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DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 701

RIN 0560–AH89

Emergency Forest Restoration Program and Emergency Conservation Program

AGENCY: Farm Service Agency, USDA.

ACTION: Interim rule.

SUMMARY: The Farm Service Agency (FSA) is amending regulations as required by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) to implement the new Emergency Forest Restoration Program (EFRP). EFRP will provide financial assistance to owners of nonindustrial private forest land to restore land that was damaged by a natural disaster on or after January 1, 2010. This interim rule also reorganizes existing Emergency Conservation Program (ECP) regulations to incorporate EFRP and makes minor technical amendments to the existing regulations for ECP including general regulations that will now apply to both ECP and EFRP.

DATES: *Effective Date:* November 17, 2010. *Comment Date:* We will consider comments that we receive by January 18, 2011.

ADDRESSES: We invite you to submit comments on this interim rule. In your comment, include the Regulation Identifier Number (RIN) and the volume, date, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Katina Hanson, ECP Program Manager, Conservation and Environmental Program Division, FSA, United States Department of Agriculture (USDA), Mail STOP 0513, 1400 Independence Avenue, SW., Washington, DC 20250–0513.
- *Hand Delivery or Courier:* Deliver comments to the above address.

All written comments will be available for public inspection at the above address during business hours from 8 a.m. to 5 p.m., Monday through Friday, except holidays. A copy of this interim rule is available through the FSA home page at *http://www.fsa.usda.gov/.*

FOR FURTHER INFORMATION CONTACT: Katina Hanson, *phone:* (202) 720–0062; or *e-mail: ecpreports@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

This interim rule implements Section 8203 of the 2008 Farm Bill (Pub. L. 110–246), which amends Title IV of the Agricultural Credit Act of 1978, as amended, (16 U.S.C. 2201–2206) by adding the new EFRP. Title IV of the Agricultural Credit Act of 1978 authorizes ECP, and generally authorizes payments to farmers and ranchers to rehabilitate farmland damaged by wind erosion, floods, hurricanes, or other natural disasters, and for carrying out emergency water conservation measures during periods of severe drought. Section 8203 of the 2008 Farm Bill adds EFRP, which will make payments available to an owner of nonindustrial private forest land who is approved for program participation and carries out emergency measures to restore land that is damaged by a natural disaster. The fiscal year (FY) 2010 Supplemental Appropriations Act (Pub. L. 111–212) provides $18 million for EFRP to remain available until expended for expenses resulting from natural disasters that occurred on or after January 1, 2010, and for other purposes.

This rule also makes minor technical changes to the existing ECP regulations to be consistent with the 2008 Farm Bill and with other FSA and Commodity Credit Corporation (CCC) regulations. Specifically, this rule replaces the term "person" with "person or legal entity" for consistency with applicable payment limitation regulations in 7 CFR part 1400, and revises a provision dealing with the payment limit that applies to ECP. This rule also reorganizes 7 CFR part 701 to set up three subparts: A subpart of general provisions that previously applied only to ECP and now apply to both ECP and EFRP; a subpart on ECP and miscellaneous ECP-related ad hoc disaster programs; and a subpart on EFRP. The general provisions section also contains the sections that describe programs that were previously administered under 7 CFR part 701.

Subpart A—General

Most of the general provisions that apply to ECP in the current 7 CFR part 701 are also needed to implement EFRP. The new Subpart A includes those general administrative and eligibility requirements that apply to both ECP and EFRP. This rule makes minor technical amendments to the general provisions, such as changing provisions that apply to ECP to refer to both ECP and EFRP. Also included in Subpart A are provisions required for continued administration of still-existing contracts for two other programs that have been administered under part 701, those being the Agricultural Conservation Program (ACP) contracts and Forestry Incentive Program (FIP) contracts.

This rule makes the following additional technical changes to the general provisions in the new Subpart A:

The "Administration" section is amended to clarify, consistent with current practice, that FSA may obtain assistance from Federal agencies, State agencies, or other providers of technical assistance when necessary for program implementation.

The "Definitions" section is amended to add a definition of "Natural Disaster" consistent with § 8203(a) of the 2008 Farm Bill and the current ECP definition, which includes wildfires, hurricanes or excessive winds, drought, ice storms or blizzards, floods, or other naturally-occurring resource impacting events. For EFRP, a natural disaster may also include insect or disease infestations, as determined by FSA in consultation with other Federal and State agencies as appropriate. The definition of "program year" is being removed as the term is not used in the regulation.

The "Onsite Inspections" section is amended to permit waivers of the onsite inspection requirement for both ECP and EFRP when conditions warrant. After some disasters, damage is so extensive and the need to address damage so severe that the time delay

associated with completing onsite inspections for every participant in areas with limited access hinders efficient implementation of the program. These circumstances were common following Hurricanes Andrew and Iniki in 1993 and Hurricanes Katrina and Rita in 2005 where the extent and magnitude of damage made onsite inspections unnecessary and difficult. The new provision will allow FSA to waive the requirement for inspections when those inspections could put people and property at risk and needlessly delay emergency assistance.

The "Eligible Costs" section is amended to replace the phrase "farm or ranch" with "eligible land" to clarify that nonindustrial private forest land may be considered eligible land.

The "Appeals" section is amended to specify that the appeal regulations of the Natural Resources and Conservation Service (7 CFR part 614) apply to 7 CFR part 701 for those particular situations where NRCS has performed technical assistance.

Many of the eligibility and application requirements that apply to ECP also apply to EFRP under the regulations implemented for EFRP in this interim rule. These include, for example, requirements for onsite inspections so that FSA can verify damage, and requirements for proving that the "practice" (emergency forest restoration measure) has been completed. Provisions concerning appeals, change of ownership of the land, assignment of payments, etc., also apply to both ECP and EFRP. Both ECP and EFRP have a "qualifying minimum cost" provision, meaning that the cost of the restoration must meet a minimum threshold to be eligible. This provision is intended to eliminate de minimis losses where the cost of the administration may exceed the amount of the benefit; however, the regulations do allow for some exceptions where the circumstances warrant. The minimum for ECP is $1,000 in most States and for EFRP, FSA will establish the minimum qualifying cost of restoration, which will be available in the FSA county office. With respect to the filing of applications for enrollment in the program, the information that will be required for EFRP will be the same as the information required for ECP and other FSA conservation financial assistance programs. There will be no different information collection requirements for EFRP.

Subpart B—Emergency Conservation Program

The provisions that apply specifically to ECP are moved to a new Subpart B. As illustrated in the table at the end of this preamble summarizing changes made by this interim rule, many sections have been redesignated (assigned a new number). In addition, this rule makes minor technical changes needed for this restructuring, such as replacing the word "part" with "subpart" where appropriate, and to correct internal references. This rule also removes § 701.54 concerning ECP assistance for oyster reefs damaged by 2005 hurricanes. The section is no longer needed because the funding and authority for that type of assistance was transferred to the National Oceanic and Atmospheric Administration.

Subpart C—Emergency Forest Restoration Program

This rule adds a new Subpart C for provisions specific to the new EFRP. All of the provisions are new, because this is a new program. Under EFRP, FSA will provide financial assistance to owners of nonindustrial private forest land who carry out emergency measures to restore the land that was damaged by a natural disaster that occurred on or after January 1, 2010. To be eligible, the land must have had tree cover immediately before the natural disaster. EFRP is a financial assistance program; the financial assistance will pay up to 75 percent of the cost of the emergency forest restoration measures to approved owners of private nonindustrial forest land.

Similar to ECP, as specified in 7 CFR 701.13, FSA will announce an enrollment period for the submission of requests for EFRP financial assistance. To request EFRP financial assistance, eligible owners will apply on forms specified by FSA. FSA will review the applications, determine the applicant's and the land's eligibility, and approve applications. As specified in 7 CFR 701.16, requests will be prioritized as determined appropriate or needed before approval by FSA based on factors including, but not limited to:

- Type and degree of damage;
- Type of practices needed to address the problem;
- Availability of funds;
- Availability of technical assistance;
- Environmental concerns; and
- Safety factors.

These requests may be approved if funds are available and the requested practice is determined eligible.

As specified in 7 CFR 701.21, prior to applying for payment, the approved practice must be completed and proof of completion must be submitted to the FSA county office. In addition, as specified in § 701.15(b)(4), the practice must have been started no more than 60 days before the EFRP designation is approved for the applicable county office, but it is understood that no payments will be made unless approved, and then only when consistent with the provisions of the regulations—thus, there may be a risk inherent in incurring expenses prior to approval. However, USDA will endeavor to provide notice of the availability or impending availability of these programs when the need for these programs is present and there is funding available as well. EFRP designation information is made available by FSA county offices through outreach and information campaigns to ensure that nonindustrial private forest land owners and underserved populations are aware of the availability of EFRP financial assistance.

For EFRP, "nonindustrial private forest land" is defined in the 2008 Farm Bill as:

> rural land, as determined by the Secretary, that—(A) has existing tree cover (or had tree cover immediately before the natural disaster and is suitable for growing trees); and (B) is owned by any nonindustrial private individual, group, association, corporation, or other private legal entity, that has definitive decision-making authority over the land.

EFRP is somewhat similar in scope to previous ECP-related ad hoc disaster programs (most recently the 2005 hurricane disaster assistance portions of ECP that provided assistance to owners of private nonindustrial forest land). That assistance was limited to certain non-industrial private forest landowners who suffered a loss of, or damage to, at least 35 percent of forest acres on forest land due to the 2005 hurricanes. The producer had 5 years from the date of the loss to:

(1) Reforest the lost or damaged forest acres in accordance with a plan approved by FSA that was appropriate for the forest type;

(2) Use best management practices in accordance with FSA's best management practices; and

(3) Exercise stewardship on the forest land while maintaining the land in a forested condition.

As authorized by the 2008 Farm Bill, the new EFRP does not have these limitations in geographic scope, type of qualifying natural disaster, or timeframe to implement restoration. Unlike some previous ECP-related ad hoc disaster assistance programs, EFRP will be available nationwide.

Some provisions are different for ECP and EFRP. For example, ECP regulations, though not required by the program statute itself, have traditionally had a limit of $200,000 per participant

per disaster, and this will continue under the program regulations implemented in this interim rule. Similarly, the Farm Bill does not require a limit for EFRP, but these regulations will set a limit of $500,000 per person or legal entity, per disaster. The higher limit was selected because while damage to ECP land may damage only one season's crops, a damaged forest may take 15 years to recover. ECP has a limit of 75 percent of the participant's actual costs, with up to 90 percent for limited resource participants; in no case can the financial assistance exceed 50 percent of the value of the land. EFRP has a statutory limit of 75 percent of actual costs for all producers, and no provision capping financial assistance based on the agricultural value of the land.

Both ECP and EFRP are subject to the availability of appropriated funding. There was no funding for EFRP in 2008 or 2009. The FY 2010 Supplemental Appropriation provides $18 million for EFRP.

Most of the provisions in this rule for EFRP are required by the 2008 Farm Bill. FSA has added a few discretionary provisions to ensure program integrity, including requiring that the forest restoration practice specifications represent the minimum level of performance needed to restore the land to the applicable FSA, NRCS, Forest Service, or State forestry standard. The 2008 Farm Bill provides that owners of nonindustrial private forest land damaged by a natural disaster are eligible for EFRP if certain conditions are met.

Nothing in this rule creates an entitlement of any kind, and payments will be made only to the extent that funds are available and only to the extent that, in addition to other eligibility requirements, the FSA Deputy Administrator for Farm Programs has approved the availability of benefits for a particular disaster in a particular area for a particular time period.

Summary of Interim Rule Reorganization of 7 CFR Part 701

This interim rule reorganizes 7 CFR part 701 into three new subparts. Subpart A will include general provisions that apply to both ECP and EFRP; the sections will be numbered §§ 701.1 through 701.99. Subpart B will include provisions specific to ECP and to the miscellaneous 2005 hurricane relief programs; the sections will be numbered §§ 701.100 through 701.199. Subpart C will include provisions specific to EFRP, and the sections will be numbered §§ 701.200 through 701.299. The following table provides a summary comparison of where sections in the current regulation in 7 CFR part 701 have been placed in this interim rule, and the substantive changes. The table lists the sections in the order in which they appear in the current CFR. Sections with no substantive change listed may have minor technical changes, such as adding references to EFRP or updating internal references. Current 7 CFR part 701 provisions will be in subparts A or B; subpart C is an entirely new subpart for EFRP.

Current CFR	Section title	This rule
§ 701.1	Administration	§ 701.1 (revises provision to clarify technical assistance sources).
§ 701.2	Definitions	§ 701.2 (adds definition of natural disaster).
§ 701.3	Scope	Redesignated as § 701.103 for ECP; § 701.203 for EFRP.
§ 701.4	Producer eligibility	Redesignated as § 701.104 for ECP; § 701.204 for EFRP.
§ 701.5	Land eligibility	Redesignated as § 701.105 for ECP; § 701.205 for EFRP.
§§ 701.6 through 701.9	[Reserved]	No change.
§ 701.10	Qualifying minimum cost of restoration	Redesignated as § 701.110 for ECP; § 701.210 for EFRP.
§ 701.11	Prohibition on duplicate payments	Redesignated as § 701.111 for ECP; § 701.211 for EFRP.
§ 701.12	Eligible practices	Redesignated as § 701.112 for ECP; § 701.212 for EFRP.
§ 701.13	Submitting requests	§ 701.13.
§ 701.14	Onsite inspections	§ 701.14 (adds waiver of inspections provisions).
§ 701.15	Starting practices before financial assistance request is submitted; non-entitlement to payment; payment subject to the availability of funds.	§ 701.15.
§ 701.16	Practice approval	§ 701.16.
§ 701.17	Average adjusted gross income limitation	Redesignated as § 701.117 for ECP.
§§ 701.18 through 701.220	[Reserved]	No change.
§ 701.21	Filing payment application	§ 701.21.
§ 701. 701.22..		
§ 701.23	Eligible costs	§ 701.23.
§ 701.24	Dividing cost-share among more than one participant.	§ 701.24.
§ 701.25	Practices carried out with aid from ineligible persons.	§ 701.25.
§ 701.26	Maximum cost-share percentage	Redesignated as § 701.126 for ECP; § 701.226 for EFRP.
§ 701.27	Maximum ECP payments per person	Redesignated as § 701.127 for ECP.
§§ 701.28 through 701.30	[Reserved]	No change.
§ 701.31	Maintenance and proper use of practices	§ 701.31.
§ 701.32	Failure to comply with program provisions	§ 701.32.
§ 701.33	Death, incompetency, or disappearance	§ 701.33.

Current CFR	Section title	This rule
§ 701.34	Appeals	§ 701.34 (adds a provision for NRCS appeals).
§ 701.35	Compliance with regulatory measures	§ 701.35.
§ 701.36	Schemes and devices and claims avoidances	§ 701.36.
§ 701.37	Loss of control of the property during the practice life span.	§ 701.37.
§§ 701.38 through 701.40	[Reserved]	No change.
§ 701.41	Cost-share assistance not subject to claims	§ 701.41.
§ 701.42	Assignments	§ 701.42.
§ 701.43	Information collection requirements	§ 701.43.
§ 701.44	Agricultural Conservation Program (ACP) contracts.	§ 701.44.
§ 701.45	Forestry Incentives Program (FIP) contracts	§ 701.45.
§ 701.50	2005 hurricanes	Redesignated as § 701.150 for ECP.
§ 701.51	Definitions	Redesignated as § 701.151 for ECP.
§ 701.52	Availability of funding	Redesignated as § 701.152 for ECP.
§ 701.53	Debris removal and water for livestock	Redesignated as § 701.153 for ECP.
§ 701.54	Oysters	Section removed, because the assistance is now provided by NOAA; section number reserved.
§ 701.55	Nursery	Redesignated as § 701.155 for ECP.
§ 701.56	Poultry	Redesignated as § 701.156 for ECP.
§ 701.57	Private nonindustrial forest land	Redesignated as § 701.157 for ECP.

Notice and Comment

FSA is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule. FSA is authorized by the FY 2010 Supplemental Appropriations Act (Pub. L. 111–212) to issue an interim rule effective on publication with an opportunity for comment.

Executive Order 12866

This rule has been determined to be significant and was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The cost benefit analysis is summarized below and is available from the contact information listed above.

Cost Benefit Analysis Summary

Title IV of the Agricultural Credit Act of 1978 authorizes ECP and generally authorizes payments to farmers and ranchers to rehabilitate farmland damaged by wind erosion, floods, hurricanes, or other natural disasters, and for carrying out emergency water conservation measures during periods of severe drought. The 2008 Farm Bill broadens the scope of Title IV by adding EFRP to provide financial assistance to owners of nonindustrial private forest land who carry out emergency measures to restore the land that was damaged by a natural disaster. EFRP is a financial assistance program; the financial assistance will pay up to 75 percent of the cost of the emergency forest restoration measures to approved owners of private nonindustrial forest land.

The impact of the program amounts to a transfer to private forest landowners, which is equivalent to total program outlays. EFRP is expected to be funded through irregular ad hoc appropriations in a manner similar to the way the ECP is funded. It is assumed that no additional funding beyond the $18 million appropriated for FY 2010 will be provided during the current Farm Bill cycle, and that program outlays will therefore be $18 million.

Regulatory Flexibility Act

This rule is not subject to the Regulatory Flexibility Act since FSA is not required to publish a notice of proposed rulemaking for this rule. FSA is authorized by the FY 2010 Supplemental Appropriations Act (Pub. L. 111–212) to issue an interim rule effective on publication with an opportunity for comment.

Environmental Review

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and FSA regulations for compliance with NEPA (7 CFR part 799). The FY 2010 Supplemental Appropriations Act (Pub. L. 111–212) provides that EFRP will be considered to have met the requirements of the NEPA for activities similar in nature and quantity to those of ECP established under Title IV of the Agricultural Credit Act of 1978 (16 U.S.C. 2201–2206). FSA has determined that the activities allowed by the EFRP provisions are similar in nature and quantity to those of ECP and thus the exception applies. Further, it is the determination of FSA that the impacts associated with amending regulations as required by the 2008 Farm Bill to implement the new EFRP would be the same as those discussed in the Final Supplemental Environmental Impact Statement (FSEIS) on the ECP, which can be found at: *http://www.fsa.usda.gov/FSA/webapp?area=home&subject=ecrc&topic=nep-cd.*

For these reasons, separately and together, FSA has determined that no additional environmental assessment or environmental impact statement will be prepared.

Executive Order 12372

This program is not subject to Executive Order 12372, which requires consultation with State and local officials. *See* the notice related to 7 CFR part 3015, subpart V, published in the **Federal Register** on June 24, 1983 (48 FR 29115).

Executive Order 12988

This interim rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule does not preempt State and or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. Before any judicial action may be brought concerning the provisions of this rule, appeal provisions of 7 CFR parts 11 and 780 must be exhausted. As specified in the 2008 Farm Bill, this interim rule does not preempt a State or tribal government law, including any State or tribal government liability law.

Executive Order 13132

The policies contained in this rule would not have any substantial direct effect on States, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government. Nor does this interim rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

The policies contained in this rule do not have tribal implications that preempt tribal law. USDA will undertake, within 6 months after this rule becomes effective, Tribal consultation to gain input by Tribal officials concerning the impact of this rule on Tribal governments, communities, and individuals. The consultation will establish a baseline of consultation for future actions, should any become necessary, regarding this rule. Reports from the consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal leaders and their representatives concerning ways to improve this rule in Indian country.

Unfunded Mandates

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandate Reform Act of 1995 (UMRA, Pub. L. 104–4). In addition, CCC is not required to publish a notice of proposed rulemaking for this rule. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, SBREFA). Therefore, FSA is not required to delay the effective date for 60 days from the date of publication to allow for Congressional review and this rule is effective on the date of publication in the **Federal Register**.

Federal Assistance Programs

The titles and numbers of the Federal assistance programs in the Catalog of Federal Domestic Assistance to which this rule applies are:

Emergency Conservation Program (ECP)—10.054;
Agricultural Conservation Program (ACP)—10.063;
Forestry Incentives Program (FIP)—10.064; and
Emergency Forest Restoration Program (EFRP)—10.095.

Paperwork Reduction Act

The EFRP regulations in this rule are exempt from the requirements of the Paperwork Reduction Act (44 U.S.C. Chapter 35), as specified in the FY 2010 Supplemental Appropriations Act (Pub. L. 111–212), which provides that these regulations be promulgated and the programs administered without regard to the Paperwork Reduction Act.

The amendments in this rule to the existing ECP require no revisions to the information collection requirements that are approved for ECP by OMB under control number 0560–0082.

E-Government Act Compliance

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

List of Subjects in 7 CFR part 701

Disaster assistance, Environmental protection, Forests and forest products, Reporting and recordkeeping requirements, Rural areas, Soil conservation, Water resources, Wildlife.

■ For the reasons discussed in the preamble, this rule amends 7 CFR part 701 as follows:

PART 701—EMERGENCY CONSERVATION PROGRAM, EMERGENCY FOREST RESTORATION PROGRAM, AND CERTAIN RELATED PROGRAMS PREVIOUSLY ADMINISTERED UNDER THIS PART

■ 1. The authority citation for part 701 is revised to read as follows:

Authority: 16 U.S.C. 2201–2206; Sec. 101, Pub. L. 109–148, 119 Stat. 2747; and Pub. L. 111–212, 124 Stat. 2302

■ 2. The heading for part 701 is revised as set out above.

Subpart A—General

■ 3. Designate §§ 701.1 through 701.45 as subpart A under the heading set forth above.

■ 4. Amend § 701.1 as follows:

■ a. Revise paragraph (a) to read as set forth below;

■ b. In paragraph (b), first sentence, remove the words "ECP is" and add, in their place, the words "ECP and EFRP are", and in the third sentence, add the words "or legal entity" immediately following the word "person";

■ c. Revise paragraph (i) to read as set forth below;

■ d. In paragraph (j), add the words "or legal entity" immediately following the words "in any person", and add the words "or EFRP" immediately following the word "ECP"; and

■ e. In paragraph (k), add the words "or EFRP" immediately following the word "ECP".

The revision reads as follows:

§ 701.1 Administration.

(a) Subject to the availability of funds, this part provides the terms, conditions and requirements of the Emergency Conservation Program (ECP) and the Emergency Forest Restoration Program (EFRP) administered by the Farm Service Agency (FSA). Neither program is an entitlement program and payments will only be made to the extent that the Deputy Administrator announces the eligibility of benefits for certain natural disasters, the areas in which such benefits will be available, the time period in which the disaster and the rehabilitation must occur, and only so long as all the conditions for eligibility specified in this part and elsewhere in law are met. However, the Deputy Administrator will not apply any non-statutory limitation on payments provided for in this part in such a way that it would necessarily result in the non-expenditure of program funds required to otherwise be made by law.

* * * * *

(i) FSA may consult with any other Federal agency, State agency, or other provider of technical assistance for such assistance as is determined by FSA to be necessary to implement ECP or EFRP. FSA is responsible for the technical aspects of ECP and EFRP but may enter into a Memorandum of Agreement with another party to provide technical assistance. If the requirement for technical assistance results in undue delay or significant hardship to producers in a county, the State committee may request in writing that FSA waive this requirement for that county. However, nothing in this paragraph or in this part creates a right of appeal or action for an applicant with respect to provisions relating to internal procedures of FSA.

* * * * *

■ 5. Amend § 701.2, paragraph (b), as follows:

■ a. In the definition of "Applicant," add the words "or legal entity" immediately following the word "person" and add the

words "or EFRP" immediately following the word "ECP";
■ b. Add, in alphabetical order, a new definition for "Natural disaster"; and
■ c. Remove the definition "Program year".

The addition reads as follows:

§ 701.2 Definitions.

* * * * *

(b) * * *

Natural disaster means wildfires, hurricanes or excessive winds, drought, ice storms or blizzards, floods, or other naturally-occurring resource impacting events as determined by FSA. For EFRP, a natural disaster also includes insect or disease infestations as determined by FSA in consultation with other Federal and State agencies as appropriate.

* * * * *

§§ 701.3 through 701.5 [Redesignated as §§ 701.103 through 701.105]

■ 6. Redesignate §§ 701.3 through 701.5 as §§ 701.103 through 701.105, and reserve §§ 701.3 through 701.5.

§§ 701.10 through 701.12 [Redesignated as §§ 701.110 through 701.112]

■ 7. Redesignate §§ 701.10 through 701.12 as §§ 701.110 through 701.112 and reserve §§ 701.10 through 701.12.

§ 701.13 [Amended]

■ 8. Amend § 701.13, paragraph (a), by adding the words "or EFRP" immediately following the word "ECP".

■ 9. Amend § 701.14 as follows:
■ a. Redesignate the undesignated text as a new paragraph (a),
■ b. In newly redesignated paragraph (a), add the words "or EFRP" immediately following the word "ECP", and
■ c. Add paragraph (b) to read as set forth below.

§ 701.14 Onsite inspections.

* * * * *

(b) Notwithstanding paragraph (a) of this section, onsite inspections may be waived by FSA, in its discretion only, where damage is so severe that an onsite inspection is unnecessary, as determined by FSA.

§ 701.15 [Amended]

■ 10. Amend § 701.15 as follows:
■ a. In paragraph (b), introductory text, remove the word "ECP", and
■ b. In paragraph (b)(4), add the words "or EFRP" immediately following the word "ECP".

§ 701.16 [Amended]

■ 11. Amend § 701.16, paragraph (a)(7), by removing the word "Welfare" and adding, in its place, the words "In the case of ECP, welfare".

§ 701.17 [Redesignated as § 701.117]

■ 12. Redesignate § 701.17 as § 701.117 and reserve § 701.17.

§ 701.23 [Amended]

■ 13. Amend § 701.23 as follows:
■ a. In paragraph (a), remove the words "§§ 701.26 and 701.27" and add, in their place, the words "§§ 701.126, 701.127, and 701.226", and
■ b. In paragraphs (b)(1) and (b)(2), remove the words "farm or ranch" and add, in their place, the words "eligible land", and
■ c. In paragraph (c), remove the words "§ 701.12(d)" and add, in their place, "§§ 701.112(d) or 701.212(d)".

■ 14. Amend § 701.25 as follows:
■ a. Revise the section heading to read as set forth below, and
■ b. In the first sentence of the section, add the words "or EFRP" immediately following the word "ECP".

§ 701.25 Practices carried out with aid from ineligible persons or ineligible legal entities.

* * * * *

§§ 701.26 through 701.27 [Redesignated as §§ 701.126 through 701.127]

■ 15. Redesignate §§ 701.26 through 701.27 as §§ 701.126 through 701.127 and reserve §§ 701.26 through 701.27.

§ 701.34 [Amended]

■ 16. Amend § 701.34 by removing the word "part" and adding, in its place, the words "parts 614 and".

§ 701.35 [Amended]

■ 17. Amend § 701.35, second sentence of the section, by adding the words "or EFRP" immediately following the word "ECP" both times it appears.

§ 701.36 [Amended]

■ 18. Amend § 701.36 as follows:
■ a. In paragraph (a), first sentence, add the words "or legal entity" immediately following the word "person", and in the second sentence, remove the words ""person" determinations made under this part", and add, in their place, the words "any eligibility determination, including, but not limited to, a payment limit eligibility",
■ b. In paragraph (b), remove the word "ECP" and add, in its place, the word "program",
■ c. In paragraph (c), add the words "or legal entity" immediately following the word "person",
■ d. In paragraph (d), add the words "or EFRP" immediately following the word "ECP".

§ 701.37 [Amended]

■ 19. Amend § 701.37, in the first sentence of the section, by adding the words "or EFRP" immediately following the word "ECP" each time it appears, and add the words "or legal entity" immediately following the word "person".

§§ 701.44 and 701.45 [Amended]

■ 20. Amend §§ 701.44 and 701.45 by removing the comma between the words "CFR" and "parts".

§§ 701.50 through 701.53 [Redesignated as §§ 701.150 through 701.153]

■ 21. Redesignate §§ 701.50 through 701.53 as §§ 701.150 through 701.153.

§ 701.54 [Removed]

■ 22. Remove § 701.54.

§§ 701.55 through 701.57 [Redesignated as §§ 701.155 through 701.157]

■ 23. Redesignate §§ 701.55 through 701.57 as §§ 701.155 through 701.157.

§ 701.103 [Amended]

■ 24. Amend newly redesignated § 701.103, as follows:
■ a. In paragraph (a), at the end, remove the period and add, in it's place, the punctuation and words ", subject to the availability of funds and only for areas, natural disasters, and time periods approved by the Deputy Administrator."
■ b. In paragraph (c) introductory text, remove the word "part" and add, in its place, the word "subpart".

§ 701.104 [Amended]

■ 25. Amend newly redesignated § 701.104, paragraph (a), by adding the words "or legal entity" immediately following the word "person" both times it appears.

§ 701.110 [Amended]

■ 26. Amend newly redesignated § 701.110, paragraph (a), by removing the words "§ 701.3(a)" and adding, in their place, the words "§ 701.103(a)".

§ 701.112 [Amended]

■ 27. Amend newly redesignated § 701.112, paragraph (a), by removing the word "part" and adding, in its place, the word "subpart".

■ 28. Revise newly redesignated § 701.127 to read as follows:

§ 701.127 Maximum ECP payments per person or legal entity.

A person or legal entity, as defined in part 1400 of this title, is limited to a maximum ECP cost-share of $200,000 per person or legal entity, per natural disaster.

§ 701.150 [Amended]

■ 29. Amend newly redesignated § 701.150, first sentence, by removing the words "§§ 701.50 through 701.57" and adding, in their place, the words "§§ 701.150 through 701.157" and in the third sentence, by removing the words "§§ 701.51 through 701.57" and adding, in their place, the words "§§ 701.151 through 701.157".

§ 701.151 [Amended]

■ 30. Amend newly redesignated § 701.151, introductory text, by removing the words "§§ 701.52 through 701.57" and adding, in their place, the words"§§ 701.152 through 701.157".

§ 701.152 [Amended]

■ 31. Amend newly redesignated § 701.152 by removing the words "§§ 701.53 through 701.57" and adding, in their place, the words "§§ 701.153 through 701.157", and by removing the words "109–149" and adding, in their place, the words "109–148".

§ 701.155 [Amended]

■ 32. Amend newly redesignated § 701.155, paragraph (b), by removing the words "§ 701.26" and adding, in their place, the words "§ 701.126".

§ 701.157 [Amended]

■ 33. Amend newly redesignated § 701.157 as follows:

■ a. In paragraph (b)(1), add the words "or legal entity" immediately following the word "person", and

■ b. In paragraph (c), remove the words "§ 701.26" and add, in their place, the words "§ 701.126".

Subpart B—Emergency Conservation Program

■ 34. Designate newly redesignated §§ 701.103–701.157 as subpart B under the heading set forth above.

§§ 701.100 through 701.102, 701.106 through 701.109, 701.113 through 701.116, 701.118 through 701.125, 701.128 through 701.149, and 701.154 [Added and Reserved]

■ 35. Add and reserve §§ 701.100 through 701.102, 701.106 through 701.109, 701.113 through 701.116, 701.118 through 701.125, 701.128 through 701.149, and 701.154.

■ 36. Add subpart C to read as follows:

Subpart C—Emergency Forest Restoration Program

Sec.

701.200–701.202 [Reserved]
701.203 Scope.
701.204 Participant eligibility.
701.205 Land eligibility.
701.206 through 701.209 [Reserved]
701.210 Qualifying minimum cost of restoration.
701.211 Prohibition on duplicate payments.
701.212 Eligible EFRP practices.
701.213 through 701.225 [Reserved]
701.226 Maximum financial assistance.

Subpart C—Emergency Forest Restoration Program

§§ 701.200 through 701.202 [Reserved]

§ 701.203 Scope.

(a) Subject to the availability of funds and only for areas, natural disasters, and time periods for the natural disaster and rehabilitation approved by the Deputy Administrator, FSA will provide financial assistance to owners of nonindustrial private forest land who carry out emergency measures to restore land damaged by a natural disaster on or after January 1, 2010, as determined by FSA.

(b) The objective of EFRP is to make financial assistance available to eligible participants on eligible land for certain practices to restore nonindustrial private forest land that has been damaged by a natural disaster.

§ 701.204 Participant eligibility.

(a) To be eligible to participate in EFRP, a person or legal entity must be an owner of nonindustrial private forest land affected by a natural disaster, and must be liable for or have the expense that is the subject of the financial assistance. The owner must be a person or legal entity (including an Indian tribe) with full decision-making authority over the land, as determined by FSA, or with such waivers as may be needed from lenders or others as may be required, to undertake program commitments.

(b) Federal agencies and States, including all agencies and political subdivisions of a State, are ineligible for EFRP.

(c) An application may be denied for any reason.

§ 701.205 Land eligibility.

(a) For land to be eligible, it must be nonindustrial private forest land and must, as determined by FSA:

(1) Have existing tree cover or have had tree cover immediately before the natural disaster and be suitable for growing trees;

(2) Have damage to natural resources caused by a natural disaster, which occurred on or after January 1, 2010, that, if not treated, would impair or endanger the natural resources on the land and would materially affect future use of the land; and

(3) Be physically located in a county in which EFRP has been implemented.

(b) Land is ineligible for EFRP if FSA determines that the land is any of the following:

(1) Owned or controlled by the United States; or

(2) Owned or controlled by States, including State agencies or political subdivisions of a State.

§§ 701.206 through 701.209 [Reserved]

§ 701.210 Qualifying minimum cost of restoration.

(a) FSA will establish the minimum qualifying cost of restoration, which may vary by State or region.

(b) An applicant may request a waiver of the qualifying minimum cost of restoration. The waiver request must document how failure to grant the waiver will result in environmental damage or hardship to the person or legal entity, and how the waiver will accomplish the goals of the program.

§ 701.211 Prohibition on duplicate payments.

(a) Participants are not eligible to receive funding under EFRP for land on which FSA determines that the participant has or will receive funding for the same or similar expenses under:

(1) The Emergency Conservation Program provided for in subpart B of this part;

(2) The Wetland Reserve Program (WRP) provided for in part 1467 of this title;

(3) The Emergency Wetland Reserve Program (EWRP) provided for in part 623 of this chapter;

(4) The Emergency Watershed Protection Program (EWP), provided for in part 624 of this chapter; or

(5) Any other program that covers the same or similar expenses so as to create duplicate payments, or, have the effect of creating in total, otherwise, a higher rate of financial assistance than is allowed on its own under this part.

(b) Participants who receive any duplicate funds, payments, or benefits must refund any EFRP payments received, except the Deputy Administrator may reduce the refund amount to the amount determined appropriate by the Deputy Administrator to ensure that the total amount of assistance received by the owner of the land under all programs does not exceed an amount otherwise allowed in this part.

§ 701.212 Eligible EFRP practices.

(a) Financial assistance may be offered to eligible persons or legal entities for EFRP practices to restore forest health and forest-related resources on eligible land.

(b) Practice specifications must represent the minimum level of

performance needed to restore the land to the applicable FSA, NRCS, Forest Service, or State forestry standard.

§§ 701.213 through 701.225 [Reserved]

§ 701.226 Maximum financial assistance.

(a) In addition to other restrictions that may be applied by FSA, an EFRP participant will not receive more than 75 percent of the lesser of the participant's total actual cost or of the total allowable costs, as determined by this subpart, to perform the practice.

(b) A person, as defined in part 1400 of this title, is limited to a maximum cost-share of $500,000 per person or legal entity, per disaster.

(c) The Deputy Administrator may waive the provisions of this section on a case by case basis to address unusually large losses. Such relief is solely at the discretion of the Deputy Administrator, and the failure to provide such relief is not subject to administrative review or appeal under parts 11 or 780 of this title.

Signed in Washington, DC, November 9, 2010.

Jonathan W. Coppess,

Administrator, Farm Service Agency.

[FR Doc. 2010–28946 Filed 11–16–10; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM435; Special Conditions No. 25–413–SC]

Special Conditions: Bombardier Inc. Model CL–600–2E25 Airplane, Operation Without Normal Electrical Power

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Bombardier Inc. Model CL–600–2E25 airplane. This airplane will have a novel or unusual design feature associated with a command-by-wire (CBW) rudder-control system, which requires a source of continuous electrical power to operate the control system. The current 14 CFR part 25.1351(d), "Operation without normal electrical power," requires safe operation in VFR conditions for at least five minutes with inoperative normal electrical power. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is November 5, 2010. We must receive your comments by January 3, 2011.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM–113), Docket No. NM435, 1601 Lind Avenue, SW., Renton, Washington, 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM435 You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Steve Slotte, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington, 98057–3356; telephone (425) 227–2315; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice of, and opportunity for prior public comment on, these special conditions are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public-comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to acknowledge receipt of your comments on these special conditions, include with your comments a self-addressed, stamped postcard on which you have written the docket number. We will stamp the date on the postcard and mail it back to you.

Background

On February 28, 2007, Bombardier Inc. applied for an amendment to Type Certificate No. A21EA, through Transport Canada, to include the new Model CL–600–2E25 airplane. The CL–600–2E25, which is a derivative of the CL–600–2D24 currently approved under Type Certificate No. A21EA, is to be certified for a maximum occupancy of 110 people, including 5 crewmembers. The CL–600–2E25 has increased gross weight, extended wing tip, and increased fuselage length to accommodate the additional passengers as compared to the CL–600–2D24.

The CL–600–2E25 will have a CBW rudder-control system that will affect the performance of the airplane. This system requires a continuous source of electrical power to maintain an operable control system.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.101, Bombardier Inc. must show that the Model CL–600–2E25 airplane meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–119, except for earlier amendments as agreed upon by the FAA. These regulations will be incorporated into Type Certificate No. A21EA after type-certification approval of the Model CL–600–2E25. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type-certification basis." The regulations incorporated by reference in Type Certificate No. A21EA are as follows:

The original type-certification basis for the Model CL–600–2D24 (CRJ 900), shown on TCDS A21EA, Revision 25, and reprinted below.

Model CL–600–2D15/CL–600–2D24

Part 25, including Amendments 25–1 through 25–86, Amendments 25–88 through Amendments 25–90, and

Amendments 25–92 through 25–98 with the following exceptions:

• Section 25.783(f) at Amendment 25–23 shall replace § 25.783(f) at Amendment 25–88 for the Aft Cargo Compartment and Main Avionics Bay Doors only (common doors with CL–600–2C10 (CRJ–700);

• Section 25.807(d)(6) at Amendment 25–72 shall replace § 25.807(h) at Amendment 25–94;

• Sections 25.365, 25.831(a), and 25.1447(c) at Amendment 25–87. Part 25, Amendment 25–91, is not included in the type-certification basis.

Additional FAA Requirements for Model CL–600–2D15/CL–600–2D24

1. 14 CFR part 36, effective September 10, 1990, and including all amendments effective on the date of type certification.

2. 14 CFR part 34, effective September 10, 1990, and including all amendments effective on the date of type certification.

3. Special Conditions:

(a) *High Intensity Radiated Fields,* No. 25–ANM–109, dated October 31, 1995.

(b) *Go-Around Performance Credit for Use of Automatic Power Reserve (APR),* No. 25–167–SC, dated October 24, 2000 (same as CL–600–2C10).

(c) *Sudden Engine Stoppage,* No. 25–217–SC, dated October 04, 2002.

(d) *Passenger Seats With Non-traditional, Large, Non-metallic Panels,* No. 25–384–SC, dated August 12, 2009.

4. *Exemptions:* Exemption No. 7447, hydraulic-systems testing per 14 CFR 25.1435(b)(1).

Equivalent safety has been established for the following requirements:

CL–600–2D15/CL–600–2D24

1. Section 25.103 and others, *Reduced Minimum Operating Speed Factors.*

2. Section 25.811(d)(2), *Main Door Exit Marking Sign.*

3. Section 25.813(c)(2)(i), *Emergency Exit Access.*

4. Section 25.904, *Performance Credit for Use of APR During Reduced Thrust Takeoff.*

5. Section 25.933(a)(1)(ii), *Thrust Reverser System.*

6. Section 25, appendix I, § 25.5(b)(4), *Lack of On/Off Switch for Automatic Takeoff Thrust Control System (ATTCS).*

7. Section 25.841(b)(6), *High Altitude Takeoff and Landing Operations* documented in Transport Airplane Directorate ELOS Memo AT2587NY–T, dated January 31, 2007.

In addition, the certification basis includes other regulations, special conditions, and exemptions that are not relevant to these special conditions. Type Certificate No. A21EA will be updated to include a complete description of the certification basis for this airplane model.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the CL–600–2E25 because of a novel or unusual design feature, special conditions are prescribed under the provisions of 14 CFR 21.16.

In addition to the applicable airworthiness regulations and special conditions, the CL–600–2E25 must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under 14 CFR 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

Novel or Unusual Design Features

The Bombardier Model CL–600–2E25 airplane will incorporate the following novel or unusual design features:

The CL–600–2E25 airplane will have a CBW rudder-control system that requires a continuous source of electrical power to maintain operability of the control system.

Discussion

The current 14 CFR 25.1351(d), "Operation without normal electrical power," requires safe operation in VFR conditions for at least five minutes with inoperative normal power. This rule was premised on a traditional design utilizing mechanical control cables for flight control while the crew took time to sort out the electrical failure, start engine(s) if necessary, and re-establish some of the electrical-power-generation capability.

To maintain the same level of safety associated with traditional designs, the Bombardier CL–600–2E25 design must not be time limited in its operation, including being without the normal source of engine- or Auxiliary Power Unit (APU)-generated electrical power. Service experience on other airplane models with similar electrical-power systems has shown that the loss of all electrical power, which is generated by the airplane's engine generators or APU, is not extremely improbable. Thus, it must be demonstrated that the airplane can continue through safe flight and landing (including steering and braking on ground for airplanes using steer/brake-by-wire) with the use of its emergency electrical-power systems. These emergency electrical-power systems must be able to power loads that are essential for continued safe flight and landing.

Applicability

As discussed above, these special conditions are applicable to the Model CL–600–2E25. Should Bombardier Inc. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability.

Under standard practice, the effective date of final special conditions would be 30 days after the date of publication in the **Federal Register**; however, as the certification date for the Model CL–600–2E25 airplane is imminent, the FAA finds that good cause exists to make these special conditions effective upon issuance.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

■ The authority citation for these special conditions is as follows:

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

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type-certification basis for Bombardier Model CL–600–2E25 airplanes modified according to DCA 0145–000–00020–2008/FAA (latest revision approved by the FAA).

