such as driving, operating a train, or flying.

Next, FRA received two comments from individuals who are generally opposed to this regulation. One commenter did not believe this regulation would be effective, stating railroads already have operating rules in place prohibiting the use of electronic devices, and that this will be a more monetarily costly rule than predicted. The commenter also stated that certain electronic devices have utility in the railroad setting. In response, although railroads have operating rules in place regarding the use of electronic devices, the incidents referenced above and in the NPRM have shown those rules are not an effective deterrent to keep railroad employees from using distracting devices in a manner that severely impacts safety. Thus, FRA views this regulation as necessary. Further, FRA has built in exceptions to this rule that the commenter discusses in order to accommodate technologies that are beneficial to railroad operating environments and do not detract from safety. The second individual commenter states the regulation should only apply to employees on moving trains, and that cell phones can help save lives in an emergency if left on. FRA disagrees, as there are other safety-critical times when operating employees are on the ground where electronic

[12] There are also possible sanctions applicable to the employer both in Emergency Order 26 and the proposed rulemaking, but these may not be as salient in the individual employee's choice on whether to use an electronic device.

device distraction can have severe consequences, such as when performing an inspection. Illustrating such is a December 2, 2009, Norfolk Southern train derailment. The train stopped after a detector alerted the crew to a problem, and while inspecting the train the conductor failed to notice a freight car that had already derailed. The conductor's cell phone records indicated personal cell phone use occurred during the period of time he was supposed to be inspecting the train. The train then continued on its route and a large-scale derailment occurred a short distance later.

An individual commenter expressed general support for additional regulation of electronic devices, referencing a fellow operating employee's extensive cell phone use. Another commenter was strongly opposed to ever giving railroads access to an employee's personal cell phone records. As indicated above, FRA did not propose such in the NPRM. Finally, an anonymous commenter submitted a comment after the comment period had closed which discussed the June 21, 2010, MARC commuter train incident where passengers were stuck on a malfunctioning train for a lengthy time period without air conditioning during extremely hot weather conditions. The comment stated the final rule should not preclude railroad employees from using alternative channels to communicate to avoid future situations. As explained above and in the Section-by-Section Analysis, FRA has built exceptions into this rule to account for varying operating situations, with particular flexibility for railroad-supplied devices. The final rule also contains an exception allowing for the use of devices to respond to emergency situations.

III. Section-by-Section Analysis

All section references below refer to sections in Title 49, Part 220 of the Code of Federal Regulations (CFR). The NTSB asked FRA to identify sanctions for violating this subpart. As part of FRA regulations, railroads and individuals violating of these provisions are subject to civil penalties under 49 U.S.C. 21301. Individuals who violate the final rule also may be possibly removed from safety-sensitive service under 49 U.S.C. 20111, and, in the future, 49 CFR Part 240 may be amended to revoke the locomotive engineer certification of engineers who fail to comply with these restrictions.

Amendments to 49 CFR Part 220 (Part 220)

Section 220.1 Scope

FRA amends the scope of § 220.1 to include the new Subpart C. The amendment states that part 220 now sets forth prohibitions, restrictions, and requirements for the use of electronic devices. It also establishes that these are only minimum restrictions that must be complied with and that railroads are free to impose stricter prohibitions at their discretion.

Section 220.2 Preemptive Effect

FRA is removing this section from 49 CFR part 220 (part 220). This section was prescribed in 1998 and has become outdated and, therefore, misleading because it does not reflect post-1998 amendments to 49 U.S.C. 20106. Such a section is unnecessary because 49 U.S.C. 20106 and 20701–20703 and case law under those statutory provisions sufficiently address the preemptive effect of part 220. In other words, providing a separate Federal regulatory provision concerning part 220's preemptive effect is duplicative of statutory law and case law and, therefore, unnecessary.

There has been no opportunity for public comment on this particular amendment in the final rule. FRA has determined, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), that prior notice and an opportunity for comment on the removal of § 220.2 are not necessary. The amendment is administrative in nature and merely eliminates an outdated and incomplete restatement of the preemptive effect of part 220. FRA is not exercising its discretion in a way that could be informed by public comment. As such, FRA finds that notice and public comment procedures are "impracticable, unnecessary, or contrary to the public interest" under 5 U.S.C. 553(b)(3)(B).

Section 220.5 Definitions

FRA amends the existing "definitions" section for part 220 by both adding new definitions and amending an existing definition. FRA adds new definitions for the following terms: Associate Administrator for Railroad Safety/Chief Safety Officer, authorized business purpose, earpiece, electronic device, fouling a track, FRA, in deadhead status, medical device, personal electronic device, railroad operating employee, railroad-supplied electronic device, and switching operation. FRA also amends part 220's existing definition of "train."

Of the new terms that FRA adds to this section, most of them had been previously defined in the Order, and proposed in the NPRM. Some of those definitions have been amended slightly to be more efficiently focused toward accomplishing the goals of this final rule. For example, as explained in the NPRM, in describing "electronic device," FRA broadens that description from that found in the Order to ensure that the definition in this final rule includes electronic book-reading devices or devices used to replicate navigation of the physical world. We have also excepted locomotive electronic control systems and digital timepieces from the definition. The first exception makes clear that this subpart does not affect the use of any control systems or displays in the cab of a locomotive that facilitate the operation of a train. We have specified that the control systems may be fixed or portable, and expanded the definition by removing the phrase "for a locomotive engineer" in recognition that devices under a conductor or other crewmember's control may be necessary to operate a train in response to AAR's comment that requested both of these minor changes. This rule instead obviously intends to address electronic devices that are not part of those systems. In addition, FRA expects that a device mentioned in AAR's comment (one to calculate where a locomotive horn should be sounded) would be considered to be part of the control system.

The second exception allows railroad operating employees the use of digital clocks or wristwatches whose primary functions are as timepieces. Timepieces are commonly used in the railroad industry to verify the accuracy of a locomotive's speed indicator. This function is safety-related in that it accurately allows a train crew to comply with relevant track speed limits during the course of a train's movement. FRA notes that this specific provision is limited to allowing the use of a stopwatch, wristwatch, or other similar device whose primary function is the keeping of time. This provision does not allow for the use of other devices, such as a cell phone or a personal digital assistant, that might have a stopwatch function but whose primary purpose is not that of a timepiece. FRA has so limited this exception specifically to timepieces as enforcement otherwise would be difficult, but also primarily to avoid the potential for distraction when an employee might turn on a cell phone with a stopwatch function in order to verify the train's speed, but then might proceed to use that device in an otherwise impermissible manner.

FRA has also chosen to refer to an "electronic or electrical device" as only an "electronic device" in the rule. We have done so both for the purposes of complying with plain language directives and for brevity. We have also done so because "electronic device" is a more accurate descriptor of the devices meant to be subject to this rule. The definition of "railroad operating employee" has also been changed from that found in the Order. We have attempted to clarify which employees are covered by this rule in order to avoid inadvertent over-inclusion. The definition of "railroad-supplied electronic devices" has also been modified from the Order to mean that the term refers only to devices that are provided for a business purpose authorized by the employing railroad and not being used for something other than an authorized business purpose. FRA has slightly changed that definition in order to focus more narrowly on which devices will be considered railroad-supplied.

In addition, the definition of "railroad-supplied electronic device" and "personal electronic device" have both been altered somewhat from the definitions proposed in the NPRM. NJT requested and received a brief meeting with FRA officials, documented in the docket, raising the issue that it, as well as at least one other railroad, allows its employees limited personal use of phones the railroad provides for business purposes. How the electronic devices are being used at any given moment determines what standards-those for personal or railroad-supplied devices-should apply. The definition railroad-supplied electronic device was slightly altered to clearly reflect such. The amended definitions make clear that when a railroad-supplied device is being used for other than an authorized business purpose that for the purposes of this regulation that the device will be treated as a personal electronic device.

The only truly new definitions that were not established in some form in the Order are for the following terms: "Associate Administrator for Railroad Safety/Chief Safety Officer," "authorized business purpose," "earpiece," "in deadhead status," and "medical device." However, these definitions were proposed in the NPRM. FRA adds a definition for the term "in deadhead status" because below in § 220.311 we explain that railroad operating employees in deadhead status are subject to somewhat different prohibitions on the use of electronic devices than are employees who are actively engaged in their assigned duties. The definition that we have is similar to and consistent with the existing definition of "deadheading" found in existing 49 CFR 228.5. FRA also adds the term "medical device" to the "definitions" section, as below we explain that the use of any electronic medical devices consistent with a railroad's medical fitness for duty standards is exempt from the restrictions of this subpart. FRA wishes to make clear that medical devices such as hearing aids or blood sugar monitors are exempt from the prohibitions that this rule puts forth. FRA finds that these devices do not detract from rail safety, but they may actually enhance safety in some circumstances for obvious reasons.