To ensure that the total loss of electrical power is extremely improbable, and because the loss of all electrical power may be catastrophic to airplanes utilizing an Electronic Flight Control System, the following Special Condition is issued in lieu of § 25.1351(d):

It must be demonstrated by test, or combination of test and analysis, that the airplane can continue safe flight and landing with inoperative normal engine- and APU-generated electrical power (for example, without electrical power from any source, except for the battery and any other standby electrical sources). The airplane operation should be considered at the critical phase of flight and include the ability to restart the engines and maintain flight for the maximum diversion time capability being certified.

Issued in Renton, Washington on November 5, 2010.

Jeffrey Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–28998 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM434; Notice No. 25–412–SC]

Special Conditions: Bombardier Inc. Model CL–600–2E25 Airplane, Interaction of Systems and Structures

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Bombardier Inc. Model CL–600–2E25 airplane. This airplane will have a novel or unusual design feature associated with the rudder-traveler limiting system controlling the command-by-wire (CBW) rudder. This system can serve to alleviate loads in the airframe but, in a failure state, can create loads in the airframe. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is November 5, 2010. We must receive your comments by January 3, 2011.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM–113), Docket No. NM434, 1601 Lind Avenue, SW., Renton, Washington 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM434. You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Todd Martin, FAA, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1178; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice of, and opportunity for prior public comment on, these special conditions are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public-comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to acknowledge receipt of your comments on these special conditions, include with your comments a self-addressed, stamped postcard on which you have written the docket number. We will stamp the date on the postcard and mail it back to you.

Background

On February 28, 2007, Bombardier Inc. applied for an amendment to Type Certificate No. A21EA, through Transport Canada, to include the new Model CL–600–2E25 airplane. The CL–600–2E25, which is a derivative of the CL–600–2D24 currently approved under Type Certificate No. A21EA, is to be certified for a maximum occupancy of 110 people, including 5 crewmembers. The CL–600–2E25 has increased gross weight, extended wing tip, and increased fuselage length to accommodate the additional passengers as compared to the CL–600–2D24.

The CL–600–2E25 will have a CBW rudder-control system that will affect the structural performance of the airplane. The airplane will use CBW Rudder Electronic Control Unit (ECU) software as a replacement for the Rudder Travel Limiter to limit rudder commands. The CBW Rudder ECU controls the rudder, trim, and yaw damping as well. This system can serve to alleviate loads in the airframe but, in a failure state, can create loads in the airframe. The current rules do not adequately account for the effects of this system and its failures on structural performance. The special conditions defined herein provide the criteria to be used in assessing the effects of this system on structures.

Type Certification Basis

Under the provisions of § 21.101, Bombardier Inc. must show that the Model CL–600–2E25 airplane meets the applicable provisions of Title 14, Code of Federal Regulations (14 CFR) part 25, as amended by Amendments 25–1 through 25–119, except for earlier amendments as agreed upon by the FAA. These regulations will be incorporated into Type Certificate No. A21EA after type-certification approval of the Model CL–600–2E25. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type-certification basis." The regulations incorporated by reference in Type Certificate No. A21EA are as follows:

The original type-certification basis for the Model CL–600–2D24 (CRJ 900), shown on TCDS A21EA, Revision 25, and reprinted below.

Model CL–600–2D15/CL–600–2D24

Part 25, including Amendments 25–1 through 25–86, Amendments 25–88 through Amendments 25–90, and Amendments 25–92 through 25–98 with the following exceptions:

- Section 25.783(f) at Amendment 25–23 shall replace § 25.783(f) at Amendment 25–88 for the Aft Cargo Compartment and Main Avionics Bay Doors only (common doors with CL–600–2C10 (CRJ–700);

• Section 25.807(d)(6) at Amendment 25–72 shall replace § 25.807(h) at Amendment 25–94;

• Sections 25.365, 25.831(a), and 25.1447(c) at Amendment 25–87. Part 25, Amendment 25–91, is not included in the type-certification basis.

Additional FAA Requirements for Model CL–600–2D15/CL–600–2D24

1. 14 CFR part 36, effective September 10, 1990, and including all amendments effective on the date of type certification.
2. 14 CFR part 34, effective September 10, 1990, and including all amendments effective on the date of type certification.
3. Special Conditions:
   (a) *High Intensity Radiated Fields,* No. 25–ANM–109, dated October 31, 1995.
   (b) *Go-around Performance Credit for Use of Automatic Power Reserve (APR),* No. 25–167–SC, dated October 24, 2000 (same as CL–600–2C10).
   (c) *Sudden Engine Stoppage,* No. 25–217–SC, dated October 04, 2002.
   (d) *Passenger Seats with Non-traditional, Large, Non-metallic Panels,* No. 25–384–SC, dated August 12, 2009.
4. *Exemptions:* Exemption No. 7447, hydraulic-systems testing per 14 CFR 25.1435(b)(1). Equivalent safety has been established for the following requirements:

CL–600–2D15/CL–600–2D24

1. Section 25.103 and others, *Reduced Minimum Operating Speed Factors.*
2. Section 25.811(d)(2), *Main Door Exit Marking Sign.*
3. Section 25.813(c)(2)(i), *Emergency Exit Access.*
4. Section 25.904*, Performance Credit for Use of APR During Reduced Thrust Takeoff.*
5. Section 25.933(a)(1)(ii), *Thrust Reverser System.*
6. Section 25, appendix I, § 25.5(b)(4), *Lack of On/Off Switch for Automatic Takeoff Thrust Control System (ATTCS).*
7. Section 25.841(b)(6), *High Altitude Takeoff and Landing Operations* documented in Transport Airplane Directorate ELOS Memo AT2587NY–T, dated January 31, 2007.

In addition, the certification basis includes other regulations, special conditions, and exemptions that are not relevant to these special conditions. Type Certificate No. A21EA will be updated to include a complete description of the certification basis for this airplane model.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the CL–600–2E25 because of a novel or unusual design feature, special conditions are prescribed under the provisions of 14 CFR 21.16.

In addition to the applicable airworthiness regulations and special conditions, the CL–600–2E25 must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under 14 CFR 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

Novel or Unusual Design Features

The Bombardier Model CL–600–2E25 airplane will incorporate the following novel or unusual design features:

The CL–600–2E25 airplane will have a CBW rudder-control system that will affect the structural performance of the airplane. The airplane will use a CBW Rudder ECU software as a replacement for the rudder-travel limiter to limit rudder commands. The CBW Rudder ECU controls the rudder, trim, and yaw damping as well.

Discussion

This CBW system can affect the airplane's structural performance, either directly or as a result of failure or malfunction. That is, the CBW system affects how the airplane responds in maneuver and gust conditions, and thereby affects the airplane's structural capability. Such systems represent a novel and unusual feature when compared to the technology envisioned in the current airworthiness standards. Special conditions are needed to require consideration of the effects of the system on the structural capability and aeroelastic stability of the airplane, both in the normal and in the failed state. These special conditions require that the airplane meet the structural requirements of subparts C and D of 14 CFR part 25 when the airplane systems are fully operative. These special conditions also require that the airplane meet these requirements considering failure conditions. In some cases, these special conditions allow reduced margins (in terms of speed margins and factors of safety) for failure conditions, as a function of system reliability.

The Administrator considers these special conditions necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Model CL–600–2E25. Should Bombardier Inc. apply at a later date for a change to the type certificate to include another airplane model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability.

Under standard practice, the effective date of final special conditions would be 30 days after the date of publication in the **Federal Register**. However, as the certification date for the Model CL–600–2E25 is imminent, the FAA finds that good cause exists to make these special conditions effective upon issuance.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

■ The authority citation for these special conditions is as follows:

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

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type-certification basis for Bombardier Model CL–600–2E25 airplanes modified according to DCA 0145–000–00020–2008/FAA (latest revision approved by the FAA).

1. CWB Rudder-Control-System Special Conditions

The Bombardier Model CL–600–2E25 airplane is equipped with systems that affect the airplane's structural performance either directly or as a result of failure or malfunction. The influence of these systems and their failure conditions must be taken into account when showing compliance with requirements of 14 CFR part 25, subparts C and D. The following criteria

must be used for showing compliance with these special conditions for airplanes equipped with flight-control systems, autopilots, stability-augmentation systems, load-alleviation systems, flutter-control systems, fuel-management systems, and other systems that either directly, or as a result of failure or malfunction, affect structural performance. If these special conditions are used for other systems, it may be necessary to adapt the criteria to the specific systems.

(a) The criteria defined here address only direct structural consequences of system responses and performances. They cannot be considered in isolation but should be included in the overall safety evaluation of the airplane. They may, in some instances, duplicate standards already established for this evaluation. These criteria are only applicable to structure the failure of which could prevent continued safe flight and landing. Specific criteria defining acceptable limits on handling characteristics or stability requirements, when operating in the system-degraded or inoperative mode, are not provided in these special conditions.

(b) Depending on the specific characteristics of the airplane, additional studies may be required, which go beyond the criteria provided in these special conditions, to demonstrate the capability of the airplane to meet other realistic conditions such as alternative gust conditions or maneuvers for an airplane equipped with a load-alleviation system.

(c) The following definitions are applicable to these special conditions:

(1) *Structural performance:* The capability of the airplane to meet the structural requirements of part 25.

(2) *Flight limitations:* Limitations that can be applied to the airplane flight conditions following an in-flight failure occurrence, and that are included in the flight manual (speed limitations or avoidance of severe weather conditions, for example).

(3) *Operational limitations:* Limitations, including flight limitations, that can be applied to the airplane operating conditions before dispatch, and which include, for example, fuel, payload, and master minimum-equipment-list limitations.

(4) *Probabilistic terms:* Terms, including probable, improbable, and extremely improbable, used in these special conditions and which are the same as those probabilistic terms used in § 25.1309.

(5) *Failure condition:* The same term as used in § 25.1309. However, in these special conditions, the term "failure condition" applies only to system-failure conditions that affect structural performance of the airplane. Examples are system-failure conditions that induce loads, change the response of the airplane to inputs such as gusts or pilot actions, or lower flutter margins.

Note: Although failure-annunciation-system reliability must be included in probability calculations for paragraph (d)(2) of these special conditions, there is no specific reliability requirement for the annunciation system required in paragraph (e) of these special conditions.

(d) *General.* The following criteria will be used in determining the influence of a system and its failure conditions on the airplane structure:

(1) *System fully operative.* With the system fully operative, the following apply:

(i) Limit loads must be derived in all normal operating configurations of the system from all the limit conditions specified in subpart C of 14 CFR part 25 (or used in lieu of those specified in subpart C), taking into account any special behavior of such a system or associated functions, or any effect on the structural performance of the airplane that may occur up to the limit loads. In particular, any significant degree of nonlinearity in rate of displacement of control surface or thresholds, or any other system nonlinearities, must be accounted for in a realistic or conservative way when deriving limit loads from limit conditions.

(ii) The airplane must meet the strength requirements of part 25 for static strength and residual strength, using the specified factors to derive ultimate loads from the limit loads defined above. The effect of nonlinearities must be investigated beyond limit conditions to ensure the behavior of the system presents no anomaly compared to the behavior below limit conditions. However, conditions beyond limit conditions need not be considered if the applicant demonstrates that the airplane has design features that will not allow it to exceed those limit conditions.

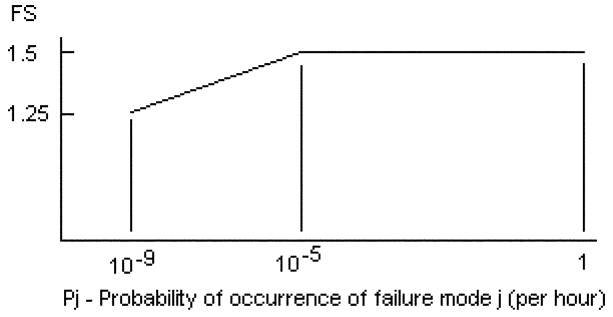
(iii) The airplane must meet the aeroelastic stability requirements of § 25.629.

(2) *System in the failure condition.* For any system failure condition not shown to be extremely improbable, the following apply:

(i) *Establishing loads at the time of occurrence.* Starting from 1g level flight conditions, a realistic scenario including pilot corrective actions must be established to determine loads occurring at the time of failure and immediately after failure.

(A) For static-strength substantiation, these loads, multiplied by an appropriate factor of safety related to probability of occurrence of the failure, are ultimate loads to be considered for design. The factor of safety (FS) is defined in Figure 1.

Figure 1: FS at the time of occurrence



(B) For residual-strength substantiation, the airplane must be able to withstand two-thirds of the ultimate loads defined in paragraph (d)(2)(i)(A) of these special conditions. For pressurized cabins, these loads must be combined with the normal operating differential pressure.

(C) Freedom from aeroelastic instability must be shown up to the speeds defined in § 25.629(b)(2). For failure conditions that result in speeds beyond design cruise speed or design cruise mach number (V_c/M_c), freedom from aeroelastic instability must be shown to increased speeds, so that the margins intended by § 25.629(b)(2) are maintained.

(D) Failures of the system that result in forced structural vibrations (oscillatory failures) must not produce loads that could result in detrimental deformation of primary structure.

(3) *Establishing loads in the system-failed state for the continuation of the flight.* For airplane-flight continuation in the system-failed state, and considering any appropriate reconfiguration and flight limitations, the following apply:

(i) Loads derived from the following conditions (or used in lieu of the following conditions) at speeds up to V_c/M_c, or the speed limitation prescribed for the remainder of the flight, must be determined:

(A) The limit symmetrical-maneuvering conditions specified in §§ 25.331 and 25.345.

(B) The limit gust-and-turbulence conditions specified in §§ 25.341 and 25.345.

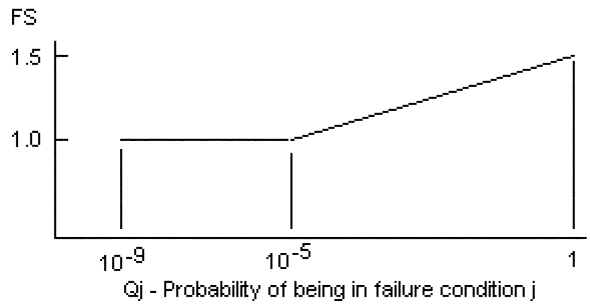
(C) The limit rolling conditions specified in § 25.349 and the limit unsymmetrical conditions specified in §§ 25.367 and 25.427(b) and (c).

(D) The limit yaw-maneuvering conditions specified in § 25.351.

(E) The limit ground-loading conditions specified in §§ 25.473 and 25.491.

(ii) For static-strength substantiation, each part of the structure must be able to withstand the loads in paragraph (d)(3)(i) of these special conditions, multiplied by a FS depending on the probability of being in this failure state. The FS is defined in Figure 2.

Figure 2: FS for continuation of flight



$Q_j = (T_j)(P_j)$

Where:

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per hour)

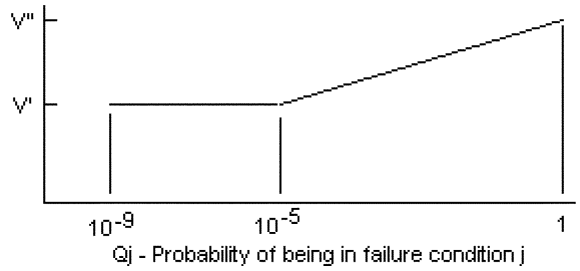
Note: If P_j is greater than 10^{-3} per flight hour, then a 1.5 FS must be applied to all limit-load conditions specified in part 25, subpart C.

(iii) For residual-strength substantiation, the airplane must be able to withstand two-thirds of the ultimate loads defined in paragraph (d)(3)(ii) of these special conditions. For pressurized cabins, these loads must be combined with the normal operating differential pressure.

(iv) If the loads induced by the failure condition have a significant effect on fatigue or damage tolerance, then the effects of these loads must be taken into account.

(v) Freedom from aeroelastic instability must be shown up to a speed determined from Figure 3. Flutter-clearance speeds V′ and V″ may be based on the speed limitation specified for the remainder of the flight using the margins defined by § 25.629(b).

Figure 3: Flutter-clearance speed



V′ = Clearance speed as defined by § 25.629(b)(2)

V″ = Clearance speed as defined by § 25.629(b)(1)

$Q_j = (T_j)(P_j)$

Where:

T_j = Average time spent in failure condition j (in hours)
P_j = Probability of occurrence of failure mode j (per hour)

Note: If P_j is greater than 10^{-3} per flight hour, then the flutter-clearance speed must not be less than V″.

(vi) Freedom from aeroelastic instability must also be shown up to V′ in Figure 3 above, for any probable system-failure condition, combined with any damage, required or selected for investigation by § 25.571(b).

(4) Consideration of certain failure conditions may be required by other sections of part 25 regardless of calculated system reliability. Where analysis shows the probability of these failure conditions to be less than 10^{-9}, criteria other than those specified in this paragraph may be used for structural substantiation to show continued safe flight and landing.

(e) *Failure indications.* For system failure detection and indication, the following apply:

(1) The system must be checked for failure conditions, not extremely improbable, that degrade the structural capability of the airplane below the level required by part 25 or significantly reduce the reliability of the remaining system. As far as reasonably practicable, the flightcrew must be made aware of these failures before flight. Certain elements of the control system, such as mechanical and hydraulic components, may use special periodic inspections, and electronic components may use daily checks, instead of detection and indication systems to achieve the objective of this requirement. Such certification-maintenance inspections or daily checks must be limited to components on which faults are not readily detectable by normal detection and indication systems, and where service history shows that inspections will provide an adequate level of safety.

(2) The existence of any failure condition, not extremely improbable during flight, that could significantly affect the structural capability of the airplane and for which the associated reduction in airworthiness can be minimized by suitable flight limitations, must be signaled to the flightcrew. For example, failure conditions that result in a FS between the airplane strength and the loads of part 25, subpart C, below 1.25, or flutter margins below V″, must be signaled to the crewmembers during flight.

(f) *Dispatch with known failure conditions.* If the airplane is to be dispatched in a known system-failure condition that affects structural performance, or affects the reliability of the remaining system to maintain structural performance, then the provisions of these special conditions must be met, including the provisions of paragraph (d)(1) of these special conditions for the dispatched condition, and paragraph (d)(2) of these special conditions for subsequent failures. Expected operational limitations may be taken into account in establishing P_j as the probability of failure occurrence for determining the safety margin in Figure 1. Flight limitations and expected operational limitations may be taken into account in establishing Q_j as the combined probability of being in the dispatched failure condition and the subsequent failure condition for the safety margins in Figures 2 and 3. These limitations must be such that the probability of being in this combined failure state, and then subsequently encountering limit load conditions, is extremely improbable. No reduction in these safety margins is allowed if the subsequent system-failure rate is greater than 10^{-3} per hour.

Issued in Renton, Washington, on November 5, 2010.

Jeffrey Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–28999 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0732; Directorate Identifier 2010–NE–04–AD; Amendment 39–16509; AD 2010–23–20]

RIN 2120–AA64

Airworthiness Directives; General Electric Company (GE) CT7–9C and –9C3 Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD requires inspecting certain serial number (S/N) gas generator turbine (GGT) shafts for nonconforming land balance-cuts, and if found, removing the shaft from service. This AD was prompted by reports of a manufacturing quality problem. We are issuing this AD to detect nonconforming GGT shaft land balance-cuts, which could result in the shaft failing before its published life limit, and which could result in an uncontained engine failure and damage to the airplane.

DATES: This AD is effective December 22, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of December 22, 2010.

ADDRESSES: For service information identified in this AD, contact General Electric Company, GE–Aviation, Room 285, 1 Neumann Way, Cincinnati, Ohio 45215; e-mail *geae.aoc@ge.com;* telephone (513) 552–3272; fax (513) 552–3329. You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call (781) 238–7125.

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 (phone: 800–647–5527) is 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: Walter Meibaum, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; telephone (781) 238–7119; fax (781) 238–7199; e-mail: *walter.meibaum@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to the specified products. That NPRM published in the **Federal Register** on July 23, 2010 (75 FR 43099). That NPRM proposed to require inspecting certain S/N GGT shafts, P/N 6068T44P02, for nonconforming land balance-cuts, and if found, replacing the shaft.

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 relevant data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD affects five engines installed on airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspect	1 work-hour × $85 per hour = $85.		$85	$425
Replace shaft	1.5 work-hour × $85 per hour = $127.50.	$28,633	28,760.50	143,802
Total				144,227

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

(3) Will not affect intrastate aviation in Alaska, and

(4) 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.

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 airworthiness directive (AD):

2010–23–20 General Electric Company (GE): Amendment 39–16509; Docket No. FAA–2010–0732; Directorate Identifier 2010–NE–04–AD.

Effective Date

(a) This AD is effective December 22, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to GE CT7–9C and –9C3 turboprop engines with gas generator turbine (GGT) shafts, part number (P/N) 6068T44P02, that have a serial number (S/N) listed in Table 1 of this AD, installed. These engines are installed on, but not limited to, EADS CASA (formerly Construcciones Aeronauticas, S.A.) CN–235 series airplanes.

TABLE 1—AFFECTED GGT SHAFT S/NS

Affected Shaft S/Ns			
GATHHCPC	GATHHJR7	GATHHJR9	GATHHKG6
GATHHM9R	GATHHWM3	GATHJ4ED	GATHJ9FL
GATHJ19J	GATHJE8P	GATHJWWR	GATHK0KM
GATHK2N1	GATHK3M3	GATHK90K	GATHK96D
GATHKF9R	GATHKH36	GATHKMP7	GATHKRKN
NCE715DA			

Unsafe Condition

(d) This AD results from reports of a manufacturing quality problem. We are issuing this AD to detect nonconforming GGT shaft land balance-cuts, which could result in the shaft failing before its published life limit, and which could result in an uncontained engine failure and damage to the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed at the first shop visit after the effective date of this AD, or within 5,000 cycles-

since-new, whichever occurs first, unless the actions have already been done.

Inspection for Nonconforming Land Balance-Cuts

(f) For CT7–9C and –9C3 engines with a GGT shaft, P/N 6068T44P02, that has a S/N listed in Table 1 of this AD, installed, inspect the shaft for nonconforming land balance-cuts. Use the Accomplishment Instructions 3.A.(1) through 3.A.(4) of GE CT7–TP Alert Service Bulletin 72–A0501, Revision 01, dated March 3, 2010, to perform the inspection.

(g) If you find any nonconforming land balance-cuts, remove the shaft from service.

Alternative Methods of Compliance

(h) 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

(i) For more information about this AD, contact Walter Meibaum, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; telephone (781) 238–7119; fax (781) 238–7199; e-mail: *walter.meibaum@faa.gov.*

Material Incorporated by Reference

(j) You must use GE CT7–TP Alert Service Bulletin 72–A0501, Revision 01, dated March 3, 2010, 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 GE CT7–TP Alert Service Bulletin 72–A0501, Revision 01, dated March 3, 2010, under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact General Electric Company, GE–Aviation, Room 285, 1 Neumann Way, Cincinnati, Ohio 45215; e-mail *geae.aoc@ge.com;* telephone (513) 552–3272; fax (513) 552–3329.

(3) You may review copies of the service information at the FAA, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call (781) 238–7125.

(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 an NARA facility, 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 October 29, 2010.

Peter A. White,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2010–28449 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0522; Directorate Identifier 2010–CE–022–AD; Amendment 39–16506; AD 2010–23–17]

RIN 2120–AA64

Airworthiness Directives; Various Aircraft Equipped With Rotax Aircraft Engines 912 A Series Engines

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:

This Airworthiness Directive (AD) results from reports of cracks in the engine crankcase. Austro Control GmbH (ACG) addressed the problem by issuing AD No 107R3 which was superseded by ACG AD A–2004–01.

The present AD supersedes the ACG AD A–2004–01. On one hand, introduction by Rotax of an optimized crankcase assembly has permitted to reduce applicability of the new AD, when based on engines' serial numbers (s/n). On the other hand, applicability is extended for some engines that may have been fitted with certain crankcase s/n, supplied as spare parts.

In addition, accomplishment instructions given through the relevant Service Bulletins (SB) have been detailed to better locate engine's areas that are to be scrutinised.

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

DATES: This AD becomes effective December 22, 2010.

On December 22, 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 service information identified in this AD, contact BRP–Powertrain GMBH & Co KG, Welser Strasse 32, A–4623 Gunskirchen, Austria; phone: (+43) (0) 7246 601–0; fax: (+43) (0) 7246 6370; Internet: *http://www.rotax.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

FOR FURTHER INFORMATION CONTACT: Sarjapur Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4145; fax: (816) 329–4090 e-mail: *sarjapur.nagarajan@faa.gov.*

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 21, 2010 (75 FR 28504). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

This Airworthiness Directive (AD) results from reports of cracks in the engine crankcase. Austro Control GmbH (ACG) addressed the problem by issuing AD No 107R3 which was superseded by ACG AD A–2004–01.

The present AD supersedes the ACG AD A–2004–01. On one hand, introduction by Rotax of an optimized crankcase assembly has permitted to reduce applicability of the new AD, when based on engines' serial numbers (s/n). On the other hand, applicability is extended for some engines that may have been fitted with certain crankcase s/n, supplied as spare parts.

In addition, accomplishment instructions given through the relevant Service Bulletins (SB) have been detailed to better locate engine's areas that are to be scrutinised.

Comments

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

Request To Change AD 2002–16–26

Robert Seton of Rotech Research Canada Ltd. requested information regarding if AD 2006–16–26 would be changed to incorporate the same terminating action specified in this AD. We infer that he wants us to supersede

AD 2002–16–26 with a new AD that incorporates the same terminating action. Mr. Seton also commented there was confusion regarding the starting serial number range for the new crankcase.

We agree with the comment that AD 2002–16–26 should be superseded. AD 2002–16–26 does address the same unsafe condition, but that AD applies to a different group of products. On October 4, 2010, AD 2010–20–23, Amendment 39–16458 (75 FR 61046, October 4, 2010) was published and is effective on November 8, 2010. AD 2010–20–23 supersedes AD 2002–16–26 and added the following terminating action:

(k) Installing a crankcase that has a S/N above 27811 terminates the inspection requirements of paragraphs (g)(1) through (g)(4) and (h) of this AD.

The wording for the applicable starting S/N for the terminating action in AD 2010–20–23 is slightly different than what was in the proposed rulemaking for this final rule AD. To clarify the starting S/N for the terminating action, we changed the starting S/N in this final rule AD action to match AD 2010–20–23.

Conclusion

We reviewed the available data, including the comment 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 FAA policies. Any such differences are highlighted in a **Note** within the AD.

Costs of Compliance

We estimate that this AD will affect 60 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 to the U.S. operators to be $15,300, or $255 per product.

In addition, we estimate that any necessary follow-on actions will take about 20 work-hours and require parts costing $6,500, for a cost of $8,200 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:

2010–23–17 Various Aircraft: Amendment 39–16506; Docket No. FAA–2010–0522; Directorate Identifier 2010–CE–022–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 22, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all serial numbers (S/N) of the following aircraft, equipped with a Rotax Aircraft Engines 912 A series engine with a crankcase assembly S/N up to and including S/N 27811, certificated in any category:

Type certificate holder	Aircraft model	Engine model
Aeromot-Industria Mecanico Metalurgica ltda	AMT–200	912 A2
Diamond Aircraft Industries	HK 36 R "SUPER DIMONA"	912 A
Diamond Aircraft Industries GmbH	HK 36 TS	912 A3
	HK 36 TC	912 A3
Diamond Aircraft Industries Inc.	DA20–A1	912 A3
HOAC-Austria	DV 20 KATANA	912 A3
Iniziative Industriali Italiane S.p.A.	Sky Arrow 650 TC	912 A2
SCHEIBE-Flugzeugbau GmbH	SF 25C	912 A2 or 912 A3

Subject

(d) Air Transport Association of America (ATA) Code 72: Engine.

Reason

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

This Airworthiness Directive (AD) results from reports of cracks in the engine crankcase. Austro Control GmbH (ACG) addressed the problem by issuing AD No 107R3 which was superseded by ACG AD A–2004–01.

The present AD supersedes the ACG AD A–2004–01. On one hand, introduction by Rotax of an optimized crankcase assembly has permitted to reduce applicability of the new AD, when based on engines' serial numbers (s/n). On the other hand, applicability is extended for some engines that may have been fitted with certain crankcase s/n, supplied as spare parts.

In addition, accomplishment instructions given through the relevant Service Bulletins (SB) have been detailed to better locate engine's areas that are to be scrutinised.

The aim of this AD is to ensure that the requested engine power is available at any time to prevent a sudden loss of power that could lead to a hazardous situation in a low altitude phase of flight.

The MCAI requires inspecting certain crankcases for cracks and replacing the crankcase if cracks are found.

Actions and Compliance

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

(1) Within the next 50 hours time-in-service (TIS) after December 22, 2010 (the effective date of this AD), inspect the engine crankcase for cracks following Rotax Aircraft Engines Service Bulletin SB–912–029 R3, dated July 11, 2006. Repetitively thereafter do the inspection at each 100-hour, annual, or progressive inspection or within 110 hours TIS since last inspection, whichever occurs first.

(2) If cracks in the engine crankcase are found during any inspection required by paragraph (f)(1) of this AD, before further flight, replace the crankcase following Rotax Aircraft Engines Service Bulletin SB–912–029 R3, dated July 11, 2006.

(3) Installing a crankcase that has a S/N above 27811 terminates the inspection requirements of paragraph (f)(1) of this AD.

Note 1: The service information is a combined service bulletin for both the 912 type (Service Bulletin SB–912–029 R3, dated July 11, 2006) and 914 type (Service Bulletin SB–914–018, Revision 3, dated July 11, 2006) engines. This AD does not reference Service Bulletin SB–914–018, Revision 3, dated July 11, 2006, because this AD does not apply to the 914 series engines. This unsafe condition for the 914 type engines is the subject of AD 2010–20–23.

FAA AD Differences

Note 2: 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: Sarjapur Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4145; fax: (816) 329–4090; e-mail: *sarjapur.nagarajan@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, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

Special Flight Permit

(h) We are limiting the special flight permits for this AD by the following conditions if the crankcase is cracked or there is evidence of oil leakage from the crankcase:

(1) Perform a leak check as follows:

(i) Clean the crankcase surface to remove any oil.

(ii) Warm up the engine to a minimum oil temperature of 50 degrees C (120 degrees F). Information about warming up the engine can be found in the applicable line maintenance manual.

(iii) Accelerate the engine to full throttle and stabilize at full throttle speed for a time period of 5 to 10 seconds. Information about performing a full throttle run can be found in the applicable line maintenance manual.

(iv) Shutdown after running the engine at idle only long enough to prevent vapor locks in the cooling system and fuel system.

(v) Inspect the crankcase for evidence of oil leakage. Oil wetting is permitted, but oil leakage of more than one drip in 3 minutes after engine shutdown is not allowed.

(2) Check the crankcase mean pressure to confirm that it is 1.46 pounds-per-square inch gage (psig) (0.1 bar) or higher when checked at takeoff power to ensure proper return of oil from the crankcase to the oil tank. Information about checking crankcase mean pressure is available in the Lubrication System section of the applicable engine installation manual.

(3) A ferry flight is not allowed if oil leakage exceeds one drip in 3 minutes or if crankcase mean pressure is below 1.46 psig.

Related Information

(i) Refer to MCAI EASA AD No.: 2007–0025, dated February 1, 2007, for related information.

Material Incorporated by Reference

(j) You must use Rotax Aircraft Engines Service Bulletin SB–912–029 R3, dated July 11, 2006, 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 BRP–Powertrain GMBH & Co KG, Welser Strasse 32, A–4623 Gunskirchen, Austria; phone: (+43) (0) 7246 601–0; fax: (+43) (0) 7246 6370; Internet: *http://www.rotax.com.*

(3) You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information

on the availability of this material at the FAA, call (816) 329–4148.

(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 November 1, 2010.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–27980 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0490; Directorate Identifier 2010–SW–037–AD; Amendment 39–16514; AD 2010–23–24]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation (Sikorsky) Model S–70A and S–70C Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the Sikorsky Model S–70A and S–70C helicopters. This AD requires an ultrasonic test (UT) inspection of the tail gearbox output bevel gear (gear) for a crack. If you find a crack, replacing the gear with an airworthy gear is required before further flight. This AD is prompted by three gear cracking incidents, one of which resulted in the tail rotor separating from the helicopter. The actions specified by this AD are intended to detect a crack in the gear to prevent a tail rotor separating, loss of tail rotor control, and subsequent loss of control of the helicopter.

DATES: Effective December 22, 2010.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 22, 2010.

ADDRESSES: You may get the service information identified in this AD from Sikorsky Aircraft Corporation, Attn: Manager, Commercial Technical Support, mailstop s581a, 6900 Main Street, Stratford, CT, telephone (203) 383–4866, e-mail address *tsslibrary@sikorsky.com*, or at *http://www.sikorsky.com.*

Examining the Docket: You may examine the docket that contains this AD, any comments, and other information on the Internet at *http://www.regulations.gov* or at the Docket Operations office, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Michael Schwetz, Aviation Safety Engineer, Boston Aircraft Certification Office, 12 New England Executive Park, Burlington, MA 01803, telephone (781) 238–7761, fax (781) 238–7170.

SUPPLEMENTARY INFORMATION: A proposal to amend 14 CFR part 39 to include an AD for the specified model helicopters was published in the **Federal Register** on May 13, 2010 (75 FR 26888). That action proposed to require a UT inspection of the gear for a crack and replacing any cracked gear before further flight. The proposal was prompted by three gear crack incidents, one of which resulted in the tail rotor separating from the helicopter. The tail gearbox on the helicopter where the tail rotor separated from the helicopter experienced a fracture of the output shaft spline that drives the tail rotor blades. An investigation into the cause of the cracks is ongoing. The unsafe condition described previously, if not corrected, could result in a tail rotor separating, loss of tail rotor control, and subsequent loss of control of the helicopter.

We have reviewed Sikorsky Alert Service Bulletin No. 70–06–28A, Revision A, dated May 21, 2009 (ASB), which refers to procedures for a UT inspection of the gear in accordance with Special Service Instructions (SSI) No. 70–121A or latest revision.

This unsafe condition is likely to exist or develop on other helicopters of the same type design. Therefore, this AD requires a UT inspection of the gear, part number 70358–06620, for a crack. If a crack is found, this AD requires replacing the gear with an airworthy gear before further flight. The actions are required to be to be done by following the SSI described previously.

We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public. Therefore, we are adopting the action as proposed with only minor non-substantive changes.

We estimate that this AD affects 5 helicopters in the U.S. registry. The actions will take about 4 work hours per helicopter at an average labor rate of $85 per work hour. Required parts cost about $20,000 for each gear. Based on these figures, we estimate the total cost impact of this AD on U.S. operators to be $101,700, assuming the gear is replaced on the entire fleet.

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 the regulation:

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

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

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

We prepared an economic evaluation of the estimated costs to comply with this AD. *See* the AD docket to examine the economic evaluation.

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 AD.

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

2010–23–24 Sikorsky Aircraft Corp.: Amendment 39–16514; Docket No. FAA–2010–0490; Directorate Identifier 2010–SW–037–AD.

Applicability: Model S–70A and S–70C helicopters with a tail gearbox output bevel gear (gear), part number 70358–06620, certificated in any category.

Compliance: Required as indicated.

To prevent a tail rotor separating, loss of tail rotor control, and subsequent loss of control of the helicopter, do the following:

(a) Within 500 hours time-in-service (TIS), unless accomplished previously, and thereafter at intervals not to exceed 500 hours TIS, remove the tail rotor servo control and pitch beam shaft, and using a Level II Ultrasonic Testing Technician or equivalent, ultransonic inspect the gear for a crack. Ultrasonic inspect the gear by following paragraphs A.(5)a. through A(5)n. of Special Service Instructions No. 70–121A, Revision A, dated May 21, 2009. If you find a crack, before further flight, replace the gear with an airworthy gear.

(b) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Manager, Boston Aircraft Certification Office, FAA, *Attn:* Michael Schwetz, Aviation Safety Engineer, Boston Aircraft Certification Office, 12 New England Executive Park, Burlington, MA 01803, telephone (781) 238–7761, fax (781) 238–7170, for information about previously approved alternative methods of compliance.

(c) The Joint Aircraft System/Component (JASC) Code is 6520: Tail rotor gearbox.

(d) The inspections shall be done in accordance with the specified portions of Sikorsky Special Service Instructions No. 70–121A, Revision A, dated May 21, 2009. The Director of the Federal Register approved this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Sikorsky Aircraft Corporation, Attn: Manager, Commercial Technical Support, mailstop s581a, 6900 Main Street, Stratford, CT, telephone (203) 383–4866, e-mail address *tsslibrary@sikorsky.com*, or at *http://www.sikorsky.com.* Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 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.*

(e) This amendment becomes effective on December 22, 2010.

Issued in Fort Worth, Texas, on November 1, 2010.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2010–28458 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0376; Directorate Identifier 2009–NM–267–AD; Amendment 39–16504; AD 2010–23–15]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 777–200, –200LR, –300, and –300ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Model 777–200, –200LR, –300, and –300ER series airplanes. This AD requires removing and repairing the sealant at the four lower corners of the wing center section and the four lower t-chord segment gaps on each side of the wing center section. This AD results from reports of fuel leakage from the center tank. We are issuing this AD to detect and correct improperly applied sealant, which could result in the disbonding and displacing of sealant, and consequent fuel leaks. On the ground, uncontained fuel leakage could result in pooling, and pooling combined with an ignition source could result in a fire.

DATES: This AD is effective December 22, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of December 22, 2010.

ADDRESSES: For service information identified in this 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.*

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: Kevin Nguyen, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6501; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Model 777–200, –200LR, –300, and –300ER series airplanes. That NPRM was published in the **Federal Register** on April 8, 2010 (75 FR 17889). That NPRM proposed to require removing and repairing the sealant at the four lower corners of the wing center section and the four lower t-chord segment gaps on each side of the wing center section.

Comments

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

Support for the NPRM

Continental Airlines (CAL) stated that it concurs with intent of the NRPM to ensure a high level of safety for the Model 777 airplane fleet.

Request to Include Revised Inspection Criteria in Revised Service Information

Boeing requested that we revise the NPRM to refer to Revision 2 of Boeing Special Attention Service Bulletin 777–57–0063. Boeing stated that this revision includes an alternative inspection, and, depending on the inspection findings, it may be unnecessary to remove and replace the sealant. Furthermore, Boeing requested that we provide credit for actions accomplished in accordance with Boeing Special Attention Service Bulletin 777–57–0063, Revision 1, dated May 14, 2009.

CAL also requested a provision to allow the inspection of the sealant condition in the affected areas before the sealant repair that is specified by Boeing Special Attention Service Bulletin 777–57–0063, Revision 1, dated

May 14, 2009. CAL stated it believes that the additional inspection of the sealant is required to prevent unnecessary corrective actions on the affected airplanes that do not have the fuel leakage problems. CAL based its recommendation on its two affected airplanes that have not had any abnormal fuel leakage. CAL stated that Boeing has agreed that such a provision is acceptable to ensure an adequate level of safety. CAL asked that we revise the proposed AD to include the additional inspection criteria.

We infer that Boeing is asking us to revise the NPRM to add an additional inspection for sealant that Boeing plans to include in the next revision of the service information. We agree that an alternative inspection may prevent unnecessarily removing the sealant. However, we do not agree to delay this AD action until after Boeing revises the service bulletin, since sufficient methods specified in Boeing Special Attention Service Bulletin 777–57–0063, Revision 1, dated May 14, 2009, address the unsafe condition within the compliance time. However, after reviewing the next revision of this service bulletin, we might consider approving it as an alternative method of compliance (AMOC), if requested. In addition, any operator may request approval of an AMOC under the provisions of paragraph (i) of the final rule if data are submitted to substantiate that such a request would provide an acceptable level of safety. We have not changed this final rule in regard to this issue.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD affects 8 airplanes of U.S. registry. We also estimate that it will take about 10 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 this AD to the U.S. operators to be $6,800, 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

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2010–23–15 The Boeing Company: Amendment 39–16504. Docket No. FAA–2010–0376; Directorate Identifier 2009–NM–267–AD.

Effective Date

(a) This airworthiness directive (AD) is effective December 22, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to The Boeing Company Model 777–200, –200LR, –300, and –300ER series airplanes, certificated in any category; as identified in Boeing Special Attention Service Bulletin 777–57–0063, Revision 1, dated May 14, 2009.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Unsafe Condition

(e) This AD results from reports of fuel leakage from the center tank. We are issuing this AD to detect and correct improperly applied sealant, which could result in the disbonding and displacing of sealant, and consequent fuel leaks. On the ground, uncontained fuel leakage could result in pooling, and pooling combined with an ignition source could result in a fire.

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.

Removal and Repair of Sealant

(g) Within 36 months or 6,000 flight cycles after the effective date of this AD, whichever occurs first: Remove and repair the sealant at the four lower corners of the wing center section and the four lower t-chord segment gaps on each side of the wing center section, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–57–0063, Revision 1, dated May 14, 2009.

Credit for Actions Accomplished According to Previous Issue of Service Bulletin

(h) Actions accomplished before the effective date of this AD in accordance with Boeing Special Attention Service Bulletin 777–57–0063, dated November 20, 2008, are considered acceptable for compliance with the corresponding action specified in this AD.

Alternative Methods of Compliance (AMOCs)

(i)(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: Kevin Nguyen, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6501; 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 reference this AD.

Material Incorporated by Reference

(j) You must use Boeing Special Attention Service Bulletin 777–57–0063, Revision 1, dated May 14, 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 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.*

(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 October 22, 2010.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–28176 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0670; Directorate Identifier 2009–SW–42–AD; Amendment 39–16513; AD 2010–23–23]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France (ECF) Model SA330F, G, and J; and AS332C, L, L1, and L2 Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the specified ECF model helicopters. This AD results from a mandatory continuing airworthiness information (MCAI) AD issued by the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community. The MCAI AD states that EASA received a report of a rear hinged door on a Model AS332L1 helicopter opening in flight without loss of the door. Examinations revealed incorrect positioning of a door catch that resulted in incorrect locking and uncontrolled opening of the door. This condition, if not detected and corrected, can lead to the loss of the hinged door in flight, damage to the main or tail rotor blades, and subsequent loss of control of the helicopter.

DATES: This AD becomes effective on December 22, 2010.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 22, 2010.

ADDRESSES: You may examine the AD docket on the Internet at *http://regulations.gov* or in person at the Docket Operations office, U.S. Department of Transportation, M–30, 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.

You may get the service information identified in this AD from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, TX 75053–4005, telephone (800) 232–0323, fax (972) 641–3710, or at *http://www.eurocopter.com.*

Examining the AD Docket: The AD docket contains the Notice of proposed rulemaking (NPRM), the economic evaluation, any comments received, and other information. The street address and operating hours for the Docket Operations office (telephone (800) 647–5527) are in the **ADDRESSES** section of this AD. Comments will be available in the AD docket shortly after they are received.

FOR FURTHER INFORMATION CONTACT: DOT/FAA Southwest Region, Gary Roach, ASW–111, Aviation Safety Engineer, Rotorcraft Directorate, Regulations and Guidance Group, 2601 Meacham Blvd, Fort Worth, Texas 76137, telephone (817) 222–5130, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Discussion

We issued an NPRM to amend 14 CFR part 39 to include an AD that would apply to the specified ECF model helicopters on June 11, 2010. That NPRM was published in the **Federal Register** on July 7, 2010 (75 FR 38956). That NPRM proposed to require:

- Within the next 220 hours time-in-service (TIS) or 6 months, whichever occurs first, inspecting the positioning of each lower and upper door catch; and
- If any door catch is improperly installed, before further flight, replacing the affected catch, adjusting the micro-switches, and doing a functional test of the hinged door indicating system.

Comments

By publishing the NPRM, we gave the public an opportunity to participate in developing this AD. However, we received no comment on the NPRM or on our determination of the cost to the public. Therefore, based on our review and evaluation of the available data, we have determined that air safety and the public interest require adopting the AD as proposed.

Related Service Information

ECF has issued Alert Service Bulletin (ASB) No. 52.13 for the SA330F, G, and J helicopters, and 52.00.38 for the AS332C, C1, L, L1, and L2 helicopters, both ASBs dated December 1, 2008. The ASBs specify inspecting the upper and lower catches of the hinged doors to ensure the catches are correctly positioned. The actions described in the MCAI AD are intended to correct the unsafe condition identified in the service information. The AS332C1 is not type certificated in the United States.

FAA's Evaluation and Unsafe Condition Determination

These helicopters have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, their Technical Agent, has notified us of the unsafe condition described in the MCAI AD. We are issuing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs.

Differences Between This AD and the MCAI AD

We refer to flight hours as hours TIS. This AD does not apply to the Model AS332C1 because that model is not FAA type certificated.

Costs of Compliance

We estimate that this AD will affect about 10 helicopters of U.S. registry. We also estimate that it will take about 2 work-hours per helicopter to inspect each door catch for correct position of the door hinges, replace an affected

catch, adjust the micro-switches of the hinged door, and do a functional test. The average labor rate is $85 per work-hour. The cost of the required parts is minimal. Based on these figures, we estimate that the cost of this AD on U.S. operators is $1,700.

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 the regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. We prepared an economic evaluation of the estimated costs to comply with this AD. See the AD docket to examine the economic evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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 adding the following new AD:

2010–23–23 Eurocopter France: Amendment 39–16513; Docket No. FAA–2010–0670; Directorate Identifier 2009–SW–42–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective on December 22, 2010.

Other Affected ADs

(b) None.

Applicability

(c) This AD applies to Model SA330F, G, J, and AS332C, L, L1, and L2 helicopters, certificated in any category.

Reason

(d) The mandatory continuing airworthiness information (MCAI) AD states that EASA received a report of a rear hinged door on a Model AS332L1 helicopter opening in flight without loss of the door. Examinations revealed incorrect positioning of a door catch that resulted in incorrect locking and uncontrolled opening of the door. This condition, if not detected and corrected, can lead to the loss of the hinged door in flight, damage to the main or tail rotor blades, and subsequent loss of control of the helicopter.

Actions and Compliance

(e) Required as indicated:

(1) Within the next 220 hours time-in-service (TIS) or 6 months, whichever occurs first, unless done previously, inspect the position of each upper and lower door catch:

(i) As depicted in Figures 1 through 4 and by following the Accomplishment Instructions, Table 1 of paragraph 2.B.2., of Alert Service Bulletin (ASB) No. 52.13, dated December 1, 2008 (ASB 52.13) for the Model SA330F, G, and J helicopters, or

(ii) As depicted in Figures 1 through 5 and by following the Accomplishment Instructions, Table 1 of paragraph 2.B.2. of ASB No. 52.00.38, dated December 1, 2008 (ASB 52.00.38) for the Model AS332C, L, L1, and L2 helicopters.

(2) Before further flight, replace each improperly positioned catch by following the Accomplishment Instructions, paragraphs 2.B.3. and 2.B.4., of ASB 52.13 or ASB 52.00.38, as appropriate for your model helicopter.

(3) Before further flight, adjust each micro-switch, and conduct a functional test of the hinged-door indicating system:

(i) By following the Accomplishment Instructions, paragraph 2.B.5. and 2.B.6., of ASB 52.13, for the Model SA330F, G, and J helicopters, or

(ii) By following the Accomplishment Instructions, paragraph 2.B.5.a. through 2.B.5.b. of ASB 52.00.38 for the Model AS332C, L, L1, and L2 helicopters.

Differences Between This AD and the MCAI AD

(f) We refer to flight hours as hours TIS. This AD does not apply to the Model AS332C1 because that model is not FAA type certificated.

Other Information

(g) Alternative Methods of Compliance (AMOCs): The Manager, Safety Management Group, ATTN: DOT/FAA Southwest Region, Gary Roach, ASW–111, Aviation Safety Engineer, Rotorcraft Directorate, Regulations and Guidance Group, 2601 Meacham Blvd, Fort Worth, Texas 76137, telephone (817) 222–5130, fax (817) 222–5961, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(h) EASA MCAI AD No. 2009–0015, dated January 21, 2009, contains related information.

Joint Aircraft System/Component (JASC) Code

(i) The JASC Code is 5200: Doors.

Material Incorporated by Reference

(j) You must use the specified portions of Eurocopter Alert Service Bulletin No.52.00.38 or No. 52.13, both dated December 1, 2008, to do the actions required.

(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 American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, TX 75053–4005, telephone (800) 232–0323, fax (972) 641–3710, or at *http://www.eurocopter.com.*

(3) You may review copies at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd, Fort Worth, Texas 76137; 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 Fort Worth, Texas, on November 1, 2010.

Kim Smith,

Manager, Rotocraft Directorate, Aircraft Certification Service.

[FR Doc. 2010–28455 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0699; Directorate Identifier 2009–NM–236–AD; Amendment 39–16510; AD 2010–23–21]

RIN 2120–AA64

Airworthiness Directives; Viking Air Limited (Type Certificate Previously Held by Bombardier, Inc.) Model DHC–7 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:

Viking Air Limited has completed a system safety review of the aircraft fuel system against fuel tank safety standards introduced in Chapter 525 of the Airworthiness Manual through Notice of Proposed Amendment (NPA) 2002–043. The identified non-compliances were then assessed using Transport Canada Policy Letter No. 525–001, to determine if mandatory corrective action is required.

The assessment showed that supplemental maintenance tasks would be required to prevent potential ignition sources within the fuel system, which could result in a fuel tank explosion. * * *

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

DATES: This AD becomes effective December 22, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 22, 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: Richard Fiesel, 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) 228–7304; 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 July 23, 2010, (75 FR 43092). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Viking Air Limited has completed a system safety review of the aircraft fuel system against fuel tank safety standards introduced in Chapter 525 of the Airworthiness Manual through Notice of Proposed Amendment (NPA) 2002–043. The identified non-compliances were then assessed using Transport Canada Policy Letter No. 525–001, to determine if mandatory corrective action is required.

The assessment showed that supplemental maintenance tasks would be required to prevent potential ignition sources within the fuel system, which could result in a fuel tank explosion. Viking Air Limited has revised Chapter 5 of the DHC–7 Maintenance Manual, PSM 1–7–2, to introduce the required maintenance tasks.

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

Clarification of Table Reference

Table 1—Temporary Revisions of the NPRM has a typographical error. "FLS–06" is corrected in Table 1 of this AD to "FSL–06."

Clarification of Viking DHC–7 Dash 7 Maintenance Manual Section Number

Paragraph (g) of the NPRM has a typographical error. "Section 5–10–30" is corrected in paragraph (g) of this AD to "Section 5–10–13."

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD with the correction described previously. We determined that this correction 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 11 products of U.S. registry. We also estimate that it will take about 1 work-hour 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 to the U.S. operators to be $935, or $85 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:

2010–23–21 Viking Air Limited (Type Certificate Previously Held by Bombardier, Inc.): Amendment 39–16510. Docket No. FAA–2010–0699; Directorate Identifier 2009–NM–236–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 22, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Viking Air Limited (Type Certificate previously held by Bombardier, Inc.) Model DHC–7–1, DHC–7–100, DHC–7–101, DHC–7–102, and DHC–7–103 airplanes; certificated in any category.

Subject

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

Reason

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

Viking Air Limited has completed a system safety review of the aircraft fuel system against fuel tank safety standards introduced in Chapter 525 of the Airworthiness Manual through Notice of Proposed Amendment (NPA) 2002–043. The identified non-compliances were then assessed using Transport Canada Policy Letter No. 525–001, to determine if mandatory corrective action is required.

The assessment showed that supplemental maintenance tasks would be required to prevent potential ignition sources within the fuel system, which could result in a fuel tank explosion. * * *

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

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) Within 60 days after the effective date of this AD, incorporate all the fuel system limitation (FSL) tasks as specified in the temporary revisions (TR) listed in Chapter 5 of the Viking Dash 7 Series 1/100 Aircraft Maintenance Manual (AMM), PSM 1–7–2; and incorporate Section 5–10–13, as specified in Viking Air Limited TR 5–106, dated December 15, 2008, to Chapter 5 of the Viking Dash 7 Series 100 Maintenance Manual PSM 1–7–2.

Note 1: This may be done by inserting copies of the TRs identified in paragraph (g) of this AD in the AMM. When these TRs have been included in general revisions of the AMM, the general revisions may be inserted in the AMM, provided the relevant information in the general revision is identical to that in the TRs identified in paragraph (g) of this AD.

(h) At the applicable time specified in paragraphs (h)(1), (h)(2), (h)(3), and (h)(4) of this AD, do the initial inspections in accordance with the applicable TR identified in Table 1 of this AD.

(1) For Tasks FSL–01, FSL–02, FSL–03, FSL–04 and FSL–05: Inspect at the later of the times specified in paragraphs (h)(1)(i) and (h)(1)(ii) of this AD.

(i) Prior to the accumulation of 18,000 total flight hours.

(ii) Within 6,000 flight hours or within 36 months after the effective date of this AD, whichever occurs first.

(2) For Task FSL–06: Inspect at the later of the times specified in paragraphs (h)(2)(i) and (h)(2)(ii) of this AD.

(i) Prior to the accumulation of 40,000 total flight hours.

(ii) Within 6,000 flight hours or within 36 months after the effective date of this AD, whichever occurs first.

(3) For Task FSL–07: Within 1 month after the effective date of this AD.

(4) For Task FSL–08: Inspect at the later of the times specified in paragraphs (h)(4)(i) and (h)(4)(ii) of this AD.

(i) Prior to the accumulation of 4,000 total flight hours.

(ii) Within 2,000 flight hours or within 12 months after the effective date of this AD, whichever occurs first.

TABLE 1—TEMPORARY REVISIONS

Task—	Viking TR—	Date—
FSL–01	5–107	December 15, 2008.
FSL–02	5–108	December 15, 2008.
FSL–06	5–109	December 15, 2008.
FSL–07	5–110	December 15, 2008.
FSL–08	5–111	December 15, 2008.
FSL–03	5–112	December 15, 2008.
FSL–04 and FSL–05	5–113	December 15, 2008.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(i) 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

(j) Refer to MCAI Canadian Airworthiness Directive CF–2009–15, dated April 17, 2009, and the TRs identified in Table 2 of this AD, for related information.

TABLE 2—RELATED SERVICE INFORMATION

Viking TR—	Dated—	Chapter 5 of the—
5–106	December 15, 2008	Viking Dash 7 Series 1/100 AMM, PSM 1–7–2.
5–107	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–108	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–109	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–110	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–111	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–112	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–113	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.

Material Incorporated by Reference

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

TABLE 3—MATERIAL INCORPORATED BY REFERENCE

Viking TR—	Dated—	Chapter 5 of the—
5–106	December 15, 2008	Viking Dash 7 Series 1/100 Airplane Maintenance Manual, PSM 1–7–2.
5–107	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–108	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–109	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–110	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–111	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–112	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.
5–113	December 15, 2008	Viking Dash 7 Series 100 Maintenance Manual, PSM 1–7–2.

(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 Viking Air Limited, 9574 Hampden Road, Sidney, British Columbia, V8L 8V5, Canada; telephone 250–656–7227; fax 250–656–0673; e-*mail technical.publications@vikingair.com*; Internet *http://www.vikingair.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 November 2, 2010.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–28273 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0223; Directorate Identifier 2009–NM–105–AD; Amendment 39–16503; AD 2010–23–14]

RIN 2120–AA64

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

> Several cases of corrosion in lower structural members of the passenger door have been reported. It was subsequently determined that a drainage ramp (constructed from resin) had deteriorated with time and was retaining moisture. * * * Corrosion left undetected could eventually affect the structural integrity of the door and surrounding structure.

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

DATES: This AD becomes effective December 22, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 22, 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: Craig Yates, 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) 228–7355; 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 March 15, 2010 (75 FR 12152). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> Several cases of corrosion in lower structural members of the passenger door have been reported. It was subsequently determined that a drainage ramp (constructed from resin) had deteriorated with time and was retaining moisture. The ramp, therefore, requires removal, both to prevent further corrosion and to allow full access to the door structure during future scheduled inspections. Corrosion left undetected could eventually affect the structural integrity of the door and surrounding structure.

The required actions include a general visual inspection for corrosion and damage of the lower inner section of the door, repair if necessary, and application of corrosion inhibitor compound. You may obtain further information by examining the MCAI in the AD docket.

Since the NPRM was issued, we received Bombardier Modification Summary Packages IS601R52110030, Revision B, dated May 28, 2010; and IS67052110074, Revision D, dated June 2, 2010. The revised modification summaries provide instructions for optional access to ease removal of the drainage ramp, which includes an option to install the appropriate-sized rivets. Those revised modification summaries have been referenced in this AD. We have revised Table 2 of this AD to give credit for doing the actions before the effective date of this AD in accordance with Bombardier Modification Summary Package IS601R52110030, Revision A1, dated April 24, 2009; and Bombardier Modification Summary Package IS67052110074, Revision A1, dated April 24, 2009.

Comments

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

Request To Include Provisions for Oversized Rivets and Repairs for Inner Skin When Required

American Eagle Airlines requested that the proposed AD include an option to install oversized rivets and/or repair the inner skin when required. American Eagle Airlines stated that if certain rivets must be installed per specific drawings, and the next nominal fastener is required, alternative method of compliances (AMOC) must be obtained, which will increase the number of AMOCs and decrease efficiency when accomplishing this modification.

We agree with the commenter's request. As stated previously, we have revised this AD to refer to Bombardier Modification Summary Package IS601R52110030, Revision B, dated May 28, 2010; and Bombardier Modification Summary Package IS67052110074, Revision D, dated June 2, 2010. These modification summaries were issued to ensure that the appropriate information concerning the option requested by the commenter is addressed.

Request That Cost of Compliance Be Amended To Reflect True Cost of Labor

Air Wisconsin Airlines requested that the cost of compliance be amended to more truly reflect the amount of labor and costs to the airlines. Air Wisconsin Airlines stated that this modification has been accomplished on 20 airplanes and the modifications have taken between 100 and 140 work-hours to accomplish.

We agree that the cost of compliance should be changed to reflect the actual cost of the modification. We have considered the data presented by the commenter and the manufacturer, and agree that the number of work hours required is higher than our previous estimate. The cost analysis in AD rulemaking actions, typically does not include incidental costs such as the time required to gain access and close up, time necessary for planning, or time necessitated by other administrative actions. Those incidental costs, which might vary significantly among operators, are almost impossible to calculate. The manufacturer states that the average work-hours required for each airplane for the modification is 80. We have revised the work-hour estimate to 80. The costs have been changed accordingly.

Request To Remove Certain Wording From Paragraph (g)(3) of the NPRM

Mesaba Airlines requested that the wording "Remove the lower passenger door ramp" be removed from paragraph (g)(3) of the NPRM. Mesaba Airlines stated that paragraph (g)(1) of the NPRM requires removing the lower passenger door ramp, and stating it again in paragraph (g)(3) may cause confusion.

We agree that the wording in question should be removed from paragraph (g)(3) of this AD. Since the door ramp is already removed when accomplishing the tasks in paragraph (g)(3) of this AD, it is unnecessary to repeat the phrase. Paragraph (g)(3) of this AD has been revised accordingly.

Clarification of Wording in Paragraph (g)(3) of This AD

For clarity, we have removed the sentence "Applying corrosion inhibiter compound is a terminating action for the requirements of this AD" from paragraph (g)(3) of this AD. As specified in paragraph (g) of this AD, the actions in all of the subparagraphs of paragraph (g) of this AD (i.e., paragraphs (g)(1), (g)(2), and (g)(3)) must be done.

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 1,072 products of U.S. registry. We also estimate that it will take 80 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 $7,289,600, or $6,800 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:

2010–23–14 Bombardier, Inc: Amendment 39–16503. Docket No. FAA–2010–0223; Directorate Identifier 2009–NM–105–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 22, 2010.

Affected ADs

(b) None.

Applicability

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

(1) Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7003 through 8089 inclusive;

(2) Model CL–600–2C10 (Regional Jet Series 700, 701 & 702) airplanes, serial numbers 10003 through 10265 inclusive; and

(3) Model CL–600–2D15 (Regional Jet Series 705) and CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 through 15173 inclusive.

Subject

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

Reason

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

Several cases of corrosion in lower structural members of the passenger door have been reported. It was subsequently determined that a drainage ramp (constructed from resin) had deteriorated with time and was retaining moisture. The ramp, therefore, requires removal, both to prevent further corrosion and to allow full access to the door structure during future scheduled inspections. Corrosion left undetected could eventually affect the structural integrity of the door and surrounding structure.

The required actions include a general visual inspection for corrosion and damage of the lower inner section of the door, repair if necessary, and application of corrosion inhibitor compound.

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) Before the accumulation of 15,000 total flight hours, or within 5,000 flight hours after the effective date of this AD, whichever occurs later, do the actions specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD.

(1) Remove the lower passenger door ramp, in accordance with the applicable

Bombardier modification summary package specified in Table 1 of this AD.

(2) Do a general visual inspection for any damage and corrosion behind the drainage ramp in the lower portion of the passenger door. If any damage or corrosion is found, before further flight repair in accordance with a method approved by the Manager, New York Aircraft Certification Office, FAA; or Transport Canada Civil Aviation (TCCA) (or its delegated agent).

(3) Apply corrosion inhibitor compound, in accordance with the applicable Bombardier modification summary package specified in Table 1 of this AD.

TABLE 1—SERVICE INFORMATION

Applicable airplanes	Bombardier service information	Revision	Date
Model CL–600–2B19 airplanes	Bombardier Modification Summary Package IS601R52110030.	B	May 28, 2010.
Model CL–600–2C10, CL–600–2D15, and CL–600–2D24 airplanes.	Bombardier Modification Summary Package IS67052110074.	D	June 2, 2010.

(4) Inspections and modifications accomplished before the effective date of this AD according to the applicable Bombardier modification summary package listed in Table 2 of this AD, are considered acceptable for compliance with the corresponding inspection or modification specified in this AD.

TABLE 2—CREDIT SERVICE INFORMATION

Applicable airplanes	Bombardier service information	Revision	Date
Model CL–600–2B19 airplanes	Bombardier Modification Summary Package IS601R52110030.	A	July 5, 2006.
Model CL–600–2B19 airplanes	Bombardier Modification Summary Package IS601R52110030.	A1	April 24, 2009.
Model CL–600–2C10, CL–600–2D15, and CL–600–2D24 airplanes.	Bombardier Modification Summary Package IS67052110074.	A	July 5, 2006.
Model CL–600–2C10, CL–600–2D15, and CL–600–2D24 airplanes.	Bombardier Modification Summary Package IS67052110074.	A1	April 24, 2009.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: The MCAI does not require an inspection or application of a corrosion inhibitor compound. This AD requires both actions.

Other FAA AD Provisions

(h) 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

(i) Refer to MCAI Canadian Airworthiness Directive CF–2009–23, dated May 19, 2009, and the Bombardier modification summary packages listed in Table 1 of this AD, for related information.

Material Incorporated by Reference

(j) You must use Bombardier Modification Summary Package IS601R52110030, Revision B, dated May 28, 2010; and Bombardier Modification Summary Package IS67052110074, Revision D, dated June 2, 2010; as applicable; to do the actions required by this AD, unless the AD specifies otherwise. (The revision date of these modification summary packages is located only on sheet 2 of the documents; no other page of the documents contains this information.)

(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 October 23, 2010.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–28175 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 878

[Docket No. FDA–2010–N–0513]

Medical Devices; General and Plastic Surgery Devices; Classification of Non-Powered Suction Apparatus Device Intended for Negative Pressure Wound Therapy

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying the non-powered suction apparatus device intended for negative pressure wound therapy (NPWT) into class II (special controls). The special control that will apply to the device is the guidance document entitled "Class II Special Controls Guidance Document: Non-Powered Suction Apparatus Device Intended for Negative Pressure Wound Therapy." The agency is classifying the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice of availability for the guidance document entitled "Class II Special Controls Guidance Document: Non-Powered Suction Apparatus Device Intended for Negative Pressure Wound Therapy."

DATES: *Effective Date:* December 17, 2010.

FOR FURTHER INFORMATION CONTACT: Jiyoung Dang, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3615, Silver Spring, MD 20993, 301–796–5650.

SUPPLEMENTARY INFORMATION:

I. What is the background of this rulemaking?

The Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 301 *et seq.*), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Public Law 94–295), the Safe Medical Devices Act of 1990 (the SMDA) (Public Law 101–629), and the Food and Drug Administration Modernization Act (the FDAMA) (Public Law 107–250) established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

FDA refers to devices that were not in commercial distribution prior to May 28, 1976 (the date of enactment of the 1976 amendments), as postamendments devices. Postamendments devices are classified automatically by statute (section 513(f) of the FD&C Act) into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless: (1) FDA reclassifies the device into class I or II; (2) FDA issues an order classifying the device into class I or class II in accordance with section 513(f)(2); or FDA issues an order finding the device to be substantially equivalent, under section 513(i) of the FD&C Act), to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 of the regulations (21 CFR part 807).

Section 513(f)(2) of the FD&C Act provides that any person who submits a premarket notification under section 510(k) of the FD&C Act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device into class III under section 513(f)(1) of the FD&C Act, request that FDA classify the device under the criteria set forth in section 513(a)(1) of the FD&C Act. FDA will, within 60 days of receiving this request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing this classification.

In accordance with section 513(f)(1) of the FD&C Act, FDA issued an order on October 28, 2008, classifying the SNaP Wound Care Device into class III, because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device which was subsequently reclassified into class I or class II. On November 3, 2008, Spiracur, Inc., submitted a petition requesting classification of the SNaP Wound Care Device under section 513(f)(2) of the FD&C Act. The manufacturer recommended that the device be classified into class II (Ref. 1).

In accordance with section 513(f)(2) of the FD&C Act, FDA reviewed the petition in order to classify the device under the criteria for classification set forth in 513(a)(1) of the FD&C Act. FDA classifies devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide reasonable assurance of the safety and effectiveness of the device for its intended use. After review of the information submitted in the petition, FDA determined that the device can be classified into class II with the establishment of special controls. FDA believes these special controls will provide reasonable assurance of the safety and effectiveness of the device.

The device is assigned the generic name SNaP Wound Care Device, and it is identified as non-powered suction apparatus device intended for negative pressure wound therapy.

FDA has identified the following risks to health associated specifically with this type of device and the recommended measures to mitigate these risks.

- Adverse tissue reaction
- Material degradation
- Improper function of suction apparatus (*e.g.,* reflux of waste exudate to wound, incorrect delivery of negative pressure)
- Non-compatibility with other therapeutics and diagnostics (*e.g.,* MRI, hyperbaric chamber, defibrillation)
- Uncontrolled bleeding
- Transmission of infectious agents
- Unsafe use of device (*e.g.,* improper wound selection, improper wound management, improper placement of dressing)

TABLE 1—RISKS TO HEALTH AND MITIGATION MEASURES

Identified risk	Recommended mitigation measures
Adverse tissue reaction	Section 6. Biocompatibility. Section 7. Sterility.
Material degradation	Section 8. Stability and Shelf Life.

TABLE 1—RISKS TO HEALTH AND MITIGATION MEASURES—Continued

Identified risk	Recommended mitigation measures
Improper function of suction apparatus (*e.g.,* reflux of waste exudate to wound, incorrect delivery of negative pressure).	Section 9. Performance Testing.
Non-compatibility with other therapeutics and diagnostics (*e.g.,* MRI, hyperbaric chamber, defibrillation).	Section 9. Performance Testing.
Uncontrolled bleeding	Section 11. Labeling.
Transmission of infectious agents	Section 11. Labeling.
Unsafe use of device (*e.g.,* improper wound selection, improper wound management, improper placement of dressing).	Section 11. Labeling.

FDA believes that the special controls guidance document, in addition to general controls, address the risks to health identified in table 1 of this document and provides reasonable assurance of the safety and effectiveness of the device. Therefore, on August 7, 2009, FDA issued an order to the petitioner classifying the device into class II. FDA is codifying this device by adding 21 CFR 878.4683.

Following the effective date of the final classification rule, any firm submitting a 510(k) premarket notification for a non-powered suction apparatus device intended for negative pressure wound therapy will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurance of safety and effectiveness.

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirement under section 510(k) of the FD&C Act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device and, therefore, the type of device is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the non-powered suction apparatus device intended for negative presure wound therapy they intend to market.

II. What is the environmental impact of this rule?

The agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

III. What is the economic impact of this rule?

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is not a significant regulatory action as defined by the Executive order and so it is not subject to review under Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because reclassification of this device from class III to class II will relieve manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the FD&C Act (21 U.S.C. 360e), and may permit small potential competitors to enter the marketplace by lowering their costs, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "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 $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $135 million, using the most current (2009) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

IV. Does this final rule have federalism implications?

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires agencies to "construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute." Federal law includes an express preemption provision that preempts certain State requirements "different from or in addition to" certain Federal requirements applicable to devices. 21 U.S.C. 360k; See *Medtronic* v. *Lohr,* 518 U.S. 470 (1996); *Riegel* v. *Medtronic,* 552 U.S. 312 (2008). The special controls established by this final rule create "requirements" to address each identified risk to health presented by these specific medical devices under 21 U.S.C. 360k, even though product sponsors have some flexibility in how they meet those requirements. Cf. *Papike* v. *Tambrands, Inc.,* 107 F.3d 737, 740–42 (9th Cir. 1997).

V. How does this rule comply with the Paperwork Reduction Act of 1995?

This final rule contains no new collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 is not required. Elsewhere in this issue of the **Federal Register**, FDA is issuing a notice announcing the guidance for the final rule. This guidance, "Class II Special Controls Guidance Document: Non-powered Suction Apparatus Device Intended for Negative Pressure Wound Therapy," references previously approved collections of information found in FDA regulations.

VI. What references are on display?

The following reference has been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Petition from Spiracur, Inc., November 3, 2008.

List of Subjects in 21 CFR Part 878

Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 878 is amended as follows:

PART 878—GENERAL AND PLASTIC SURGERY DEVICES

■ 1. The authority citation for 21 CFR part 878 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Section 878.4683 is added to subpart E to read as follows:

§ 878.4683 Non-Powered suction apparatus device intended for negative pressure wound therapy.

(a) *Identification.* A non-powered suction apparatus device intended for negative pressure wound therapy is a device that is indicated for wound management via application of negative pressure to the wound for removal of fluids, including wound exudate, irrigation fluids, and infectious materials. It is further indicated for management of wounds, burns, flaps, and grafts.

(b) *Classification.* Class II (special controls). The special control for this device is FDA's "Class II Special Controls Guidance Document: Non-powered Suction Apparatus Device Intended for Negative Pressure Wound Therapy (NPWT)." See § 878.1(e) for the availability of this guidance document.

Dated: November 10, 2010.

Nancy K. Stade,

Deputy Director for Policy, Center for Devices and Radiological Health.

[FR Doc. 2010–28873 Filed 11–16–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[TD 9506]

RIN 1545–BJ91

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210–AB42

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Consumer Information and Insurance Oversight

45 CFR Part 147

RIN 0950–AA17

[OCIIO–9991–IFC2]

Amendment to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act

AGENCY: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Office of Consumer Information and Insurance Oversight, Department of Health and Human Services.

ACTION: Amendment to interim final rules with request for comments.

SUMMARY: This document contains an amendment to interim final regulations implementing the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Patient Protection and Affordable Care Act regarding status as a grandfathered health plan; the amendment permits certain changes in policies, certificates, or contracts of insurance without loss of grandfathered status.

DATES: *Effective Date.* This amendment to the interim final regulations is effective on November 15, 2010.

Comment Date. Comments are due on or before December 17, 2010.

ADDRESSES: Written comments may be submitted to any of the addresses specified below. Any comment that is submitted to any Department will be shared with the other Departments. Please do not submit duplicates.

All comments will be made available to the public. Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

Department of Labor. Comments to the Department of Labor, identified by RIN 1210–AB42, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: E-OHPSCA1251amend.EBSA@dol.gov.*
- *Mail or Hand Delivery:* Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N–5653, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, *Attention:* RIN 1210–AB42.

Comments received by the Department of Labor will be posted without change to *http://www.regulations.gov* and *http://www.dol.gov/ebsa*, and available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Washington, DC 20210.

Department of Health and Human Services. In commenting, please refer to file code OCIIO–9991–IFC2. 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):

- *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the "More Search Options" tab.
- *By regular mail.* You may mail written comments to the following address ONLY: Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, Attention: OCIIO–9991–IFC2, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

- *By express or overnight mail.* You may send written comments to the following address only: Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, Attention: OCIIO–

9991–IFC2, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

• *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 the following address: Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, Attention: OCIIO–9991–IFC2, 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 OCIIO 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.)

Comments mailed to the address indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately three 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. EST. To schedule an appointment to view public comments, phone 1–800–743–3951.

Internal Revenue Service. Comments to the IRS, identified by REG–118412–10, by one of the following methods:

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

• *Mail:* CC:PA:LPD:PR (REG–118412–10), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

• *Hand or courier delivery:* Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–118412–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224.

All submissions to the IRS will be open to public inspection and copying in room 1621, 1111 Constitution Avenue, NW., Washington, DC from 9 a.m. to 4 p.m.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Beth Baum, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 622–6080; Lisa Campbell, Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, at (301) 492–4100.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the Department of Labor's Web site (*http://www.dol.gov/ebsa*). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) Web site (*http://www.cms.hhs.gov/HealthInsReformforConsume/01_Overview.asp*) and the Office of Consumer Information & Insurance Oversight (OCIIO) Web site (*http://www.hhs.gov/OCIIO*).

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act (the Affordable Care Act), Public Law 111–148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (the Reconciliation Act), Public Law 111–152, was enacted on March 30, 2010. The Affordable Care Act and the Reconciliation Act reorganize, amend, and add to the provisions in part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The term "group health plan" includes both insured and self-insured group health plans.[1] The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (the Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and make them applicable to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by this reference are sections 2701 through 2728. PHS Act sections 2701 through 2719A are substantially new, though they incorporate some provisions of prior law. PHS Act sections 2722 through 2728 are sections of prior law renumbered, with some, mostly minor, changes. Section 1251 of the Affordable Care Act, as modified by section 10103 of the Affordable Care Act and section 2301 of the Reconciliation Act, specifies that certain plans or coverage existing as of the date of enactment (that is, grandfathered health plans) are subject to only certain provisions.

The Departments of Health and Human Services, Labor, and the Treasury (the Departments) previously issued interim final regulations implementing section 1251 of the Affordable Care Act; these interim final regulations were published in the **Federal Register** on June 17, 2010 (75 FR 34538). Additionally, on September 20, 2010,[2] October 8, 2010,[3] October 12, 2010,[4] and October 28, 2010,[5] the Departments issued subregulatory guidance on a number of issues pertaining to the implementation of the Affordable Care Act, including several clarifications relating to the interim final regulations on grandfathered health plans.

Section 1251 of the Affordable Care Act, as modified by section 10103 of the Affordable Care Act and section 2301 of the Reconciliation Act, provides that certain plans or coverage existing as of March 23, 2010 (the date of enactment of the Affordable Care Act) are subject to only certain provisions of the Affordable Care Act. The statute and the interim final regulations refer to these plans or health insurance coverage as grandfathered health plans. The statute and the interim final regulations provide that a group health plan or group or individual health insurance coverage is a grandfathered health plan with respect to individuals enrolled on March 23, 2010 regardless of whether an individual later renews the coverage. The interim final regulations specify certain changes to a plan or coverage that would cause it to no longer be a grandfathered health plan.

In addition, the statute and the interim final regulations provide that a group health plan that provided coverage on March 23, 2010 generally is also a grandfathered health plan with

[1] The term "group health plan" is used in title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code, and is distinct from the term "health plan," as used in other provisions of title I of the Affordable Care Act. The term "health plan," as used in those provisions, does not include self-insured group health plans.

[2] The subregulatory guidance took the form of "frequently asked questions" (FAQs). The September 20, 2010 FAQs are available at *http://www.dol.gov/ebsa/faqs/faq-aca.html* and *http://www.hhs.gov/ociio/regulations/questions.html.*

[3] The October 8, 2010 FAQs are available at *http://www.dol.gov/ebsa/faqs/faq-aca2.html* and *http://www.hhs.gov/ociio/regulations/implementation_faq.html.*

[4] The October 12, 2010 FAQs are available at *http://www.dol.gov/ebsa/faqs/faq-aca3.html* and *http://www.hhs.gov/ociio/regulations/implementation_faq.html.*

[5] The October 28, 2010 FAQs are available at *http://www.dol.gov/ebsa/faqs/faq-aca4.html* and *http://www.hhs.gov/ociio/regulations/implementation_faq.html.*

respect to new employees (whether newly hired or newly enrolled) and their families that enroll in the grandfathered health plan after March 23, 2010. The interim final regulations clarify that, in such cases, any health insurance coverage provided under the group health plan in which an individual was enrolled on March 23, 2010 is also a grandfathered health plan.

Paragraph (g)(1) of the interim final regulations includes rules for determining when changes to the terms of a plan or health insurance coverage cause the plan or coverage to cease to be a grandfathered health plan. In addition to the changes described in paragraph (g)(1) of the interim final regulations that cause a plan to cease to be a grandfathered health plan, paragraph (a)(1)(ii) of the interim final regulations provides that if an employer or employee organization enters into a new policy, certificate, or contract of insurance after March 23, 2010, the policy, certificate, or contract of insurance is not a grandfathered health plan with respect to individuals in the group health plan. For example, under the interim final regulations, if a group health plan changes issuers after March 23, 2010, the group health plan ceases to be a grandfathered health plan, even if the plan otherwise would be a grandfathered health plan under the standards set forth in paragraph (g)(1).[6] In contrast, under the interim final regulations, a change in third-party administrator (TPA) by a self-insured group health plan does not cause the plan to relinquish grandfather status, provided that the change of TPA does not result in any other change that would cause loss of grandfather status under paragraph (g)(1).

II. Overview of Amendment to the Interim Final Regulations

The Departments have received comments on paragraph (a)(1)(ii) of the interim final regulations, which provides that a group health plan will relinquish grandfather status if it changes issuers or policies. The comments expressed four principal concerns about this provision of the regulations. First, commenters raised the concern that this provision treats insured group health plans, which cannot change issuers or policies without ceasing to be a grandfathered health plan, differently from self-insured group health plans, which can change TPAs without relinquishing grandfather status, as long as any other plan change (such as cost sharing or employer contributions) does not exceed the standards of paragraph (g)(1) of the interim final regulations. Second, commenters raised questions about circumstances in which a group health plan changes its issuer involuntarily (for example, the issuer withdraws from the market) yet the plan sponsor wants to maintain its grandfather status with a new issuer. Third, commenters noted that the provision would unnecessarily restrict the ability of issuers to reissue policies to current plan sponsors for administrative reasons unrelated to any change in the underlying terms of the health insurance coverage (for example, to transition the policy to a subsidiary of the original issuer or to consolidate a policy with its various riders or amendments) without loss of grandfather status. Finally, commenters expressed concern that the provision terminating grandfather status upon any change in issuer gives issuers undue and unfair leverage in negotiating the price of coverage renewals with the sponsors of grandfathered health plans, and that this interferes with the health care cost containment that tends to result from price competition.

The interim final regulations issued on June 17, 2010 were based on an interpretation of the language in section 1251 of the Affordable Care Act providing that grandfather status is based on "coverage under a group health plan or health insurance coverage in which such individual was enrolled on the date of the enactment of the Act." In adopting the interim final regulations, the Departments did not consider a new insurance policy issued after March 23, 2010 to be a grandfathered health plan (except for the special rule for a group health plan maintained pursuant to a collective bargaining agreement) because "coverage" under the new policy was not in place on that date.

Following review of the comments submitted on this issue and further review and consideration of the provisions of section 1251 of the Affordable Care Act, the Departments have determined it is appropriate to amend the interim final regulations to allow a group health plan to change health insurance coverage (that is, to allow a group health plan to enter into a new policy, certificate, or contract of insurance) without ceasing to be a grandfathered health plan, provided that the plan continues to comply fully with the standards set forth in paragraph (g)(1). For purposes of section 1251 of the Affordable Care Act, the Departments now conclude that it is reasonable to construe the statutory term "group health plan" to apply the grandfather provisions uniformly to both self-insured and insured group health plans (and, consequently, to health insurance coverage offered in connection with a group health plan). Where insured coverage is provided not through a group health plan but instead in the individual market, a change in issuer would still be a change in the health insurance coverage in which the individual was enrolled on March 23, 2010, and thus the new individual policy, certificate, or contract of insurance would not be a grandfathered health plan.

This amendment modifies paragraph (a)(1) of the interim final regulations, which previously caused a group health plan to cease to be a grandfathered health plan if the plan entered into a new policy, certificate, or contract of insurance. The modification provides that a group health plan does not cease to be grandfathered health plan coverage merely because the plan (or its sponsor) enters into a new policy, certificate, or contract of insurance after March 23, 2010[7] (for example, a plan enters into a contract with a new issuer or a new policy is issued with an existing issuer). The amendment applies to such changes to group health insurance coverage that are effective on or after November 15, 2010, the date the amendment to the interim final regulations was made available for public inspection; the amendment does not apply retroactively to such changes to group health insurance coverage that were effective before this date.[8] For this purpose, the date the new coverage becomes effective is the operative date, not the date a contract for a new policy, certificate or contract of insurance is entered into. Therefore, for example, if a plan enters into an agreement with an issuer on September 28, 2010 for a new policy to be effective on January 1, 2011, then January 1, 2011 is the date the new policy is effective and, therefore, the relevant date for purposes of determining the application of the

[6] In accordance with statutory provisions relating to collectively bargained group health plans, the interim final regulations include an exception for a group health plan governed by a collective bargaining agreement that was in effect on March 23, 2010. In such a case, the grandfathered group health plan is permitted to change issuers, or change from a self-insured plan to an insured plan, or make a change described under paragraph (g)(1) of the interim final regulations (which would otherwise end grandfather status) and remain a grandfathered health plan for the remainder of the duration of the collective bargaining agreement.

[7] Of course, with respect to changes to group health insurance coverage on or after March 23, 2010 but before June 14, 2010, the Departments' enforcement safe harbor remains in effect for good faith efforts to comply with a reasonable interpretation of the statute.

[8] As noted below, the Departments are inviting comments on this amendment to the interim final regulations.

amendment to the interim final regulations. If, however, the plan entered into an agreement with an issuer on July 1, 2010 for a new policy to be effective on September 1, 2010, then the amendment would not apply and the plan would cease to be a grandfathered health plan.

Notwithstanding the ability to change health insurance coverage pursuant to the modification made by the amendment, if the new policy, certificate, or contract of insurance includes changes described in paragraph (g)(1) of the interim final regulations, the plan ceases to be a grandfathered health plan. In applying this amendment, as with other provisions of the interim final regulations, the rules apply separately to each benefit package made available under a group health plan.

The amendment also provides that, to maintain status as a grandfathered health plan, a group health plan that enters into a new policy, certificate, or contract of insurance must provide to the new health insurance issuer (and the new health insurance issuer must require) documentation of plan terms (including benefits, cost sharing, employer contributions, and annual limits) under the prior health coverage sufficient to determine whether any change described in paragraph (g)(1) is being made. This documentation may include a copy of the policy or summary plan description. The amendment also makes minor conforming changes to other provisions of the interim final regulations.

Thus, a plan can retain its grandfather status if it changes its carrier, so long as it has not made any other changes that would revoke its status. This amendment is being issued on an interim final basis to notify plans as soon as possible of the change and is effective prospectively to minimize disruption to participants and beneficiaries. The Departments are continuing to review and evaluate the comments received in response to the June 17, 2010 interim final regulations. In addition, the Departments invite comments on this amendment to the interim final regulations, including the prospective effective date of the rule and how that affects plans with different plan years. Final regulations on grandfathered health plans will be published in the near future.

III. Interim Final Rules and Waiver of Delay of Effective Date

Section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act authorize the Secretaries of the Treasury, Labor, and HHS (collectively, the Secretaries) to promulgate any interim final rules that they determine are appropriate to carry out the provisions of chapter 100 of the Code, part 7 of subtitle B of title I of ERISA, and part A of title XXVII of the PHS Act, which include PHS Act sections 2701 through 2728 and the incorporation of those sections into ERISA section 715 and Code section 9815. The rule set forth in this amendment governs the applicability of the requirements in these sections and is therefore appropriate to carry them out. Therefore, the foregoing interim final rule authority applies to this amendment.

In addition, under Section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. Although the provisions of the APA that ordinarily require a notice of proposed rulemaking do not apply here because of the specific authority granted by section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act, even if the APA were applicable, the Secretaries have determined that it would be impracticable and contrary to the public interest to delay putting the provisions of this amendment to the June 17, 2010 interim final regulations in place until an additional public notice and comment process was completed.

As noted in the preamble to the June 17, 2010 interim final regulations, numerous provisions of the Affordable Care Act are applicable for plan years (in the individual market, policy years) beginning on or after September 23, 2010, six months after date of enactment. Because grandfathered health plans are exempt from many of these provisions while group health plans and group and individual health insurance coverage that are not grandfathered health plans must comply with them, it was critical for plans and issuers to receive clear guidance as to whether they were so exempt as soon as possible; accordingly, the June 17, 2010 interim final regulations were published without prior notice and comment. While the Affordable Care Act provisions have become effective with respect to certain plans and coverage, the majority of plans and coverage have not yet become subject to the Act. It is critical to provide those plans with the guidance in these interim final rules immediately. In addition, the provisions of this amendment essentially are the product of prior notice and comment, as they are a logical outgrowth of the June 17, 2010 interim final regulations which provided an opportunity for public comment, and are being issued in response to public comments received.