Two of the comments requested changes to the definition section. As noted above, in response to the Labor Organizations' comment, FRA is adding a definition for "authorized business purpose." AAR requested that FRA amend its definition of "fouling a track" to "an individual in such proximity to a track that the individual could be struck by a moving train or other on-track equipment." It reasoned that there would be times when, because of a wall or other physical restriction, an employee might not be able to move four feet away from the track to answer a phone call. FRA believes this scenario will be extremely rare and does not outweigh FRA's interest in consistency among its regulations: FRA's definition stems from 49 CFR 214.7. In addition, FRA believes that a measurement of four feet can be easier for employees to assess than trying to judge how close a train or on-track equipment will be.

Next, FRA amends the existing definition of a "train" in § 220.5. The existing definition specifically references a train for purposes of existing Subparts A and B to include "one or more locomotives coupled with or without cars requiring an air brake test in accordance with 49 CFR part 232 or 238 * * *". The existing definition resulted from FRA's work with an RSAC Working Group and intentionally meant to exempt certain trains and switching operations from the existing part 220. That existing definition will still apply to Subparts A and B. However, we define "train" for purposes of Subpart C to go beyond locomotive or locomotives coupled to one or more cars that are subject to the requirements of an air brake test. We use a more inclusive definition of "train" in order to apply the prohibitions on use of electronic devices to all switching movements.

Finally, FRA has eliminated one definition from this rule that appeared in the Order. The term "wireless communication device" has been eliminated, as the term "working wireless communications" is already included in existing § 220.5, and encompasses the substance of what FRA attempted to convey with that definition in the Order, and also because the devices described in that definition are already addressed by other provisions of this rule.

Subpart C—Electronic Devices

Section 220.301 Purpose and Application

FRA amends Part 220 by adding a new Subpart C. FRA's purpose for promulgating this subpart is to limit distractions caused by electronic devices to railroad crews. FRA means to limit these distractions in its effort to improve railroad safety and prevent incidents such as those mentioned in the preamble above, where loss of human life, injuries, and property damage may have been attributable to distraction by these devices. FRA notes that this subpart sets forth minimum standards that must be complied with, yet we fully anticipate that railroads will implement even stricter guidelines via operating rules. This is consistent with both existing and § 220.1, which provides that part 220 only sets minimum standards that must be complied with, but that railroads may adopt additional, more stringent, requirements.

Section 301 of this subpart describes both its purpose and application. Paragraph (a) of this section merely restates the subpart's purpose as described above. Paragraph (b) makes clear that the subpart does not affect the use of working wireless communications that railroads use under the authority of existing Subparts A and B. Paragraph (c)(1) explains that this regulation also does not in any way affect the use of railroad radios. Railroad radios are an essential part of daily operating practices, and FRA wishes to make explicit that this new subpart does not apply to their use. Paragraph (c)(2) of this section explains that in the event of a working railroad radio failure, that locomotive engineers or conductors may use electronic devices provided that use is in accordance with the applicable railroad's operating rules. FRA recognizes that, in certain instances, the use of an electronic device such as a cell phone in place of a malfunctioning radio may actually enhance safety rather than harm it. For example, should a crew need to contact a train dispatcher regarding their train's movement, a cell phone might in certain instances be the best means of reaching such a person in the event of a radio failure, and may provide a higher level of safety than not

being able to make contact at all. So long as the device is used with the parameters of railroad operating rules, FRA has made this exception to the prohibitions on use of electronic devices discussed below.

Section 220.302 Operating Rules

This section is a new provision that was not included in the NPRM, but was referred to in § 220.313 where it was proposed that railroads instruct their employees on the operating rules implementing the requirements of this subpart. The reason for including this provision in the final rule is to ensure each railroad adopts operating rules that comply with the requirements of this subpart. As explained above, railroads are free to adopt more stringent requirements than those adopted here, but this provision ensures railroads cannot adopt operating rules that are less stringent than or are contrary to this final rule. FRA is aware that most railroads already have operating rules in place governing the use of electronic device by their operating employees. However, at its discretion a railroad is also free to simply adopt the text of this subpart as its operating rule. If the railroad provides electronic devices to its employees, however, it must specify authorized business purposes in written procedures that are distributed to employees.

As stated above, FRA did not propose this section in the NPRM. However, this section is within the scope of the NPRM as it merely provides a mechanism for FRA to enforce this final rule and to ensure that railroads implement the requirements of the final rule. Further, as mentioned above, reference to railroads being required to have operating rules implementing the requirements of this subpart was proposed in § 220.313 of the NPRM.

Section 220.303 General Use of Electronic Devices

FRA adds § 220.303 to this subpart to set forth general guidance regarding the use of electronic devices. This section would prohibit railroad operating employees from using electronic devices in any way that would detract from railroad safety, irrespective of the other specific provisions and exceptions to this rule. This provision reinforces FRA's overarching mission of ensuring safety while railroad employees are performing their duties. As discussed above, distractions resulting from the use of electronic devices can result in railroad accidents that have catastrophic consequences. This paragraph is also meant to encompass other potential uses of electronic devices that may arise outside those detailed or contemplated by this rule or by railroad operating rules.

The Labor Organizations' pointed out that individuals beside railroad operating employees could be in the cab of a locomotive at critical times and could distract those employees from their safety-related duties. FRA adopted the view that no one in the cab of a controlling locomotive should use an electronic device in a way that distracts a railroad operating employee from a safety-related duty and amended § 220.303 accordingly.

Section 220.303 is intended to be restrictive, as FRA views any use of electronic devices not contemplated in this subpart as capable of distracting employees while on duty. A commenter suggested that FRA prohibit everyone, including members of the public, who is fouling a track from using cell phones. While limiting members of the public is outside the scope of the NPRM, FRA believes that this provision will limit the most hazardous use of electronic devices by the individuals most often as risk.

Section 220.305 Use of Personal Electronic Devices

This section prohibits the use of personal electronic devices while any safety-related duty is being performed. This provision governing personal electronic devices is self-explanatory, and is meant to be more restrictive than provisions governing railroad-supplied electronic devices. *See* § 220.307 discussed below. Provisions (a) through (c) of this section dictate certain safety-critical times during which each personal electronic device must be turned off with any earpiece removed, and are meant to encompass the situations in which FRA finds it is absolutely impermissible to use a personal electronic device. FRA notes that compliance with this section might have prevented many of the accidents described above and in the Order that occurred as a result of distraction caused by electronic devices.

Section 220.307 Use of Railroad-Supplied Electronic Devices

This section addresses the use of electronic devices that are supplied by the railroad to employees and are currently being used for business purposes. Paragraph (a) sets forth the general restriction that any use of these devices must be in accordance with railroad instructions for authorized business purposes as determined by the railroad. FRA also wishes to make clear that the use of railroad-supplied devices contemplated by this provision is limited to those authorized by the railroad in writing. In addition, uses involving the taking of photographs and videos must be approved by FRA. This is to prevent, for example, a crewmember using a camcorder for an entire trip.

Paragraph (b) sets forth the specific instances where FRA prohibits any use of railroad-supplied electronic devices by a locomotive engineer who is at the controls of a train. Similar to the conditions set out in § 220.305, paragraph (b) of § 220.307 describes specific instances where FRA finds distraction by electronic devices impermissibly interferes with railroad safety. While the actions specified in paragraph (b) are taking place, it is imperative that a locomotive engineer be attentive to his or her duties and not be distracted by any electronic device, regardless of whether that device is railroad-supplied or not. FRA also notes that paragraph (b)(3) of this section encompasses those times when passengers are boarding or alighting from a train. For example, it would be a violation of this regulation if a locomotive engineer at the controls of a passenger train was using a railroad-supplied electronic device while the train was stopped and passengers were boarding. Paragraph (c) sets forth the circumstances under which an operating employee other than a locomotive engineer in the situations described in paragraph (b) may use a personal electronic device while located in the cab of a controlling locomotive.