For the foregoing reasons, the Departments have determined that it is impracticable and contrary to the public interest to engage in full notice and comment rulemaking before putting these regulations into effect, and that it is in the public interest to promulgate interim final regulations.

In addition, under Section 553(d) of the APA, regulations are to be published at least 30 days before they take effect. Again, under section 553(d)(3), this requirement may be waived "for good cause found and published with the rule." For the reasons set forth above, the Departments have determined that there is good cause for waiver of the 30 day delay of effective date requirement in section 553(d).

IV. Economic Impact and Paperwork Burden

A. Overview and Need for Regulatory Action—Department of Labor and Department of Health and Human Services

As stated earlier in this preamble, the Departments of Health and Human Services, Labor, and the Treasury (the Departments) previously issued interim final regulations implementing section 1251 of the Affordable Care Act that were published in the **Federal Register** on June 17, 2010 (75 FR 34538). Paragraph (a)(1)(ii) of the interim final regulations provides that if a group health plan changes the issuer providing the insured health coverage after March 23, 2010, the group health plan ceases to be a grandfathered health plan. Paragraph (g)(1) of the interim final regulations includes rules for determining when changes to the terms of a plan or health insurance coverage cause a plan or coverage to cease to be a grandfathered health plan.

As described earlier in this preamble, comments expressed a number of concerns regarding the change in issuer rule. Among other concerns, comments stated that the change in issuer rule provides issuers with undue leverage in negotiating the price of coverage renewals with grandfathered health plans, because a change in carrier would result in plans relinquishing their grandfathered status. Therefore, in effect, the provision could impede employers' efforts to obtain group health insurance coverage for their employees at the lowest cost. Commenters also expressed concern that the rule creates an unlevel playing field for self-insured

and fully-insured group health plans, because the former could change plan administrators without relinquishing their grandfathered health plan status, while the latter could not change issuers without relinquishing such status.

After reviewing the comments concerning this issue and further analyzing the statutory provision, the Departments have determined that it is appropriate to amend the interim final regulations to allow group health plans to change a health insurance policy or issuer providing health insurance coverage without ceasing to be a grandfathered health plan, provided that the standards set forth under paragraph (g)(1) of the interim final regulations are met. The Departments expect that this amendment will result in a small increase in the number of plans retaining their grandfathered status relative to the estimates made in the interim final regulations. The Departments did not produce a range of estimates for the number of affected entities given considerable uncertainty about the behavioral response to this amendment. For a further discussion, see Section II. Overview of Amendment to the Interim Final Regulations, above.

B. Executive Order 12866—Department of Labor and Department of Health and Human Services

Under Executive Order 12866 (58 FR 51735), "significant" regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OMB has determined that this amendment to the interim final regulations is significant within the meaning of section 3(f)(4) of the Executive Order. Accordingly, OMB has reviewed the amendment pursuant to the Executive Order.

C. Regulatory Flexibility Act—Department of Labor and Department of Health and Human Services

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the APA (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Under Section 553(b) of the APA, a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. The interim final regulations were exempt from the APA, because the Departments made a good cause finding that a general notice of proposed rulemaking is not necessary earlier in this preamble. Therefore, the RFA did not apply and the Departments were not required to either certify that the regulations or this amendment would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

Nevertheless, the Departments carefully considered the likely impact of the amendment on small entities and believe that the amendment will have a positive impact on small plans, because such plans are more likely to be fully-insured. The Departments estimated in the regulatory impact analysis for the interim final regulations that small plans were more likely to relinquish grandfathered health plan status due to changes in issuers or policies than large plans. Therefore, this amendment to the interim final regulations will benefit small plans that want to retain their grandfathered health plan status while still changing health insurance issuers. This change should give employers greater flexibility to keep premiums affordable for the same plan.

D. Special Analyses—Department of the Treasury

Notwithstanding the determinations of the Department of Labor and Department of Health and Human Services, for purposes of the Department of the Treasury, it has been determined that this Treasury decision is not a significant regulatory action for purposes of Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the RFA, refer to the Special Analyses section in the preamble to the cross-referencing notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these temporary regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

E. Paperwork Reduction Act

As part of their continuing efforts to reduce paperwork and respondent burden, the Departments conduct a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, and collection requirements on respondents can be properly assessed.

As discussed earlier in this preamble, the amendment to the interim final regulation adds a new disclosure requirement that requires the group health plan that is changing health insurance coverage to provide to the succeeding health insurance issuer (and the succeeding health insurance issuer must require) documentation of plan terms (including benefits, cost sharing, employer contributions, and annual limits) under the prior health insurance coverage sufficient to make a determination whether the standards of paragraph (g)(1) are exceeded. The Departments expect that this amendment will result in a small increase in the number of plans retaining their grandfathered status relative to the estimates made in the interim final regulations. Although the Departments did not produce a range of estimates for the number of affected entities due to the considerable uncertainty regarding the behavioral response to this amendment, the Departments estimate that the new disclosure requirement associated with the amendment will result in a total hour burden of 3,845 hours and a total cost burden of $260,000.[9] The Departments welcome comments on this estimate.

The Office of Management and Budget has approved revisions to the ICRs contained under OMB Control Numbers

[9] The Departments applied the same methodology that was used in estimating the hour and cost burden associated with the information collection requests (ICRs) contained in the interim final regulations to make this estimate.

1210–0140 (Department of Labor), 1545–2178 (Department of the Treasury; Internal Revenue Service), and 0938–1093 (Department of Health and Human Services) reflecting this estimate. A copy of the ICR may be obtained by contacting the PRA addressee: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N–5718, Washington, DC 20210. Telephone: (202) 693–8410; Fax: (202) 219–2745. These are not toll-free numbers. E-mail: *ebsa.opr@dol.gov*. ICRs submitted to OMB also are available at reginfo.gov (*http://www.reginfo.gov/public/do/PRAMain*).

F. Congressional Review Act

This amendment to the interim final regulations is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review. The interim final rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it does not result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

G. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare several analytic statements before proposing any rules that may result in annual expenditures of $100 million (as adjusted for inflation) by State, local and tribal governments or the private sector. This amendment to the interim final regulations is not subject to the Unfunded Mandates Reform Act, because they are being issued as an interim final regulation. However, consistent with the policy embodied in the Unfunded Mandates Reform Act, this amendment to the interim final regulations has been designed to be the least burdensome alternative for State, local and tribal governments, and the private sector, while achieving the objectives of the Affordable Care Act.

H. Federalism Statement—Department of Labor and Department of Health and Human Services

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have "substantial direct effects" on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the regulation.

In the Departments' view, this amendment to the regulation has federalism implications, because it has direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among various levels of government. However, in the Departments' view, the federalism implications of the regulation is substantially mitigated because, with respect to health insurance issuers, the Departments expect that the majority of States will enact laws or take other appropriate action resulting in their meeting or exceeding the Federal standard.

In general, through section 514, ERISA supersedes State laws to the extent that they relate to any covered employee benefit plan, and preserves State laws that regulate insurance, banking, or securities. While ERISA prohibits States from regulating a plan as an insurance or investment company or bank, the preemption provisions of ERISA section 731 and PHS Act section 2724 (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)) apply so that the HIPAA requirements (including those of the Affordable Care Act) are not to be "construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement" of a Federal standard. The conference report accompanying HIPAA indicates that this is intended to be the "narrowest" preemption of State laws. (See House Conf. Rep. No. 104–736, at 205, reprinted in 1996 U.S. Code Cong. & Admin. News 2018.) States may continue to apply State law requirements except to the extent that such requirements prevent the application of the Affordable Care Act requirements that are the subject of this rulemaking. State insurance laws that are more stringent than the Federal requirements are unlikely to "prevent the application of" the Affordable Care Act, and be preempted. Accordingly, States have significant latitude to impose requirements on health insurance issuers that are more restrictive than the Federal law.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Departments have engaged in efforts to consult with and work cooperatively with affected State and local officials, including attending conferences of the National Association of Insurance Commissioners and consulting with State insurance officials on an individual basis. It is expected that the Departments will act in a similar fashion in enforcing the Affordable Care Act requirements. Throughout the process of developing this amendment, to the extent feasible within the specific preemption provisions of HIPAA as it applies to the Affordable Care Act, the Departments have attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide uniform minimum protections to consumers in every State. By doing so, it is the Departments' view that they have complied with the requirements of Executive Order 13132.

Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to these regulations, the Departments certify that the Employee Benefits Security Administration and the Office of Consumer Information and Insurance Oversight have complied with the requirements of Executive Order 13132 for the attached amendment to the interim final regulations in a meaningful and timely manner.

V. Statutory Authority

The Department of the Treasury temporary regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor interim final regulations are adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec.

101(g), Pub. L. 104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Public Law 111–152, 124 Stat. 1029; Secretary of Labor's Order 6–2009, 74 FR 21524 (May 7, 2009).

The Department of Health and Human Services interim final regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

List of Subjects

26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR Part 147

Health care, Health insurance, Reporting and recordkeeping requirements, and State regulation of health insurance.

Approved: November 8, 2010.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Michael F. Mundaca,

Assistant Secretary of the Treasury (Tax Policy).

Signed this 5th day of November 2010.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Approved: November 9, 2010.

Jay Angoff,

Director, Office of Consumer Information and Insurance Oversight.

Approved: November 9, 2010.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

Department of the Treasury

Internal Revenue Service

26 CFR Chapter I

■ Accordingly, 26 CFR part 54 is amended as follows:

PART 54—PENSION EXCISE TAXES

■ **Paragraph 1.** The authority citation for part 54 continues to read in part as follows:

Authority: 26 U.S.C. 7805. * * *

■ **Par. 2.** Section 54.9815–1251T is amended by:

■ 1. Revising paragraph (a)(1).

■ 2. Redesignating paragraphs (a)(3) introductory text, (a)(3)(i), and (a)(3)(ii) as paragraphs (a)(3)(i), (a)(3)(i)(A) and (a)(3)(i)(B), respectively.

■ 3. Adding new paragraph (a)(3)(ii).

■ 4. Removing paragraphs (a)(5) and (f)(2).

■ 5. Redesignating paragraph (f)(1) as paragraph (f).

■ 6. Revising the last sentence in newly-designated paragraph (f).

■ 7. Revising paragraph (g)(4) *Example 9.*

The revisions and addition reads as follows:

§ 54.9815–1251T Preservation of right to maintain existing coverage (temporary).

(a) *Definition of grandfathered health plan coverage*—(1) *In general*—(i) *Grandfathered health plan coverage. Grandfathered health plan coverage* means coverage provided by a group health plan, or a health insurance issuer, in which an individual was enrolled on March 23, 2010 (for as long as it maintains that status under the rules of this section). A group health plan or group health insurance coverage does not cease to be grandfathered health plan coverage merely because one or more (or even all) individuals enrolled on March 23, 2010 cease to be covered, provided that the plan has continuously covered someone since March 23, 2010 (not necessarily the same person, but at all times at least one person). In addition, subject to the limitation set forth in paragraph (a)(1)(ii) of this section, a group health plan (and any health insurance coverage offered in connection with the group health plan) does not cease to be a grandfathered health plan merely because the plan (or its sponsor) enters into a new policy, certificate, or contract of insurance after March 23, 2010 (for example, a plan enters into a contract with a new issuer or a new policy is issued with an existing issuer). For purposes of this section, a plan or health insurance coverage that provides grandfathered health plan coverage is referred to as a grandfathered health plan. The rules of this section apply separately to each benefit package made available under a group health plan or health insurance coverage.

(ii) *Changes in group health insurance coverage.* Subject to paragraphs (f) and (g)(2) of this section, if a group health plan (including a group health plan that was self-insured on March 23, 2010) or its sponsor enters into a new policy, certificate, or contract of insurance after March 23, 2010 that is effective before November 15, 2010, then the plan ceases to be a grandfathered health plan.

* * * * *

(3)(i) * * *

(ii) *Change in group health insurance coverage.* To maintain status as a grandfathered health plan, a group health plan that enters into a new policy, certificate, or contract of insurance must provide to the new health insurance issuer (and the new health insurance issuer must require) documentation of plan terms (including benefits, cost sharing, employer contributions, and annual limits) under the prior health coverage sufficient to determine whether a change causing a cessation of grandfathered health plan status under paragraph (g)(1) of this section has occurred.

* * * * *

(f) * * * After the date on which the last of the collective bargaining agreements relating to the coverage that was in effect on March 23, 2010 terminates, the determination of whether health insurance coverage maintained pursuant to a collective bargaining agreement is grandfathered health plan coverage is made under the rules of this section other than this paragraph (f) (comparing the terms of the health insurance coverage after the date the last collective bargaining agreement terminates with the terms of the health insurance coverage that were in effect on March 23, 2010).

(g) * * *

(4) * * *

Example 9. (i) *Facts.* A group health plan not maintained pursuant to a collective bargaining agreement offers three benefit packages on March 23, 2010. Option F is a self-insured option. Options G and H are insured options. Beginning July 1, 2013, the plan increases coinsurance under Option H from 10% to 15%.

(ii) *Conclusion.* In this *Example 9,* the coverage under Option H is not grandfathered health plan coverage as of July 1, 2013, consistent with the rule in paragraph (g)(1)(ii) of this section. Whether the coverage under Options F and G is grandfathered health plan coverage is determined separately under the rules of this paragraph (g).

Department of Labor

Employee Benefits Security Administration

29 CFR Chapter XXV

■ 29 CFR part 2590 is amended as follows:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

■ 1. The authority citation for part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L.104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Secretary of Labor's Order 6–2009, 74 FR 21524 (May 7, 2009).

■ 2. Section 2590.715–1251 is amended by:
■ 1. Revising paragraph (a)(1).
■ 2. Redesignating paragraphs (a)(3), (a)(3)(i) and (a)(3)(ii) as paragraphs (a)(3)(i), (a)(3)(i)(A) and (a)(3)(i)(B), respectively.
■ 3. Adding new paragraph (a)(3)(ii).
■ 4. Removing paragraphs (a)(5) and (f)(2).
■ 5. Redesignating paragraph (f)(1) as paragraph (f).
■ 6. Revising the last sentence in newly-designated paragraph (f).
■ 7. Revising paragraph (g)(4) *Example 9.*

The revisions and addition reads as follows:

§ 2590.715–1251 Preservation of right to maintain existing coverage.

(a) *Definition of grandfathered health plan coverage*—(1) *In general*—(i) *Grandfathered health plan coverage. Grandfathered health plan coverage* means coverage provided by a group health plan, or a health insurance issuer, in which an individual was enrolled on March 23, 2010 (for as long as it maintains that status under the rules of this section). A group health plan or group health insurance coverage does not cease to be grandfathered health plan coverage merely because one or more (or even all) individuals enrolled on March 23, 2010 cease to be covered, provided that the plan has continuously covered someone since March 23, 2010 (not necessarily the same person, but at all times at least one person). In addition, subject to the limitation set forth in paragraph (a)(1)(ii) of this section, a group health plan (and any health insurance coverage offered in connection with the group health plan) does not cease to be a grandfathered health plan merely because the plan (or its sponsor) enters into a new policy, certificate, or contract of insurance after March 23, 2010 (for example, a plan enters into a contract with a new issuer or a new policy is issued with an existing issuer). For purposes of this section, a plan or health insurance coverage that provides grandfathered health plan coverage is referred to as a grandfathered health plan. The rules of this section apply separately to each benefit package made available under a group health plan or health insurance coverage.

(ii) *Changes in group health insurance coverage.* Subject to paragraphs (f) and (g)(2) of this section, if a group health plan (including a group health plan that was self-insured on March 23, 2010) or its sponsor enters into a new policy, certificate, or contract of insurance after March 23, 2010 that is effective before November 15, 2010, then the plan ceases to be a grandfathered health plan.

* * * * *

(3)(i) * * *

(ii) *Change in group health insurance coverage.* To maintain status as a grandfathered health plan, a group health plan that enters into a new policy, certificate, or contract of insurance must provide to the new health insurance issuer (and the new health insurance issuer must require) documentation of plan terms (including benefits, cost sharing, employer contributions, and annual limits) under the prior health coverage sufficient to determine whether a change causing a cessation of grandfathered health plan status under paragraph (g)(1) of this section has occurred.

* * * * *

(f) * * * After the date on which the last of the collective bargaining agreements relating to the coverage that was in effect on March 23, 2010 terminates, the determination of whether health insurance coverage maintained pursuant to a collective bargaining agreement is grandfathered health plan coverage is made under the rules of this section other than this paragraph (f) (comparing the terms of the health insurance coverage after the date the last collective bargaining agreement terminates with the terms of the health insurance coverage that were in effect on March 23, 2010).

(g) * * *

(4) * * *

Example 9. (i) *Facts.* A group health plan not maintained pursuant to a collective bargaining agreement offers three benefit packages on March 23, 2010. Option *F* is a self-insured option. Options *G* and *H* are insured options. Beginning July 1, 2013, the plan increases coinsurance under Option *H* from 10% to 15%.

(ii) *Conclusion.* In this *Example 9,* the coverage under Option *H* is not grandfathered health plan coverage as of July 1, 2013, consistent with the rule in paragraph (g)(1)(ii) of this section. Whether the coverage under Options *F* and *G* is grandfathered health plan coverage is determined separately under the rules of this paragraph (g).

Department of Health and Human Services

45 CFR Chapter I

■ Accordingly, 45 CFR part 147 is amended as follows:

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

■ 1. The authority citation for part 147 continues to read as follows:

Authority: Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

■ 2. Section 147.140 is amended by:
■ 1. Revising paragraph (a)(1).
■ 2. Redesignating paragraphs (a)(3), (a)(3)(i) and (a)(3)(ii) as paragraphs (a)(3)(i), (a)(3)(i)(A) and (a)(3)(i)(B), respectively.
■ 3. Adding new paragraph (a)(3)(ii).
■ 4. Removing paragraphs (a)(5) and (f)(2).
■ 5. Redesignating paragraph (f)(1) as paragraph (f).
■ 6. Revising the last sentence in newly-designated paragraph (f).
■ 7. Revising paragraph (g)(4) *Example 9.*

The revisions and addition reads as follows:

§ 147.140 Preservation of right to maintain existing coverage.

(a) *Definition of grandfathered health plan coverage*—(1) *In general*—(i) *Grandfathered health plan coverage. Grandfathered health plan coverage* means coverage provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled on March 23, 2010 (for as long as it maintains that status under the rules of this section). A group health plan or group health insurance coverage does not cease to be grandfathered health plan coverage merely because one or more (or even all) individuals enrolled on March 23, 2010 cease to be covered, provided that the plan has continuously covered someone since March 23, 2010 (not necessarily the same person, but at all times at least one person). In addition, subject to the limitation set forth in paragraph (a)(1)(ii) of this section, a group health plan (and any health insurance coverage offered in connection with the group health plan) does not cease to be a grandfathered health plan merely because the plan (or its sponsor) enters into a new policy, certificate, or contract of insurance after March 23, 2010 (for

example, a plan enters into a contract with a new issuer or a new policy is issued with an existing issuer). For purposes of this section, a plan or health insurance coverage that provides grandfathered health plan coverage is referred to as a grandfathered health plan. The rules of this section apply separately to each benefit package made available under a group health plan or health insurance coverage.

(ii) *Changes in group health insurance coverage.* Subject to paragraphs (f) and (g)(2) of this section, if a group health plan (including a group health plan that was self-insured on March 23, 2010) or its sponsor enters into a new policy, certificate, or contract of insurance after March 23, 2010 that is effective before November 15, 2010, then the plan ceases to be a grandfathered health plan.

* * * * *

(3)(i) * * *

(ii) *Change in group health insurance coverage.* To maintain status as a grandfathered health plan, a group health plan that enters into a new policy, certificate, or contract of insurance must provide to the new health insurance issuer (and the new health insurance issuer must require) documentation of plan terms (including benefits, cost sharing, employer contributions, and annual limits) under the prior health coverage sufficient to determine whether a change causing a cessation of grandfathered health plan status under paragraph (g)(1) of this section has occurred.

* * * * *

(f) * * * After the date on which the last of the collective bargaining agreements relating to the coverage that was in effect on March 23, 2010 terminates, the determination of whether health insurance coverage maintained pursuant to a collective bargaining agreement is grandfathered health plan coverage is made under the rules of this section other than this paragraph (f) (comparing the terms of the health insurance coverage after the date the last collective bargaining agreement terminates with the terms of the health insurance coverage that were in effect on March 23, 2010).

(g) * * *

(4) * * *

Example 9. (i) *Facts.* A group health plan not maintained pursuant to a collective bargaining agreement offers three benefit packages on March 23, 2010. Option *F* is a self-insured option. Options *G* and *H* are insured options. Beginning July 1, 2013, the plan increases coinsurance under Option *H* from 10% to 15%.

(ii) *Conclusion.* In this *Example 9,* the coverage under Option *H* is not grandfathered health plan coverage as of July 1, 2013, consistent with the rule in paragraph (g)(1)(ii) of this section. Whether the coverage under Options *F* and *G* is grandfathered health plan coverage is determined separately under the rules of this paragraph (g).

[FR Doc. 2010–28861 Filed 11–15–10; 4:15 pm]

BILLING CODE 4830–01–4510–29–4120–01–P

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 0

[AG Order No. 3229–2010]

Office of Tribal Justice

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This rule will amend part 0 of title 28 of the Code of Federal Regulations to reflect the establishment of the Office of Tribal Justice as a distinct component of the Department of Justice. The Office of Tribal Justice was created by the Attorney General to provide a channel for Tribes to communicate their concerns to the Department, to help coordinate policy on Indian affairs both within the Department and with other Federal agencies, and to ensure that the Department and its components work with Tribes on a government-to-government basis. This rule, which sets forth the Office's organization, mission and functions, amends the Code of Federal Regulations in order to reflect accurately the Department's internal management structure.

DATES: *Effective Date:* November 17, 2010.

FOR FURTHER INFORMATION CONTACT: Tracy Toulou, Director, Office of Tribal Justice, U.S. Department of Justice, RFK Main Justice Building, Room 2318, 950 Pennsylvania Avenue, NW., Washington, DC 20530. Telephone: (202) 514–8812.

SUPPLEMENTARY INFORMATION:

Background

In 1995 the Attorney General established the Office of Tribal Justice (OTJ) to provide a principal point of contact within the Department of Justice to listen to the concerns of Indian tribes and other parties interested in Indian affairs and to communicate the Department's policies to the Tribes and the public; to promote internal uniformity of Department of Justice policies and litigation positions relating to Indian country; and to coordinate with other Federal agencies and with State and local governments on their initiatives in Indian country. On November 5, 2009, the President directed all Federal agencies to develop a consultation and coordination policy that ensures effective communication with Tribes. The Director of OTJ, in consultation with Tribes and with other Department components, developed the Department's comprehensive plan in response to the President's directive, and is designated as the Department official responsible for following through on the plan and reporting requirements associated with the President's directive. The Director of OTJ also is the Department official responsible for certifying to the Office of Management and Budget that the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, have been met with regard to any regulation or legislation proposed by the Department.

On July 29, 2010, President Obama signed into law the Tribal Law and Order Act of 2010, Public Law 111–211. Section 214 of the Tribal Law and Order Act amends title I of the Indian Tribal Justice Technical and Legal Assistance Act of 2000, to provide that "[n]ot later than 90 days after the date of enactment of the Tribal Law and Order Act of 2010, the Attorney General shall establish the Office of Tribal Justice as a component of the Department." This rule implements fully that statutory directive.

Administrative Procedure Act 5 U.S.C. 553

This rule is a rule of agency organization and procedure, and relates to the internal management of the Department of Justice. It is therefore exempt from the requirements of notice and comment and a delayed effective date. 5 U.S.C. 553(b), (d).

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule and by approving it certifies that this rule will not have a significant economic impact on a substantial number of small entities because it pertains to personnel and administrative matters affecting the Department. Further, a Regulatory Flexibility Analysis was not required to be prepared for this final rule since the Department was not required to publish a general notice of proposed rulemaking for this matter.

Executive Order 12866

This action has been drafted and reviewed in accordance with Executive

Order 12866, Regulatory Planning and Review, § 1(b), Principles of Regulation. This rule is limited to agency organization, management, and personnel as described by Executive Order 12866 § 3(d)(3) and, therefore, is not a "regulation" or "rule" as defined by that Executive Order. Accordingly, this action has not been reviewed by the Office of Management and Budget.

Federalism

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 13175—Tribal Consultation

Congress actively sought the input of Indian Tribes and Tribal organizations in developing the Tribal Law and Order Act of 2010, Public Law 111–211. As a result of that Congressional consultation, the Act includes a requirement that the Office of Tribal Justice be established as a component of the Department of Justice. This action merely amends title 28 of the Code of Federal Regulations to reflect the establishment of the Office of Tribal Justice as a Department component consistent with Tribal input to Congress. Therefore, no consultation with Tribes is required under Executive Order 13175.

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1955

This rule will not result in the expenditure by State, local and Tribal governments, in the aggregate, or by the private sector of $100,000,000 or more in any one year, and it does not create requirements that might significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

Plain Language Instructions

We try to write clearly. Suggestions about how to improve the clarity of this rule may be submitted in writing to Tracy Toulou, Director, Office of Tribal Justice.

List of Subjects in 28 CFR Part 0

Authority delegation (Government agencies), Government employees, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

■ Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509, 510, part 0 of title 28 of the Code of Federal Regulations is amended as follows:

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

■ 1. The authority citation for part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515–519.

■ 2. Revise § 0.1 by adding at the end of the list under "Offices" the title "Office of Tribal Justice".

Subpart W–1—[Redesignated as Subpart W–2]

■ 3. Redesignate subpart W–1 as subpart W–2.

■ 4. Add a new subpart W–1 to read as follows:

Subpart W–1—Office of Tribal Justice

§ 0.134 Office of Tribal Justice.

(a) *Organization.* The Office of Tribal Justice is headed by a Director appointed by the Attorney General. The Director shall be responsible to, and report directly to, the Deputy Attorney General and the Associate Attorney General and shall be a member of the Senior Executive Service.

(b) *Mission.* The mission of the Office of Tribal Justice shall be to provide a principal point of contact within the Department of Justice to listen to the concerns of Indian Tribes and other parties interested in Indian affairs and to communicate the Department's policies to the Tribes and the public; to promote internal uniformity of Department of Justice policies and litigation positions relating to Indian country; and to coordinate with other Federal agencies and with State and local governments on their initiatives in Indian country.

(c) *Function.* Subject to the general supervision and direction of the Deputy Attorney General and the Associate Attorney General, the Office of Tribal Justice shall:

(1) Serve as the program and legal policy advisor to the Attorney General with respect to the treaty and trust relationship between the United States and Indian Tribes;

(2) Serve as the Department's initial and ongoing point of contact, and as the Department's principal liaison, for Federally recognized Tribal governments and Tribal organizations;

(3) Coordinate the Department's activities, policies, and positions relating to Indian Tribes, including the treaty and trust relationship between the United States and Indian Tribes;

(4) Ensure that the Department and its components work with Indian Tribes on a government-to-government basis;

(5) Collaborate with Federal and other government agencies to promote consistent, informed government-wide policies, operations, and initiatives related to Indian Tribes;

(6) Serve as a clearinghouse for coordination among the various components of the Department on Federal Indian law issues, and with other Federal agencies on the development of policy or Federal litigation positions involving Indians and Indian Tribes;

(7) Coordinate with each component of the Department to ensure that each component of the Department has an accountable process to ensure meaningful and timely consultation with Tribal leaders in the development of regulatory policies and other actions that affect the trust responsibility of the United States to Indian Tribes, any Tribal treaty provision, the status of Indian Tribes as sovereign governments, or any other Tribal interest.

(8) Ensure that the consultation process of each component of the Department is consistent with Executive Order 13175 and with the Department's consultation policy;

(9) Serve, through its Director, as the official responsible for implementing the Department's Tribal consultation policy and for certifying compliance with Executive Order 13175 to the Office of Management and Budget; and

(10) Perform such other duties and assignments as deemed necessary from time to time by the Attorney General,

the Deputy Attorney General, or the Associate Attorney General.

Dated: November 10, 2010.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2010–28947 Filed 11–16–10; 8:45 am]

BILLING CODE 4410–07–P

POSTAL REGULATORY COMMISSION

30 CFR Part 3020

[Docket Nos. MC2011–1, et al.]

Product List Update

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is updating the postal product lists. This action reflects the disposition of recent dockets, as reflected in Commission orders, and a publication policy adopted in a recent Commission order. The referenced policy assumes periodic updates. The updates are identified in the body of this document. The product lists, which are re-published in their entirety, include these updates.

DATES: *Effective Date:* November 17, 2010.

Applicability Dates: October 20, 2010 (Express Mail Contract 9); October 29, 2010 (Priority Mail Contract 28, and Priority Mail Contract 29); November 5, 2010 (Inbound International Expedited Services 4 (MC2010–37 and CP2010–126).

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at *stephen.sharfman@prc.gov* or 202–789–6820.

SUPPLEMENTARY INFORMATION: This document identifies recent updates to the product lists, which appear as 39 CFR Appendix A to Subpart A of Part 3020—Mail Classification Schedule.[1] Publication of updated product lists in the **Federal Register** is consistent with the Postal Accountability and Enhancement Act (PAEA) of 2006.

Authorization. The Commission process for periodic publication of updates was established in Order No. 445, April 22, 2010.

Changes. Since publication of the product lists in the **Federal Register** on August 31, 2010 (75 FR 53216), the following additions to the competitive product list have been made:

1. Express Mail Contract 9, added October 20, 2010 (Order No. 563);
2. Priority Mail Contract 28, added October 29, 2010 (Order No. 573);
3. Priority Mail Contract 29, added October 29, 2010 (Order No. 574); and
4. Inbound International Expedited Services 4 (MC2010–37 and CP2010–126), added November 5, 2010 (Order No. 579).

Updated product lists. The referenced changes to the competitive product list are included in the product lists following the Secretary's signature.

List of Subjects in 39 CFR Part 3020

Administrative practice and procedure; Postal Service.

By the Commission.

Shoshana M. Grove,

Secretary.

■ For the reasons discussed in the preamble, the Postal Regulatory Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

PART 3020—PRODUCT LISTS

■ 1. The authority citation for part 3020 continues to read as follows:

Authority: 39 U.S.C. 503; 3622; 3631; 3642; 3682.

■ 2. Revise Appendix A to Subpart A of Part 3020—Mail Classification Schedule to read as follows:

Appendix A to Subpart A of Part 3020—Mail Classification Schedule

Part A—Market Dominant Products

1000 Market Dominant Product List

- First-Class Mail
  - Single-Piece Letters/Postcards
  - Bulk Letters/Postcards
  - Flats
  - Parcels
  - Outbound Single-Piece First-Class Mail International
  - Inbound Single-Piece First-Class Mail International
- Standard Mail (Regular and Nonprofit)
  - High Density and Saturation Letters
  - High Density and Saturation Flats/Parcels
  - Carrier Route
  - Letters
  - Flats
  - Not Flat-Machinables (NFMs)/Parcels
- Periodicals
  - Within County Periodicals
  - Outside County Periodicals
- Package Services
  - Single-Piece Parcel Post
  - Inbound Surface Parcel Post (at UPU rates)
  - Bound Printed Matter Flats
  - Bound Printed Matter Parcels
  - Media Mail/Library Mail
- Special Services
  - Ancillary Services
  - International Ancillary Services
  - Address Management Services
  - Caller Service
  - Change-of-Address Credit Card Authentication
  - Confirm
  - Customized Postage
  - International Reply Coupon Service
  - International Business Reply Mail Service
  - Money Orders
  - Post Office Box Service
  - Stamp Fulfillment Services
- Negotiated Service Agreements
  - HSBC North America Holdings Inc. Negotiated Service Agreement
  - Bookspan Negotiated Service Agreement
  - Bank of America Corporation Negotiated Service Agreement
  - The Bradford Group Negotiated Service Agreement
  - Inbound International
  - Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Market Dominant Services (MC2010–12 and R2010–2)
  - The Strategic Bilateral Agreement Between United States Postal Service and Koninklijke TNT Post BV and TNT Postl pakketservice Benelux BV, collectively "TNT Post" and China Post Group–United States Postal Service Letter Post Bilateral Agreement (MC2010–35, R2010–5 and R2010–6)
- Market Dominant Product Descriptions
- First-Class Mail
  - Single-Piece Letters/Postcards
  - Bulk Letters/Postcards
  - Flats
  - Parcels
  - Outbound Single-Piece First-Class Mail International
  - Inbound Single-Piece First-Class Mail International
- Standard Mail (Regular and Nonprofit)
  - High Density and Saturation Letters
  - High Density and Saturation Flats/Parcels
  - Carrier Route
  - Letters
  - [Reserved for Product Description]
  - Flats
  - Not Flat-Machinables (NFMs)/Parcels
- Periodicals
  - Within County Periodicals
  - Outside County Periodicals
- Package Services
  - Single-Piece Parcel Post
  - Inbound Surface Parcel Post (at UPU rates)
  - Bound Printed Matter Flats
  - Bound Printed Matter Parcels
  - Media Mail/Library Mail
- Special Services
  - Ancillary Services
  - Address Correction Service
  - Applications and Mailing Permits
  - Business Reply Mail
  - Bulk Parcel Return Service
  - Certified Mail
  - Certificate of Mailing
  - Collect on Delivery
  - Delivery Confirmation
  - Insurance
  - Merchandise Return Service
  - Parcel Airlift (PAL)
  - Registered Mail
  - Return Receipt
  - Return Receipt for Merchandise
  - Restricted Delivery
  - Shipper-Paid Forwarding
  - Signature Confirmation
  - Special Handling
  - Stamped Envelopes
  - Stamped Cards
  - Premium Stamped Stationery

[1] Docket Nos. MC2011–1, CP2011–2, MC2011–2, CP2011–3, MC2011–3 and CP2011–4.

Premium Stamped Cards
International Ancillary Services
International Certificate of Mailing
International Registered Mail
International Return Receipt
International Restricted Delivery
Address List Services
Caller Service
Change-of-Address Credit Card Authentication
Confirm
International Reply Coupon Service
International Business Reply Mail Service
Money Orders
Post Office Box Service
[Reserved for Product Description]
Negotiated Service Agreements
HSBC North America Holdings Inc. Negotiated Service Agreement
Bookspan Negotiated Service Agreement
Bank of America Corporation Negotiated Service Agreement
The Bradford Group Negotiated Service Agreement

Part B—Competitive Products

2000 Competitive Product List

Express Mail
Express Mail
Outbound International Expedited Services
Inbound International Expedited Services
Inbound International Expedited Services 1 (CP2008–7)
Inbound International Expedited Services 2 (MC2009–10 and CP2009–12)
Inbound International Expedited Services 3 (MC2010–13 and CP2010–12)
Inbound International Expedited Services 4 (MC2010–37 and CP2010–126)
Priority Mail
Priority Mail
Outbound Priority Mail International
Inbound Air Parcel Post (at non-UPU rates)
Royal Mail Group Inbound Air Parcel Post Agreement
Inbound Air Parcel Post (at UPU rates)
Parcel Select
Parcel Return Service
International
International Priority Airlift (IPA)
International Surface Airlift (ISAL)
International Direct Sacks—M–Bags
Global Customized Shipping Services
Inbound Surface Parcel Post (at non-UPU rates)
Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services (MC2010–14 and CP2010–13—Inbound Surface Parcel Post at Non-UPU Rates and Xpresspost-USA)
International Money Transfer Service—Outbound
International Money Transfer Service—Inbound
International Ancillary Services
Special Services
Address Enhancement Service
Greeting Cards and Stationery
Premium Forwarding Service
Shipping and Mailing Supplies
Negotiated Service Agreements
Domestic
Express Mail Contract 1 (MC2008–5)
Express Mail Contract 2 (MC2009–3 and CP2009–4)
Express Mail Contract 3 (MC2009–15 and CP2009–21)
Express Mail Contract 4 (MC2009–34 and CP2009–45)
Express Mail Contract 5 (MC2010–5 and CP2010–5)
Express Mail Contract 6 (MC2010–6 and CP2010–6)
Express Mail Contract 7 (MC2010–7 and CP2010–7)
Express Mail Contract 8 (MC2010–16 and CP2010–16)
Express Mail Contract 9 (MC2011–1 and CP2011–2)
Express Mail & Priority Mail Contract 1 (MC2009–6 and CP2009–7)
Express Mail & Priority Mail Contract 2 (MC2009–12 and CP2009–14)
Express Mail & Priority Mail Contract 3 (MC2009–13 and CP2009–17)
Express Mail & Priority Mail Contract 4 (MC2009–17 and CP2009–24)
Express Mail & Priority Mail Contract 5 (MC2009–18 and CP2009–25)
Express Mail & Priority Mail Contract 6 (MC2009–31 and CP2009–42)
Express Mail & Priority Mail Contract 7 (MC2009–32 and CP2009–43)
Express Mail & Priority Mail Contract 8 (MC2009–33 and CP2009–44)
Parcel Select & Parcel Return Service Contract 1 (MC2009–11 and CP2009–13)
Parcel Select & Parcel Return Service Contract 2 (MC2009–40 and CP2009–61)
Parcel Return Service Contract 1 (MC2009–1 and CP2009–2)
Priority Mail Contract 1 (MC2008–8 and CP2008–26)
Priority Mail Contract 2 (MC2009–2 and CP2009–3)
Priority Mail Contract 3 (MC2009–4 and CP2009–5)
Priority Mail Contract 4 (MC2009–5 and CP2009–6)
Priority Mail Contract 5 (MC2009–21 and CP2009–26)
Priority Mail Contract 6 (MC2009–25 and CP2009–30)
Priority Mail Contract 7 (MC2009–25 and CP2009–31)
Priority Mail Contract 8 (MC2009–25 and CP2009–32)
Priority Mail Contract 9 (MC2009–25 and CP2009–33)
Priority Mail Contract 10 (MC2009–25 and CP2009–34)
Priority Mail Contract 11 (MC2009–27 and CP2009–37)
Priority Mail Contract 12 (MC2009–28 and CP2009–38)
Priority Mail Contract 13 (MC2009–29 and CP2009–39)
Priority Mail Contract 14 (MC2009–30 and CP2009–40)
Priority Mail Contract 15 (MC2009–35 and CP2009–54)
Priority Mail Contract 16 (MC2009–36 and CP2009–55)
Priority Mail Contract 17 (MC2009–37 and CP2009–56)
Priority Mail Contract 18 (MC2009–42 and CP2009–63)
Priority Mail Contract 19 (MC2010–1 and CP2010–1)
Priority Mail Contract 20 (MC2010–2 and CP2010–2)
Priority Mail Contract 21 (MC2010–3 and CP2010–3)
Priority Mail Contract 22 (MC2010–4 and CP2010–4)
Priority Mail Contract 23 (MC2010–9 and CP2010–9)
Priority Mail Contract 24 (MC2010–15 and CP2010–15)
Priority Mail Contract 25 (MC2010–30 and CP2010–75)
Priority Mail Contract 26 (MC2010–31 and CP2010–76)
Priority Mail Contract 27 (MC2010–32 and CP2010–77)
Priority Mail Contract 28 (MC2011–2 and CP2011–3)
Priority Mail Contract 29 (MC2011–3 and CP2011–4)
Outbound International
Direct Entry Parcels Contracts
Direct Entry Parcels 1 (MC2009–26 and CP2009–36)
Global Direct Contracts (MC2009–9, CP2009–10, and CP2009–11)
Global Expedited Package Services (GEPS) Contracts
GEPS 1 (CP2008–5, CP2008–11, CP2008–12, CP2008–13, CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23 and CP2008–24)
Global Expedited Package Services 2 (CP2009–50)
Global Expedited Package Services 3 (MC2010–28 and CP2010–71)
Global Plus Contracts
Global Plus 1 (CP2008–8, CP2008–46 and CP2009–47)
Global Plus 1A (MC2010–26, CP2010–67 and CP2010–68)
Global Plus 2 (MC2008–7, CP2008–48 and CP2008–49)
Global Plus 2A (MC2010–27, CP2010–69 and CP2010–70)
Inbound International
Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010–34 and CP2010–95)
Inbound Direct Entry Contracts with Foreign Postal Administrations
Inbound Direct Entry Contracts with Foreign Postal Administrations (MC2008–6, CP2008–14 and MC2008–15)
Inbound Direct Entry Contracts with Foreign Postal Administrations 1 (MC2008–6 and CP2009–62)
International Business Reply Service Competitive Contract 1 (MC2009–14 and CP2009–20)
International Business Reply Service Competitive Contract 2 (MC2010–18, CP2010–21 and CP2010–22)
Competitive Product Descriptions
Express Mail
Express Mail
Outbound International Expedited Services
Inbound International Expedited Services
Priority
Priority Mail
Outbound Priority Mail International
Inbound Air Parcel Post
Parcel Select
Parcel Return Service
International
International Priority Airlift (IPA)

International Surface Airlift (ISAL)
International Direct Sacks—M–Bags
Global Customized Shipping Services
International Money Transfer Service
Inbound Surface Parcel Post (at non-UPU rates)
International Ancillary Services
International Certificate of Mailing
International Registered Mail
International Return Receipt
International Restricted Delivery
International Insurance
Negotiated Service Agreements
Domestic
Outbound International

Part C—Glossary of Terms and Conditions [Reserved]

Part D—Country Price Lists for International Mail [Reserved]

[FR Doc. 2010–28884 Filed 11–16–10; 8:45 am]

BILLING CODE 7710–FW–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0776]

RIN 1625–AA00

Safety Zone; Fireworks Displays, Potomac River, National Harbor, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone upon specified waters of the Potomac River. This action is necessary to provide for the safety of life on navigable waters during fireworks displays launched from a discharge barge located at National Harbor, in Prince Georges County, Maryland. This safety zone is intended to protect the maritime public in a portion of the Potomac River.

DATES: This rule is effective from 6 p.m. on November 17, 2010 through 11 p.m. on November 18, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0776 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0776 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Ronald L. Houck, Sector Baltimore Waterways Management Division, Coast Guard; telephone 410–576–2674, e-mail *Ronald.L.Houck@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On September 1, 2010, we published a temporary interim rule with request for comments entitled "Safety Zone; Fireworks Displays, Potomac River, National Harbor, MD" in the **Federal Register** (75 FR 169). We received one comment on the interim rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Due to the need for immediate action, the restriction of vessel traffic is necessary to protect life, property and the environment; therefore, a 30-day notice is impracticable. Delaying the effective date would be contrary to the safety zone's intended objectives of protecting persons and vessels involved in the event, and enhancing public and maritime safety.

Background and Purpose

Fireworks displays are frequently held from locations on or near the navigable waters of the United States. The potential hazards associated with fireworks displays are a safety concern during such events. The purpose of this rule is to promote public and maritime safety during five fireworks displays, and to protect mariners transiting the area from the potential hazards associated with a fireworks display, such as the accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris. This rule is needed to ensure safety on the waterway during the scheduled events.

Discussion of Comments and Changes

The Coast Guard received a total of one piece of correspondence in response to the temporary interim rule. No public meeting was requested and none was held. What follows is a review of, and the Coast Guard's response to, the issues and questions that were presented by the commenter concerning the interim rule.

The commenter, the sponsor's representative for the fireworks displays, stated in an e-mail on September 2, 2010 that a date change had occurred for the fireworks display scheduled on November 18, 2010. The fireworks display will now be held on November 17, 2010.

One change is being made to the temporary final rule to reflect the change in date for the fireworks display. The temporary final rule will now be enforced from 6 p.m. through 11 p.m. on November 17, 2010 and if necessary due to inclement weather, from 6 p.m. through 11 p.m. on November 18, 2010.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. Although this safety zone will restrict some vessel traffic, there is little vessel traffic associated with commercial fishing in the area, and recreational boating in the area can transit waters outside the safety zone. In addition, the effect of this rule will not be significant because the safety zone is of limited duration and limited size. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to operate, transit, or anchor in a portion of the Potomac River, located at National Harbor, MD, from 6 p.m. through 11 p.m. on November 17, 2010, and if necessary due to inclement weather, from 6 p.m. through 11 p.m. on November 18, 2010.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. The safety zone is of limited size and duration. In addition, before the effective periods, the Coast Guard will issue maritime advisories widely available to users of the waterway to allow mariners to make alternative plans for transiting the affected area.

Assistance for Small Entities

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

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. This rule involves establishing a temporary 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, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T05–0776 to read as follows:

§ 165.T05–0776 Safety Zone; Fireworks Displays, Potomac River, National Harbor, MD.

(a) *Regulated Area.* The following area is a safety zone: All waters in the Potomac River, within an area bounded by a line drawn from the following points: latitude 38°47′18″ N, longitude

077°01′01″ W; thence to latitude 38°47′11″ N, longitude 077°01′26″ W; thence to latitude 38°47′25″ N, longitude 077°01′33″ W; thence to latitude 38°47′32″ N, longitude 077°01′08″ W; thence to the point of origin, located at National Harbor, Maryland (NAD 1983).

(b) *Regulations.* The general safety zone regulations found in 33 CFR 165.23 apply to the safety zone created by this temporary section, § 165.T05.0776.

(1) All vessels and persons are prohibited from entering this zone, except as authorized by the Coast Guard Captain of the Port Baltimore.

(2) Persons or vessels requiring entry into or passage within the zone must request authorization from the Captain of the Port Baltimore or his designated representative by telephone at 410–576–2693 or on VHF–FM marine band radio channel 16.

(3) All Coast Guard assets enforcing this safety zone can be contacted on VHF–FM marine band radio channels 13 and 16.

(4) The operator of any vessel within or in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign, and

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign.

(c) *Definitions. Captain of the Port Baltimore* means the Commander, Coast Guard Sector Baltimore or any Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port to act on his behalf.

Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Baltimore to assist in enforcing the safety zone described in paragraph (a) of this section.

(d) *Enforcement.* The U.S. Coast Guard may be assisted by Federal, State and local agencies in the patrol and enforcement of the zone.

(e) *Enforcement period.* This section will be enforced from 6 p.m. through 11 p.m. on November 17, 2010, and if necessary due to inclement weather, from 6 p.m. through 11 p.m. on November 18, 2010.

Dated: October 26, 2010.

Mark P. O'Malley,

Captain, U.S. Coast Guard, Captain of the Port Baltimore.

[FR Doc. 2010–28898 Filed 11–16–10; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 111

2011 Changes for Domestic Mailing Services

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service will revise *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) to incorporate standards for the introduction of Address Information System services, for the discontinuation of rigid flats claiming flats prices, and other clarifications.

DATES: Effective January 2, 2011.

FOR FURTHER INFORMATION CONTACT: Bill Chatfield, 202–268–7278.

SUPPLEMENTARY INFORMATION: On July 9 2010, the **Federal Register** published the Postal Service proposed rule, *New Standards for Domestic Mailing Services* (75 FR 39477–39492). We are re-filing separately with the Postal Regulatory Commission (PRC) our request for two incentive programs and for changes in the Move Update tolerance and will publish related standards in a separate **Federal Register** notice. The Postal Service is postponing implementation of any changes directly related to a price change.

This final rule includes changes in terminology for some Standard Mail letter prices, discontinuation of the current exception that allows some rigid flats to claim flats prices, a change in the expression of decimal pounds for Package Services parcels, the list of Address Information System services, and the mailing standards in the DMM to implement the changes. We received no customer comments on these elements of the prior proposed rule.

Standard Mail Letters

Currently, nonbarcoded or nonautomation-compatible Standard Mail letters that are mailed at saturation or high density prices pay the corresponding nonautomation Standard Mail flats prices. This causes confusion for both customers and employees regarding mail preparation. For example, mailers often ask if they can enter nonautomation saturation or high density letters at destination delivery unit (DDU) prices, which is allowed for flats but not for letters. Similar confusion exists regarding the price terminology for nonmachinable letters weighing more than 3.3 ounces, which currently default to nonautomation flats prices.

To reduce confusion, we are changing the terminology used for the pricing of nonbarcoded and/or nonautomation-compatible saturation and high density letters by establishing a separate price table for these pieces. Prices will be the same as for saturation and high density flats. This does not change the applicable prices for these pieces; it only clarifies the application of the current prices.

We also will be using the term "nonmachinable letter prices" to refer to presorted nonmachinable letters weighing more than 3.3 ounces, instead of using the current terminology. Nonmachinable letters over 3.3 ounces will continue to have the same prices as nonautomation flats over 3.3 ounces, but the prices will be called nonmachinable letter prices.

Flats

The Postal Service found that rigid flat-size pieces are generally less efficient to handle than non-rigid flats, even when they are able to be sorted by our flat-sorting machines. Therefore, we will eliminate the current option for rigid flats to be eligible for automation prices if they pass a Pricing and Classification Service Center-administered testing process. The current flexibility test will remain as described in DMM 301.1.3.

Parcels

Parcel Post®, Bound Printed Matter (BPM), Media Mail®, and Library Mail single-piece parcel weights will be calculated by rounding off to two decimal places, instead of the current four decimal places.

Special and Other Services

Address Information System Products and Services

Address Management at the USPS® National Customer Support Center (NCSC) in Memphis, TN, provides value-added product and service offerings that enable customers to better manage the quality of their mailing lists while maximizing the Postal Service's ability to deliver mail efficiently. Our changes add a comprehensive list of address information system products and services available from the NCSC. The prices for these items will be incorporated into Notice 123—*Price List.*

The Postal Service hereby adopts the following changes to the *Mailing Services of the United States Postal Service,* Domestic Mail Manual (DMM), which is incorporated by reference in the *Code of Federal Regulations. See* 39 CFR Part 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

■ Accordingly, 39 CFR Part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), as follows:

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200 Commercial Letters and Cards

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240 Standard Mail

243 Prices and Eligibility

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3.0 Basic Standards for Standard Mail Letters

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3.2 Defining Characteristics

3.2.1 Mailpiece Weight

All Standard Mail pieces must weigh less than 16 ounces. The following weight limits also apply to pieces mailed at Standard Mail letter prices:

[*Revise items a and b to read as follows:*]

a. Pieces mailed at machinable letter prices may weigh up to 3.3 ounces. Letter-size pieces weighing more than 3.3 ounces are mailable at nonmachinable letter prices, unless they are barcoded and eligible to be mailed as automation letters. For saturation and high density letters over 3.5 ounces, *see* 3.2.1b.

b. Pieces mailed at automation letter prices may weigh up to 3.5 ounces. Saturation and high density letters weighing more than 3.5 ounces are mailable at applicable saturation or high density nonautomation letter prices.

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5.0 Additional Eligibility Standards for Nonautomation Standard Mail Letters

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5.5 Nonmachinable Price Application

[*Revise 5.5 to read as follows:*]

Nonmachinable prices in 1.0 apply only to Standard Mail letter-size pieces (including card-size pieces) that meet the criteria in 201.2.1 for nonmachinable letters. Nonmachinable saturation or high density letter-size pieces are subject to the applicable saturation or high density nonautomation letter prices.

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6.0 Additional Eligibility Standards for Enhanced Carrier Route Standard Mail Letters

6.1 General Enhanced Carrier Route Standards

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6.1.2 Basic Eligibility Standards

All pieces in an Enhanced Carrier Route or Nonprofit Enhanced Carrier Route Standard Mail mailing must:

* * * * *

[*Revise item 6.1.2g to read as follows:*]

g. Meet the requirements for automation compatibility in 201.3.0 and bear an accurate delivery point POSTNET barcode (through April 2011) or Intelligent Mail barcode encoded with the correct delivery point routing code matching the delivery address and meeting the standards in 202.5.0, and 708.4.0, except as provided in 6.1.2h. Pieces prepared with a simplified address format are exempt from the automation-compatibility and barcode requirements. Letters with Intelligent Mail barcodes entered under the full-service Intelligent Mail automation option also must meet the standards in 705.22.0.

[*Add new item 6.1.2h to read as follows:*]

h. All saturation and high density letters over 3.5 ounces, and saturation (other than pieces with a simplified address) and high density letter-size pieces not meeting the standards 6.1.2g must pay the applicable nonautomation saturation or high density prices. Basic carrier route letter prices are the same for barcoded automation-compatible pieces and nonautomation pieces.

[*Delete 6.1.3, Maximum Weight for Enhanced Carrier Route Letters, in its entirety.*]

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6.3 Basic Price Enhanced Carrier Route Standards

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6.3.2 Basic Price Eligibility

[*Revise 6.3.2 by deleting items a and b in their entirety to read as follows:*]

Basic prices apply to each piece sorted under 245.6.0 or 705.8.0 in a full carrier route tray, in a carrier route bundle of 10 or more pieces, or in groups of 10 or more pieces placed in a 5-digit carrier routes or a 3-digit carrier routes tray.

6.4 High Density Enhanced Carrier Route Standards

6.4.1 Basic Eligibility Standards for High Density Prices

[*Revise 6.4.1, by deleting items a and b and incorporating those items into the text to read as follows:*]

High density letter-size mailpieces must be in a full carrier route tray or in a carrier route bundle of 10 or more pieces placed in a 5-digit carrier routes or 3-digit carrier routes tray. High density prices for barcoded letters apply to each piece that is automation-compatible according to 201.3.0, and has an accurate delivery point POSTNET barcode (through April 2011) or Intelligent Mail barcode encoded with the correct delivery point routing code matching the delivery address and meeting the standards in 202.5.0, and 708.4.0. Except for pieces with a simplified address, pieces that are not automation-compatible or not barcoded are mailable only at the nonautomation high density letter prices.

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6.4.3 High Density Discount for Heavy Letters

[*Revise 6.4.3 to read as follows:*]

High density pieces that are automation-compatible under 201.3.0, that are accurately barcoded with a delivery point barcode, and that weigh more than 3.3 ounces but not more than 3.5 ounces, pay postage equal to the piece/pound price and receive a discount equal to the high density flat-size piece price (3.3 ounces or less) minus the high density letter piece price (3.3 ounces or less). The discount is calculated using nondestination entry prices only, regardless of entry level. This discount does not apply to pieces paying nonautomation high density letter prices.

6.5 Saturation ECR Standards

6.5.1 Basic Eligibility Standards for Saturation Prices

[*Revise 6.5.1 by deleting items a through c and incorporating those items into the text to read as follows:*]

Saturation letter-size mailpieces must be in a full carrier route tray or in a carrier route bundle of 10 or more pieces placed in a 5-digit carrier routes or 3-digit carrier routes tray. Saturation prices for barcoded letters apply to each piece that is automation-compatible according to 201.3.0, and has an accurate delivery point POSTNET barcode (through April 2011) or Intelligent Mail barcode encoded with the correct delivery point routing code matching the delivery address and

meeting the standards in 202.5.0 and 708.4.0. Except for pieces with a simplified address, pieces that are not automation-compatible or not barcoded are mailable at nonautomation saturation letter prices.

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6.5.3 Saturation Discount for Heavy Letters

[*Revise 6.5.3 to read as follows:*]

Saturation pieces that are automation-compatible under 201.3.0, are accurately barcoded with a delivery point barcode, and weigh more than 3.3 ounces but not more than 3.5 ounces pay postage equal to the piece/pound price and receive a discount equal to the saturation flat-size piece price (3.3 ounces or less) minus the saturation letter piece price (3.3 ounces or less). The discount is calculated using nondestination entry prices only, regardless of entry level. This discount also applies to saturation pieces with simplified addresses. This discount does not apply to pieces paying nonautomation saturation letter prices.

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300 Commercial Flats

301 Physical Standards

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3.0 Physical Standards for Automation Flats

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[*Delete 3.3 in its entirety, and renumber current 3.4 through 3.6 as new 3.3 through 3.5.*]

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400 Commercial Parcels

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460 Bound Printed Matter

463 Prices and Eligibility

1.0 Prices and Fees for Bound Printed Matter

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1.2 Commercial Bound Printed Matter

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1.2.6 Determining Single-Piece Weight

[*Revise the last sentence of 1.2.6 to read as follows:*]

* * * Express all single-piece weights in decimal pounds rounded off to two decimal places.

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470 Media Mail

473 Prices and Eligibility

1.0 Media Mail Prices and Fees

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1.5 Computing Postage for Media Mail

1.5.1 Determining Single-Piece Weight

[*Revise the last sentence of 1.5.1 to read as follows:*]

* * * Express all single-piece weights in decimal pounds rounded off to two decimal places.

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480 Library Mail

483 Prices and Eligibility

1.0 Library Mail Prices and Fees

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1.5 Computing Postage for Library Mail

1.5.1 Determining Single-Piece Weight

[*Revise the last sentence of 1.5.1 to read as follows:*]

* * * Express all single-piece weights in decimal pounds rounded off to two decimal places.

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500 Additional Mailing Services

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507 Mailer Services

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7.0 Mailing List Services

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7.2 General Information

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[*Revise title and text of 7.2.2 to read as follows:*]

7.2.2 Carrier Route Information System

The official city delivery scheme, called the Carrier Route Information System, is available to mailers.

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509 Other Services

1.0 Address Information System Services

[*Revise all of 509.1.0 to reorganize by adding additional address information system services as follows:*]

1.1 General Information

Address Management provides services that enable customers to manage the quality of their mailing lists while maximizing the Postal Service's ability to efficiently deliver mail. These services are described in 1.2 through 1.38. Additional information on these services can be found on RIBBS at *ribbs.usps.gov* or by calling the National Customer Support Center (*see* 608.8.0 for address) at 800–238–3150. *See* Notice 123–*Price List.*

1.2 Address Element Correction

Address Element Correction (AEC) service identifies and corrects bad or incomplete addresses using enhanced computer logic.

1.3 Address Matching System Application Program Interface

Address Matching System Application Program Interface (AMS API) is a core set of compiled address-matching software instructions available, for a set fee, to developers to incorporate into their software so that address lists can be updated with address data from the following databases, which are integrated into the AMS–API: City State, ZIP + 4, Five-Digit ZIP, eLOT, DPV, and LACS Link. The following services require payment of separate additional fees:

a. Installing the AMS–API on multiple computers for its own use.

b. Reselling its address-matching software.

c. Obtaining computer software instructions that permit the API to access the RDI data when licensed separately.

d. Reselling RDI–API.

1.4 Advance Notification and Tracking System

The Advance Notification and Tracking System provide mailers with delivery performance reports and data for qualified Standard Mail and Periodicals mailings with specific in-home delivery windows.

1.5 AEC ll Service

AEC II Service sends addresses with errors that cannot be resolved through other Address Management services to the field for resolution based on knowledge of delivery personnel. The mailer is provided with the correct address or with information that the address is not a recognized deliverable address.

1.6 Address Information Service Viewer

The Address Information Service (AIS) Viewer is an interactive CD–ROM that provides the ability to retrieve, view, and print accurate and current ZIP Code information for all 50 states on demand, eliminating hardcopy reports.

1.7 Barcode Certification

The barcode certification program evaluates manufacturers' printers, computer software, and computer systems that produce a barcode in order to certify that the barcode meets all dimensional specifications required by the Postal Service.

1.8 Carrier Route Information System

The Carrier Route Information System (CRIS) service provides reference information needed to apply carrier route codes to addresses. Copying is allowed for an additional fee.

1.9 CASS Certification

CASS evaluates and certifies the accuracy of address-matching software that applies ZIP + 4, DPV, LACS Link, Carrier Route Information System (CRIS), DSF2, eLOT, RDI, and Five-Digit ZIP. The Postal Service certifies software meeting its standards until the expiration of the applicable CASS cycle. Software must be re-certified for each CASS cycle. Ordinarily, a CASS testing cycle extends from August 1 through July 31 of the next year, and permits software use until the following July 31.

1.10 Change-of-Address Information for Election Boards and Registration Commissions

Change-of-Address Information for Election Boards and Registration Commissions service provides election boards and voter registration commissions with the current address of a resident addressee, if known to the Postal Service.

1.11 City State

The City State service is a comprehensive ZIP Code list associated with the appropriate city, county, and Post Office names. Copying is allowed for an additional fee.

1.12 Computerized Delivery Sequence (CDS)

CDS service provides and updates delivery sequence address information by carrier route for qualified mailers. The CDS No Stat service provides and updates nondelivery address information about new construction and rural route vacancies by carrier route for qualified mailers.

1.13 Delivery Statistics

The Delivery Statistics service provides statistical information regarding delivery by carrier route and Post Office box section. Copying is allowed for an additional fee.

1.14 Delivery Type

The Delivery Type service provides a file that indicates the type of deliveries (i.e., P.O. Box, street, unique, military, and general deliveries) made within each 5-digit ZIP Code area in the United States. Copying is allowed for an additional fee.

1.15 Delivery Point Validation

The Delivery Point Validation (DPV) service in conjunction with CASS-Certified address matching software validates delivery points. Unlimited sublicensing is allowed by software developers without further payment.

1.16 DSF2 Service

The DSF2 service is used to check mailing address accuracy, identify address types, and obtain walk sequence statistics. The DSF2 database is the most complete Postal Service address database available, containing every deliverable mailing address in the United States, and is used to verify that address lists are correct and complete, identify business versus residential addresses, recognize commercial mail receiving agencies, provide walk sequence numbers and postal codes, identify seasonal addresses, detect addresses vacant for over 90 days, and categorize addresses by delivery type, *e.g.,* curb, door slot, box, etc. DSF2 processing includes address standardization that may be used to apply for CASS qualification.

1.17 eLine-Of-Travel Service

eLine-of-Travel (eLOT) service gives mailers the ability to sort their mailings in approximate carrier-casing line-of-travel sequence. Copying is allowed for an additional fee.

1.18 FAST*forward* Multi-line Optical Character Reader

The *FASTforward* system makes change-of-address information for moves available to mailers so that it can be applied to a mailpiece while it is being processed on a multi-line optical character reader (MLOCR). Customers use *FASTforward* Move Update Notification electronic files to update their databases with change-of-address information.

1.19 Five-Digit ZIP

The Five-Digit ZIP service provides detailed street data for multi-coded cities (*i.e.,* cities that have more than one 5-digit ZIP Code), so that the proper ZIP Code can be identified. Copying is allowed for an additional fee.

1.20 Labeling Lists

Labeling Lists contain destination ZIP Codes with the corresponding Postal Service facility destination information.

1.21 LACS Link

LACS Link service provides mailers an automated method of obtaining new addresses when rural-style addresses are converted to street-style addresses. The three types of licenses are listed in 1.21.1 through 1.21.3.

1.21.1 Interface Developer

Interface Developer service grants the right to develop an interface between address-matching software and the LACS Link database service.

1.21.2 Interface Distributor

Interface Distributor service grants the right to sublicense the interface and the LACS Link database service to third parties.

1.21.3 End User

End User service grants the right to obtain the LACS Link database service directly from the Postal Service for use in updating mailing lists.

1.22 MAC Batch System Certification

The MAC Batch System Certification service evaluates and certifies that manifest/presort mailing products accurately list and calculate postage for presorted non-identical piece mailings consistent with DMM, IMM, and manifest mailing system processing standards. Software is certified until the expiration of the applicable MAC Batch System cycle.

1.23 MAC Gold System Certification

The MAC Gold System Certification service evaluates and certifies that manifest mailing systems (software, weigh scales, and label printers) accurately list and calculate postage for nonidentical piece mailings consistent with DMM, IMM, and manifest mailing system itemized pricing standards. Software is certified until the expiration of the applicable MAC Gold System cycle.

1.24 MAC System Certification

The MAC System Certification service evaluates and certifies that manifest mailing software accurately lists and calculates postage for nonidentical piece mailings consistent with DMM, IMM, and manifest mailing system standards, until the expiration of the applicable MAC System cycle.

1.25 MASS Certification

MASS (Multiline Accuracy Support System) Certification service provides certification for multiline optical character readers, remote video encoding, local video encoding, and encoding stations ("equipment"). The MASS certification process is designed to evaluate the ability of the equipment to process address information using CASS-Certified software, and apply an accurate delivery point barcode to a mailpiece. The Postal Service separately

certifies the equipment for a manufacturer and the user. Certified equipment can be used until the expiration of the applicable MASS cycle. Ordinarily, a MASS testing cycle extends from August 1st through July 31st of the next year, and permits use until the following July 31st.

1.26 NCOA Link

The NCOA Link service makes change-of-address information for moves available to mailers. The Postal Service tests the systems under the Developer, Full Service Provider, Limited Service Provider, End User, and Mail Processing Equipment licenses to ensure that they meet Postal Service performance requirements. The six types of licenses are listed in 1.26.1 through 1.26.6.

1.26.1 NCOA Link Interface Developer

NCOA Link Interface Developer service grants the right to develop a software interface between address-matching software and the NCOA Link service database.

1.26.2 NCOA Link Interface Distributor

NCOA Link Interface Distributor service grants the right to unlimited sublicensing of software interfaces developed pursuant to an NCOA Link Interface Developer License.

1.26.3 NCOA Link Full Service Provider (FSP)

NCOA Link FSP service grants the right to perform address list updating services for both the licensee and third party mailers using 48 months of change-of-address data. Postal Service database services such as DPV and LACS Link are included.

1.26.4 NCOA Link Limited Service Provider (LSP)

NCOA Link LSP service grants the right to perform address list updating services for third-party mailers, as well as for the licensee's own mail using 18 months of change-of-address data.

1.26.5 NCOA Link End User Mailer

NCOA Link End User Mailer service grants a mailer the right to perform address list updating for its own mail using 18 months of change-of-address data.

1.26.6 NCOA Link Mail Processing Equipment

NCOA Link Mail Processing Equipment service grants a mailer the right to either perform address updating directly onto its mailpieces using 18 months of change-of-address data and an MLOCR or to create an electronic file for address updating using other mail processing equipment.

1.27 NCOA Link — ANK Link Service Option

ANK Link provides an option for NCOA Link LSP and End User Mailer licensees to acquire an additional 30 months of change-of-address information. ANK Link informs mailers that a customer has moved, along with the move effective date. It does not provide the new address.

1.28 Official National Zone Charts

The Official National Zone Charts identify the appropriate distance code assigned to each originating and destination pairing for every ZIP Code in the nation.

1.29 Periodicals Accuracy, Grading, and Evaluation System Certification

The Periodicals Accuracy, Grading, and Evaluation (PAGE) system evaluates and certifies the accuracy of publication and print planning (PPP) software that calculates virtual copy weight and the percentage of advertising consistent with Periodicals computation standards, and certifies users of PPP software who demonstrate knowledge of the software for Periodicals mailings based on DMM standards and applicable USPS Customer Support Rulings. Software and users are certified until the expiration of the applicable PAGE cycle.

1.30 PAVE System Certification

The PAVE (presort accuracy validation evaluation) system evaluates and certifies the accuracy of presort software that sorts mailing lists consistent with DMM mail preparation standards. Software is certified until the expiration of the applicable PAVE cycle.

1.31 RDI Service

The RDI service verifies whether a delivery type is classified as residential or business.

1.32 Topological Integrated Geographic Encoding and Referencing

Topological Integrated Geographic Encoding and Referencing (TIGER/ZIP+4) service is a bridge file that allows mailers to access other information using the ZIP+4 codes they already have associated with their addresses. This file offers demographers and market researchers a method to relate ZIP+4 coded address lists to U. S. Census Bureau demographic data.

1.33 Z4CHANGE

The Z4CHANGE service provides the information necessary to facilitate frequent and cost-effective updating of very large computerized mailing lists for automation compatibility and improved deliverability. Copying is allowed for an additional fee.

1.34 Z4INFO

Z4INFO is an add-on utility to the ZIP+4 service that can be integrated into address-matching software to improve address quality. There is no charge for this service.

1.35 ZIP+4 Service

The ZIP+4 service is the base reference that can be used to assign the correct ZIP+4 code associated with a physical address. Copying is allowed for an additional fee.

1.36 ZIPMove

The ZIPMove data file assists address-matching software in providing up-to-date, accurate ZIP+4 codes.

1.37 ZIP Code Sortation of Address Lists

ZIP Code Sortation of Address Lists service provides sortation of addresses to the finest possible ZIP Code level.

1.38 99 Percent Accurate Method

The 99 Percent Accurate Method provides testing of mailers' address lists to determine whether they are at least 99 percent accurate.

* * * * *

We will publish an appropriate amendment to 39 CFR Part 111 to reflect these changes.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 2010–28590 Filed 11–16–10; 8:45 am]

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POSTAL SERVICE

39 CFR Part 111

New Incentive Programs and Other Changes for Domestic Mailing Services

AGENCY: Postal Service.™

ACTION: Final rule.

SUMMARY: The Postal Service will revise *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) to incorporate standards for the two new Mailing Services incentive programs filed in November 2010 with the Postal Regulatory Commission (PRC). This final rule also includes DMM revisions related to Move Update standards, also in the November 2010 PRC filing.

DATES: January 2, 2011.

FOR FURTHER INFORMATION CONTACT: Bill Chatfield, 202–268–7278.

SUPPLEMENTARY INFORMATION: On July 9, 2010, the **Federal Register** published a Postal Service proposed rule, *New Standards for Domestic Mailing Services* (75 FR 39477–39492). We received comments from three mailer associations regarding the Reply Rides Free incentive program that was part of that filing and comments on the proposed changes to the Move Update tolerance. We have subsequently made a new filing with the PRC to implement the two incentive programs (Reply Rides Free and the Saturation/High Density) and changes to the Move Update tolerance. The other changes proposed in July will be addressed in a separate final rule to be published in the **Federal Register.**

This final rule includes a recap of the two incentive programs and the Move Update changes, customer comments, our responses to the comments, and the mailing standards to implement the changes.

Reply Rides Free First-Class Mail Incentive Program

The Postal Service encourages the growth of automation letter-size mail volume, particularly pieces that are part of full-service Intelligent Mail® automation mailings entered at *PostalOne!*® acceptance facilities. Accordingly, effective January 2, 2011, we will offer an option for First-Class Mail letters weighing over 1 ounce up to and including 1.2 ounces to qualify for postage payment at the 1-ounce price when those letters include a reply card or reply envelope under specified conditions. Reply pieces must bear an Intelligent Mail barcode as of May 1, 2011.

This new program provides an incentive for mailers to include more content in their automation First-Class Mail letters by providing a postage credit equal to the second ounce of postage for eligible letters as follows:

- Eligible letters must qualify for automation letter prices and weigh more than 1 ounce up to 1.2 ounces. At the time of mailing, mailers pay the applicable 2-ounce price for these pieces. All commercial (presorted and automation) First-Class Mail letter-size volume counts towards meeting an overall mail volume threshold, but only those letters qualifying for automation letter prices will be eligible for postage credit. As of May 1, 2011, only those automation letters qualifying for and mailed at full-service automation letter prices will be eligible for postage credit under this incentive program.
- Letters must include a reply card or envelope, either Business Reply Mail® or Courtesy Reply Mail™. As of May 1, 2011, reply pieces must bear an accurate Intelligent Mail barcode corresponding to the delivery address on the piece. The reply piece may be in the form of a reusable envelope. Permit reply mail pieces are not eligible for this program.
- The postage credit will be for the amount paid for the second ounce and is provided for those pieces mailed as automation letters during the 2011 program period (January 2, 2011 through December 31, 2011) when the mailer's volume of all commercial First-Class Mail letter-size mailpieces mailed in this period is at least 2.5 percent greater than the mailer's trend of all commercial First-Class Mail letter-size volume mailed during USPS® fiscal year (FY) 2010 (October 1, 2009 through September 30, 2010) compared to volume mailed in USPS FY 2009 (October 1, 2008 through September 30, 2009). The threshold volume for program postage credit eligibility is the amount that is 2.5 percent greater than the mailer's projected volume based on the mailer's trend, except that mailers with a positive trend must mail at least 2.5 percent more letter volume during calendar year 2011 than during fiscal year 2010. For example, if a mailer's letter-size volume has declined from 100,000 to 95,000 pieces (a 5 percent decline) from FY 2009 to FY 2010, the projected volume for 2011 at the same trend would be 90,250 (95,000 times .95). That mailer's volume must be at least 92,507 (1.025 times 90,250) during the program period to meet the eligibility threshold. A mailer with a positive trend (for example, an increase from 90,000 to 100,000 letters) would have a threshold that is 2.5 percent more than their FY 2010 volume or 102,500 (100,000 times 1.025).
- Separate thresholds will be set for each of the first three quarters of calendar year 2011, based on the trend for each comparable quarter in FY 2010. Postage credit will be provided after the end of each quarter, upon calculation and verification of the mail volume data.
- The threshold for quarter four of calendar year 2011 will be the yearly threshold, with all previous three quarters' volume being added to the volume for quarter four. Postage credit will be provided at the end of quarter four only when the annual volume threshold is met.
- Mailers who do not meet the calendar year 2011 volume threshold are retroactively ineligible for any postage credit for this program.
- Mailers who did not mail commercial First-Class Mail letters in FY 2009 may not participate in the Reply Rides Free program.
- The program period will be from January 2, 2011 through December 31, 2011.

Mail owners, but not mail service providers, who have mailed commercial First-Class Mail letters during USPS FY 2009 and 2010 may apply to participate in this incentive program by following instructions provided at: *http://www.usps.com/firstclassmailincentive,* no later than December 31, 2010. Mail owners must validate that they have mailed, or intend to mail, at least one commercial presorted or automation mailing of First-Class Mail letters during each of the fiscal years 2009 and 2010 and should state their intent to mail First-Class Mail letters containing qualifying reply pieces weighing more than 1 ounce up to 1.2 ounces during the 2011 program period. After registration, mail owners must supply adequate proof of the total qualifying mail volume claimed for USPS FY 2009 and FY 2010 in order to be eligible for participation.

Comments on Reply Rides Free Program

All three mailer associations offering comments objected to the full-service (Intelligent Mail) automation letter requirement for mailpieces eligible for postage credit and our provision of postage credit being issued at the end of the program year. Due to the USPS commitment to continue to encourage participation in full-service Intelligent Mail, we are retaining the provision to provide postage credit only for full-service automation letters meeting the other requirements of the program, but we will postpone that requirement until May 1, 2011. Although the incentive goals are ultimately based on annual mail volumes, we will be providing quarterly reconciliations and postage credit after the end of each quarter when mail volumes meet pro-rated thresholds, but the mailer's eligibility for postage credit is still based on meeting the annual mail volume threshold.

One association advocated charging additional postage equivalent to 2/10 of the second-ounce price. We will not be implementing any changes to charge postage for First-Class Mail letters by tenths of an ounce.

Two commenters noted the need for mailers to be able to determine an adequate return on investment and suggested that the program be extended to last 3 years. After the end of the program period, we will be evaluating the feasibility of extending or renewing this incentive program.

Two associations suggested that we substitute volume requirements for returned reply pieces rather than have outgoing mail volume thresholds and

that we provide advance certification of eligible mailpieces to mitigate potential problems identifying eligible mailpieces in combined mailings of multiple mailpieces. We will evaluate the reply mail volume recommendation as a potential component for future incentive programs.

Other issues/concerns noted by commenters were:

- A clear definition of the "mailer" is needed;
- The current restrictions on when mailers may apply to participate appears to be too limiting;
- By excluding mail service providers, significant First-Class Mail letter volume is omitted;
- Mailers having to certify previous mail volumes may be at legal risk if the information is found to be inaccurate; and,
- Software may not accommodate the recording of incremental weight volumes needed to distinguish pieces that weigh no more than 1.2 ounces.

Identification of the mailer is similar to previous incentive programs; the entity who is responsible for postage payment for mailpieces is considered to be the owner of that mail. Mail service providers are not considered mail owners for the purposes of this program.

We do not consider the registration period for this program too restrictive. Mailers who register for this initiative have no further obligations if they decide at a later time that they would not be able to submit any mailings under this program.

The exclusion of MSPs from direct participation is similar to the parameters for previous incentive programs, but we anticipate that MSPs will assist those mail owners (for whom they produce mailings) who may want to participate. Previous mail volume should be provided with accompanying documentation, which will lessen the risk of providing inaccurate information.

Additionally, as part of the program administration, the Postal Service requires each program participant to certify the data used to calculate the participant's program threshold(s). This certification requirement is similar to that currently used on a postage statement and is designed to ensure that the data used by the Postal Service to calculate the threshold level(s) are accurate.

We are working with software vendors to ensure that requirements will be effectively communicated. Upon completion of PRC review for this program, we will be making additional information available at *http://www.usps.com//firstclassmailincentive.*

2011 Saturation and High Density Incentive Program

The Postal Service will implement an incentive program designed to increase the volume of Standard Mail and Nonprofit Standard Mail letters and flats mailed at saturation and high density prices, upon completion of PRC review.

Mailers of Standard Mail or Nonprofit Standard Mail saturation or high density letters and/or flats (complete mailpieces) applying for participation in the program must meet the eligibility requirements for participation in the price category selected. Mailers meeting the eligibility criteria are able to participate in both the saturation and high density categories simultaneously. Participants have the option to demonstrate growth in total mailed volume or growth within a defined market. Mailers who participate only within defined market areas are required to demonstrate volume growth within a specific, or group of specific, USPS sectional center facility (SCF) service area(s) to qualify for the incentive. Participants have the option to select one or more, up to a maximum of 20, individual SCF areas or up to five metropolitan target markets (consisting of multiple contiguous SCFs) for participation in the program and must meet the eligibility requirements for each area selected. The USPS must approve all applicant-selected market areas prior to acceptance into the program.

Franchisees that are not separate business entities cannot apply for an incentive independently of the parent organization. Applicants will receive a credit for volume mailed, within their selected growth area and price category, above their USPS-determined volume threshold. The program period will be from January 2, 2011 through December 31, 2011.

To participate, mailers must be the permit holder (*i.e.,* owner) of a permit imprint advance deposit account(s) at a postal facility having *PostalOne!* capability or be the owner of qualifying mail volume entered through the permit imprint advance deposit account of a mail service provider at a postal facility having *PostalOne!* capability. Only the volume of the mail owner, defined as the entity paying for the postage, will be eligible within the program period to meet eligibility requirements. Mail service providers and customers supplying inserts, enclosures, or other components included in the saturation or high density mailings of another mailer are not eligible to participate in this program.

Standard Mail or Nonprofit Standard Mail saturation or high density letters and/or flats (complete mailpieces) mailed through a permit imprint advance deposit account, precanceled stamp permit, or a postage evidencing system owned by a mail service provider may be included as volume within the program, and towards program eligibility, when adequate documentation demonstrates that the applicant is the owner of the mail.

Participants must electronically submit postage statements and mailing documentation to the *PostalOne!* system for the duration of the program period. Mailers participating within a defined market area(s) must electronically submit postage statements and mailing documentation to the *PostalOne!* using Mail.dat® or Mail.XML®. All other mailers may submit postage statements through Postal Wizard.

Applicants must demonstrate a combined minimum of six saturation or high density mailings within the period of October 1, 2009 to September 30, 2010. Applicants meeting the other eligibility criteria may participate in both price categories simultaneously. Applicants who choose to participate only within defined market areas must meet the eligibility criteria independently for each selected SCF service area or selected metropolitan target market.

Mail owners participating in the 2011 Saturation and High Density Incentive Program are not eligible for concurrent participation in any other Postal Service-sponsored volume incentive program that includes Standard Mail pieces in the saturation or high density price categories.

Thresholds for the 2011 Saturation and High Density Incentive Program are set at 5 percent above the volume of Standard Mail or Nonprofit Standard Mail saturation and high density letters and flats recorded in the 2010 calendar year, within each participant-selected growth area and price category. Applicants electing to participate in both the saturation and high density price categories must exceed the combined thresholds of both categories before qualifying for an incentive payment in either category.

Approved program participants demonstrating a volume increase above their threshold level, in their total Standard Mail or Nonprofit Standard Mail saturation and high density letters and flats volume within their total market area, selected SCF service areas, or metropolitan target market, qualify for a credit to a single designated permit imprint advance deposit account or Centralized Account Payments System

(CAPS) account, following the close of the 2011 Saturation and High Density Incentive Program. The total postage paid for Standard Mail saturation and high density letters and flats within the program period will be identified for each participant and divided by the total number of recorded pieces to generate the average price per piece. Participants will receive a credit in the amount of a percentage of the average price per piece, for the total number of mailpieces of their incremental volume above their threshold level, recorded during the program period as follows:

Participation level	Standard mail (%)	Nonprofit standard mail (%)
Saturation	22	8
High Density	13	8

Program Administration

Those mailers identified by the Postal Service as being eligible to participate in the program will be sent an invitation letter after November 1, 2010. The invitation letter will direct mailers to apply for the program online at *http://www.usps.com/SaturationHD.* Mailers wishing to participate in the program, but who were not notified by letter, may request a review of their eligibility by contacting the USPS no later than December 10, 2010 at *SaturationHDIncentive@usps.gov.* or by submitting an online application. Any mailer wishing to participate in the program must initially apply online no later than December 31, 2010.

Mailers completing the online application process will receive an electronic response from the USPS that includes:

- An individual volume threshold report.
- A certification letter.
- A threshold inquiry form.

The individual threshold report will display the applicant's USPS-recorded saturation and/or high density mail volume for the 2010 calendar year. Applicants agreeing with their threshold volume(s) have the option to sign the provided certification letter and return a copy via e-mail or mail a hardcopy to Saturation Incentive Program Office, 475 L'Enfant Plaza SW., RM 5500, Washington, DC 20260–5500, to register for the program. Applicants not agreeing with any portion of their USPS-calculated threshold(s) must complete the threshold inquiry form along with supporting evidence and return it via e-mail or hardcopy, no later than March 15, 2011.

In addition to Standard Mail volume prepared and entered directly by the mailer (applicant), applicants will also be eligible to participate in the program with qualifying volume prepared by a mail service provider when entered through a permit owned by the applicant. Mail volume entered through a mail service provider's permit will also qualify for the program if adequate documentation, such as postage statements, PS Form 3602–R or PS Form 3602–N, identify the mail as being prepared on behalf of the applicant and demonstrates the applicant's 2010 mailing activity.

Additionally, as part of the program administration, the Postal Service requires each program participant to certify the data used to calculate the participant's program threshold(s). This certification requirement is similar to that currently used on a postage statement (PS Form 3602–R or 3602–N) and is designed to ensure that the data used by the Postal Service to calculate the threshold level(s) are accurate.

Move Update Changes

Following completion of the PRC review, the Postal Service is changing the tolerance for First-Class Mail and Standard Mail pieces, found through a Performance-Based Verification (PBV) procedure to be lacking an update via Move Update procedures, from the current 30 percent to a 25 percent tolerance before we charge a 7-cent per piece assessment.

The Move Update standards, applicable to commercial mailings of First-Class Mail and Standard Mail mailpieces, are designed to reduce the number of mailpieces that require forwarding, return, or disposal as waste, thus reducing Postal Service costs. The standards also help to assure that mail reaches its intended recipients in a timely manner.

Performance-Based Verification procedures introduced in 2009 allow the Postal Service to sample mailings during the acceptance process to compare mailpiece addresses with the National Change of Address (NCOA®) database. For the Move Update portion of PBV, addresses on the verification sample are compared to the NCOA database and the ratio of the number of failed changes of address (COAs) (addresses that should have been updated per Postal Service records), to the number of actual COAs in the sample is calculated. Currently, if this ratio for the sample is sufficiently high (30 percent or more), pieces above that tolerance in a First-Class Mail or Standard Mail mailing are subject to additional postage (the Move Update assessment charge).

In a final rule **Federal Register** notice published October 27, 2009 (74 FR 55140–55142), we stated: "We will analyze the results of the PBV samples periodically, and will adjust the tolerance as needed to ensure the effectiveness of mailers' Move Update processes." Accordingly, the Postal Service has filed with the PRC to change the current 30-percent tolerance to 25 percent before a Move Update assessment postage charge would be incurred.

Comments on Move Update

We received comments about the change in the Move Update tolerance change from three mailer associations.

Two commenters objected to placement of the Move Update assessment charge in Notice 123–*Price List* as inappropriate to include because the assessment is not a product which mailers choose to purchase. While we agree that the assessment charge is not a price that mailers choose to pay as a mailer might choose to pay an additional fee to mail a First-Class Mail letter as Certified Mail, inclusion of the fee assists in publicizing it so that mailers are more aware of it.

One association questioned the appearance of a Move Update noncompliance charge for Standard Mail and noted that more information is needed about the application of the charge. This charge was not mentioned in the previous proposed rule; applicability of this charge would be a subject of a separate and future **Federal Register** notice.

Two associations asked for more rationale behind changing the tolerance percentage. The change to the tolerance percentage used within the formula to calculate the Move Update Assessment Charge for mailings that fail the quality standard for correcting addresses after a customer move is reasonable based on the demonstrated performance currently being achieved by the mailing industry.

One association asserted that applying Move Update standards to Standard Mail has not resulted in any lessening of the percentage of undeliverable-as-addressed (UAA) mail, and two other associations asked for more data gleaned from the PBV process. An evaluation of 45,589 mailings during a two-month period showed that overall, 98.8 percent of all sampled mailings passed the Move Update verification with an average score of 99.7%. For the 546 mailings that fell into the 1.2 percent that failed the Move Update verification reviews, the average score was 64.4 percent. These data indicate that the vast majority of the mailing industry will not be affected by a change in the tolerance.