In its NPRM, FRA proposed that paragraph (c) only permitted use of a mobile telephone or remote computing device under the conditions of that paragraph. FRA has reconsidered and believes that limiting use to a mobile telephone or remote computing device would be overly restrictive and possibly limit the use of helpful technologies that emerge. Devices used in these circumstances may only be used if a safety briefing is held by all crewmembers in the locomotive, who must come to an agreement that it is safe to use the device. It is FRA's intent that the permissible use of these devices under this paragraph must be for a railroad-related purpose, *e.g.,* to contact a dispatcher, control operator, or yardmaster. It is not permissible to use the mechanisms provided by this section to use an electronic device for a personal use, such as making a personal phone call or watching a movie. When an employee uses a railroad-supplied device for personal reasons, the device is considered a personal device and governed accordingly. This provision and the provision found in paragraph

(d) of this section discussed below both state that they apply only to employees who are not in deadhead status. Different rules apply to employees in deadhead status, as is explained below in the analysis to § 220.311.

Paragraph (d) of § 220.307 explains the conditions under which it is permissible for an operating employee who is outside the cab of a controlling locomotive to use a railroad-supplied device. It sets forth two conditions that must be met for that use to be permitted. The first condition is that no crewmember may be fouling a track. The second condition, at paragraph (d)(2) of this section, states that all crewmembers agree it is safe to use the device. An instance described in the background section of the Order discusses an incident that occurred on December 21, 2005, when a contractor working on The Kansas City Southern Railway Company was struck and killed by a train after fouling a track while allegedly talking on a cell phone. Although in that case the incident involved a contractor who was apparently not a train employee, FRA notes that compliance by operating employees with the provisions of paragraph (d) would eliminate any similar occurrences among operating employees resulting from the impermissible use of electronic devices.

In the Order and as proposed in the NPRM, a railroad operating employee had to ensure that switching operations were suspended to use a railroad-supplied device in these circumstances. Because of this, AAR requested an exception for employees to use railroad-supplied devices inside buildings. It also recommended that FRA have § 220.307(c) cover employees inside and outside the cab and delete paragraph (d) completely. FRA has loosened the restrictions of paragraph (d) in response to these concerns; however, it does not add an exception for employees inside buildings. FRA believes that crews should function as a unit during any particular operation and does not see an advantage to have one employee leaving a train to go into a building to use an electronic device. FRA believes that requiring the employee not to be fouling a track and having other crewmembers to agree it is safe to use a device will provide adequate safeguards without operations suspended, especially since any use must be for an authorized business purpose and cannot interfere with a railroad operating employee's performance of safety-related duties.

Section 220.309 Permitted Uses

This section establishes six uses of electronic devices that FRA finds to be permissible. This list is intended to be exhaustive. FRA has specifically weighed other exceptions and uses, such as the proposed GPS device and personal emergency exceptions discussed above. After contemplating those other uses, at this time FRA does not agree there is a need for further permitted use of electronic devices other than those described here. Also, as stated in the text of this section, these permitted uses are subject to the requirement that the use not interfere with any employee's safety-related duties. This is consistent with the overall goals of this rule, and also specifically with the general prohibition established by § 220.303 discussed above.

Paragraph (a) of § 220.309 refers to electronic storage devices that specifically hold relevant operating documents that a crew might need to access during the normal course of their duties, as FRA is aware that some railroads issue devices to their operating employees that contain such information. FRA views this use as no different from a crewmember accessing relevant paperwork, such as a railroad timetable or train consist, in hardcopy form during the course of her duties. However, as stated in the text of paragraph (a), the use of this device must be authorized under an applicable railroad operating rule. For example, if a freight conductor wished to utilize a railroad-supplied electronic device while in the cab of the controlling locomotive of a moving train for the purpose of accessing a railroad operating rule, he would be allowed to do so if permitted by applicable railroad operating rules. If railroad operating rules more stringent than those provided by this subpart prohibited the use of that device while on a moving train, then that use would be disallowed.

Paragraph (b) of this section specifically allows for the use of personal electronic devices in response to an emergency situation. This paragraph is meant to allow flexibility to this regulation, as common sense dictates that unpredictable emergency situations may arise where use of a personal electronic device, such as a cell phone, may be appropriate. FRA contemplated this when it proposed § 220.301(b), which allows for use of a personal electronic device in instances where a radio failure occurs, but also proposes this broader emergency exception to build in flexibility where common sense dictates.

Paragraph (c) of this section is amended from that proposed in the NPRM. This provision specifically allows for employees to take a photograph of a safety hazard or a violation of a rail safety regulation, or order outside of those periods of time where it would otherwise be prohibited by § 220.303 or by § 220.305. However, it provides that only cameras may be used to take these photographs, unless the device is a railroad-supplied device as discussed above. A camera that is equipped with the ability to take video is allowed, but no video may be taken under this exception. As stated in the rule text, a camera that is part of a personal cell phone or other similar personal electronic device is not included in this exception. To allow personal cell phone cameras to be used outside the periods of time prohibited by § 220.305 would present enforceability issues for FRA. More importantly, however, FRA also decided such because after turning on a device such as a cell phone to take a photo, FRA does not want to encourage or permit an employee to then continue to use the device. FRA wishes to avoid presenting any temptation once a device is turned on to then send text messages or engage in other distracting use of electronic devices. Use of the camera to document such rail safety hazards or violations is only permitted where its use does not interfere with a crewmember's performance of a safety-related duty, is turned off immediately after documentation has been made, and is not used by a locomotive engineer who is at the controls of a moving train. FRA realizes the importance of documenting hazardous conditions, but emphasizes that such documentation should only be made when the filming of the hazard itself does not create a hazardous situation. For the reasons explained above in response to public comments, FRA has also deleted reference to the use of "video" to document safety hazards in this final rule. An employee taking advantage of this exception using a railroad-supplied device must be using the device for an authorized business purpose that has been approved by FRA.

Paragraph (d) permits the use of a calculator. The use of this device is common in the railroad industry for important safety-related purposes. Train tonnage, train length, and train stopping formulas are commonly computed using a calculator. An example of the safety-related reasons for allowing the use of a calculator includes the need to compute train length accurately so that a locomotive engineer (via the locomotive's distance counter) can accurately ascertain when his or her train has cleared a relevant speed

restriction, interlocking, or working limits. However, consistent with paragraph (c) above, FRA has chosen to limit the permissible devices under this paragraph to those whose primary purpose is as a calculator. FRA will not allow the use of another device, such as a personal cell phone that might have a calculator function.

Paragraph (e) permits the use of a medical device, if that use is consistent with the railroad's standards for medical fitness for duty. In putting forth this exception, FRA envisioned blood sugar monitors used by operating employees with diabetes, hearing aids used by operating employees with hearing loss, etc. The definition of a "medical device" was added to the definitions section of this part, at § 220.5, as is discussed above. FRA finds that the use of these devices does not detract from rail safety and in many instances may enhance it. For example, an operating employee with hearing loss who utilizes an electronic hearing aid may consequently be able to communicate via working radio more effectively, resulting in safer train operations.

Paragraph (f) permits the use of wireless communication devices for crewmembers of trains that are exempt from the requirement of a working radio under § 220.9(b). That section exempts railroads that have less than 400,000 annual employee work hours from being required to have a working radio on the controlling locomotive of certain trains so long as such usage is limited to performing the employees' railroad duties. FRA created this exception to allow smaller railroads to continue to operate as they are presently permitted. The locomotives of these railroads do not operate at high speeds, do not handle regular passenger traffic, are only permitted to operate over joint territory in specific, low-speed circumstances, and must have working wireless communications aboard the controlling locomotive of trains containing placarded hazardous material loads. As such, FRA finds there is no safety risk in continuing to allow permitted railroads to use wireless communication devices in place of railroad radios so long as such usage by railroad employees is limited to performing their railroad duties. It is not the intent of this rule to affect in any way the use of working wireless communications pursuant to existing Part 220, as those presently permitted business uses have not been problematic in regard to safety in the past. This rule is instead obviously directed at the type of use that occurred in the railroad accidents described above.

Section 220.311 Railroad Operating Employees in Deadhead Status

This section establishes guidelines for the use of an electronic device by operating employees in deadhead status. The definition of "in deadhead status" has been added to the "definitions" section of this part at § 220.5 as discussed above. Paragraph (a) of this section allows for employees in deadhead status to use electronic devices so long as that use does not interfere with any employee's safety or the performance of safety related duties. FRA created this loosened restriction on employees in deadhead status as the agency recognizes that while deadheading, operating employees typically do not have any safety-related responsibilities. As stated above, these changes amend the restrictions on electronic devices put forth in the Order in a more appropriate manner to address safety concerns.