One association suggested that the assessment charges would more appropriately apply to the total volume of UAA mailpieces in a mailing, instead of applying charges to the whole mailing based on the percentage of UAA mailpieces. Where mailers are currently allowed to have up to 30 percent of the addresses (in a mailing) with an outdated address more than 95 days following a customer's move, the new tolerance will be reduced to 25 percent. This is a minimal tightening of the quality standard that is necessary to continue to reduce the percentage of poorly-addressed commercial mail that is produced by mailers and delivered by the Postal Service.

One association implied that the Postal Service is using the tightening of the tolerance as a means to generate money via fines. This is not substantiated by the data. Using the data described previously, the 546 mailings that failed at the 30-percent threshold tolerance incurred approximately $47,000 in additional charges, or approximately $86 per mailing on average. Tightening the tolerance further incents mailers to improve their processes to update customer address information. The Postal Service has advised the mailing industry of its intent to continue to modify the tolerance in each of the next 2 years. In anticipation of these changes, mailers should continually review their processes. The Postal Service will continue to monitor the data and share the information with the mailing industry through the Mailer's Technical Advisory Committee. Our focus will be to ensure that the current high level of performance is maintained within the mailing industry.

In accordance with the Postal Accountability and Enhancement Act, on November 2, 2010, the Postal Service filed a Notice with the Postal Regulatory Commission (PRC) regarding the incentive programs and the change in the Move Update tolerance. Regulatory review will take up to 45 days from that date.

The Postal Service adopts the following changes to the *Mailing Services of the United States Postal Service,* Domestic Mail Manual (DMM), which is incorporated by reference in the *Code of Federal Regulations.* See 39 CFR Part 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

■ Accordingly, 39 CFR Part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), as follows:

* * * * *

200 Commercial Letters and Cards

* * * * *

230 First-Class Mail

233 Prices and Eligibility

* * * * *

3.0 Basic Standards for First-Class Mail Letters

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3.5 Move Update Standard

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3.5.4 Basis for Move Update Assessment Charge

[*Revise the introductory text of 3.5.4 to read as follows:*]

Mailings are subject to a Move Update assessment charge if more than 25 percent of addresses with a change-of-address (COA) are not updated, based on the error rate found in USPS sampling at acceptance during Performance-Based Verification. Specifically, mailings for which the sample contains greater than 25 percent failed COAs out of the total COAs in the sample are subject to additional postage charges as follows:

[*Revise item 3.5.4a as follows:*]

a. The percentage of the mailing paying the charge is based on the percentage of failed pieces above 25 percent (%).

* * * * *

[*Revise item 3.5.4c as follows:*]

c. As an example, if 35% of COAs in the sample are not updated, then the charge is applied to 10% (=35% − 25%) of the total mailing.

* * * * *

[*Add new 7.0 to read as follows:*]

7.0 First-Class Mail Incentive Programs

7.1 General Description

First-Class Mail incentive programs are designed to encourage mail volume growth and retention.

7.2 Reply Rides Free Program

The Reply Rides Free program provides an incentive for mailers to include additional contents in their automation First-Class Mail letters by providing a postage credit for letters weighing over 1 ounce but no more than 1.2 ounces. Applicants are required to review and certify the accuracy of the data used by the USPS to calculate their threshold level (see 7.2.1); and, upon request, may be required to provide documentation of their mailing activity in fiscal years 2009 and 2010 and during the 2011 program period.

7.2.1 Basic Mailpiece Eligibility

Letter-size mailpieces mailed by an approved program participant are eligible for a postage credit under all of the following conditions:

a. Eligible automation letters must weigh more than 1 ounce but no more than 1.2 ounces. Mailers pay the applicable 2-ounce price for these pieces. As of May 1, 2011, automation letters must be eligible for and mailed at full-service (see 705.22) Intelligent Mail prices.

b. Letters must include a reply card or envelope, either Business Reply Mail or Courtesy Reply Mail. The reply piece may be part of a reusable envelope prepared according to 601.6.4 or 601.6.5. Mailers must provide a sample of the reply card or envelope at the time of mailing. Reply pieces must be automation-compatible and must bear the correct Intelligent Mail barcode corresponding to the address as of May 1, 2011.

c. The postage credit is for the amount paid for the second ounce for eligible letters that meet the standards in 7.2, that are mailed during the 2011 program period, and that meet or exceed their USPS-determined threshold volume for 2011. To be eligible for program participation, a mailer must have mailed at least one mailing of 500 or more presorted or automation First-Class Mail letters during USPS fiscal years (FY) 2009 and 2010 (October 1 through

September 30). The threshold volume is determined as follows:

1. The USPS determines a mailing volume trend for mailers with all commercial First-Class Mail letter volume mailed during both USPS FY 2009 and USPS FY 2010. To qualify for postage credit, the mailing volume in 2011 must be at least 2.5 percent greater than the projected mail volume based on the volume trend percentage from FY 2009 to FY 2010. For example, if a mailer's letter-size volume has declined from 100,000 to 95,000 pieces (a trend of 5 percent decline) from USPS FY 2009 to USPS FY 2010, that mailer's projected volume for 2011 would be 95,000 pieces times 0.95 (90,250). The actual volume mailed during calendar year 2011 must be at least 92,507 pieces (the threshold volume, which is 1.025 times the projected volume of 90,250) during the program period.

2. However, mailers with a positive volume trend will have a threshold of 2.5 percent more than their FY 2010 volume, rather than 2.5 percent more than their trend. For example, a mailer's whose volume rose from 90,000 in FY 2009 to 100,000 in FY 2010 would have a threshold for the 2011 calendar year of 102,500 (1.025 times 100,000).

d. In addition to an annual volume threshold, separate thresholds will be set for each of the first three quarters of calendar year 2011, based on the trend for each comparable quarter in FY 2010. Quarterly thresholds for mailers with a positive mail volume trend will be set at 2.5 percent more than the volume in the comparable quarter of FY 2010. Postage credit will be provided after the end of each quarter, upon calculation and verification of the mail volume data.

e. The threshold for quarter four of calendar year 2011 will be the yearly threshold, with all previous three quarters' volume being added to the volume for quarter four. Postage credit will be provided at the end of quarter four only when the annual volume threshold is met.

f. Credit is provided to the mail owner's CAPS account, upon USPS calculation and verification of the mail volume data after the end of each quarter.

g. The program period for eligible mail volume is from January 2, 2011 through December 31, 2011. To be eligible for any postage credit, the participant must ensure that the total volume of First-Class Mail commercial letters paid at presorted or automation letter prices mailed during the 2011 program period meets or exceeds the USPS-determined threshold volume, as determined under 7.2.1.

h. Mailers who do not meet the calendar year 2011 volume threshold are ineligible for any postage credit for this program. Any quarterly credits provided to mailers for quarters one through three must be returned to the Postal Service if the calendar year 2011 volume threshold is not met.

7.2.2 Mailer Participation Eligibility and Documentation

Mail service providers are not eligible to participate in this program. Mail owners are considered eligible for the program as follows:

a. Applicants must have mailed at least one presorted or automation First-Class Mail mailing of 500 letters or more during both USPS FY 2009 and FY 2010. Applicants must be able to document their total mailed volume of commercial First-Class Mail letters for FY 2009 and 2010, as follows:

1. Volume through one or more permit imprint advance deposit accounts, precanceled stamp permits, or postage meter permits owned by the applicant, or

2. Volume prepared by a mail service provider when entered through a permit owned by the applicant, or

3. Volume mailed under a mail service provider's permit that can be specifically identified as being mailed on behalf of the applicant.

b. Approved participants must be able to document the total mailed volume of letters that are eligible, under 7.2, for postage credit. Accordingly, pieces must be presented for mailing under either of the following conditions:

1. A separate mailing of identical weight pieces, all of which weigh more than 1 ounce up to 1.2 ounces.

2. A mailing of nonidentical weight pieces, supported by documentation under the manifest mailing standards in 705.2.0, with individual piece weight listings substantiating that participant pieces weigh more than 1 ounce but no more than 1.2 ounces. The manifest listing must also provide a total of eligible pieces.

c. At the end of the 2011 program period, approved participants must be able to document their total mailed volume of commercial First-Class Mail letters during the program period, the total mail volume eligible for postage credit under 7.2.2b, and meet the following conditions:

1. Letters mailed in the 2011 program period that meet the USPS-determined mail volume threshold, as provided in 7.2.1, must weigh more than 1 ounce up to a maximum of 1.2 ounces.

2. Letters mailed during the 2011 program period must contain a reply card or reply envelope. Reply pieces must be automation-compatible and barcoded. As of May 2011, the barcode on reply pieces must bear the correct Intelligent Mail barcode corresponding to the address on the reply piece.

3. Credit applies only to automation letters; as of May 1, 2011 credit will apply only for automation letters mailed under the full-service automation option described in 705.22.

d. Fluctuations in mailing activity resulting from the merger or acquisition of one or more program participants, prior or subsequent to the beginning of the program period, are subject to review, possible recalculation of thresholds, and approval by the USPS.

e. Mailers participating in the Reply Rides Free incentive program are not eligible for simultaneous participation in any other USPS-sponsored volume incentive program that includes First-Class Mail commercial letters during the 2011 program period.

7.2.3 Application

Mail owners wishing to participate may apply at *http://www.usps.com/firstclassmailincentive* no later than December 31, 2010. Following registration, mailers are required to provide documentation demonstrating their total commercial First-Class Mail letter volume mailed during USPS FY 2009 and FY 2010 (as described in 7.2.1). The USPS reviews the documentation provided for adequacy and provides an electronic response that includes:

a. Notification of approval (or of the need for additional documentation) for participation in the program.

b. Applicant's verified mail volume for USPS FY 2009 and FY 2010.

c. Applicant's 2011 mail volume threshold for program and postage credit eligibility.

d. A certification letter. Mailers must present a printed copy of the certification letter to a postal acceptance employee with the first mailing under this program, at each mailing office.

7.2.4 Mailer Response

Mailers wishing to dispute the USPS-verified mail volume or USPS-determined threshold (see 7.2.1) may request a review by following the procedure outlined at *http://www.usps.com/firstclassmailincentive* no later than February 15, 2011.

7.2.5 Program Credits

Approved participants that can demonstrate an increase in their mailed volume of commercial First-Class Mail letters in the 2011 program period, meeting or exceeding the threshold volume as determined under 7.2.1,

qualify for a credit, after the end of the program period, to their designated Centralized Account Payment System (CAPS) permit imprint account, as follows:

a. The letter-size pieces for which the credit is claimed must weigh more than 1 ounce but no more than 1.2 ounces and be mailed under all standards in 7.2.

b. Participants that meet or exceed their threshold volume receive a credit in the amount of the postage paid for the second ounce for each eligible piece meeting all the conditions in 7.2 that are mailed during the 2011 program year from January 2, 2011 through December 31, 2011.

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240 Standard Mail

243 Prices and Eligibility

1.0 Prices and Fees for Standard Mail

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[Delete section 1.7 in its entirety to remove reference to the 2009 Saturation Mail Volume Incentive Program.]

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3.0 Basic Standards for Standard Mail Letters

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3.9 Move Update Standards

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3.9.4 Basis for Move Update Assessment Charges

[Revise the introductory text of 3.9.4 to read as follows:]

Mailings are subject to a Move Update assessment charge if more than 25 percent of addresses with a change-of-address (COA) are not updated, based on the error rate found in USPS sampling at acceptance during Performance-Based Verification. Specifically, mailings for which the sample contains greater than 25 percent failed COAs out of the total COAs in the sample are subject to additional postage charges as follows:

[Revise item 3.9.4a as follows:]

a. The percentage of the mailing paying the charge is based on the percentage of failed pieces above 25 percent (%).

* * * * *

[Revise item 3.9.4c as follows:]

c. As an example, if 35% of COAs in the sample are not updated, then the charge is applied to 10% (=35% − 25%) of the total mailing.

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[Add new section 8.0 to read as follows:]

8.0 Incentive Programs for Standard Mail Letters

8.1 General Description

Incentive programs for Standard Mail letters are designed to encourage mail volume growth and retention.

8.2 Saturation and High Density Incentive Program

The Saturation and High Density Incentive Program provides postage credits for qualified mail owners of Standard Mail, or Nonprofit Standard Mail, letters and flats mailed at saturation and high density carrier route prices that can document mail volumes exceeding their individual USPS-recorded threshold level, during the 2011 program period, from January 2, 2011 through December 31, 2011. Participating mail owners documenting volumes above their threshold level receive a credit, for each piece exceeding their threshold level, to a designated permit imprint advance deposit account or Centralized Account Payment System (CAPS) account after the end of the program period. Refer to 343.8.2 for program details.

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300 Commercial Mail Flats

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330 First-Class Mail

333 Prices and Eligibility

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3.0 Eligibility Standards for First-Class Mail Flats

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3.5 Move Update Standard

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3.5.4 Basis for Move Update Assessment Charge

[Revise text of 3.5.4 to read as follows:]

Mailings are subject to a Move Update assessment charge if more than 25 percent of addresses with a change-of-address (COA) are not updated, based on the error rate found in USPS sampling at acceptance during Performance-Based Verification. Specifically, mailings for which the sample contains greater than 25 percent failed COAs out of the total COAs in the sample are subject to additional postage charges as follows:

a. The percentage of the mailing paying the charge is based on the percentage of failed pieces above 25 percent (%).

b. Each of the assessed pieces is subject to the $0.07 per piece charge.

c. As an example, if 35% of COAs in the sample are not updated, then the charge is applied to 10% (= 35%–25%) of the total mailing.

d. Mailings for which the sample has five or fewer pieces that were not updated for a COA are not subject to the assessment, regardless of the failure percentage.

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340 Standard Mail

343 Prices and Eligibility

1.0 Prices and Fees for Standard Mail

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[Delete section 1.6 in its entirety to remove reference to the 2009 Saturation Mail Volume Incentive Program.]

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3.0 Basic Standards for Standard Mail Flats

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3.9 Move Update Standards

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[Revise title and text of 3.9.4 to read as follows:]

3.9.4 Basis for Move Update Assessment Charges

Mailings are subject to a Move Update assessment charge if more than 25 percent of addresses with a change-of-address (COA) are not updated, based on the error rate found in USPS sampling at acceptance during Performance-Based Verification. Specifically, mailings for which the sample contains greater than 25 percent failed COAs out of the total COAs in the sample are subject to additional postage charges as follows:

a. The percentage of the mailing paying the charge is based on the percentage of failed pieces above 25 percent (%).

b. Each of the assessed pieces is subject to the $0.07 per piece charge.

c. As an example, if 35% of COAs in the sample are not updated, then the charge is applied to 10% (= 35%–25%) of the total mailing.

d. Mailings for which the sample has five or fewer pieces that were not updated for a COA are not subject to the assessment, regardless of the failure percentage.

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[Add new 8.0 as follows:]

8.0 Incentive Programs for Standard Mail Flats

8.1 General Description

Incentive programs for Standard Mail flats are designed to encourage mail volume growth and retention.

8.2 Saturation and High Density Incentive Program

8.2.1 Program Description

The Saturation and High Density Incentive Program provides postage credits for qualified mail owners of Standard Mail, or Nonprofit Standard Mail, letters and flats (complete mailpieces) mailed at saturation and high density carrier route prices that can document mail volumes exceeding their individual USPS-recorded threshold level, during the 2011 program period, from January 2, 2011 through December 31, 2011. Participating mail owners documenting volumes above their threshold level receive a credit, for each piece exceeding their threshold level, to a single designated permit imprint advance deposit account or Centralized Account Payment System (CAPS) account after the end of the program period. Applicants are required to review and certify the accuracy of the data used by the USPS to calculate their threshold level(s); and, upon request, may be required to provide documentation of their mailing activity in the 2010 calendar year, the 2009–2010 eligibility period and during the program period.

8.2.2 Eligibility Standards

Mail service providers are not eligible to participate in this program. Mail owners are eligible for the program as follows:

a. Mailers must be the owner of a permit imprint advance deposit account, precanceled stamp permit, or postage meter permit at a USPS facility having *PostalOne!* capability; or the owner of qualifying mailpiece volume entered through the account(s) of a mail service provider at a USPS facility having *PostalOne!* capability, when adequate documentation demonstrates that the applicant is the owner of the mailpieces.

b. Applicants must electronically submit postage statements and mailing documentation to the *Postal One!* system. Applicants participating within a defined market area(s) must electronically submit postage statements and mailing documentation using Mail.dat or Mail.XML. All other applicants may optionally submit postage statements via Postal Wizard.

c. Only the volume of the mail owner, defined as the entity paying for the postage, is eligible within the program period.

d. Mail service providers and customers supplying inserts, enclosures or other components included in the mailings of another mailer are not eligible to participate in this program.

e. For either the saturation or high density incentives, applicants must demonstrate a combined minimum of six saturation or high density mailings of Standard Mail letters and/or flats within the qualification period of October 1, 2009 to September 30, 2010.

f. Applicants meeting the eligibility criteria in 8.2.2a through 8.2.2d may participate within both the saturation and high density price categories simultaneously.

g. Applicants who participate only within defined market areas must meet the eligibility criteria independently for each selected SCF service area or selected metropolitan target market.

h. Mailers participating in the 2011 Saturation and High Density Incentive Program are not eligible for concurrent participation in any other USPS-sponsored volume incentive program that includes Standard Mail pieces in the saturation or high density price categories.

8.2.3 Program Threshold Level

Threshold level figures are calculated independently for each applicant as follows:

a. Thresholds are set at 5 percent (5%) above (or 105% of) the volume, within the participant-selected growth area and price category, of Standard Mail or Nonprofit Standard Mail saturation and high density letters and flats recorded in the 2010 calendar year.

b. Applicants participating in both the saturation and high density price categories must exceed the combined thresholds of both categories before qualifying for an incentive payment in either category.

8.2.4 Application

Mail owners identified by the Postal Service as being eligible to participate in the program will be sent an invitation letter after November 1, 2010. Mail owners may apply for the program as follows:

a. The invitation letter directs mail owners to apply for the program online at *http://www.usps.com/SaturationHD* no later than December 31, 2010.

b. Applicants participating with Standard Mail saturation and/or high density mail volume destinating only within defined market areas must select the sectional center facility (SCF) service areas for participation in the program, up to a maximum of 20 individual SCF areas or up to five metropolitan target markets (consisting of multiple contiguous SCFs). The USPS must approve all applicant-selected market areas prior to acceptance into the program.

c. Mail owners completing the online application process receive an electronic response from the USPS that includes:

1. An individual volume threshold report, with the applicant's recorded saturation and/or high density volume for the 2010 calendar year.
2. A certification letter.
3. A threshold inquiry form.

d. Applicants agreeing with their threshold volume(s) can sign the certification letter and return a copy via email to: *SaturationHDIncentive@usps.gov* or mail hardcopy to Saturation Incentive Program Office, 475 L'Enfant Plaza SW., Room 5500, Washington, DC 20260–5500, to be registered for the program.

e. Applicants not agreeing with any portion of their USPS-calculated threshold(s) must complete the threshold inquiry form and return it along with supporting evidence, via email, or mail hardcopy to Saturation Incentive Program Office, 475 L'Enfant Plaza SW., Room 5500, Washington, DC 20260–5500, no later than March 15, 2011.

f. Mail owners wishing to participate in the program, but who were not notified by letter, may request a review of their eligibility by contacting the USPS at *Saturation/HDIncentive@usps.gov* or submitting an online application at *www.usps.com/SaturationHD* no later than December 31, 2010.

8.2.5 Program Participation

Mail owners may participate in the program with qualifying letters and flats mailpieces mailed at saturation or high density prices as follows:

a. Standard Mail, or Nonprofit Standard Mail, mailpieces mailed by the participant through the participant's own permit imprint advance account, precanceled stamp permit(s), or postage meter permit(s);

b. Standard Mail, or Nonprofit Standard Mail, mailpieces prepared by a mail service provider, when entered through a permit owned by the participant;

c. Standard Mail, or Nonprofit Standard Mail, mailpieces mailed through a mail service provider's permit, only when the pieces can be identified as being prepared for the participant and when the applicant's prior mailing activity through the mail service provider's permit can be validated.

d. Fluctuations in mailing activity resulting from the merger or acquisition of one or more program participants, prior or subsequent to the beginning of the program period, are subject to

review and approval by the USPS for inclusion in reported volume.

8.2.6 Incentive Program Credits

Approved participants demonstrating an increase in Standard Mail, or Nonprofit Standard Mail, saturation and high density letters and flats volume above their threshold level qualify for a credit to a single designated permit imprint advance deposit account or CAPS account as follows:

a. The total postage paid for Standard Mail, or Nonprofit Standard Mail, letters and flats mailed at saturation and high density prices, recorded during the program is identified for each participant.

b. The total postage paid during the program period is divided by the total number of recorded mailpieces to determine the average price per piece for the program period.

c. Participants receive a credit, based on the percentages of the average price per piece, for the number of mailpieces of incremental volume above their threshold level, recorded during the program period, as follows:

1. Saturation letters and flats: 22 percent for Standard Mail, 8 percent for Nonprofit Standard Mail pieces.

2. High density letters and flats: 13 percent for Standard Mail, 8 percent for Nonprofit Standard Mail pieces.

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400 Commercial Parcels

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430 First-Class Mail

433 Prices and Eligibility

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3.0 Basic Standards for First-Class Mail Parcels

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3.5 Move Update Standards

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3.5.4 Basis for Move Update Assessment Charge

[Revise text of 3.5.4 to read as follows:]

Mailings are subject to a Move Update assessment charge if more than 25 percent of addresses with a change-of-address (COA) are not updated, based on the error rate found in USPS sampling at acceptance during Performance-Based Verification. Specifically, mailings for which the sample contains greater than 25 percent failed COAs out of the total COAs in the sample are subject to additional postage charges as follows:

a. The percentage of the mailing paying the charge is based on the percentage of failed pieces above 25 percent (%).

b. Each of the assessed pieces is subject to the $0.07 per piece charge.

c. As an example, if 35% of COAs in the sample are not updated, then the charge is applied to 10% (=35% − 25%) of the total mailing.

d. Mailings for which the sample has five or fewer pieces that were not updated for a COA are not subject to the assessment, regardless of the failure percentage.

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440 Standard Mail

443 Prices and Eligibility

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3.0 Basic Standards for Standard Mail Parcels

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3.5 Move Update Standards

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[Revise title and text of 3.5.4 to read as follows:]

3.5.4 Basis for Move Update Assessment Charges

Mailings are subject to a Move Update assessment charge if more than 25 percent of addresses with a change-of-address (COA) are not updated, based on the error rate found in USPS sampling at acceptance during Performance-Based Verification. Specifically, mailings for which the sample contains greater than 25 percent failed COAs out of the total COAs in the sample are subject to additional postage charges as follows:

a. The percentage of the mailing paying the charge is based on the percentage of failed pieces above 25 percent (%).

b. Each of the assessed pieces is subject to the $0.07 per piece charge.

c. As an example, if 35% of COAs in the sample are not updated, then the charge is applied to 10% (=35% − 25%) of the total mailing.

d. Mailings for which the sample has five or fewer pieces that were not updated for a COA are not subject to the assessment, regardless of the failure percentage.

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We will publish an appropriate amendment to 39 CFR Part 111 to reflect these changes.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 2010–28412 Filed 11–16–10; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2010–0321, FRL–9212–1]

Approval and Promulgation of Implementation Plans; New York Prevention of Significant Deterioration of Air Quality and Nonattainment New Source Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to grant a partial approval to revisions of the New York State Implementation Plan (SIP) submitted by the New York State Department of Environmental Conservation on March 3, 2009. As a result of this action, New York will implement its own Prevention of Significant Deterioration of Air Quality (PSD) and Nonattainment New Source Review (NNSR) State regulations. These revisions create a new New York State PSD regulation program and modify the existing New York State NNSR regulations in the SIP. These revisions also address changes mandated by the revised Federal New Source Review (NSR) regulations, referred to as the "2002 NSR Reform Rules."

In this action, EPA is taking final action to approve these revisions by issuing a partial approval, with the caveat that EPA is taking no action at this time on the PSD permitting threshold provisions to the extent that those provisions may require permits for sources of greenhouse gas (GHG) emissions that equal or exceed the 100/250 tons per year (tpy) GHG levels but are less than the thresholds identified in EPA's final Tailoring Rule; and the PSD significance level provisions of New York's rule to the extent that those provisions may treat as significant GHG emissions increases that are less than the thresholds identified in the final Tailoring Rule. The PSD applicability thresholds below the Tailoring Rule will be acted on, as necessary, as part of an EPA national rulemaking or in a separate EPA Region 2 rulemaking.

DATES: *Effective Date:* This rule is effective on December 17, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R02–OAR–2010–0321. All documents in the docket are listed on the *http://www.regulations.gov* Web site. All docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at

the Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is 212–637–4249.

FOR FURTHER INFORMATION CONTACT: Frank Jon, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–4085; e-mail address: *jon.frank@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, references to "EPA," "we," "us," or "our," are intended to mean the Environmental Protection Agency. The supplementary information is arranged as follows:

I. What is being addressed by this document?
II. What sections of New York's rules are we approving in this action?
III. What are EPA's responses to comments to EPA's proposal?
IV. What action is EPA taking?
V. Statutory and Executive Order Reviews

I. What is being addressed by this document?

On March 3, 2009, the State of New York, through the New York State Department of Environmental Conservation (NYSDEC), submitted to EPA Region 2 revisions to the New York State Implementation Plan (SIP). The submittal consists of revisions to three regulations that are already part of the New York SIP. The affected regulations are: 6 New York Code of Rules and Regulations (NYCRR) Part 231, New Source Review for New and Modified Facilities; 6 NYCRR Part 200, General Provisions; and 6 NYCRR Part 201, Permits and Certificates. The revisions were made to create a new New York State PSD regulation program and to update the existing New York State nonattainment regulations consistent with changes to the Federal NSR regulations published on December 31, 2002 (67 FR 80186). In today's action, EPA is taking final action to approve those revisions by issuing a partial approval, as proposed (see 75 FR 43892 (July 27, 2010)), with the caveat that EPA is taking no action at this time on (1) the PSD permitting threshold provisions to the extent that those provisions may require permits for sources of greenhouse gas (GHG) emissions that equal or exceed the 100/250 tons per year (tpy) GHG levels but are less than the thresholds identified in EPA's final Tailoring Rule at 75 FR 31514, 31606 (June 3, 2010); and (2) the PSD significance level provisions of New York's rule to the extent that those provisions may treat as significant GHG emissions increases that are less than the thresholds identified in the final Tailoring Rule. *Id.* We are taking this action, in part, because in its August 11, 2010 letter to EPA, New York State confirmed to us that they have authority to regulate greenhouse gases without any additional rulemaking or other administrative action. For PSD applicability thresholds below the Tailoring Rule, EPA is still reviewing New York's ability to limit the permitting to sources equal to and above the Tailoring Rule thresholds. Action on this issue will be forthcoming, as necessary, as part of an EPA national action or in a separate EPA Region 2 action.

II. What sections of New York's rules are we approving in this action?

With respect to 6 NYCRR Part 200, EPA is taking final action to approve into the New York SIP only sections 200.1 and 200.9, Table 1 (Part 231 references), as effective March 5, 2009. EPA is not taking final action on the revisions to section 200.10 since they include only references to Federal standards and requirements and are therefore already Federally enforceable standards and requirements.

With respect to 6 NYCRR Part 201, EPA is taking final action to approve into the New York SIP only those revisions to subpart 201–2, effective March 5, 2009, submitted by NYSDEC specifically for implementation of the Part 231 NSR permitting program. Specifically, EPA is approving the definition of "Major stationary source or major source or major facility" that is contained in subpart 201–2.1(b)(21).

With respect to 6 NYCRR Part 231, EPA is taking final action to approve all of Part 231 into the New York SIP except certain revisions to Part 231 that may be applicable to GHG emissions, effective March 5, 2009, specifically, (1) the PSD permitting threshold provisions to the extent that those provisions may require permits for sources of greenhouse gas (GHG) emissions that equal or exceed the 100/250 tons per year (tpy) GHG levels but are less than the thresholds identified in EPA's final Tailoring Rule at 75 FR 31514, 31606 (June 3, 2010); and (2) the PSD significance level provisions of New York's rule to the extent that those provisions may treat as significant GHG emissions increases that are less than the thresholds identified in the final Tailoring Rule. Note that by this final action, EPA is removing and reserving 40 CFR 52.1689 which had incorporated the Federal PSD regulations at 40 CFR 52.21 into New York's applicable implementation plan.

III. What are EPA's responses to comments to EPA's proposal?

EPA received only one comment on this proposal. The commenter congratulates the agency on the policy decision it has made. The commenter also states that when EPA promulgated the NSR Reform Rule, it indicated that it would not approve State plans that did not include the "reforms," and stated that it would issue a Federal Implementation Plan imposing the reforms on any State that did not adopt them. By contrast, the commenter notes that the proposed rule would approve New York's program, even though it diverges in important respects from the NSR Reform package. The commenter further notes that EPA does so on the grounds that the New York program is more stringent than Federal requirements. The commenter indicates that this is quite a change from the position of the previous Administration. The commenter further states that he does not know if EPA has previously taken the position it does here. If not, the commenter urges EPA to provide discussion of the rationales for this change in stance. Otherwise, the commenter warns, the change might well be struck down by the courts as unexplained, and therefore arbitrary and capricious.

Response

Except in specific cases of preemption unrelated to this action, the Clean Air Act does not preclude States from adopting or enforcing a more stringent regulation than Federal requirements. 42 U.S.C. 7416. New York State has adopted the reforms of EPA's 2002 NSR reform rules. In general, the New York State revisions to the rule are similar to the Federal NSR Reform Rules except for a few specific provisions. EPA is required to approve State SIP revisions that are at least as stringent as the Federal rules even if they contain provisions that differ in minor ways. These specific provisions, addressed in New York's Revised Regulatory Impact Statement and discussed in detail in our proposal (see 75 FR 43892, (July 27, 2010), retain and, in fact, may exceed the environmental benefits of the NSR program.

IV. What action is EPA taking?

EPA is taking a final action to grant a partial approval to revisions to the New York State Implementation Plan (SIP) submitted by the New York State Department of Environmental Conservation on March 3, 2009.

V. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 18, 2011. 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 29, 2010.

George Pavlou,

Acting Regional Administrator, Region 2.

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

PART 52—[AMENDED]

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

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

Subpart HH—New York

■ 2. Section 52.1670 is amended by adding new paragraph (c)(115) to read as follows:

§ 52.1670 Identification of plan.

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(c) * * *

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(115) On March 3, 2009, the New York State Department of Environmental Conservation (NYSDEC), submitted to EPA proposed revisions to the State Implementation Plan concerning Prevention of Significant Deterioration (PSD) and nonattainment new source review.

(i) Incorporation by reference:

(A) Letter dated March 3, 2009, from Assistant Commissioner J. Jared Snyder, NYSDEC, to George Pavlou, Acting Regional Administrator, EPA Region 2, submitting the revisions for Title 6 of the New York Code of Rules and Regulations, Part 200, "General Provisions," sections 200.1 and 200.9, Table 1 (Part 231 references); Subpart 201–2.1(b)(21); and Part 231, which identifies an effective date of March 5, 2009.

(B) Title 6 of the New York Code of Rules and Regulations, Part 200, "General Provisions," sections 200.1 and 200.9, Table 1 (Part 231 references), with an effective date of March 5, 2009, Subpart 201–2.1(b)(21), definition of "Major stationary source or major source or major facility," with an effective date of March 5, 2009, and Part 231, "New Source Review for New and Modified Facilities," with an effective date of March 5, 2009.

■ 3. Section 52.1679, is amended by revising the table entries under Title 6, for Part 200 and Part 231, and adding new entry Subpart 201–2.1(b)(21) following Part 201, "Permits and certificates" in numerical order to read as follows:

§ 52.1679 EPA-approved New York State regulations.

New York State regulation	State effective date	Latest EPA approval date	Comments
Title 6			
Part 200, General Provisions, Section 200.1.	3/5/09	11/17/10, [Insert FR page citation].	The word odor is removed from the Subpart 200.1(d) definition of "air contaminant or air pollutant."

New York State regulation	State effective date	Latest EPA approval date	Comments
			Redesignation of non-attainment areas to attainment areas (200.1(av)) does not relieve a source from compliance with previously applicable requirements as per letter of Nov. 13, 1981 from H. Hovey, NYSDEC. Changes in definitions are acceptable to EPA unless a previously approved definition is necessary for implementation of an existing SIP regulation. EPA is including the definition of "Federally enforceable" with the understanding that (1) the definition applies to provisions of a Title V permit that are correctly identified as Federally enforceable, and (2) a source accepts operating limits and conditions to lower its potential to emit to become a minor source, not to "avoid" applicable requirements.
Section 200.9, Table 1 (Part 231 references).	3/5/09	11/17/10, [Insert FR page citation].	EPA is approving reference documents that are not already Federally enforceable.
Sections 200.6, 200.7 and 200.9.	2/25/00	4/22/08, 73 FR 21548	EPA is approving reference documents that are not already Federally enforceable.
* *		* *	* * *
Subpart 201–2.1(b)(21), Definitions.	3/5/09	11/17/10, [Insert FR page citation].	EPA is including the definition of "Major stationary source or major source or major facility" with the understanding that the definition applies only to provisions of Part 231.
* *		* *	* * *
Part 231, New Source Review for New and Modified Facilities.	3/5/09	11/17/10, [Insert FR page citation].	Partial approval; no action taken on provisions that may require PSD permits for sources of greenhouse gas (GHG) emissions with emissions below the thresholds identified in EPA's final PSD and Title V GHG Tailoring Rule at 75 FR 31514, 31606 (June 3, 2010).
* *		* *	* * *

§ 52.1689 [Reserved]

■ 4. Section 52.1689 is removed and reserved.

[FR Doc. 2010–28964 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0812; FRL–8851–7]

Acequinocyl; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of acequinocyl in or on bean, edible podded; hop, dried cones; okra and vegetable, fruiting, group 8. The Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 17, 2010. Objections and requests for hearings must be received on or before January 18, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0812. 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.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Sidney Jackson, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7610; e-mail address: *jackson.sidney@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A . Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult

the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0812 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 18, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2009–0812, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of January 6, 2010 (75 FR 868) (FRL–8801–5), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7598) by IR–4 Project Headquarters, 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.599 be amended by establishing tolerances for residues of the insecticide acequinocyl, 2-(acetyloxy)-3-dodecyl-1,4-naphthalenedione, and its metabolite, 2-dodecyl-3-hydroxy-1,4-naphthoquinone, calculated as the stoichiometric equivalent of acequinocyl and by establishing a tolerance for the residues of acequinocyl, including its metabolites and degradates in or on vegetable, fruiting, group 8 at 0.7 parts per million (ppm); okra at 0.7 ppm; bean, edible podded at 0.25 ppm and hop, dried cone at 3.5 ppm. That notice referenced a summary of the petition prepared on behalf of IR–4 by Arysta LifeScience North America LLC, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the proposed tolerance for hop dried cones from 3.5 ppm to 4.0 ppm as available data submitted support the higher tolerance. The reason(s) for these changes are explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *"

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for acequinocyl including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with acequinocyl follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Acequinocyl exhibits low acute toxicity in oral, dermal and inhalation routes of exposure, as well as, primary eye and primary skin irritation studies. It is not a dermal sensitizer.

In rat studies including a subchronic oral toxicity study, a 28-day dermal toxicity study, and a chronic feeding/oncogenicity study, acequinocyl increased prothrombin and activated partial thromboplastin. Internal hemorrhages were observed in both a rat and rabbit developmental toxicity study, a mouse subchronic/chronic toxicity study, and in a 2-generation reproduction rat study. In a combined chronic toxicity/oncogenicity study in rats, enlarged eyeballs were observed. Hepatotoxicity in the mouse was evidenced by histopathology and increased liver enzymes.

In both rat and rabbit developmental toxicity studies, acequinocyl increased the number of resorptions. Developmental effects (*i.e.,* resorptions) occurred at a dose that was higher than or the same as the dose that caused maternal toxicity. In the 2-generation reproduction toxicity study in the rat, there was no evidence of reproductive toxicity, though there were notable toxic effects observed in offspring that were not observed in adults including swollen body parts, protruding eyes, clinical signs, delays in pupil development and increased mortality occurring mainly after weaning.

There was no evidence of carcinogenic potential in either the rat or mouse carcinogenicity study, indicating that acequinocyl is "not likely" to be carcinogenic to humans. There was no concern for mutagenic activity as indicated by several

mutagenicity studies. Acequinocyl is classified as "Not likely to be Carcinogenic to Humans."

Specific information on the studies received and the nature of the adverse effects caused by acequinocyl as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document, "Acequinocyl; Human-Health Risk Assessment for Proposed Section 3 Uses on Fruiting Vegetables, Hops, Okra, and Edible-Podded Beans" dated August 26, 2010, at pp. 32–35 in docket ID number EPA–HQ–OPP–2009–0812–0004.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for acequinocyl used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ACEQUINOCYL FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/Scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (General population including infants and children).	N/A	N/A	An endpoint attributable to a single dose was not identified in the database.
Chronic dietary (All populations)	NOAEL = 2.7 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.027 mg/kg/day. cPAD = 0.027 mg/kg/day.	Carcinogenicity study in mice (18 month); LOAEL = 7.0 mg/kg/day based on the clinical chemistry and microscopic nonneoplastic lesions (brown pigmented cells and perivascular inflammatory cells in liver).
Short-term (1 to 30 days) and intermediate-term (1–6 months) dermal.	Dermal NOAEL = 200 mg/kg/day.	LOC (occupational/residential) for MOE = <100.	28-day dermal study in rats; LOAEL = 1000 mg/kg/day based on increased clotting factor times.
Short-term (1 to 30 days) inhalation	Oral NOAEL = 60 mg/kg/day (inhalation absorption rate = 100%). UF_A = 10x UF_H = 10x	LOC (occupational/residential) = MOE <100.	Developmental toxicity study in rabbits; Maternal LOAEL = 120 mg/kg/day based on clinical signs (hematuria, reduced fecal output, body weight loss, and reduced food consumption) and gross necropsy findings (pale lungs and liver, hemorrhaging uterus, fluid in the cecum, fur in the stomach, blood stained vaginal opening, blood-stained urinary bladder contents/urine).
Cancer (oral, dermal, inhalation)	Classification: "Not likely to be Carcinogenic to Humans."		

UF_A = extrapolation from animal to human (interspecies).
UF_H = potential variation in sensitivity among members of the human population (intraspecies).
FQPA SF = Food Quality Protection Act Safety Factor.
PAD = population adjusted dose (a = acute, c = chronic).
RfD = reference dose.
MOE = margin of exposure.
LOC = level of concern.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to acequinocyl, EPA considered exposure under the petitioned-for tolerances as well as all existing acequinocyl tolerances in 40 CFR 180.599. EPA assessed dietary exposures from acequinocyl in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

No such effects were identified in the toxicological studies for acequinocyl; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used the food consumption data from the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 and the Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA conducted a chronic dietary exposure analysis of acequinocyl based on the assumption of tolerance level residues and 100 percent crops treated (PCT) for all existing and proposed uses.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that acequinocyl does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue or PCT information in the dietary assessment for acequinocyl. Tolerance level residues and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for acequinocyl in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of acequinocyl. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of acequinocyl for chronic exposures for non-cancer assessments are estimated to be 2.45 parts per billion (ppb) acequinocyl for surface water and 0.0036 ppb (acequinocyl and its metabolite, acequinocyl-OH) for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 2.45 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Acequinocyl is currently registered for the following uses that could result in residential exposures: Landscape ornamentals in residential and public areas for use by commercial applicators and homeowners. EPA assessed residential exposure using the following assumptions: In assessing residential exposure/risk, the homeowner handlers are expected to complete all tasks associated with the use of a pesticide product including mixing and loading (if needed), and application. No chemical-specific data were available with which to assess potential exposure to pesticide handlers. The estimates of exposure to pesticide handlers are based upon surrogate study data available from the Outdoor Residential Exposure Task Force (ORETF) and the Pesticide Handlers Exposure Data (PHED). Homeowner handler assessments are based on the assumption that individuals are wearing shorts, short-sleeved shirts, socks, and shoes. Residential handler exposure scenarios are considered to be short-term only, due to infrequent use patterns associated with homeowner products.

Based upon the proposed use pattern, the following residential handler scenarios have been assessed:

(1) Mixing/loading/applying liquids with low-pressure handwand (ORETF-fruit trees and ornamentals).

(2) Mixing/loading/applying liquids with hose-end sprayer (ORETF-fruit trees and ornamentals).

No significant dermal post-application exposure is expected from landscape ornamentals uses.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found acequinocyl to share a common mechanism of toxicity with any other substances, and acequinocyl does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that acequinocyl does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* In the rat prenatal developmental toxicity study, developmental toxicity was indicated by increased resorptions and fetal variations. The developmental toxicity study in rabbits identified an increased number of complete resorptions. In the rat two-generation reproductive toxicity study, both the maternal and reproductive toxicity LOAELs were not observed, however the LOAEL for parental males was 58.9/69.2 mg/kg/day based on hemorrhagic effects. The offspring systemic LOAEL was also 58.9 mg/kg/day. Though the offspring LOAEL was similar to that of parental male's, there were effects specific to the pups which in addition to the hemorrhagic effects noted in both generations, included swollen body parts, protruding eyes, clinical signs, delays in pupil development and increased mortality occurring mainly after weaning.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. At this time, the Agency is making permanent registration of these new uses conditional pending resolution of toxicological issues and has identified the following studies needed, including: (1) A 28-day inhalation study; (2) an immunotoxicity study; and (3) acute and subchronic neurotoxicity studies. Except for the 28-day inhalation study, the remaining studies are required under new EPA regulations. The toxicology database for acequinocyl does not show any evidence of treatment-related effects on the immune system. The overall weight of evidence suggests that this chemical does not directly target the immune system. An immunotoxicity study is required as a part of new data requirements in the 40 CFR part 158 for conventional pesticide registration; however, the Agency does not believe that conducting a functional immunotoxicity study will result in a lower point of departure (POD) than that currently in use for overall risk assessment, and therefore, a database uncertainty factor (UF_{DB}) is not needed to account for lack of this study.

Although a 28-day inhalation study is not available, EPA has determined that the additional FQPA SF is not needed. Residential inhalation risk was estimated by calculating exposure using the Agency's Residential SOPs. For chemicals with low vapor pressure (7.5×10^{-5} mmHg or below for outdoor uses at 20–30 °C), these standard assumptions are expected to overestimate the exposure via the inhalation route. Acequinocyl is such a compound (1.69×10^{-11} mmHg at 25 °C) and exposure through the inhalation route is expected to be minimal. Therefore, the risk estimate is conservative and is considered protective and the additional FQPA SF is not needed. Since all calculated inhalation MOEs for residential handlers are significantly greater than the Agency's LOC (MOE >100), even retaining the FQPA SF would not affect EPA's conclusion on safety.

There is potential evidence of neurotoxicity or neuropathology in the 2-generation reproduction study as well as the rat subchronic oral toxicity study, however these toxicities are not considered to be primary effects since they occur in the presence of more severe systemic effects in both studies. Therefore, although an acute and subchronic neurotoxicity studies are now required as a part of new data requirements in the 40 CFR part 158 for conventional pesticide registration, the agency does not believe that conducting these studies will result in a lower point of departure (POD) than that currently used for overall risk assessment.

ii. There is no evidence that acequinocyl results in increased susceptibility in *in utero* rat or rabbit fetuses in the prenatal developmental studies or in young rats in the 2-generation reproduction study. In the 2-generation rat reproduction study, more severe effects were observed in the offspring, however these effects were observed at the same doses as parental effects, and a clear NOAEL was established which is being used in endpoint selection.

iii. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground water and surface water modeling used to assess exposure to acequinocyl in drinking water. The residential use (ornamentals) is not expected to result in post-application exposure to infants and children. These assessments will not underestimate the exposure and risks posed by acequinocyl.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, acequinocyl is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to acequinocyl from food and water will utilize 45% of the cPAD for children 1–2 years old the population group receiving the greatest exposure. Based on the use pattern, chronic residential exposure to residues of acequinocyl is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Acequinocyl is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to acequinocyl.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded that the combined short-term food, drinking water, and dermal and inhalation residential exposures result in aggregate MOE of 2,700 for adults 50+ years old, the highest exposed population. Because EPA's level of concern for chemical name is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Acequinocyl is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for acequinocyl.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity, acequinocyl is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to acequinocyl residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodologies are available for enforcing tolerances for acequinocyl residues of concern in/on the proposed/registered plant commodities. Methods include two high-performance liquid chromatography methods with tandem mass-spectroscopy detection (HPLC/MS/MS).

The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the U.S. is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established MRLs for acequinocyl.

C. Revisions to Petitioned-for Tolerances

The Agency revised the 3.5 ppm proposed tolerance on hop, dried cones to 4.0 ppm. The Agency's tolerance spreadsheet as specified by the *Guidance for Setting Tolerances Based on Field Trial Data* SOP (August 2009 version) was used to determine appropriate tolerance levels.

EPA has revised the tolerance expression for acequinocyl to clarify

1. That, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of acequinocyl not specifically mentioned; and

2. That compliance with the specific compounds mentioned in the tolerance expression.

V. Conclusion

Therefore, tolerances are established for residues of acequinocyl including its metabolites and degradates in or on bean, edible podded at 0.25 ppm, hop, dried cones at 4.0 ppm, okra at 0.70 ppm, and vegetable, fruiting, group 8 at 0.70 ppm. Compliance with the tolerance levels specified is to be determined by measuring only the sum of acequinocyl [2-(acetyloxy)-3-dodecyl-1,4-naphthalenedione] and its metabolite, 2-dodecyl-3-hydroxy-1,4-naphthoquinone, calculated as the stoichiometric equivalent of acequinocyl, in or on the commodity.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report 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 this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 4, 2010.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.599 is amended by revising paragraph (a) introductory text and alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

§ 180.599 Acequinocyl; tolerance for residues.

(a) *General.* Tolerances are established for residues of acequinocyl, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of acequinocyl [2-(acetyloxy)-3-dodecyl-1,4-naphthalenedione] and its metabolite, 2-dodecyl-3-hydroxy-1,4-naphthoquinone, calculated as the stoichiometric equivalent of acequinocyl, in or on the commodity.

Commodity	Parts per million
* * * * *	
Bean, edible podded	0.25
* * * * *	
Hop, dried cones	4.0
* * * * *	
Okra	0.70
* * * * *	
Vegetable, fruiting, group 8	0.70

* * * * *

[FR Doc. 2010–28973 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

Universal Service Support Mechanisms

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: The Federal Communications Commission has published a number of requirements related to the universal service support mechanisms. This document announces the approval of the Office of Management and Budget (OMB) for information collection requirements contained in the sections outlined in the **DATES** section.

DATES: Effective November 17, 2010, the following regulations have been approved by OMB:

54.5—71 FR 38796, July 10, 2006.
54.409(d)—69 FR 34600, June 22, 2004.
54.410—69 FR 34600, June 22, 2004.
54.416—69 FR 34601, June 22, 2004.
54.513(c)—69 FR 6191, Feb. 10, 2004.
54.514(b)—68 FR 36942, June 20, 2003.
54.609(d)(2)—68 FR 74502, Dec. 24, 2003.
54.609(e)—70 FR 6373, Feb. 7, 2005.
54.621—68 FR 74503, Dec. 24, 2003.
54.703(c)—63 FR 70573, Dec. 21, 1998.
54.708—71 FR 38797, July 10, 2006.
54.712—71 FR 38797, July 10, 2006.

FOR FURTHER INFORMATION CONTACT: Nicholas Degani, Telecommunications Access Policy Division, Wireline Competition Bureau, at (202) 418–7400.

SUPPLEMENTARY INFORMATION:

On April 19, 2000, OMB approved the information collection requirements contained in § 54.703(c) of title 47 of the United States Code as a revision to OMB Control Number 3060–0876. OMB had previously temporarily approved this information collection several times.

On March 16, 2004, OMB approved the information collection requirements contained in §§ 54.609(d)(2) and 54.621 of title 47 of the United States Code as a revision to OMB Control Number 3060–0804.

On July 13, 2004, OMB approved the information collection requirements contained in § 54.513(c) of title 47 of the United States Code as a part of OMB Control Number 3060–1062.

On November 12, 2004, OMB approved the information collection requirements contained in § 54.514(b) of title 47 of the United States Code as a revision to OMB Control Number 3060–0806.

On May 12, 2005, OMB approved the information collection requirements contained in §§ 54.409(d), 54.410, and 54.416 of title 47 of the United States Code as a revision to OMB Control Number 3060–0819.

On June 28, 2005, OMB approved the information collection requirements contained in §§ 54.609(e) of title 47 of the United States Code as a revision to OMB Control Number 3060–0804.

On March 19, 2007, OMB approved the information collection requirements contained in §§ 54.5, 54.708, and 54.712 of title 47 of the United States Code as a revision to OMB Control Number 3060–0855. OMB had previously temporarily approved these information collections on October 20, 2006.

These information collection requirements required OMB approval in order to become effective. The Commission publishes this document as an announcement of those approvals. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Thomas Butler, Federal Communications Commission, Room 5–C457, 445 12th Street, SW., Washington, DC 20554. Please include the OMB Control Numbers, 3060–0804, 3060–0806, 3060–0819, 3060–0855, 3060–0876, 3060–1062, in your correspondence. The Commission will also accept your comments via the Internet if you send them to *PRA@fcc.gov.*

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

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval for the information collection requirements described above. The OMB Control Numbers are 3060–0804, 3060–0806, 3060–0819, 3060–0855, 3060–0876, and 3060–1062. The total annual reporting burden for respondents for these collections of information, including the time for gathering and maintaining the collection of information, has been most recently approved to be:

For 3060–0804: 59,464 responses, for a total annual burden of 67,468 hours, and no annual costs.

For 3060–0806: 221,000 responses, for a total annual burden of 525,003 hours, and no annual costs.

For 3060–0819: 227,055 responses, for a total annual burden of 61,788 hours, and no annual costs.

For 3060–0855: 36,068 responses, for a total annual burden of 273,129 hours, and no annual costs.

For 3060–0876: 22 responses, for a total annual burden of 560 hours, and no annual costs.

For 3060–1062: 100 responses, for a total annual burden of 100 hours, and no annual costs.

An agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act, which does not display a current, valid OMB Control Number. The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

List of Subjects in 47 CFR Part 54

Telecommunications, Universal service.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–29016 Filed 11–16–10; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register

Vol. 75, No. 221

Wednesday, November 17, 2010

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0228; Directorate Identifier 2009–NM–252–AD]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Corporation Model MD–11 and MD–11F Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposed airworthiness directive (AD) for the products listed above. That NPRM proposed a one-time inspection to detect damage of the wire assemblies of the tail tank fuel system, a wiring change, and corrective actions if necessary. That NPRM was prompted by fuel system reviews conducted by the manufacturer. This action revises that NPRM by adding, for certain airplanes, a general visual inspection for correct installation of the self-adhering, high-temperature electrical insulation tape; installation of a wire assembly support bracket and routing wire assembly; changing wire supports; and installation of a wire protection bracket. We are proposing this supplemental NPRM to detect and correct a potential of ignition sources inside fuel tanks, which, in combination with flammable vapors, could result in a fuel tank fire or explosion, and consequent loss of the airplane.

DATES: We must receive comments on this supplemental NPRM by December 13, 2010.

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

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

For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; e-mail *dse.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 (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Serj Harutunian, Aerospace Engineer, Propulsion Branch, ANM–140L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5254; fax (562) 627–5210; e-mail: *Serj.Harutunian@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–2010–0228; Directorate Identifier 2009–NM–252–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 issued an NPRM to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain McDonnell Douglas Corporation Model MD–11 and MD–11F airplanes. That NPRM was published in the **Federal Register** on March 16, 2010 (75 FR 12464). That NPRM proposed to require a one-time inspection to detect damage of the wire assemblies of the tail tank fuel system, a wiring change, and corrective actions if necessary.

Comments

We gave the public the opportunity to comment on the previous NPRM. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Incorporate Revised Service Bulletin

Boeing requested that we modify the original NPRM to reference Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010, which clarifies work instructions and screw length requirements.

We agree. We have revised paragraphs (c), (g), and (h) of this supplemental NPRM to refer to Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010. The revised service bulletin adds a general visual inspection of the self-adhering high-temperature electrical insulation tape for correct installation, and changes wire supports, on airplanes on which the actions specified in Boeing Alert Service Bulletin MD11–28A124, dated June 17, 2009, have been accomplished.

Request To Incorporate Information Notice

FedEx requested that Boeing Service Bulletin Information Notice (IN) MD11–28A124 IN 01, dated October 1, 2009, be referenced in the original NPRM as an approved deviation from Boeing Alert Service Bulletin MD11–28A124, dated June 17, 2009. FedEx stated that, as the original NPRM is written, the compliance requirements will prevent FedEx from complying with the original NPRM unless an alternative method of compliance (AMOC) is granted.

We partially agree. Since the issuance of the original NPRM, Boeing has issued Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010, to incorporate the changes outlined in Boeing Service Bulletin IN MD11–28A124 IN 01, dated October 1, 2009. The revised service bulletin clarifies work instructions and screw length requirements. As stated previously, we have changed paragraphs (c), (g), and (h) of this supplemental NPRM to refer to Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

Request To Change Wording in Paragraphs (g)(1) and (g)(2)

Boeing requested that the wording in paragraphs (g)(1) and (g)(2) of the original NPRM be changed to include the installation of hardware. Boeing stated that the original NPRM implies that only wiring changes would be required; installation of brackets and supporting hardware, however, are required in addition to the wiring changes.

We agree. The installation of brackets and supporting hardware is required in addition to the wiring changes. We have revised paragraphs (g)(1) and (g)(2) of this supplemental NPRM to include the installation of a wire assembly support bracket, routing wire assembly, and a wire protection bracket.

Additional Changes

We have revised the Estimated Costs table to include the cost of the new inspection and wire support change required in paragraphs (h) and (i) of this supplemental NPRM, as well as to specify the on-condition costs that might be incurred.

FAA's Determination

We are proposing this supplemental NPRM because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs. Certain changes described above expand the scope of the original NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this supplemental NPRM.

Proposed Requirements of the Supplemental NPRM

This supplemental NPRM would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD will affect 110 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of tail tank fuel system wire assembly.	1 work-hour × $85 per hour = $85	$0	$85	$9,350.
Inspection of electrical insulation tape	1 work-hour × $85 per hour = $85	0	85	$9,350.
Change wire supports	3 work-hours × $85 per hour = $255	9	264	Up to $29,040.

We estimate the following costs to do any necessary installations and repairs that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need these installations and repairs.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Installation/repair	Up to 23 work-hours × $85 per hour = $1,955	$11,829	Up to $13,784.
Adjust tape installation	1 × $85 per hour = $85	0	$85.

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

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),

(3) Will not affect intrastate aviation in Alaska, and

(4) 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.

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 airworthiness directive (AD):

McDonnell Douglas Corporation: Docket No. FAA–2010–0228; Directorate Identifier 2009–NM–252–AD.

Comments Due Date

(a) We must receive comments by December 13, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to McDonnell Douglas Corporation Model MD–11 and MD–11F airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 28: Fuel.

Unsafe Condition

(e) This AD was prompted by fuel system reviews conducted by the manufacturer. We are issuing this AD to detect and correct a potential of ignition sources inside fuel tanks, which, in combination with flammable vapors, could result in a fuel tank fire or explosion, and consequent loss of the airplane.

Compliance

(f) Comply with this AD within the compliance times specified, unless already done.

Action

(g) For airplanes in Group 1, Configuration 1; and Group 2, Configuration 1: Within 60 months after the effective date of this AD, perform a general visual inspection to detect damage of wire assemblies of the tail tank fuel system, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(1) For airplanes in Group 1, Configuration 1: If no damage is found, before further flight, apply self-adhering high-temperature electrical insulation tape on the wire assemblies, install wire assembly support brackets, route wire assemblies, install extruded channel wire supports, and install a wire protection bracket, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(2) For airplanes in Group 1, Configuration 1: If damage is found, before further flight, repair or replace the wire assemblies, apply self-adhering high-temperature electrical insulation tape on the wire assemblies, install wire assembly support brackets, route wire assemblies, install extruded channel wire supports, and install a wire protection bracket, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(3) For airplanes in Group 2, Configuration 1: If no damage is found, before further flight, install wire assembly support brackets, route wire assemblies, install extruded channel wire supports, and install a wire protection bracket, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(4) For airplanes in Group 2, Configuration 1: If damage is found, before further flight, repair or replace wire assembly, install wire assembly support brackets, route wire assemblies, install extruded channel wire supports, and install a wire protection bracket, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(h) For airplanes in Group 1, Configuration 2: Within 60 months after the effective date of this AD, do a general visual inspection for correct installation of the self-adhering high-temperature electrical insulation tape, and change the wire supports, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010. If the self-adhering high-temperature electrical insulation tape is installed incorrectly, before further flight, adjust the tape installation to achieve the correct dimensions, in accordance with Figure 1 of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(i) For airplanes in Group 2, Configuration 2: Within 60 months after the effective date of this AD, change the wire supports, in accordance with Figure 2 of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, Los Angeles 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. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your Principal Maintenance Inspector or Principal Avionics Inspector, as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

Related Information

(k) For more information about this AD, contact Serj Harutunian, Aerospace Engineer, Propulsion Branch, ANM–140L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5254; fax (562) 627–5210; e-mail: *Serj.Harutunian@faa.gov.*

(l) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; e-mail *dse.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.

Issued in Renton, Washington, on November 5, 2010.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–28937 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038–AC96

Implementation of Conflicts of Interest Policies and Procedures by Futures Commission Merchants and Introducing Brokers

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing rules to implement new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street

Reform and Consumer Protection Act (Dodd-Frank Act). The proposed regulations establish conflicts of interest requirements for futures commission merchants (FCMs) and introducing brokers (IBs) for the purpose of ensuring that such persons implement adequate policies and procedures in compliance with the Commodity Exchange Act (CEA), as amended by the Dodd-Frank Act.

DATES: Comments must be received on or before January 18, 2011.

ADDRESSES: You may submit comments, identified by RIN number 3038–AC96 and FCM–IB Conflicts of Interest, by any of the following methods:

- Agency Web site, via its Comments Online process: *http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in CFTC Regulation 145.9, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Sarah E. Josephson, Associate Director, Division of Clearing and Intermediary Oversight, (202) 418–5684, *sjosephson@cftc.gov,* or Ward P. Griffin, Counsel, Office of General Counsel, (202) 418–5425, *wgriffin@cftc.gov,* Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act.[1] Title VII of the Dodd-Frank Act[2] amended the CEA[3] to establish a comprehensive regulatory framework to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the Commission with respect to all registered entities and intermediaries subject to the Commission's oversight.

This proposed rulemaking relates to the conflicts of interest provisions set forth in section 732 of the Dodd-Frank Act. In relevant part, section 732 of the Dodd-Frank Act amends section 4d of the CEA to direct each FCM and IB to implement conflicts of interest systems and procedures that establish safeguards within the firm to ensure that any persons researching or analyzing the price or market for any commodity are separated by "appropriate informational partitions" within the firm from review, pressure, or oversight of persons whose involvement in trading or clearing activities might potentially bias the judgment or supervision of the persons. Section 732 also requires that such conflicts of interest systems and procedures "address such other issues as the Commission determines to be appropriate."

Section 754 of the Dodd-Frank Act establishes that "[u]nless otherwise provided in this title, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle." Consequently, the Commission will seek to promulgate rules—by July 15, 2011—implementing the conflicts of interest provisions of section 732 of the Dodd-Frank Act.

Accordingly, pursuant to authority granted under sections 4d(c) and 8a(5) of the CEA, as amended by the Dodd-Frank Act, the Commission is proposing to adopt Regulation 1.71 to address potential conflicts of interest in the preparation and release of research reports by FCMs and IBs, and the establishment of "appropriate informational partitions" within such firms, as required by the Dodd-Frank Act. The proposed rule also will address other issues, such as enhanced disclosure requirements, in order to minimize the potential that conflicts of interest will arise within FCMs and IBs.

The proposed rules reflect consultation with staff of the following agencies: (i) The Securities and Exchange Commission; (ii) the Board of Governors of the Federal Reserve System; (iii) the Office of the Comptroller of the Currency; and (iv) the Federal Deposit Insurance Corporation. Staff from each of these agencies has had the opportunity to provide oral and/or written comments to the proposal, and the proposed rules incorporate elements of the comments provided.

The Commission requests comment on all aspects of the proposed rules, as well as comment on the specific provisions and issues highlighted in the discussion below.

II. Proposed Regulations

A. Conflicts of Interest in Research or Analysis

Section 732 of the Dodd-Frank Act requires, in relevant part, that FCMs and IBs implement conflicts of interest systems and procedures that "establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in trading or clearing activities might potentially bias the judgment or supervision of the persons."

The language in section 732 of the Dodd-Frank Act is similar to certain language contained in section 501(a) of the Sarbanes-Oxley Act of 2002,[4] which

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov.*

[2] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[3] 7 U.S.C. 1 *et seq.*

[4] Public Law 107–204, 116 Stat. 745 (2002) (codified at 15 U.S.C. 78o–6).

amended the Securities Exchange Act of 1934 by creating a new section 15D. In relevant part, section 15D(a) mandates that the Securities and Exchange Commission, or a registered securities association or national securities exchange, adopt "rules reasonably designed to address conflicts of interest that can arise when securities analysts recommend equity securities in research reports and public appearances, in order to improve the objectivity of research and provide investors with more useful and reliable information, including rules designed * * * to establish structural and institutional safeguards within registered brokers or dealers to assure that securities analysts are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of those whose involvement in investment banking activities might potentially bias their judgment or supervision * * *."

Unlike section 15D of the Securities Exchange Act of 1934, section 732 of the Dodd-Frank Act does not expressly limit the requirement for informational partitions to only those persons who are responsible for the preparation of the substance of research reports; rather, section 732 could be read to require informational partitions between persons involved in trading or clearing activities and any person within a FCM or IB who engages in "research or analysis of the price or market for any commodity," whether or not such research or analysis is to be made part of a research report that may be publicly disseminated.

However, the Commission believes that an untenable outcome could result from implementing informational partitions between persons involved in trading or clearing activities and all persons who may be engaged in "research or analysis of the price or market for any commodity," given that persons involved in trading or clearing activities are routinely—or even primarily—engaged in "research or analysis of the price or market for" commodities. Sound trading and/or clearing activities necessarily require some form of pre-decisional research or analysis of the facts supporting such trading or clearing determinations.

Therefore, given the untenable alternative, the proposed rules reflect the Commission's belief that the Congressional intent underlying section 732 with respect to "research and analysis of the price or market of any commodity" is primarily intended to prevent undue influence by persons involved in trading or clearing activities over the substance of research reports that may be publicly disseminated, and to prevent pre-public dissemination of any material information in the possession of a person engaged in research and analysis, or of the research reports, to traders.

Many elements of the proposed rule, particularly those provisions relating to potential conflicts of interest surrounding research and analysis, have been adapted from National Association of Securities Dealers (NASD) Rule 2711. To construct the "structural and institutional safeguards" mandated by Congress under section 732 of the Dodd-Frank Act, the proposed rule establishes specific restrictions on the interaction and communications between persons within a FCM or IB involved in research or analysis of the price or market for any derivative [5] and persons involved in trading or clearing activities. The proposed rules also impose duties and constraints on persons involved in the research or analysis of the price or market for any derivative. For instance, such persons will be required to disclose conspicuously during public appearances any relevant personal financial interests relating to any derivative of a type that the person follows. FCMs and IBs similarly will be obligated to make certain disclosures clearly and prominently in research reports, including third-party research reports that are distributed or made available by the FCM or IB. Further, FCMs and IBs, as well as employees involved in trading or clearing activities, will be prohibited from retaliating against any person involved in the research or analysis of the price or market for any derivative who produces, in good faith, a research report that adversely impacts the current or prospective trading or clearing activities of the FCM or IB.

Although section 732 of the Dodd-Frank Act requires that appropriate informational partitions be constructed within FCMs and IBs, the Commission recognizes that the appropriateness of such partitions may be affected by the size of the FCM or IB and the scope of its operations. The Commission invites comment on how these rules should apply to FCMs and IBs, considering the varying size and scope of the operations of such firms. For instance, NASD Rule 2711(k) provides an exception from certain requirements for "small firms," defined to include those firms that over the past three years have participated in ten or fewer "investment banking services transactions" and "generated $5 million or less in gross investment banking services revenues from those transactions." The Commission solicits comment on whether a similar approach should be adopted for small FCMs and IBs. Moreover, the exceptions to the definition of "research report" are designed to address issues typically found in smaller firms where individuals in the trading unit perform their own research to advise their clients or potential clients. These exceptions do not in any way impact or lessen the restrictions placed on firms that prepare research reports and release them for public consumption. Any attempt by such firms to move research personnel into a trading unit to attempt to avail themselves of the exception will result in insufficient "structural and institutional safeguards" and will be a violation of Section 732 of the Dodd-Frank Act and these Regulations.

To address the possibility that the proposed rules could be evaded by employing research analysts in an affiliate of a FCM or IB, the proposed rules also will restrict communications with research analysts employed by an affiliate. An affiliate will be defined as an entity controlling, controlled by, or under common control with, a FCM or IB.

B. Other Issues

In addition to mandating the establishment of "appropriate informational partitions" within FCMs and IBs that focus on the activities of persons involved in the "research or analysis of the price or market for any commodity," section 732 of the Dodd-Frank Act also requires FCMs and IBs to "implement conflict-of-interest systems and procedures that * * * address such other issues as the Commission determines to be appropriate." Having considered the potential conflicts of interest that may arise in a FCM or IB, the Commission is proposing rules that will address two general topics: (1) Clearing activities; and (2) the potential for undue influence on customers. The intended cumulative effect of the proposed rules is to fulfill Congress's objective that FCMs and IBs construct "structural and institutional safeguards" to minimize the potential conflicts of interest that could arise within such firms.

With respect to the proposed language relating to clearing activities, although the Commission is exercising its statutory authority under section 4d(c)(2) of the CEA, as amended by the Dodd-Frank Act, the impetus underlying the proposed language originates in the Dodd-Frank Act: Section 731. Section 731 creates a new

[5] Use of the term "derivative" is based upon the products listed in the definitions of futures commission merchant and introducing broker in sections 1a(28) and 1a(29) of the CEA.

section 4s of the CEA, which provides for the registration and regulation of swap dealers (SDs) and major swap participants (MSPs). New section 4s contains a conflicts of interest provision that is similar—though not identical—to the conflicts of interest provision in section 732 of the Dodd-Frank Act. New section 4s(j)(5) requires the establishment of "structural and institutional safeguards" surrounding the activities of any person "providing clearing activities or making determinations as to accepting clearing customers"—specifically that the activities of such persons be separated from the review, pressure, or oversight of persons involved in pricing, trading, or clearing. Although the quoted language is not contained in section 4d(c) of the CEA, as amended by section 732 of the Dodd-Frank Act, the Commission believes that to effectuate fully the intent of section 4s(j)(5) of the CEA, these issues should be addressed with regard to FCMs.

The Dodd-Frank Act stipulates that only a person registered as a FCM may accept money, securities or property to clear a swap through a derivatives clearing organization on behalf of another person, though the restriction does not prohibit a SD or MSP from clearing its own swap transaction.[6] New section 4s(j)(5) of the CEA requires that certain determinations be made relating to the provision of clearing activities or the acceptance of clearing customers, such as (1) whether to enter into a cleared or uncleared trade, (2) whether to refer a counterparty to a particular FCM for clearing, or (3) whether to send a cleared trade to a particular derivatives clearing organization. Although the ultimate determination as to whether to accept a customer for clearing would be made at a FCM, an affiliated SD or MSP could have incentives to try to influence that decision improperly. Such influence may be motivated by conflicts of interest that could have a direct impact on the clearing treatment of transactions. Moreover, in any situation where a person is dually registered as a FCM and as a SD or MSP, the restrictions on clearing activities set forth in the proposed regulations are intended to apply to the relationship between the clearing unit of the FCM and the business trading unit of the SD or MSP, even though the business trading unit and clearing unit reside within the same entity. The proposed rules, set forth at subsection (d), have been adapted from NASD Rule 2711(b).

The Commission specifically requests comment regarding whether there are alternative approaches that could be taken to address the potential conflicts of interest that may arise between a FCM providing clearing services to customers and the business trading unit personnel of an affiliated swap dealer or major swap participant. For example, what approach would address an attempt by a swap dealer's trading desk personnel to interfere with an affiliated FCM's decision to offer clearing services to a particular customer because of a perceived competitive threat?

As an additional safeguard, the Commission is proposing to require that each affected FCM and IB implement policies and procedures mandating the disclosure to its customers of any material conflicts of interest that relate to a customer's decision on the execution or clearing of a transaction.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[7] requires that agencies, in proposing rules, consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis addressing the impact. The proposed rules would impact FCMs and IBs, each of which is addressed separately in the following paragraphs.

The Commission previously has established certain definitions of "small entities" to be used in evaluating the impact of the Commission's rules on such small entities in accordance with the RFA. In the Commission's "Policy Statement and Establishment of Definitions of 'Small Entities' for Purposes of the Regulatory Flexibility Act,"[8] the Commission concluded that registered FCMs should not be considered to be small entities for purposes of the RFA. The Commission's determination in this regard was based, in part, upon the obligation of registered FCMs to meet the capital requirements established by the Commission. Likewise, the Commission determined "that, for the basic purpose of protection of the financial integrity of futures trading, Commission regulations can make no size distinction among registered FCMs."[9] Thus, with respect to registered FCMs, the Commission believes that the proposed regulations will not have a significant economic impact on a substantial number of small entities.

The Commission previously has determined that, for purposes of the RFA, the Commission should "evaluate within the context of a particular rule proposal whether all or some [IBs] should be considered to be small entities and, if so, to analyze the economic impact on [IBs] of any such rule at that time. Specifically, the Commission recognizes that the [IB] definition, even as narrowed to exclude certain persons, undoubtedly encompasses many business enterprises of variable size."[10] At present, IBs are subject to various existing rules that govern and impose minimum requirements on their internal compliance operations, based on the nature of their business. The proposed amendments would merely augment the existing compliance requirements of such persons to address potential conflicts of interest within such firms. To the extent that certain IBs may be considered to be small entities, the Commission believes that the proposed regulations will not have a significant economic impact.

Accordingly, pursuant to Section 605(b) of the RFA, 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies that these proposed rule amendments will not have a significant economic impact on a substantial number of small entities. However, the Commission invites the public to comment on this finding.

B. Paperwork Reduction Act

The Paperwork Reduction Act (PRA),[11] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of this proposed rulemaking would result in new collection of information within the meaning of the PRA. The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3597(d) and 5 CFR 1320.11. The title for this collection is "Conflicts of Interest Policies and Procedures by Futures Commission Merchants and Introducing Brokers." 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. OMB has not yet assigned a control number to the new collection.

[6] *See* section 4d(f)(1) of the CEA, as amended by section 724(a) of the Dodd-Frank Act.

[7] 5 U.S.C. 601 *et seq.*

[8] 47 FR 18618, Apr. 30, 1982.

[9] *Id.* at 18619.

[10] 48 FR 35248, 35276, Aug. 3, 1983.

[11] 44 U.S.C. 3501 *et seq.*

The collection of information under these proposed rules is necessary to implement certain provisions of the CEA, as amended by the Dodd-Frank Act. Specifically, it is essential to ensuring that FCMs and IBs develop and maintain the required conflicts of interest systems and procedures. The Commission's staff would use the information collected when conducting examination and oversight to evaluate the completeness and effectiveness of the conflicts of interest procedures and disclosures of FCMs and IBs.

If the proposed regulations are adopted, responses to this new collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[12]

1. Information Provided by Reporting Entities/Persons

The proposed rules will require FCMs and IBs to adopt conflicts of interest policies and procedures that may impose PRA burdens, particularly through the implementation of certain recordkeeping requirements. For purposes of the PRA, the term "burden" means the "time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency."[13] This burden will result from the recordkeeping obligations related to an FCM and IB's obligations to adopt and implement written policies and procedures reasonably designed to ensure compliance with the proposed regulation, document certain communications between non-research personnel and research department personnel, and provide certain disclosures. The burden relates solely to recordkeeping requirements; the proposed regulation does not contain any reporting requirements.

The burden for compliance per respondent is expected to be 44.5 hours, at a cost annually of $4,450 for each respondent. This estimate includes the time needed to review applicable laws and regulations; develop and update conflicts of interest policies and procedures and to maintain records of certain communications and disclosures periodically required by the proposed regulation. The Commission does not expect respondents to incur any start-up costs in connection with this proposed regulation as it anticipates that respondents already maintain personnel and systems for regulatory recordkeeping.

There are currently 159 registered FCMs and 1,645 registered IBs that will be required to comply with the proposed conflicts of interest provisions (or a total of 1,804 registrants). It is expected that the compliance officers of those firms will be the employees charged with fulfilling the regulatory obligations imposed by the proposed regulations. According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 13–1041, "Compliance Officers, Except Agriculture, Construction, Health and Safety, and Transportation," that is employed by the "Securities and Commodity Contracts Intermediation and Brokerage" industry is $38.77.[14] Because FCMs and IBs include financial institutions whose compliance employees' salaries may exceed the mean wage, the Commission has taken a conservative approach and estimated the cost burden of these proposed regulations based upon an average salary of $100 per hour. Accordingly, the estimated burden was calculated as follows:

Recordkeeping Related to Maintenance of Conflicts of Interest Policies and Procedures

Number of registrants: 1,804.

Average number of annual responses by each registrant: 1.

Estimated average hours per response: 2.

Frequency of collection: Annually.

Aggregate annual burden: 1,804 registrants × 1 response × 2 hours = 3,608 burden hours.

Recordkeeping Related to Communications Between Certain Personnel

Number of registrants: 1,804.

Average number of annual responses by each registrant: 20.

Estimated average hours per response: 0.5.

Frequency of collection: As needed.

Aggregate annual burden: 1,804 registrants × 20 responses × 0.5 hours = 18,040 burden hours.

Recordkeeping Related to Disclosure Requirements

Number of registrants: 1,804.

Average number of annual responses by each registrant: 65.

Estimated average hours per response: 0.5.

Frequency of collection: As needed.

Aggregate annual burden: 1,804 registrants × 65 responses × 0.5 hours = 58,630 burden hours.

Based upon the above, the aggregate cost for all registrants is 80,278 burden hours and $8,027,800 [80,278 burden hours × $100 per hour].

2. Information Collection Comments

The Commission invites the public and other federal agencies to comment on any aspect of the recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at *OIRAsubmissions@omb.eop.gov.* Please provide the Commission with a copy of submitted comments so that they can be summarized and addressed in the final rule. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting *http://www.RegInfo.gov.* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

C. Cost-Benefit Analysis

Section 15(a) of the CEA[15] requires the Commission to consider the costs

[12] 5 U.S.C. 552a.

[13] 44 U.S.C. 3502(2).

[14] *http://www.bls.gov/oes/current/oes131041.htm.*

[15] 7 U.S.C. 19(a).

and benefits of its actions before issuing a rulemaking under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of the rule or to determine whether the benefits of the rulemaking outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions.

Section 15(a) further specifies that the costs and benefits of a proposed rulemaking shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas and could, in its discretion, determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.

1. Summary of Proposed Requirements

The proposed regulations would implement section 732 of the Act, which amends section 4d of the CEA [16] to direct each FCM and IB to implement conflicts of interest systems and procedures to ensure that any persons researching or analyzing the price or market for any commodity are separated by "appropriate informational partitions" within the firm from review, pressure, or oversight of persons whose involvement in trading or clearing activities might potentially bias the judgment or supervision of the persons. Such conflicts of interest systems and procedures also must address any other issues that the Commission determines to be appropriate.

2. Costs

With respect to costs, the Commission has determined that costs to FCMs and IBs would be minimal because the anticipated implementation of the proposed rules would require little additional resources beyond internal organizational changes to prevent compliance violations.

3. Benefits

With respect to benefits, the Commission has determined that formal conflicts of interest rules will enhance transparency, bolster confidence in markets, reduce risk and allow regulators to better monitor and manage risks to our financial system.

4. Public Comment

The Commission invites public comment on its cost-benefit considerations. Commenters also are invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed regulations with their comment letters.

List of Subjects in 17 CFR Part 1

Brokers, Commodity futures, Conflicts of interest, Reporting and recordkeeping requirements.

For the reasons stated in this release, the Commission proposes to amend 17 CFR part 1 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

1. The authority citation for part 1 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 9a, 12, 12a, 16, 18, 19, 21, 23.

2. Section 1.71 is added to read as follows:

§ 1.71 Implementation of conflicts of interest policies and procedures by futures commission merchants and introducing brokers.

(a) *Definitions.* For purposes of this section, the following terms shall be defined as provided.

(1) *Affiliate.* This term means, with respect to any person, a person controlling, controlled by, or under common control with, such person.

(2) *Business trading unit.* This term means any department, division, group, or personnel of a futures commission merchant or introducing broker or any of its affiliates, whether or not identified as such, that performs or is involved in any pricing, trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a futures commission merchant or introducing broker.

(3) *Clearing unit.* This term means any department, division, group, or personnel of a futures commission merchant or any of its affiliates, whether or not identified as such, that performs or is involved in any proprietary or customer clearing activities on behalf of a futures commission merchant.

(4) *Derivative.* This term means (i) a contract for the purchase or sale of a commodity for future delivery; (ii) a security futures product; (iii) a swap; (iv) any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; (v) any commodity option authorized under section 4c of the Act; and (vi) any leverage transaction authorized under section 19 of the Act.

(5) *Non-research personnel.* This term means any employee of the business trading unit or clearing unit, or any other employee of the futures commission merchant or introducing broker who is not directly responsible for, or otherwise involved with, research concerning a derivative, other than legal or compliance personnel.

(6) *Public appearance.* This term means any participation in a conference call, seminar, forum (including an interactive electronic forum) or other public speaking activity before 15 or more persons, or interview or appearance before one or more representatives of the media, radio, television or print media, or the writing of a print media article, in which a research analyst makes a recommendation or offers an opinion concerning a derivatives transaction. This term does not include a password-protected Webcast, conference call or similar event with 15 or more existing customers, provided that all of the event participants previously received the most current research report or other documentation that contains the required applicable disclosures, and that the research analyst appearing at the event corrects and updates during the public appearance any disclosures in the research report that are inaccurate, misleading, or no longer applicable.

(7) *Research analyst.* This term means the employee of a futures commission merchant or introducing broker who is primarily responsible for, and any employee who reports directly or indirectly to such research analyst in connection with, preparation of the substance of a research report relating to any derivative, whether or not any such person has the job title of "research analyst."

(8) *Research department.* This term means any department or division that is principally responsible for preparing the substance of a research report relating to any derivative on behalf of a futures commission merchant or introducing broker, including a department or division contained in an affiliate of a futures commission merchant or introducing broker.

(9) *Research report.* This term means any written communication (including electronic) that includes an analysis of the price or market for any derivative, and that provides information reasonably sufficient upon which to base a decision to enter into a

[16] 7 U.S.C. 6d.

derivatives transaction. This term does not include:

(i) Communications distributed to fewer than 15 persons;

(ii) periodic reports or other communications prepared for investment company shareholders or commodity pool participants that discuss individual derivatives positions in the context of a fund's past performance or the basis for previously-made discretionary decisions;

(iii) any communication generated by an employee of the business trading unit that is conveyed as a solicitation for entering into a derivatives transaction, and is conspicuously identified as such; and

(iv) internal communications that are not given to current or prospective customers.

(b) *Policies and Procedures.* Each futures commission merchant and introducing broker subject to this rule must adopt and implement written policies and procedures reasonably designed to ensure that the futures commission merchant or introducing broker and its employees comply with the provisions of this rule.

(c) *Research Analysts and Research Reports.*

(1) *Restrictions on Relationship with Research Department.*

(i) Non-research personnel shall not influence the content of a research report of the futures commission merchant or the introducing broker.

(ii) No research analyst may be subject to the supervision or control of any employee of the futures commission merchant's or introducing broker's business trading unit or clearing unit, and no personnel engaged in trading or clearing activities may have any influence or control over the evaluation or compensation of a research analyst.

(iii) Except as provided in paragraph (c)(1)(iv) of this section, non-research personnel, other than the board of directors and any committee thereof, shall not review or approve a research report of the futures commission merchant or introducing broker before its publication.

(iv) Non-research personnel may review a research report before its publication as necessary only to verify the factual accuracy of information in the research report, to provide for non-substantive editing, to format the layout or style of the research report, or to identify any potential conflicts of interest, provided that:

(A) Any written communication between non-research personnel and research department personnel concerning the content of a research report must be made either through authorized legal or compliance personnel of the futures commission merchant or introducing broker or in a transmission copied to such personnel; and

(B) Any oral communication between non-research personnel and research department personnel concerning the content of a research report must be documented and made either through authorized legal or compliance personnel acting as an intermediary or in a conversation conducted in the presence of such personnel.

(2) *Restrictions on Communications.* Any written or oral communication by a research analyst to a current or prospective customer, or to any employee of the futures commission merchant or introducing broker, relating to any derivative must not omit any material fact or qualification that would cause the communication to be misleading to a reasonable person.

(3) *Restrictions on Research Analyst Compensation.* A futures commission merchant or introducing broker may not consider as a factor in reviewing or approving a research analyst's compensation his or her contributions to the futures commission merchant's or introducing broker's trading or clearing business. No employee of the business trading unit or clearing unit of the futures commission merchant or introducing broker may influence the review or approval of a research analyst's compensation.

(4) *Prohibition of Promise of Favorable Research.* No futures commission merchant or introducing broker may directly or indirectly offer favorable research, or threaten to change research, to an existing or prospective customer as consideration or inducement for the receipt of business or compensation.

(5) *Disclosure Requirements.*

(i) *Ownership and Material Conflicts of Interest.* A futures commission merchant or introducing broker must disclose in research reports and a research analyst must disclose in public appearances whether the research analyst maintains, from time to time, a financial interest in any derivative of a type that the research analyst follows, and the general nature of the financial interest.

(ii) *Prominence of Disclosure.* Disclosures and references to disclosures must be clear, comprehensive, and prominent. With respect to public appearances by research analysts, the disclosures required by paragraph (c)(5) of this section must be conspicuous.

(iii) *Records of Public Appearances.* Each futures commission merchant and introducing broker must maintain records of public appearances by research analysts sufficient to demonstrate compliance by those research analysts with the applicable disclosure requirements under paragraph (c)(5) of this section.

(iv) *Third-Party Research Reports.*

(A) For the purposes of paragraph (c)(5)(iv) of this section, "independent third-party research report" shall mean a research report, in respect of which the person or entity producing the report:

(*1*) Has no affiliation or business or contractual relationship with the distributing futures commission merchant or introducing broker, or that futures commission merchant's or introducing broker's affiliates, that is reasonably likely to inform the content of its research reports; and

(*2*) makes content determinations without any input from the distributing futures commission merchant or introducing broker or from the futures commission merchant's or introducing broker's affiliates.

(B) Subject to paragraph (c)(5)(iv)(C) of this section, if a futures commission merchant or introducing broker distributes or makes available any independent third-party research report, the futures commission merchant or introducing broker must accompany the research report with, or provide a web address that directs the recipient to, the current applicable disclosures, as they pertain to the futures commission merchant or introducing broker, required by this section. Each futures commission merchant and introducing broker must establish written policies and procedures reasonably designed to ensure the completeness and accuracy of all applicable disclosures.

(C) The requirements of paragraph (c)(5)(iv)(B) of this section shall not apply to independent third-party research reports made available by a futures commission merchant or introducing broker to its customers:

(*1*) Upon request; or

(*2*) through a website maintained by the futures commission merchant or introducing broker.

(6) *Prohibition of Retaliation Against Research Analysts.* No futures commission merchant or introducing broker, and no employee of a futures commission merchant or introducing broker who is involved with the futures commission merchant's or introducing broker's trading or clearing activities, may, directly or indirectly, retaliate against or threaten to retaliate against any research analyst employed by the futures commission merchant or introducing broker or its affiliates as a

result of an adverse, negative, or otherwise unfavorable research report or public appearance written or made, in good faith, by the research analyst that may adversely affect the futures commission merchant's or introducing broker's present or prospective trading or clearing activities.

(d) *Clearing activities.*

(1) No futures commission merchant shall permit any affiliated swap dealer or major swap participant to directly or indirectly interfere with, or attempt to influence, the decision of the clearing unit personnel of the futures commission merchant with regard to the provision of clearing services and activities, including but not limited to:

(i) Whether to offer clearing services and activities to customers;

(ii) Whether to accept a particular customer for the purposes of clearing derivatives;

(iii) Whether to submit a transaction to a particular derivatives clearing organization;

(iv) Setting risk tolerance levels for particular customers;

(v) Determining acceptable forms of collateral from particular customers; or

(vi) Setting fees for clearing services.