However, paragraph (b) of this section limits the use of any electronic device by employees in deadhead status who are located inside the cab of a controlling locomotive of a train. Employees in deadhead status who are located inside the cab of a controlling locomotive must follow the identical restrictions set forth both in this provision and in § 220.305, regardless of whether the device is a personal electronic device or a railroad-supplied electronic device. This is to reflect that any use of electronic devices in the cab of a controlling locomotive has the potential to distract employees engaged in safety-related duties, no matter the status of person using a device. This provision more strictly prohibits the use of any railroad-supplied device than does § 220.307, as employees in deadhead status typically do not have any safety-related responsibilities that would necessitate use of such devices.

Section 220.313 Instruction

This section requires that railroads provide instruction to their operating employees on the operating rules implementing the requirements of this subpart. This instruction is necessary as employees must be operationally tested by railroad supervisors on the substance of this regulation, as FRA has required in § 220.315(a). By requiring such instruction FRA also intends to ensure that both railroads and their employees are fully aware of the requirements of this regulation. FRA has removed the word "training" from this final rule, because "instruction" is the more appropriate descriptor of the education this section requires railroads provide their employees. Further, the terms were duplicative.

In paragraph (a), FRA requires that each railroad maintain a written program that will qualify its operating employees for compliance with the requirements of this final rule. The written program may be consolidated with the program of instruction required under 49 CFR 217.11. FRA has allowed railroads 90 days to implement a program of instruction, as per AAR's comment that should FRA allow railroads appropriate time to prepare these programs for presentation to their employees in the first-quarter of 2011, as is discussed below. Paragraph (a)(1) specifically requires that the program include instruction on both the requirements of this subpart as well as consequences of non-compliance. Paragraph (a)(2) states that the written program must include instruction on specific provisions of this rule. Paragraph (a)(2)(iii) requires that instruction be provided on the distinctions between the requirements of this regulation and any more stringent railroad operating rules. FRA has decided to leave this provision in the final rule despite AAR's comment discussed above due to the different potential consequences involved with violation of this subpart versus violation of a railroad rule. If FRA were to find a probable violation of this regulation has occurred, FRA could attempt to take action against an individual employee by way of its authority to impose a monetary civil penalty or disqualification of that employee from safety-sensitive service. These actions are in some instances much more severe than those that a railroad might take against an individual employee for a violation of its operating rules. Also, should FRA add violations of this subpart as revocable violations for locomotive engineers and conductors as it is contemplating, it is critical that employees have been instructed on these distinctions.

Paragraph (b) sets the implementation schedule for this section. Paragraph (b) states that within 180 days from the publication date of the final rule, employees performing duties subject to these requirements shall receive instruction on the requirements of this subpart. FRA has lengthened this time period from that proposed in the NPRM in order to allow for railroad employees to be instructed during first-quarter of 2011, as AAR's comment indicates is the industry norm. After 180 days from the publication date of the final rule, FRA expects that new operating employees would receive the proper instruction before being allowed to

perform duties subject to the requirements of this subpart. The three-year recurrent instruction window in this paragraph was adopted because it is a standard industry practice to re-qualify employees on rules at least every three years. Finally, in paragraph (b)(2), FRA requires records maintenance of the instruction required by this section, which shall serve as documentation that employees have been qualified on the requirements of this subpart.

In paragraph (c), FRA requires that records discussed in paragraph (b)(2), documenting an employee's instruction and examination, be retained at a railroad's division headquarters where the employee is assigned. This will enable FRA to quickly obtain such records upon request if necessary. Records must be kept for each employee instructed on the requirements of this subpart, and must be kept for three years after the end of the calendar year to which they relate. This paragraph allows railroads the discretion to keep the required records electronically.

Paragraph (d) provides a mechanism for FRA to review a railroad's written program required under paragraph (a). This paragraph requires that the Associate Administrator for Railroad Safety/Chief Safety Officer only disapprove programs of instruction and examination required by this section for cause stated. As the disapproval decision is made for cause, it is significant for the railroad to understand exactly why FRA is disapproving the program; thus, FRA notification of such disapproval must be made in writing and specify the basis for the disapproval decision. If the Associate Administrator for Railroad Safety/Chief Safety Officer disapproves the program, paragraph (d)(1) provides that a railroad is required to respond within 35 days by either providing submissions in support of its program or by amending its program and submitting those proposed amendments. Paragraph (d)(1)(ii) mandates that the Associate Administrator for Railroad Safety/Chief Safety Officer shall render a final decision in writing informing the railroad of FRA's decision. Paragraph (d)(2) provides that a failure to submit a program with the necessary revisions to the Associate Administrator for Railroad Safety/Chief Safety Officer will be considered by FRA to be a failure to implement a program under this part. FRA is not requiring that each railroad submit its program for review and explicit approval. Rather, FRA may review the programs of railroads in connection with review of their overall programs of instruction to determine if they are effective.

Section 220.315 Operational Tests and Inspections; Further Restrictions on Use of Electronic Devices

This section requires that railroads perform operating tests to ensure operating employees' compliance with this subpart. FRA is requiring operating tests be performed to both ensure that railroads provide employee instruction on the conditions of this subpart and to help verify that the requirements of the subpart are being adhered to by railroad employees.

Per Part 217, railroads are already required to perform regular operating tests. This paragraph adds Subpart C to that existing requirement. Paragraph (a) leaves to the railroads' discretion the minimum number of operational tests that must be performed by referring to the guidelines established in 49 CFR Part 217, Railroad Operating Rules. Paragraph (b) of this section prohibits railroad supervisors from calling or sending text message to an electronic device of an operating employee during an operational test while the train to which the employee is assigned is moving, while the employee is on the ground or riding rolling equipment, or while the employee is assisting in preparation of the train for movement. This provision has been expanded from that proposed in the NPRM, and is meant to prevent an operating test from posing potentially dangerous distractions that could impact rail safety. It is also meant to prevent the encouragement of potential rail safety violations.

Finally, for the reasons explained in the response to the AAR's comment above, FRA has deleted the proposed § 220.315(c) from this final rule. FRA has done so because in most instances, employees are not aware an operating test is being conducted until after the test has already been performed. Thus, that proposed provision could have created confusion. Further, after reviewing comments and deliberating the provision, FRA does not believe it would have been of significant utility.

Appendix C to Part 220 Schedule of Civil Penalties

FRA is amending appendix C of this part to establish guideline penalties for subpart C. Appendix C specifies the civil penalty FRA will ordinarily assess for the violation of a particular provision of this rule. However, consistent with 49 CFR part 209, appendix A, FRA's Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, FRA reserves the right to assess a penalty up to the statutory maximum where circumstances warrant. Further, a penalty may be assessed against an individual only for a willful violation. FRA did not solicit public comment on this appendix as it is a statement of agency policy.

IV. Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This rule is a significant regulatory action within the meaning of Executive Order 12866 and the U.S. Department of Transportation's regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, Feb. 26, 1979). FRA has made this determination by finding that, although the economic effects of the regulatory action will not exceed the $100 million annual threshold as defined in Executive Order 12866, the rule is significant because of substantial public interest in transportation safety and because it is part of a broader programmatic effort to address distracted transportation operations. FRA has prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of restrictions on traincrew use of electronic devices as well as the costs of this final rule.

The RIA details estimates of the costs likely to be induced over a twenty year period. This analysis also includes break-even analyses, or estimates of the monetized benefits that will be necessary to achieve to offset the total costs of restricting use of electronic devices. Informed by its analysis of the economic effects of both EO 26 and this rule, FRA believes that this rule will achieve the same safety outcome as EO 26 at a lower cost. This rule achieves this outcome more cost-effectively relative to EO 26 by removing some restrictions on the usage of electronic devices by deadhead status employees and on the usage of calculators and cameras, under certain circumstances. These restrictions in EO 26 likely achieved little to no safety benefits, but they may have created substantial, unquantifiable opportunity costs, the removal of which makes this rule more cost-effective. The costs that may be induced by this rule over the twenty-year period considered include both direct costs and indirect costs. The direct costs may include the cost of revising operational testing and inspections programs; the cost of conducting additional operational testing and inspections; the cost of instructing employees on the requirements of this rule; and the cost of calculators and cameras for train crew use. Indirect costs may include the

opportunity cost of railroad operating employees' time spent in safety briefings. The summed total of the estimated direct costs over twenty years equals about $12.7 million at a 3 percent discount rate and about $9.5 million at a 7 percent discount rate (in 2009 dollars). Additionally, the indirect costs that may result are estimated to equal about $30.2 million at a 3 percent discount rate and $22.4 million at a 7 percent discount rate. The majority of the costs associated with implementation of the restrictions are for costs that are already being incurred through the implementation of EO 26. The table below summarizes both the direct and indirect costs of the restrictions as considered in the RIA, summed over the twenty-year period analyzed and discounted to present value using 3 percent and 7 percent discount rates.

	Twenty-year total (3% discount rate)	Twenty-year total (7% discount rate)
Direct costs:		
Revising programs *	$8,348.02	$6,175.35
Revising programs for rule	39,659.62	39.659.62
Performing operational tests	633,087.44	468,318.78
Instruction *	11,339,537.79	8,388,404.44
Instruction on rule	246,610.00	246,610.00
Cameras (potential)	334,951.39	252,434.85
Calculators (potential)	75,080.95	74,083.90
Total direct costs	12,677,415.21	9,475,686.94
Indirect Costs:		
Opportunity cost of additional time spent in safety briefings *	30,238,989.11	22,368,926.84
Total indirect costs	30,238,989.11	22,368,926.84

* Costs already being incurred under EO 26.

FRA also modified some provisions of the Notice of Proposed Rulemaking (NPRM) in this final rule. Two of these modifications were to remove potentially costly provisions that were very unlikely to yield net benefits. The first of these modifications was with respect to a proposal in the NPRM, at § 220.307(c), which had allowed a limited set of railroad-supplied electronic devices to be used by railroad operating employees not in deadhead status, other than locomotive engineers, under certain circumstances and only following a crew safety briefing and unanimous agreement amongst the crew that such use would be safe.[13] Specifically, in the NPRM, § 220.307(c) had limited the railroad-supplied electronic devices that could be used in certain circumstances to "a mobile phone or remote computing device."[14] This limitation could have inadvertently stifled the development or adoption of new technologies that could be used by railroads to enhance productivity, safety, or for some other purpose. To avoid this unintended cost of potentially hindering the growth or adoption of technology, FRA removed the limitation, instead adopting language that will allow the use of any railroad-supplied electronic device under prescribed circumstances and following a safety briefing and unanimous agreement amongst crewmembers that it is safe to use the device.

The second modification was with respect to § 220.307(d)(2) in the NPRM, which had required that, among other conditions, operations be suspended when a crewmember not in deadhead status outside a cab of a controlling locomotive used a railroad-supplied electronic device. The requirement that operations be suspended could have inadvertently prevented the development or adoption of technologies that potentially enhance productivity or safety while performing operations. For example, if some operations are currently performed using printed or handwritten instructions, FRA recognizes that such instructions could just as easily be followed on an electronic device—a device that might also allow the automatic updating of data or instructions and through such updating increase safety for crewmembers. Thus, in the final rule, FRA removed the requirement that all operations be suspended before a crewmember uses a railroad-supplied electronic device outside the cab of a controlling locomotive, while still requiring that the crewmember not be fouling a track and that all crewmembers agree that it is safe to use the device prior to its use.

Both of the modifications discussed above removed a potentially costly provision of the NPRM. However, no change in expected costs, vis-à-vis the preliminary RIA, is reflected in this final RIA because the preliminary RIA accompanying the NPRM had not accounted for these potential costs. FRA had not intended to create such burden.

Although FRA has not estimated the total benefits associated with the restrictions on use of electronic devices, FRA has performed break-even analyses using differing assumptions regarding the frequency and severity of future accidents caused by or linked to electronic device usage. In most scenarios considered, it will not require an unreasonable decrease in the annual probability of such an accident in order for this rule to at least break even—in fact, for most cases considered, decreases in relevant accident probability of less than 0.10 would make the rule cost-beneficial. As an alternative framework, FRA compared the costs to the minimum number of statistical fatalities that will need to be prevented for implementation to be cost-beneficial. Considering direct costs alone, if the new regulation prevented the loss of one-fifth of the value of a statistical life each year of the twenty-year period examined, the restrictions will yield positive net benefits. If considering direct and indirect costs, the restrictions will yield positive net benefits if it prevents the loss of just half of the value of a statistical life each year over the twenty-year period examined. In other words, prevention of one fatality every two years will justify the restrictions. For some perspective on the achievability of such prevention, FRA notes that over the period from 2000 to

[13] Federal Railroad Administration. (2010). "Notice of Proposed Rulemaking: Restrictions on Railroad Operating Employees' Use of Cellular Telephones and Other Electronic Devices." **Federal Register**, May 18, Vol. 75, No. 95. Available online: *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480aef96d.*

[14] *Ibid.*, p. 27688.

2008, electronic device usage by train operating employees likely caused or contributed to accidents resulting in approximately 30 fatalities and over 100 injuries—an average of over three deaths per year, as well as significant train delay and property damages. The table below lists the quantifiable benefits considered in the RIA.

Benefit
Fatalities avoided
Injuries avoided
Property damage avoided

Given the frequency and severity of accidents together with the observed rising incidence of improper uses of cell phones and other electronic devices, FRA is confident that the elimination of improper electronic device usage by railroad operating employees, as required by this rule, will yield total monetizable safety benefits that will likely outweigh total monetized costs.

Relative to the requirements of EO 26, the only additional burdens produced by the requirements of this rule are those related to revising programs and initial instruction focused on the exceptions that this rule will introduce; the potential cost associated with purchasing cameras and calculators or carrying ones previously purchased and available for use should the need arise, which were banned under EO 26, but are permitted under this rule; and nominal costs associated with seeking FRA approval for use of railroad-supplied electronic devices for taking photographs and videos.

This added burden, estimated over a 20-year period, could total as much as $696,000, discounted at an annual rate of 3%, or $613,000, discounted at a rate of 7% and is broken down as follows.

	PV (3%)	PV (7%)
Program revision ..	$39,660	$39,660
Initial instruction	246,610	246,610
Potential cost of cameras	334,951	252,435
Potential cost of calculators	75,081	74,084
Total	696,302	612,789

Clearly, the benefits associated with a more cost effective program will justify the additional costs associated with the program revisions and initial training focused on the exceptions introduced by the rule. The benefits associated with the allowance for use of cameras and calculators will equal or exceed the costs associated with carrying and using these devices in accordance with this regulation. Given that this is not a mandatory requirement, but rather a permissive one, cameras and calculators will only be used to the extent that perceived benefits exceed perceived costs. The benefits of seeking FRA approval for use of railroad-supplied electronic devices for taking photographs and videos will be the avoidance of unwarranted use of such devices, which would equal or exceed the nominal costs associated with meeting this requirement.

B. Regulatory Flexibility Act and Executive Order 13272

To ensure potential impacts of rules on small entities are properly considered, FRA developed this rule in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The Regulatory Flexibility Act requires agencies to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities.

As discussed in earlier sections of this preamble, FRA has discovered numerous examples proving the danger of distracting electronic devices. This rulemaking is intended to limit distractions caused by the use of cellular telephones and other electronic devices in an effort to improve railroad safety and prevent incidents where loss of human life, injuries, and property damage may have been attributable to distraction by these devices. In 2008, FRA issued Emergency Order No. 26 restricting the on-duty use of cellular telephones and other electronic devices. This FRA action was in part a response to the September 12, 2008, Chatsworth accident, which resulted in 25 deaths, numerous injuries, and more than $7 million in damages. The BLET and the UTU filed a Petition for Review of that Emergency Order, citing some valid concerns. FRA then issued an NPRM on May 18, 2010, in which FRA proposed to codify most of the requirements of the Order with some modifications to accommodate changes that had been previously recommended by a Petition for Review of that Order as well as a number of amendments that FRA believed appropriate. FRA reviewed and responded to comments on its NPRM in this preamble. With this rule, which is slightly different from the NPRM version, as discussed above, FRA is finalizing the codification of its restrictions on the unsafe usage of electronic devices by railroad operating employees.

FRA is certifying that this rule will result in "no significant economic impact on a substantial number of small entities." The following section explains the reasons for this certification.

1. Description of Regulated Entities and Impacts

The "universe" of the entities under consideration includes only those small entities that can reasonably be expected to be directly affected by the provisions of this rule. In this case, the "universe" comprises solely small railroads.

"Small entity" is defined in 5 U.S.C. 601. Section 601(3) defines a "small entity" as having the same meaning as "small business concern" under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) likewise includes within the definition of "small entities" not-for-profit enterprises that are independently owned and operated, and are not dominant in their fields of operation. Additionally, § 601(5) defines as "small entities" governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

The U.S. Small Business Administration (SBA) stipulates "size standards" for small entities. It provides that the largest a for-profit railroad business firm may be and still classify as a "small entity" is 1,500 employees for "Line-Haul Operating" railroads, and 500 employees for "Short-Line Operating" railroads.[15]

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to the authority provided to it by SBA, FRA has published a final policy that formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad.[16] Currently, the revenue requirement is $20 million or less in annual operating revenue, adjusted annually for inflation ($32,113,449 for 2008). This threshold is based on the Surface Transportation Board's (STB) threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment.[17]

[15] "Table of Size Standards," U.S. Small Business Administration, January 31, 1996, 13 CFR Part 121. *See also* NAICS Codes 482111 and 482112.

[16] *See* 68 FR 24891 (May 9, 2003).

[17] For further information on the calculation of the specific dollar limit, please *see* 49 CFR Part 1201.

FRA is using the STB's threshold in its definition of "small entities" for this rule.

Approximately 700 railroads meet the criteria for small entities and report operational data to FRA. FRA is using this as our estimate of the universe of small entities that could be directly impacted by this rule. Many of these railroads rely on cell phones for train operations.

Like EO 26, this rule contains exceptions that would allow railroads that have fewer than 400,000 annual employee hours and that rely on wireless communication devices for certain train operations to continue to do so, with the same restriction that such usage be limited to performing the employees' railroad duties. The primary benefactors of this flexibility are small railroads. FRA is clarifying that the exception in the Order for railroad operating employees to use railroad-supplied or railroad-authorized electronic devices to conduct train or switching operations "under conditions authorized under 49 CFR Part 220" was intended to accommodate small railroad operations. The locomotives of the trains exempt from the requirement to have a working radio on the lead locomotive do not operate at high speeds, do not handle regular passenger traffic, are only permitted to operate over joint territory in specific low-speed circumstances, and must have working wireless communications aboard the controlling locomotive of trains containing placarded hazardous material loads.

This rule contains additional flexibility that would reduce the impact relative to EO 26. With this rule, FRA will: (1) Allow deadheading railroad operating employees who are not in the cab of a controlling locomotive to use electronic devices if that use does not interfere with an employee's personal safety or performance of safety-related duties; (2) allow use of cameras to document safety hazards or violations, except in the cab of the controlling locomotive of a moving train; and (3) exclude standalone calculators from all restrictions within this subpart as long as the calculator is used for an authorized business purpose and does not interfere with the performance of any employee's safety-related duties. In addition, FRA is creating an exception for medical devices to encompass both devices that enhance an ability to perform safety-related tasks, such as a hearing aid, and other devices that protect an employee's health and well-being.

In general, small railroad costs associated with compliance with EO 26 would continue to accrue under FRA's rule. Additional burden to such railroads would come from the requirement to provide instruction to its operating employees on the substance of the regulation as well as the need to update their written programs to qualify its operating employees for compliance with operating rules implementing the new requirements. FRA anticipates that this instruction will be achieved through means such as distribution of written materials to employees, job briefings by supervisors or roving instructors, and question-and-answer services. FRA estimates that the time cost of such instruction will come to about 15 minutes per employee in the first year of the rule. Approximately 91,000 train and engine employees will be impacted, and about 20 percent of these will be small railroad employees. Assuming a cost per hour of employee instructed of $43.37, the total cost of this additional instruction will be approximately $200,000 for small railroads or an average of $300 per railroad. Revision of programs is not expected to entail more than 1 labor hour per railroad. These two costs—that of additional instruction and that of revising programs—will likely not significantly burden any small railroads.

Additional railroad costs transferred from EO 26 include the costs associated with performing operational tests and conducting periodic instruction. Given that operational tests and instruction associated with this regulation will be conducted with other required operational testing and instruction, the additional annual cost will total about as much as the cost in the first year for instruction and program revision. Again, this cost will likely not significantly burden small railroads.

Because this rule will apply to all small railroads, FRA has concluded that a substantial number of small entities will be impacted. However, the overall impact on small railroads is not expected to be significant. FRA believes that the costs to small railroads associated with this rule are not significant and are very similar to those currently incurred under EO 26.

In the NPRM, FRA certified that the proposal would likely not result in a significant economic impact on a substantial number of small entities and requested comments on all aspects of its supporting analysis. No comments were received.

2. Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FRA Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities. Although a substantial number of small railroads could be affected by the rule, they will not be significantly impacted.

C. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new and current information collection requirements, and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
220.8—Waivers	728 Railroads	6 petitions	1 hour	6 hours.
220.25—Instruction in Proper Use of Radio Communication.	728 Railroads	91,000 trained Employees.	30 minutes	45,500 hours.
—Subsequent Years	728 Railroads	12,540 trained Employees.	30 minutes	6,270 hours.
—Operational Testing of Employees	728 Railroads	100,000 tests	5 minutes	8,333 hours.
220.37—Testing of Radios and Wireless Devices.	728 Railroads	780,000 tests	30 seconds	6,500 hours.
220.61—Transmission of Mandatory Directives				
—Copying of Mandatory Directives	728 Railroads	7,200,000 copies	1.5 minutes	180,000 hours.
—Marking Mandatory Directives	728 Railroads	624,000 marks	15 seconds	2,600 hours.

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
New Requirements				
220.302—Operational Rules That Comply with this Subpart.	728 Railroads	Burden Incl. Under OMB No. 2130–0035.	Burden Incl. Under OMB No. 2130–0035.	Burden Incl. Under OMB No. 2130–0035.
—Revision of RR Operational Rules in Part 217 to Comply with this Supart.				
220.307—Use of Railroad-Supplied Electronic Device As Specified in Writing.	728 Railroads	728 amended RR Op. codes, 50 documents.	1 hour	728 hours.
—Written documents submitted to FRA specifying authorized business purpose for taking photo/video w/railroad-supplied electronic device.	728 Railroads		1 hour	50 hours.
—Engineer and Train Crew Briefings to Use RR–Supplied Electronic Device Inside/Outside of Locomotive Cab.	91,000 hours	5,460,000 briefings	1 minute	91,000 hours.
220.313—Instruction Railroad Written Program of Instruction.	728 Railroads	728 amended programs.	1 hour	728 hours.
—Implementation: Training of Employees.	91,000 Employees	91,000 trained Employees.	15 minutes	22,750 hours.
—Records: Successful Completion of Training.	728 Railroads	91,000 records	5 minutes	7,583 hours.
Approval Process: Disapproval of RR Written Program of Instruction or Written Response in Support of Program.	728 Railroads	6 revised programs/written resp.	60 minutes	6 hours.
220.315—Operational Tests/Inspections	728 Railroads	Burden Incl. Under OMB #2130–0579.	Burden Incl. Under OMB #2130–0579.	Burden Incl. Under OMB #2130–0579.
—Revision of RR Program of Operational Tests and Inspections under Part 217 to Include This Subpart.				

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Robert Brogan at 202–493–6292 or Ms. Kimberly Toone at 202–493–6132 or via e-mail at the following addresses: *robert.brogan@dot.gov; kimberly.toone@dot.gov.*

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, 725 17th St., NW., Washington, DC 20590; *Attention:* FRA OMB Desk Officer. Comments may also be sent via e-mail to the Office of Management and Budget at the following address: *oira_submissions@omb.eop.gov.*

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Environmental Impact

FRA has evaluated this final rule in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this action is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28547, May 26, 1999. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this final rule that triggered the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

E. Federalism Implications

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a

regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that the final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that the final rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this final rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970 (former FRSA), repealed and recodified at 49 U.S.C 20106, and the former Locomotive-Boiler Inspection Act (former LBIA), repealed and recodified at 49 U.S.C. 20701–20703. *See* Pub. L. 103–272. The former FRSA provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the "local safety or security hazard" exception to § 20106. Moreover, the former LBIA has been interpreted by the Supreme Court as preempting the entire field of locomotive safety. *See Napier* v. *Atlantic Coast R.R.,* 272 U.S. 605, 611; 47 S.Ct. 207, 209 (1926).

In sum, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under the former FRSA and the former LBIA. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this final rule is not required.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $140,800,000 or more in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of $140,800,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." *See* 66 FR 28355 (May 22, 2001). Under the Executive Order a "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this final rule is not a "significant energy action" within the meaning of the Executive Order.

H. Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of DOT's 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 published in the **Federal Register** on April 11, 2000 (65 FR 19477–78), or you may visit *http://DocketsInfo.dot.gov.*

I. Executive Order 12988 (Civil Justice Reform)

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

List of Subjects in 49 CFR Part 220

Communications, Penalties, Railroads, Railroad safety.

The Rule

■ In consideration of the foregoing, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 220—[AMENDED]

■ 1. The authority citation for Part 220 is revised to read as follows:

Authority: 49 U.S.C. 20102–20103, 20103, note, 20107, 21301–21302, 20701–20703, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Section 220.1 is revised to read as follows:

§ 220.1 Scope.

This part prescribes minimum requirements governing the use of wireless communications in connection with railroad operations. In addition, this part sets forth prohibitions, restrictions, and requirements that apply to the use of personal and railroad-supplied cellular telephones and other electronic devices. So long as these minimum requirements are met, railroads may adopt additional or more stringent requirements.

§ 220.2 [Removed and Reserved]

■ 3. Section 220.2 is removed and reserved.

■ 4. Section 220.5 is amended by revising the introductory text; adding definitions in alphabetical order for "Associate Administrator for Railroad Safety/Chief Safety Officer," "Authorized business purpose," "Earpiece," "Electronic device," "Fouling a track," "FRA," "In deadhead status," "Medical device," "Personal electronic device," "Railroad operating employee," "Railroad-supplied electronic device," and "Switching operation"; and revising the definition of "Train" to read as follows:

§ 220.5 Definitions.

As used in this part, the term—

* * * * *

Associate Administrator for Railroad Safety/Chief Safety Officer means either the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Ave., SE., Washington, DC 20590 or that person's delegate.

Authorized business purpose means a purpose directly related to the tasks that a crewmember is expected to perform during the current tour of duty as specified by the railroad in writing.

* * * * *

Earpiece means a small speaker that is inserted in, or held next to, the ear for use in transmitting sounds related to an electronic device.

Electronic device means an electronic or electrical device used to conduct oral, written, or visual communication; place or receive a telephone call; send or read an electronic mail message or text message; look at pictures; read a book or other written material; play a game; navigate the Internet; navigate the physical world; play, view, or listen to a video; play, view, or listen to a television broadcast; play or listen to a radio broadcast other than a radio broadcast by a railroad; play or listen to music; execute a computational function; or, perform any other function that is not necessary for the health or safety of the person and that entails the risk of distracting the employee or another railroad operating employee from a safety-related task. This term does not include—

(1) Electronic control systems and information displays within the locomotive cab (whether the displays or systems be fixed or portable) or on a remote control transmitter necessary to operate a train or conduct switching operations; or

(2) A digital watch whose only purpose is as a timepiece.

* * * * *

Fouling a track means the placement of an individual in such proximity to a track that the individual could be struck by a moving train or other on-track equipment, or in any case is within four feet of the nearest rail.

FRA means the Federal Railroad Administration.

* * * * *

In deadhead status means awaiting or in deadhead transport from one point to another as a result of a railroad-issued verbal or written directive.

* * * * *

Medical device means an instrument, apparatus, implement, machine, contrivance, implant, or other similar or related article (including a component part), or accessory that is intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease or other conditions.

Personal electronic device means an electronic device that was not provided to the railroad operating employee by the employing railroad for a business purpose.

Railroad operating employee means a person performing duties subject to—

(1) An individual engaged in or connected with the movement of a train, including a hostler, as defined in 49 U.S.C. 21101(5), who is subject to 49 U.S.C. 21103 effective July 16, 2009;

(2) A train employee providing commuter rail passenger transportation or intercity rail passenger transportation as defined in 49 U.S.C. 24102 who, pursuant to 49 U.S.C. 21102(c), is subject to 49 U.S.C. 21103 as it was in effect on October 15, 2008; or

(3) An individual subject to any Federal Railroad Administration regulations prescribed pursuant to 49 U.S.C. 21109 governing the hours of service of train employees.

* * * * *

Railroad-supplied electronic device means an electronic device provided to a railroad operating employee by the employing railroad for an authorized business purpose. A railroad-supplied device will be considered a personal electronic device when it is being used by the employee for a purpose other than an authorized business purpose.

* * * * *

Switching operation means the classification of rail cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing of locomotives and cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a train movement.

* * * * *

Train, for purposes of subparts A and B of this part, means one or more locomotives coupled with or without cars, requiring an air brake test in accordance with 49 CFR part 232 or part 238, except during switching operations or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up trains. The term, for purposes of subpart C of this part, means—

(1) A single locomotive,

(2) Multiple locomotives coupled together, or

(3) One or more locomotives coupled with one or more cars.

* * * * *

■ 5. Add a new subpart C to part 220 to read as follows:

Subpart C—Electronic Devices

Sec.
§ 220.301 Purpose and application.
§ 220.302 Operating rules implementing the requirements of this subpart.
§ 220.303 General use of electronic devices.
§ 220.305 Use of personal electronic devices.
§ 220.307 Use of railroad-supplied electronic devices.
§ 220.309 Permitted uses; exceptions to other restrictions.
§ 220.311 Railroad operating employees in deadhead status.
§ 220.313 Instruction.
§ 220.315 Operational tests and inspections; further restrictions on use of electronic devices.

Subpart C—Electronic Devices

§ 220.301 Purpose and application.

(a) The purpose of this subpart is to reduce safety risks resulting from railroad operating employees being distracted by the inappropriate use of electronic devices, such as mobile telephones (cell phones or cellular phones) and laptop computers.

(b) The applicability of this subpart is governed by § 220.3; this subpart, however, does not affect the use of working wireless communications pursuant to subparts A and B of this part.

(c) The restrictions of this subpart C do not apply—

(1) To the working radio; or

(2) When a working radio failure occurs and an electronic device is used in accordance with railroad rules.

§ 220.302 Operating rules implementing the requirements of this subpart.

Each railroad shall adopt operating rules that implement the requirements of this subpart.

§ 220.303 General use of electronic devices.

A railroad operating employee shall not use an electronic device if that use would interfere with the employee's or another railroad operating employee's performance of safety-related duties. No individual in the cab of a controlling locomotive shall use an electronic device if that use would interfere with a railroad operating employee's performance of safety-related duties.

§ 220.305 Use of personal electronic devices.

A railroad operating employee must have each personal electronic device turned off with any earpiece removed from the ear—

(a) When on a moving train;

(b) When any member of the crew is—

(1) On the ground, or

(2) Riding rolling equipment during a switching operation; or

(c) When any railroad employee is assisting in preparation of the train for movement.

§ 220.307 Use of railroad-supplied electronic devices.

(a) *General restriction.* A railroad operating employee may use a railroad-supplied electronic device only for an authorized business purpose as specified by the railroad in writing. An authorized business purpose involving the taking of a photograph or video must be approved by FRA. A railroad subject to this subpart must submit to FRA's Associate Administrator for Railroad Safety/Chief Safety Officer a document specifying in writing the authorized business purpose(s) involving the taking of a photograph or video for which a railroad-supplied electronic device may be used by the carrier's railroad operating employees.

(b) *Use by locomotive engineers operating controls.* A locomotive engineer operating the controls of a train shall not use a railroad-supplied electronic device—

(1) When on a moving train;

(2) When any member of the crew is—

(i) On the ground, or

(ii) Riding rolling equipment during a switching operation; or

(3) When any railroad employee is assisting in preparation of the train for movement.

(c) *Use in freight and passenger locomotive cabs generally.* In addition to the restrictions on locomotive engineers described in paragraph (b) of this section, a railroad operating employee who is not in deadhead status shall not use a railroad-supplied electronic device in the cab of a controlling locomotive unless—

(1) A safety briefing that includes all crewmembers is held; and

(2) All crewmembers agree that it is safe to use the device.

(d) *Use outside freight locomotive cabs.* A freight train crewmember who is not in deadhead status may use a railroad-supplied electronic device outside the cab of a controlling freight locomotive only if all of the following conditions are met:

(1) The crewmember is not fouling a track; and

(2) All crewmembers agree it is safe to use the device.

§ 220.309 Permitted uses; exceptions to other restrictions.

Notwithstanding any other limitations in this subpart, a railroad operating employee may use the following, if that use does not interfere with any employee's performance of safety-related duties—

(a) The digital storage and display function of an electronic device to refer to a railroad rule, special instruction, timetable, or other directive, if such use is authorized under a railroad operating rule or instruction.

(b) An electronic device as necessary to respond to an emergency situation involving the operation of the railroad or encountered while performing a duty for the railroad.

(c) An electronic device to take a photograph of a safety hazard or a violation of a rail safety law, regulation, order, or standard, provided that—

(1) A camera that is part of a cell phone or other similar multi-functional electronic device is not included in this exception unless it is a railroad-supplied device and is used for an authorized business purpose;

(2) The camera, unless otherwise permitted, is turned off immediately after the documentation has been made; and

(3) If the camera is used in the cab of a moving train, the use is only by a crewmember other than the locomotive engineer.

(d) A stand-alone calculator if used for an authorized business purpose.

(e) A medical device that is consistent with the railroad's standards for medical fitness for duty.

(f) A wireless communication device to conduct train or switching operations if the railroad operating employee is part of a crew assigned to a train that is exempt under § 220.9(b) from the requirement of a working radio when the employing railroad has fewer than 400,000 annual employee work hours.

§ 220.311 Railroad operating employees in deadhead status.

(a) Notwithstanding any other restrictions in this subpart, a railroad operating employee who is in deadhead status and not inside the cab of a controlling locomotive may use an electronic device only if the employee is not using the device in such a way that interferes with any railroad operating employee's personal safety or performance of safety-related duties.

(b) A railroad operating employee who is in deadhead status and located inside the cab of a controlling locomotive must have each electronic device turned off with any earpiece removed from the ear—

(1) When on a moving train;

(2) When any member of the crew is—

(i) On the ground, or

(ii) Riding rolling equipment during a switching operation; or

(3) When any railroad employee is assisting in preparation of the train for movement.

§ 220.313 Instruction.

(a) *Program.* Beginning December 27, 2010, each railroad shall maintain a written program of instruction and examination of each railroad operating employee and each supervisor of the railroad operating employee on the meaning and application of the railroad's operating rules implementing the requirements of this subpart if these requirements are pertinent to the employee's duties. If all requirements of this subpart are satisfied, a railroad may consolidate any portion of the instruction or examination required by this subpart with the program of instruction required under § 217.11 of this chapter.

(1) The written program of instruction and examination shall address the requirements of this subpart, as well as consequences of noncompliance.

(2) The written program of instruction and examination shall include, but is not limited to, an explanation of the following:

(i) When a railroad operating employee must have personal electronic devices turned off with the earpiece removed from the ear as required by this subpart.

(ii) If a railroad supplies an electronic device to its railroad operating employees, when a railroad operating employee may use such a device. The employee must be instructed on what constitutes an authorized business purpose.

(iii) The potential penalties and other consequences of committing a violation of this subpart, both those imposed by the Federal Railroad Administration (FRA) and those imposed by the railroad, as well as any distinction between the requirements of this subpart and any more stringent requirements imposed by the railroad and the related distinction between the two sets of potential consequences.

(b) *Implementation schedule.* Each employee performing duties subject to the requirements in this subpart shall be initially instructed prior to March 28, 2011.

(1) Beginning March 28, 2011, no employee shall perform work requiring compliance with the operating rules implementing the requirements of this subpart unless the employee has been instructed on requirements of this subpart within the previous three years.

(2) The records of successful completion of instruction and examination required by this section

shall document the instruction of each employee under this subpart.

(c) *Records.* Written records documenting successful completion of instruction and examination of each employee and of his or her supervisors shall be made and shall be retained at the railroad's system headquarters and at the division headquarters for each division where the employee is assigned for three calendar years after the end of the calendar year to which they relate and made available to representatives of FRA for inspection and copying during normal business hours. Each railroad to which this part applies is authorized to retain a program, or any records maintained to prove compliance with such a program, by electronic recordkeeping in accordance with §§ 217.9(g) and 217.11(c) of this chapter.

(d) *Approval process.* Upon review of the program of instruction and examination required by this section, the Associate Administrator for Railroad Safety/Chief Safety Officer may, for cause stated, disapprove the program. Notification of such disapproval shall be made in writing and specify the basis for the disapproval.

(1) If the Associate Administrator for Railroad Safety/Chief Safety Officer disapproves the program, the railroad has 35 days from the date of the written notification of such disapproval to—

(i) Amend its program and submit it to the Associate Administrator for Railroad Safety/Chief Safety Officer for approval; or

(ii) Provide a written response in support of the program to the Associate Administrator for Railroad Safety/Chief Safety Officer, who informs the railroad of FRA's final decision in writing.

(2) A failure to submit the program with the necessary revisions to the Associate Administrator for Railroad Safety/Chief Safety Officer in accordance with this paragraph is considered a failure to implement a program under this subpart.

§ 220.315 Operational tests and inspections; further restrictions on use of electronic devices.

(a) The railroad's program of operational tests and inspections under part 217 of this chapter shall be revised as necessary to include this subpart and shall specifically include a minimum number of operational tests and inspections, subject to adjustment as appropriate.

(b) When conducting a test or inspection under part 217 of this chapter, a railroad officer, manager, or supervisor is prohibited from calling the personal electronic device or the railroad-supplied electronic device used by a railroad operating employee while the railroad officer, manager, or supervisor knows or should have known that—

(1) The train to which the employee is assigned is moving;

(2) The employee is—

(i) On the ground;

(ii) Riding rolling equipment during switching operations; or

(iii) Assisting in preparation of the train to which the employee is assigned for movement.

■ 6. Appendix C to part 220 is amended by adding footnote 2 to the first column heading "Section," and adding an entry for subpart C to read as follows:

APPENDIX C TO PART 220—SCHEDULE OF CIVIL PENALTIES [1]

Section [2]	Violation	Willful violation
* * *	*	*
Subpart C—Electronic Devices		
220.302 Operating rules	9,500	17,000
220.303 General; interfering with safety-related duties	9,500	17,000
220.305 Personal electronic device turned on while prohibited	5,500	10,000
(a)–(c) Personal device in use while prohibited	9,500	17,000

APPENDIX C TO PART 220—SCHEDULE OF CIVIL PENALTIES [1]—Continued

Section [2]	Violation	Willful violation
220.307 Railroad-supplied device turned on while prohibited	5,500	10,000
(a) Use not authorized by railroad in writing	9,500	17,000
(b)–(d) Railroad-supplied devices in use while prohibited	9,500	17,000
220.311 Railroad operating employees in deadhead status:		
(a)	9,500	17,000
(b) Devices turned on while prohibited; or	5,500	10,000
device in use while prohibited	9,500	17,000
220.313 Program of instruction:		
(a)–(d)	9,500	17,000
220.315 Operational tests and inspections:		
(a)–(b)	9,500	17,000

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $100,000 for any violation where circumstances warrant. *See* 49 CFR part 209, appendix A.

[2] The penalty schedule uses section numbers from 49 CFR part 220. If more than one item is listed as a type of violation of a given section, each item is also designated by a "penalty code," which is used to facilitate assessment of civil penalties, and which may or may not correspond to any subsection designation(s). For convenience, penalty citations will cite the CFR section and the penalty code, if any. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined CFR and penalty code citation, should they differ.

Issued in Washington, DC, on September 17, 2010.

Karen J. Hedlund,

Chief Counsel, Federal Railroad Administration.

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H.R. 511/P.L. 111–231
To authorize the Secretary of Agriculture to terminate certain easements held by the Secretary on land owned by the Village of Caseyville, Illinois, and to terminate associated contractual arrangements with the Village. (Aug. 16, 2010; 124 Stat. 2489)

H.R. 2097/P.L. 111–232
Star-Spangled Banner Commemorative Coin Act (Aug. 16, 2010; 124 Stat. 2490)

H.R. 3509/P.L. 111–233
Agricultural Credit Act of 2010 (Aug. 16, 2010; 124 Stat. 2493)

H.R. 4275/P.L. 111–234
To designate the annex building under construction for the Elbert P. Tuttle United States Court of Appeals Building in Atlanta, Georgia, as the "John C. Godbold Federal Building". (Aug. 16, 2010; 124 Stat. 2494)

H.R. 5278/P.L. 111–235
To designate the facility of the United States Postal Service located at 405 West Second Street in Dixon, Illinois, as the "President Ronald W. Reagan Post Office Building". (Aug. 16, 2010; 124 Stat. 2495)

H.R. 5395/P.L. 111–236
To designate the facility of the United States Postal Service located at 151 North Maitland Avenue in Maitland, Florida, as the "Paula Hawkins Post Office Building". (Aug. 16, 2010; 124 Stat. 2496)

H.R. 5552/P.L. 111–237
Firearms Excise Tax Improvement Act of 2010 (Aug. 16, 2010; 124 Stat. 2497)

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