(2) Each futures commission merchant shall create and maintain an appropriate informational partition between business trading units of an affiliated swap dealer or major swap participant and clearing unit personnel of the futures commission merchant. At a minimum, such informational partitions shall require that:

(i) No employee of a business trading unit of an affiliated swap dealer or major swap participant may review or approve the provision of clearing services and activities by clearing unit personnel of the futures commission merchant, make any determination regarding whether the futures commission merchant accepts clearing customers, or participate in any way with the provision of clearing services and activities by the futures commission merchant;

(ii) No employee of a business trading unit of an affiliated swap dealer or major swap participant shall supervise, control, or influence any employee of a clearing unit of the futures commission merchant; and

(iii) No employee of the business trading unit of an affiliated swap dealer or major swap participant shall influence or control compensation or evaluation of any employee of the clearing unit of the futures commission merchant.

(e) *Undue Influence on Customers.* Each futures commission merchant and introducing broker must adopt and implement written policies and procedures that mandate the disclosure to its customers of any material incentives and any material conflicts of interest regarding the decision of a customer as to the trade execution and/or clearing of the derivatives transaction.

(f) All records that a futures commission merchant or introducing broker is required to maintain pursuant to this regulation shall be maintained in accordance with Commission Regulation § 1.31 and shall be made available promptly upon request to representatives of the Commission.

Issued in Washington, DC, on November 10, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

Statement of Chairman Gary Gensler

Implementation of Conflicts of Interest Policies and Procedures by Futures Commission Merchants and Introducing Brokers

I support the proposed rulemakings that establish firewalls to ensure a separation between the research arm, the trading arm and the clearing activities of swap dealers, major swap participants, futures commission merchants and introducing brokers. This rule proposal relates to the conflicts-of-interest provisions of the Dodd-Frank Act that direct swap dealers and major swap participants to have appropriate informational partitions. The proposal builds upon similar protections in the securities markets as mandated in the Sarbanes-Oxley Act. The proposed rules will protect market participants and the public while also promoting the financial integrity of the marketplace.

[FR Doc. 2010–29003 Filed 11–16–10; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[REG–118412–10]

RIN 1545–BJ50

Group Health Plans and Health Insurance Coverage Rules Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue in the **Federal Register**, the IRS is issuing temporary regulations regarding status as a grandfathered health plan under the provisions of the Patient Protection and Affordable Care Act (the Affordable Care Act) in connection with changes in policies, certificates, or contracts of insurance. The temporary regulations provide guidance to employers, group health plans, and health insurance issuers providing group health insurance coverage. The IRS is issuing the temporary regulations at the same time that the Employee Benefits Security Administration of the U.S. Department of Labor and the Office of Consumer Information and Insurance Oversight of the U.S. Department of Health and Human Services are issuing substantially similar interim final regulations with respect to group health plans and health insurance coverage offered in connection with a group health plan under the Employee Retirement Income Security Act of 1974 and the Public Health Service Act. The text of the temporary regulations being issued by the IRS serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by December 17, 2010.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–118412–10), room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered to: CC:PA:LPD:PR (REG–118412–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224. Alternatively, taxpayers may submit comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–118412–10).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Karen Levin at 202–622–6080; concerning submissions of comments or to request a hearing, Regina Johnson at 202–622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations published elsewhere in this issue of the **Federal Register** amend § 54.9815–1251T of the Miscellaneous Excise Tax Regulations. The proposed and temporary regulations are being published as part of a joint rulemaking with the

Department of Labor and the Department of Health and Human Services (the joint rulemaking). The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this proposed regulation. It is hereby certified that the collection of information contained in this notice of proposed rulemaking will not have a significant impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

The amendment to the temporary regulations adds a new third-party disclosure requirement so that it also applies to a group health plan that is changing health insurance coverage. The group health plan must provide to a succeeding or new health insurance issuer (and the succeeding or new health insurance issuer must require) documentation of plan terms (including benefits, cost sharing, employer contributions, and annual limits) under the prior health insurance coverage sufficient to make a determination whether a change described in § 54.9815–1251T(g)(1) has occurred. The hour and cost burden associated with this requirement is de minimis, because group health plans can satisfy the requirement by providing a copy of the policy or summary plan description to the succeeding or new health insurance issuer. This is not a significant burden for any plan and thus will not have a significant impact on a substantial number of small entities.

For further information and for analyses relating to the joint rulemaking, see the preamble to the joint rulemaking. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. Comments are specifically requested on this amendment to the proposed regulations, including the prospective effective date of the rule and how that affects plans with different plan years. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Karen Levin, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), IRS. The proposed regulations, as well as the temporary regulations, have been developed in coordination with personnel from the U.S. Department of Labor and the U.S. Department of Health and Human Services.

List of Subjects in 26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 54 is proposed to be amended as follows:

PART 54—PENSION EXCISE TAXES

Paragraph 1. The authority citation for part 54 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 54.9815–1251 as published on June 17, 2010, at 75 FR 34571, is amended by revising paragraphs (a)(1), (a)(3)(ii), (f), and (g)(4) *Example 9* to read as follows:

§ 54.9815–1251 Preservation of right to maintain existing coverage.

(a) * * * (1) [The text of proposed § 54.9815–1251(a)(1) is the same as the text of § 54.9815–1251T(a)(1) published elsewhere in this issue of the **Federal Register**].

* * * * *

(3) * * *

(ii) [The text of proposed § 54.9815–1251(a)(3)(ii) is the same as the text of § 54.9815–1251T(a)(3)(ii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(f) [The text of proposed § 54.9815–1251(f) is the same as the text of § 54.9815–1251T(f) published elsewhere in this issue of the **Federal Register**].

(g) * * *

(4) * * *

Example 9. [The text of proposed § 54.9815–1251(g)(4) *Example 9* is the same as the text of § 54.9815–1251T(g)(4) *Example 9* published elsewhere in this issue of the **Federal Register**].

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2010–28866 Filed 11–15–10; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 147

[Docket No. OCIIO–9986–NC]

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

Affordable Care Act; Federal External Review Process; Request for Information

AGENCY: Office of Consumer Information and Insurance Oversight, Department of Health and Human Services; Employee Benefits Security Administration, Department of Labor.

ACTION: Notice; request for information.

SUMMARY: This notice is a request for information (RFI) to gain market analysis information in advance of one or more future Requests for Proposals (RFP). On July 23, 2010, the Departments of Health and Human Services, Labor, and the Treasury published interim final regulations regarding, among other things, procedures for external review of health plan denials. The regulations include a provision for a Federal external review process in instances where there is no applicable State process. This RFI solicits information that will enable the Departments of Health and Human Services (HHS) and Labor (DOL) to conduct a market analysis and assist the Departments in planning and developing the Federal external review process. HHS and/or DOL may contract for services required to fulfill the statutory and regulatory requirements of the Federal external review process established under section 2719 of the

Public Health Service Act, as amended by the Affordable Care Act, and its implementing regulations.

DATES: Submit written or electronic comments by December 8, 2010.

We note that responses to this notice are not offers and cannot be accepted by the Government to form a binding contract or issue a grant. The purpose of this RFI is to inform the RFP, not to gather public comments on the interim final rules for internal claims and appeals and external review processes under the Affordable Care Act; those comments are being collected and evaluated on a separate track. Information obtained as a result of this RFI may be used by the government for program planning and development on a non-attribution basis. Do not include any information that might be considered proprietary or confidential.

ADDRESSES: In commenting, please refer to file code OCIIO–9986–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:

Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, *Attention:* OCIIO–9986–NC, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

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:

Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, *Attention:* OCIIO–9986–NC, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

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:

Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, *Attention:* OCIIO–9986–NC, 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 OCIIO 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.)

Comments mailed to the address 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: Linda G. Greenberg, Department of Health and Human Services, Office of Consumer Information and Insurance Oversight at (301) 492–4225 or Amy Turner, Department of Labor, Employee Benefits Security Administration at (202) 693–8335.

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 electronic comments received before the close of the comment period on the following public Web site as soon as possible after they have been received at: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at Room 445–G, Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, call 1–800–743–3951.

I. Background

Section 1001 of the Patient Protection and Affordable Care Act (the Affordable Care Act), Public Law 111–148, added a new section 2719 to the Public Health Service Act (the PHS Act). The Affordable Care Act also added a new section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (the Code) incorporating the provisions of part A of title XXVII of the PHS Act (including PHS Act section 2719) into ERISA and the Code and making them applicable to group health plans and health insurance coverage in connection with group health plans. The Departments of Health and Human Services, Labor, and the Treasury (the Departments) published interim final regulations implementing the provisions of PHS Act section 2719 on July 23, 2010, at 75 FR 43330.

Section 2719(b)(1) of the PHS Act and the Departments' regulations provide that, if a State external review process that applies to and is binding on a health insurance issuer includes, at a minimum, the consumer protections set forth in the Uniform External Review Model Act issued by the National Association of Insurance Commissioners ("NAIC Uniform Model Act"), then the issuer is not required to comply with the Federal external review process. State law may provide similar protection for group health plans that are not subject to ERISA preemption, such as nonfederal governmental plans. The Departments, through guidance, are authorized to establish an external review process that is similar to a State external review process that meets the standards set forth in the interim final regulations for group health plans and health insurance coverage if a State has not established such a process.[1]

II. Questions

This RFI requests comments on operational issues associated with implementation of a Federal external review process for health coverage in States that do not have an applicable external review process that meets the minimum Federal standards. HHS and DOL plan to ensure consistent and uniform processes for external review by independent review organizations (IROs) within relevant geographic areas and throughout the nation. The Department of HHS and/or Labor may enter into one or more contractual relationships to implement the external review process and reserve the right to award one contract or several contracts depending on the workload and decisions on how to divide the workload of the Federal external review process, as necessary.

In particular, HHS and/or DOL may contract for services required to fulfill the statutory and regulatory

[1] The Departments' interim final regulations provide for a transition period for States until July 1, 2011 during which time HHS will work with States to assist them in making any necessary changes so that the State process provides, at a minimum, the consumer protections under the NAIC Uniform Model Act.

requirements of the Federal external review process established under section 2719 of the PHS Act and its implementing regulations. In such a case, the contractor would be responsible for conducting standard and expedited reviews of all adverse benefit determinations and final internal adverse benefit determinations that are eligible for external review as defined by the regulations. Reviews would be conducted in an accurate, efficient, timely, and consistent manner. In conjunction with completing these reviews, the contractor may be tasked with the following functions and responsibilities to support the permanent Federal external appeals process:

- Development, maintenance, distribution, and update of "decision support" protocols;
- Adjudication of external review cases, using established protocols;
- Timely and accurate disposition of all external review cases;
- Collection, consolidation, storage, maintenance, and transmission of information regarding the receipt and disposition of external review cases for the Federal external review process;
- Performance of statistical and data analyses of external review cases to include trend analyses, and compliance with HHS data and reporting requirements including ad-hoc analyses for reports and inquiries from HHS, Congress, and other entities, and for purposes of continuous quality improvement;
- Participation and coordination with other entities (including other IROs) involved in the Federal external review process for quality improvement purposes;
- Communication of external review decisions to claimants and other parties involved in the case;
- Case management and documentation, which may include document imaging to produce a complete electronic case file; and
- Training all critical and qualified staff on all aspects of the external review process.

Accordingly, the Departments of HHS and Labor are seeking to engage formally, in a transparent and participatory manner, with the public on best practices and standards currently used by IROs. Specific questions are set forth below. Comments are invited from all stakeholders on these issues.

Qualified Organizations and Staff

(1) What accreditation standards currently apply to IROs?

(2) What credentialing standards do IROs require for medical and legal reviewers? Is credentialing required or voluntary?

(3) What procedures are currently used by IROs to assure that reviewers do not have conflicts of interest with disputing parties?

(4) What are IROs' current capacity for performing reviews? Does staffing and the time necessary for performing a review differ based on the type of claim (e.g., medical necessity, experimental/investigational treatment, coverage issues, etc.)?

Infrastructure

(5) Please describe the type of data collection systems that IROs currently use to conduct analyses, reporting, and tracking of appeals and grievances.

(6) Are the current data systems available in a secure, 508-compliant, web-based interactive structure?

(7) What telecommunication systems and consumer technical support systems do IROs currently maintain for consumers (*e.g.,* Web sites, 24-hour hotlines, helpdesk, and/or translation services for non-English speakers)?

(8) What is a reasonable amount of time for a contractor to become fully operational (have all systems in place to conduct external reviews) after the date of a contract award? What resources would be necessary?

(9) What considerations must be taken into account to smoothly transition from the current Federal interim external review process to a possible new permanent Federal external review process?

(10) Do IROs currently operate nationally or in limited geographic areas? Would IROs that currently serve local areas be able to expand their service areas to possibly include other geographic areas such as other States? Are there any State and/or local licensing requirements?

(11) Are there any special considerations HHS and/or DOL should be aware of in considering a specialized contract for urgent care appeals or for experimental and investigational treatments? Would such an approach have an impact on coordination?

(12) Please describe the difference in standard operating procedures and resources (time, cost, personnel) for appeals that involve only medical necessity and those that involve both medical necessity and coverage questions.

Data Collection

(13) What data are currently collected by IROs for tracking appeals and conducting analyses?

(14) What steps are taken to ensure confidentiality and security protections of patient information?

Evaluation

(15) Do IROs (or subcontractors) currently conduct evaluations of their operations? Do such evaluations include an assessment of how easy it is for consumers to access and use the external review process in a timely manner? Do evaluations result in quality improvement initiatives? If so, what are some examples of quality improvement initiatives undertaken by IROs?

(16) What specific requirements should be applied to IROs to evaluate progress toward performance goals? What performance goals are the most appropriate?

Signed at Washington, DC, November 10, 2010.

Elizabeth Fowler,

Director of Policy, Office of Consumer Information and Insurance Oversight. Department of Health and Human Services.

Signed at Washington, DC, November 9, 2010.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration Department of Labor.

[FR Doc. 2010–28876 Filed 11–12–10; 11:15 am]

BILLING CODE 4150–29– 4150–65–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AN83

Presumptive Service Connection for Diseases Associated With Persian Gulf War Service: Functional Gastrointestinal Disorders

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication regulations concerning presumptive service connection for medically unexplained chronic multisymptom illnesses associated with service in the Southwest Asia theater of operations for which there is no record during service. This amendment is necessary to implement a decision of the Secretary of Veterans Affairs that there is a positive association between service in Southwest Asia during certain periods and the subsequent development of functional gastrointestinal disorders (FGIDs), and to clarify that FGIDs fall within the scope of the existing presumption of service connection for medically

unexplained chronic multisymptom illnesses. The intended effect of this amendment is to clarify the presumption of service connection for these illnesses based on service in the Southwest Asia theater of operations during the Persian Gulf War.

DATES: Comments must be received by VA on or before December 17, 2010.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll free number.) Comments should indicate that they are submitted in response to "RIN 2900–AN83—Presumptive Service Connection for Diseases Associated With Persian Gulf War Service: Functional Gastrointestinal Disorders (FGIDs)."

Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Gerald Johnson, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461- 9727 (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has determined that the available scientific and medical evidence presented in the National Academy of Sciences (NAS) April 2010 report, titled *Gulf War and Health, Volume 8: Update on the Health Effects of Serving in the Gulf War* is sufficient to warrant a presumption of service connection for FGIDs in individuals deployed to the Southwest Asia theater of operations during the Persian Gulf War. Pursuant to that determination, this document proposes to clarify that the Department of Veterans Affairs (VA) adjudication regulations (38 CFR Part 3), specifically 38 CFR 3.317, would include FGIDs as medically unexplained chronic multisymptom illnesses subject to presumptive service connection. FGIDs include, but are not limited to, such conditions as irritable bowel syndrome (IBS) and functional dyspepsia.

National Academy of Sciences (NAS) Reports

FGIDs, Including, But Not Limited to, Irritable Bowel Syndrome (IBS) and Functional Dyspepsia

The NAS issued its report titled *Gulf War and Health, Volume 8: Update on Health Effects of Serving in the Gulf War,* on April 9, 2010. The NAS was asked to review, evaluate, and summarize the literature to determine if any of the health outcomes noted in its 2006 report, titled *Gulf War and Health, Volume 4: Health Effects of Serving in the Gulf War,* appear at higher incidence or prevalence levels in Gulf War-deployed veterans. The NAS sought to characterize and weigh the strengths and limitations of the available evidence. The NAS Update committee reviewed over 1000 relevant studies and focused on over 400 relevant references, including the studies reviewed in the Volume 4 report. The NAS determined that there is sufficient evidence of an association between deployment to the Gulf War and FGIDs, including, but not limited to, IBS and functional dyspepsia. The committee also noted that there is inadequate evidence of an association between deployment to the Gulf War and structural gastrointestinal (GI) disease.

FGIDs, such as IBS or functional dyspepsia, are syndromes characterized by recurrent or prolonged GI symptoms that occur together. They are distinguished from structural or "organic" GI disorders in that they generally are not associated with detectable anatomical abnormalities. The severity of FGIDs ranges from occasional mild episodes to more persistent and disabling symptoms. According to the NAS report, there have been numerous reports of GI disturbances in Gulf War veterans and the symptoms have continued to be persistent in the years since that war. All studies examined by NAS favored a greater prevalence of various GI symptoms and primary functional GI disorders, including IBS and dyspepsia. In NAS's opinion, there also was compelling emerging evidence of exposure during deployment to enteric pathogens leading to the development of post-infectious IBS.

The overall pattern of symptoms found in the primary and secondary studies NAS reviewed confirms an association between deployment to the Gulf War and functional GI symptoms, including abdominal pain, diarrhea, nausea, and vomiting. The NAS recommended that further studies be conducted to determine the role of prior acute gastroenteritis among deployed servicemembers in the development of FGIDs.

Detailed information on the committee's findings may be found at: *http://www.iom.edu/Reports/2010/Gulf-War-and-Health-Volume-8–Health-Effects-of-Serving-in-the-Gulf-War.aspx.* The report findings are organized by category and can be found under the heading, "Table of Contents."

Statutory Provisions

Pursuant to 38 U.S.C. 1118, VA must establish a presumption of service connection for each illness shown by sound scientific and medical evidence to have a positive association with exposure to a biological, chemical, or other toxic agent, environmental or wartime hazard, or preventive medicine or vaccine known or presumed to be associated with service in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War. Because the recent NAS report was primarily a review of the prevalence of illnesses among Gulf War veterans, it generally did not state conclusions as to whether the illnesses are associated with the types of exposures referenced in § 1118. The NAS noted that there was significant emerging evidence that FGIDs may be associated with exposure to enteric pathogens during Gulf War deployments and recommended further study of that issue. However, NAS did not state a conclusion concerning the strength of the evidence of an association between FGIDs and exposure to enteric pathogens. VA has determined that resolution of that question is not necessary for purposes of this rule, because FGIDs are within the scope of the existing presumption of service connection for medically unexplained chronic multisymptom illnesses.

Section 1117 of title 38, United States Code, provides a presumption of service connection for "qualifying chronic disability" in veterans who served in the Southwest Asia theater of operations during the Persian Gulf War. The statute defines the term "qualifying chronic disability" to include "[a] medically unexplained chronic multisymptom illness (such as chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome) that is defined by a cluster of signs or symptoms." 38 U.S.C. 1117(a)(2)(B). The plain language of the statute makes clear that it applies to all medically unexplained chronic multisymptom illnesses including, but not limited to, the three conditions parenthetically listed as examples. VA recently amended its regulation at 38 CFR 3.317 to clarify that the

presumption is not limited to the three listed examples. *See* 75 FR 61995.

FGIDs are medically unexplained chronic multisymptom illnesses within the meaning of the statute and regulation. These disorders are defined by clusters of signs and symptoms affecting GI functions. Further, FGIDs are "medically unexplained" because they are, by definition, disorders that cannot be attributed to observable structural or organic changes and the causes of the disorders are generally not known. Irritable Bowel Syndrome, which is a form of FGID, is expressly identified in the current statute and regulation as a medically unexplained chronic multisymptom illness. Because other FGIDs, such as functional dyspepsia and functional vomiting, also are medically unexplained chronic multisymptom illnesses, the current statute and regulation, as recently amended, provide a presumption of service connection for FGIDs in veterans who served in the Southwest Asia theater of operations during the Persian Gulf War. In view of the findings in the recent NAS report identifying FGIDs as prevalent and persistent illnesses among Gulf War Veterans, VA has determined that its regulations should be revised to expressly identify FGIDs as a type of medically unexplained chronic multisymptom illness within the scope of the existing presumption.

Regulatory Amendments

We propose to amend 38 CFR 3.317 to incorporate the more specific language regarding FGIDs. We propose to: Revise § 3.317(a)(2)(i)(B)(3) by removing "Irritable Bowel Syndrome" and replacing it with "Functional gastrointestinal disorders, including, but not limited to, irritable bowel syndrome and functional dyspepsia (excluding structural gastrointestinal diseases)"; and add a Note with the definition of functional gastrointestinal disorders. The intended effect of this change is to clarify that FGIDs are medically unexplained chronic multisymptom illnesses and are thus within the scope of the presumption of service connection for such illnesses.

Other Illnesses

This proposed rule does not reflect determinations concerning any illnesses other than those discussed in this proposal. The Secretary's determinations concerning other illnesses discussed in the NAS report will be addressed in other documents published in the **Federal Register**.

Paperwork Reduction Act

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

Regulatory Flexibility Act

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

Executive Order 12866

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

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined not to be a significant regulatory action under the Executive Order because it would not result in a rule that may materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.

Unfunded Mandates

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

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposed rule are 64.109, Veterans Compensation for Service-Connected Disability, and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Comment Period

Although under the rulemaking guidelines in Executive Order 12866 VA ordinarily provides a 60-day comment period, the Secretary has determined that there is good cause to limit the public comment period on this proposed rule to 30 days. The current proposed rule does not create a new presumption of service connection. Consistent with 38 U.S.C. 1117, it clarifies that functional gastrointestinal disorders fall within the scope of the existing presumption of service connection for medically unexplained chronic multisymptom illnesses. Because this rule merely clarifies VA's interpretation of the existing statute and regulation, a public comment period is not required under the Administrative Procedures Act. However, because this clarifying rule relates to VA's response to a report referred to in 38 U.S.C. 1118, VA has determined that it is appropriate to provide for public comment as provided in that statute. A 30-day notice and comment period will enable the rapid issuance of final regulations providing the public and VA adjudicators with clear guidance regarding the interpretation of the existing statute and regulation as they pertain to FGIDs. This will ensure that Veterans suffering from FGID will receive a fair determination of benefit eligibility, and will promote rapid action on affected benefits claims.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department

of Veterans Affairs, approved this document on October 18, 2010, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Veterans, Vietnam.

Dated: November 9, 2010.

Robert C. McFetridge,

Director, Regulations Policy and Management, Department of Veterans Affairs.

■ For the reasons set out in the preamble, VA proposes to amend 38 CFR part 3 as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Amend § 3.317 by revising paragraph (a)(2)(i)(B)(*3*) to read as follows:

§ 3.317 Compensation for certain disabilities due to undiagnosed illnesses.

(a) * * *

(2) * * *

(i) * * *

(B) * * *

(3) Functional gastrointestinal disorders, including, but not limited to, irritable bowel syndrome and functional dyspepsia (excluding structural gastrointestinal diseases); or **Note to paragraph (a)(2)(i)(B)(3):** Functional gastrointestinal disorders are a group of conditions characterized by chronic or recurrent symptoms that were present for at least 6 months prior to diagnosis and have been currently active for 3 months, that are unexplained by any structural, endoscopic, laboratory, or other objective signs of disease or injury and that may be related to any part of the gastrointestinal tract. Common symptoms include abdominal pain, substernal burning or pain, nausea, vomiting, altered bowel habits (including diarrhea, constipation), indigestion, bloating, postprandial fullness, and painful or difficult swallowing. Specific functional gastrointestinal disorders include, but are not limited to, irritable bowel syndrome, functional dyspepsia, functional vomiting, functional constipation, functional bloating, functional abdominal pain syndrome, and functional dysphagia.

[FR Doc. 2010–28707 Filed 11–16–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Chapter IV

[CMS–1345–NC]

Medicare Program; Request for Information Regarding Accountable Care Organizations and the Medicare Shared Saving Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Request for information.

SUMMARY: This document is a request for comments regarding certain aspects of the policies and standards that will apply to accountable care organizations (ACOs) participating in the Medicare program under section 3021 or 3022 of the Affordable Care Act.

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 December 3, 2010.

ADDRESSES: In commenting, please refer to file code CMS–1345–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):

• *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow "Submit a comment" instructions.

• *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–1345–NC, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

• *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1345–NC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

• *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) 786–7195 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 FURTHER INFORMATION CONTACT: Thomas Carey, (410) 786–4560 or *Thomas.Carey@cms.hhs.gov.*

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

The Affordable Care Act seeks to improve the quality of health care services and to lower health care costs by encouraging providers to create integrated health care delivery systems. These integrated systems will test new reimbursement methods intended to

create incentives for health care providers to enhance health care quality and lower costs. One important delivery system reform is the Medicare Shared Savings Program under section 3022 of the Affordable Care Act, which promotes the formation and operation of accountable care organizations (ACOs). Under this provision, "groups of providers * * * meeting the criteria specified by the Secretary may work together to manage and coordinate care for Medicare * * * beneficiaries through an [ACO]." An ACO may receive payments for shared savings if the ACO meets certain quality performance standards and cost savings requirements established by the Secretary. We are developing rulemaking for the establishment of the Shared Savings Program under section 3022 of the Affordable Care Act. In addition, section 3021 of the Affordable Care Act establishes a Center for Medicare and Medicaid Innovation (CMMI) within CMS, which is authorized to test innovative payment and service delivery models to reduce program expenditures while preserving or enhancing the quality of care. We are considering testing innovative payment and delivery system models that complement the Shared Savings Program in the CMMI. In both of these efforts, we are seeking to advance ACO structures that are organized in ways that are patient-centered and foster participation of physicians and other clinicians who are in solo or small practices.

We have already conducted substantial outreach and had discussions with and received feedback from a wide array of physician groups, as well as groups representing other clinicians, hospitals, employers, consumers, and other interested parties, about how ACO programs can best be structured. In particular, CMS, along with the Office of the Inspector General (OIG) of the Department of Health and Human Services (DHHS) and the Federal Trade Commission hosted a public workshop on October 5, 2010, to discuss the application and enforcement of the antitrust laws, physician self-referral prohibition, Federal anti-kickback statute, and civil monetary penalty law to the variety of possible ACO structures under the Shared Savings Program and other innovative payment models that CMMI is authorized to test under section 3021 of the Affordable Care Act. Prior to the public workshop, the three agencies solicited written comments and statements from industry stakeholders regarding a variety of issues, including the planned legal structures and business models of ACOs.

II. Solicitation of Comments

As we develop our initial rulemaking for the Shared Savings Program and begin the development of potential models in the CMMI, we are seeking additional information, particularly from the physician community, on the following questions:

- What policies or standards should we consider adopting to ensure that groups of solo and small practice providers have the opportunity to actively participate in the Medicare Shared Savings Program and the ACO models tested by CMMI?
- Many small practices may have limited access to capital or other resources to fund efforts from which "shared savings" could be generated. What payment models, financing mechanisms or other systems might we consider, either for the Shared Savings Program or as models under CMMI to address this issue? In addition to payment models, what other mechanisms could be created to provide access to capital?
- The process of attributing beneficiaries to an ACO is important to ensure that expenditures, as well as any savings achieved by the ACO, are appropriately calculated and that quality performance is accurately measured. Having a seamless attribution process will also help ACOs focus their efforts to deliver better care and promote better health. Some argue it is necessary to attribute beneficiaries before the start of a performance period, so the ACO can target care coordination strategies to those beneficiaries whose cost and quality information will be used to assess the ACO's performance; others argue the attribution should occur at the end of the performance period to ensure the ACO is held accountable for care provided to beneficiaries who are aligned to it based upon services they receive from the ACO during the performance period. How should we balance these two points of view in developing the patient attribution models for the Medicare Shared Savings Program and ACO models tested by CMMI?
- How should we assess beneficiary and caregiver experience of care as part of our assessment of ACO performance?
- The Affordable Care Act requires us to develop patient-centeredness criteria for assessment of ACOs participating in the Medicare Shared Savings Program. What aspects of patient-centeredness are particularly important for us to consider and how should we evaluate them?
- In order for an ACO to share in savings under the Medicare Shared Savings Program, it must meet a quality performance standard determined by the Secretary. What quality measures should the Secretary use to determine performance in the Shared Savings Program?
- What additional payment models should CMS consider in addition to the model laid out in Section 1899(d), either under the authority provided in 1899(i) or the authority under the CMMI? What are the relative advantages and disadvantages of any such alternative payment models?

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: November 10, 2010.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2010–28996 Filed 11–12–10; 4:15 pm]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 17

[WT Docket No. 08–61; WT Docket No. 03–187; DA 10–2178]

Federal Communications Commission Announces Public Meetings and Invites Comment on the Environmental Effects of Its Antenna Structure Registration Program

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission announces public meetings regarding the pending Programmatic Environmental Assessment (PEA) of its Antenna Structure Registration (ASR) program and invites comment on the environmental effects of its antenna structure registration program.

DATES: Interested parties may file comments on or before January 14, 2011.

ADDRESSES: You may submit comments, identified by DA 10–2178, WT Docket No. 08–61 and WT Docket No. 03–187, by any of the following methods:

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

■ *Federal Communications Commission's Web site: http://www.fcc.gov/cgb/ecfs/* or through a link

on the PEA Web site, *http://wireless.fcc.gov/antenna/index.htm?job=programmatic_environmental_assessment.* Follow the instructions for submitting comments.

■ *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

■ *People With Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, *see* the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Aaron Goldschmidt, Wireless Telecommunications Bureau, (202) 418–7146, e-mail *aaron.goldschmidt@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's public notice released on November 12, 2010. The full text of the public notice is available for public inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. It may also be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554; the contractor's Web site, *http://www.bcpiweb.com;* or by calling (800) 378–3160, facsimile (202) 488–5563, or e-mail *FCC@BCPIWEB.com.* Copies of the public notice also may be obtained via the Commission's Electronic Comment Filing System (ECFS) by entering the docket number, WT Docket No. 07–250. Additionally, the complete public notice is available on the Federal Communications Commission's Web site at *http://www.fcc.gov.*

To comply with its obligations under the National Environmental Policy Act (NEPA), the Federal Communications Commission is conducting a Programmatic Environmental Assessment (PEA) of its Antenna Structure Registration (ASR) program. The purpose of the PEA is to evaluate the potential environmental effects of the Commission's ASR program. The Commission is undertaking the PEA in response to the determination of the Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy* v. *FCC,* (516 F.3d 1027 (D.C. Cir. 2008) that registered towers may have a significant environmental effect on migratory birds. In the course of the PEA, the Commission will consider alternatives to address potential environmental effects, and will determine whether a more extensive analysis, in the form of a programmatic Environmental Impact Statement, may be required under NEPA.

Under the ASR program, owners of antenna structures that are taller than 200 feet above ground level or that may interfere with the flight path of a nearby airport must register those structures with the FCC. The antenna structure owner must obtain painting and lighting specifications from the Federal Aviation Administration and include those specifications in its registration prior to construction. The ASR program allows the FCC to fulfill its statutory responsibility to require painting and lighting of antenna structures that may pose a hazard to air navigation.

The FCC has established a Web site, *http://wireless.fcc.gov/antenna/index.htm?job=programmatic_environmental_assessment,* which contains information and downloadable documents. The Web site also allows individuals to contact the Commission, and will be updated at key milestones throughout the study.

The FCC will hold three scoping meetings for the public to provide input to the PEA process. The meetings will be open to the public; however, admittance will be limited to the seating available. Each scoping meeting will be comprised of an Information Session, a Presentation and a Formal Comment Period. Comment forms will be available, and may either be completed at the meeting, submitted through the PEA Web site, or mailed. Formal verbal comments will also be transcribed for public record by a stenographer at the meetings. PEA informational materials will be available at the meetings. Information gathered at the meetings will be used to prepare the PEA. The meetings are scheduled as follows:

• On December 6, 2010, from 1:30 p.m. until 4:30 p.m. Eastern Time, at the Federal Communications Commission's Meeting Room, 445 12th Street, SW., Washington, DC. Audio/video coverage of this meeting will be broadcast live with open captioning over the Internet from the FCC's Web page at *http://www.fcc.gov/live.* The FCC's webcast is free to the public. Those who watch the live video stream of the event may email event-related questions to *livequestions@fcc.gov.* Depending on the volume of questions and time constraints, FCC representatives will respond to as many questions as possible during the workshop.

• On December 13, 2010, from 6 p.m. until 8:30 p.m. Pacific Time, at the Council Chambers, City of Chula Vista Civic Center, 276 Fourth Avenue, Chula Vista, California.

• On December 15, 2010, from 6 p.m. until 8:30 p.m. Eastern Time, at the John F. Germany Public Library, 900 North Ashley Drive, Tampa, Florida.

Individuals requiring special assistance during a meeting should submit a request through the PEA Web site no later than two business days prior to the applicable meeting.

In addition to the scoping meetings, the Commission seeks written comments to assist it in preparing the PEA. Interested parties may file comments on or before January 14, 2011. Comments may be filed: (1) Electronically, (2) in person at one of the scoping meetings, or (3) through the use of paper copies.

• *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the Commission's Electronic Comment Filing System ("ECFS"): *http://www.fcc.gov/cgb/ecfs/*, through a link on the PEA Web site, *http://wireless.fcc.gov/antenna/index.htm?job=programmatic_environmental_assessment,* or via the Federal eRulemaking Portal: *http://www.regulations.gov.*

• *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

○ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8 a.m. to 7 p.m.

○ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

○ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

Comments and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: *http://www.fcc.gov.*

For more news and information about the Federal Communications Commission please visit: *http://www.fcc.gov.*

Federal Communications Commission.

Jane E. Jackson,

Associate Chief, Wireless Telecommunications Bureau.

[FR Doc. 2010–29005 Filed 11–16–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[CG Docket 05–231, ET Docket No. 99–254; DA 10–2050]

Consumer and Governmental Affairs Bureau Seeks To Refresh the Record on Notices of Proposed Rulemaking Regarding Closed Captioning Rules

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission, via the Consumer and Governmental Affairs Bureau (Bureau), seeks to refresh the record on issues pertaining to closed captioning that were raised in Notices of Proposed Rulemaking (NPRMs) released by the Commission in 2005 and 2008. Given the time that has elapsed and various technological developments that have occurred in the field of closed captioning since these NPRMs were released, the Bureau believes that a refreshed record will better educate the Commission regarding the issues raised for comment in the pending proceedings.

DATES: Comments are due on or before November 24, 2010. Reply comments are due on or before December 9, 2010.

ADDRESSES: Interested parties may submit comments identified by **[CG Docket No. 05–231 and ET Docket No. 99–254]**, and by any of the following methods:

• *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the Commission's Electronic Comment Filing System (ECFS): *http://www.fcc.gov/cgb/ecfs,* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the website for submitting comments, and transmit one electronic copy of the filing to each docket number referenced in the caption, which in this case is CG Docket No. 05–231 and ET Docket No. 99–254. For ECFS Filers, in completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number.

• *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. Because two docket numbers appear in the caption of this Notice, filers must submit two additional copies for the additional docket number. In addition, parties must send one copy to the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Washington, DC 20554. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW., Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8 a.m. to 7 p.m.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Amelia Brown, Consumer and Governmental Affairs Bureau, Disability Rights Office, at (202) 418–2799 (voice), (202) 418–7804 (TTY), or e-mail: *Amelia.Brown@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document DA 10–2050, released October 25, 2010 in CG Docket No. 05–231 and ET Docket No. 99–254. The full text of DA 10–2050 and any subsequently filed documents in this matter will be available for public inspection and copying via ECFS (insert **[CG Docket No. 05–231 or ET Docket No. 99–254]** into the Proceeding block) and during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554; telephone (800) 378–3160, or via its Web site, *http://www.bcpiweb.com.* DA 10–2050 can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/dro/caption.html.*

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). Pursuant to 47 CFR 1.1206, these proceedings will be conducted as permit-but-disclose proceedings in which *ex parte* communications are subject to disclosure.

Synopsis

In DA 10–2050, the Bureau seeks to refresh the record on issues pertaining to closed captioning that were raised in NPRMs released by the Commission on July 21, 2005, and November 7, 2008. *See Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc., Petition for Rulemaking,* CG Docket No. 05–231, Notice of Proposed Rulemaking, published at 70 FR 56150, September 26, 2005; and *Closed Captioning of Video Programming, Closed Captioning Requirements for Digital Television Receivers,* CG Docket No. 05–231, ET Docket No. 99–254, Declaratory Ruling, Order and Notice of Proposed Rulemaking, published at 74 FR 1594, January 13, 2009 and 74 FR 1654, January 13, 2009 (*2008 Closed Captioning Declaratory Ruling, Order*

and NPRM). More than five years have passed since the Commission sought comment on several important matters relating to the quality and implementation of closed captioning of video programming, and a variety of changes in the closed captioning landscape warrant a refresh of the record created in response to that proceeding. For example, the benchmarks for 100% captioning of nonexempt new English and Spanish language programming have passed, the transition to digital television occurred on June 12, 2009, and advances in captioning technology and availability have occurred. The Bureau also believes that a refreshed record will help it to better understand the issues that were raised for comment in the *2008 Closed Captioning Declaratory Ruling, Order and NPRM.* Because, in the *2008 Closed Captioning Declaratory Ruling, Order and NPRM,* the Commission adopted requirements for video program distributors to make contact information available to consumers, and requirements concerning the process for filing and handling closed captioning complaints, the Commission does not seek to refresh the record with regard to those matters.

Federal Communications Commission.

Karen Peltz Strauss,

Deputy Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. 2010–28718 Filed 11–16–10; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 0912161432–0453–02]

RIN 0648–XT37

Endangered and Threatened Wildlife and Plants: Proposed Endangered Status for the Hawaiian Insular False Killer Whale Distinct Population Segment

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

ACTION: Proposed rule; request for comments.

SUMMARY: We, the NMFS, have completed a comprehensive status review of the Hawaiian insular false killer whale (*Pseudorca crassidens*) under the Endangered Species Act (ESA) in response to a petition submitted by the Natural Resources Defense Council (NRDC) to list the Hawaiian insular false killer whale as an endangered species. After reviewing the best scientific and commercial information available, we have determined that the Hawaiian insular false killer whale is a distinct population segment (DPS) that qualifies as a species under the ESA. Moreover, after evaluating threats facing the species, and considering efforts being made to protect the Hawaiian insular DPS, we have determined that the DPS is declining and is in danger of extinction throughout its range. We propose to list it as endangered under the ESA. Although we are not proposing to designate critical habitat at this time, we are soliciting information to inform the development of the final listing rule and designation of critical habitat in the event the DPS is listed.

DATES: Comments on this proposal must be received by February 15, 2011. A public hearing will be held on Oahu, Hawaii, on Thursday, January 20, 2011, 6:30 p.m. to 9 p.m., at the McCoy Pavilion at Ala Moana Park, 1201 Ala Moana Blvd., Honolulu, HI 96814. NMFS will consider requests for additional public hearings if any person so requests by January 31, 2011. Notice of the location and time of any such additional hearing will be published in the **Federal Register** not less than 15 days before the hearing is held.

ADDRESSES: You may submit comments identified by 0648–XT37 by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail or hand-delivery:* Submit written comments to Regulatory Branch Chief, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814, Attn: Hawaiian insular false killer whale proposed listing.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. Comments will be posted for public viewing 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. We will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only. The petition, status review report, and other reference materials regarding this determination can be obtained via the NMFS Pacific Islands Regional Office Web site: *http://www.fpir.noaa.gov/PRD/prd_false_killer_whale.html* or by submitting a request to the Regulatory Branch Chief, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814, Attn: Hawaiian insular false killer whale proposed listing.

FOR FURTHER INFORMATION CONTACT: Krista Graham, NMFS, Pacific Islands Regional Office, 808–944–2238; Lance Smith, NMFS, Pacific Islands Regional Office, 808–944–2258; or Dwayne Meadows, NMFS, Office of Protected Resources, 301–713–1401.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2009, we received a petition from the NRDC requesting that we list the insular population of Hawaiian false killer whales as an endangered species under the ESA and designate critical habitat concurrent with listing. According to the draft 2010 Stock Assessment Report (SAR) (Carretta *et al.,* 2010) (available at *http://www.nmfs.noaa.gov/pr/pdfs/sars/)* that we have completed as required by the Marine Mammal Protection Act (MMPA), false killer whales within the United States (U.S.) Exclusive Economic Zone (EEZ) around the Hawaiian Islands are divided into a Hawaii pelagic stock and a Hawaii insular stock. The petition considers the insular population of Hawaiian false killer whales and the Hawaii insular stock of false killer whales to be synonymous. On January 5, 2010, we determined that the petitioned action presented substantial scientific and commercial information indicating that the petitioned action may be warranted, and we requested information to assist with a comprehensive status review of the species to determine if the Hawaiian insular false killer whale warranted listing under the Endangered Species Act of 1973 (ESA) (75 FR 316).

ESA Statutory Provisions

The ESA defines "species" to include subspecies or a DPS of any vertebrate species which interbreeds when mature (16 U.S.C. 1532(16)). The U.S. Fish and Wildlife Service (FWS) and NMFS have adopted a joint policy describing what

constitutes a DPS of a taxonomic species (61 FR 4722). The joint DPS policy identifies two criteria for making DPS determinations: (1) The population must be discrete in relation to the remainder of the taxon (species or subspecies) to which it belongs; and (2) the population must be significant to the remainder of the taxon to which it belongs.

A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) "It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation"; or (2) "it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D)" of the ESA.

If a population segment is found to be discrete under one or both of the above conditions, its biological and ecological significance to the taxon to which it belongs is evaluated. Considerations under the significance criterion may include, but are not limited to: (1) "Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon; (2) evidence that the loss of the discrete population segment would result in a significant gap in the range of a taxon; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; and (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics."

The ESA defines an "endangered species" as one that is in danger of extinction throughout all or a significant portion of its range, and a "threatened species" as one that is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532 (6) and (20)). The statute requires us to determine whether any species is endangered or threatened because of any of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overexploitation for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence (16 U.S.C. 1533). We are to make this determination based solely on the best available scientific and commercial information after conducting a review of the status of the species and taking into account any efforts being made by states or foreign governments to protect the species.

When evaluating conservation efforts not yet implemented or implemented for only a short period of time to determine whether they are likely to negate the need to list the species, we use the criteria outlined in the joint NMFS and FWS Policy for Evaluating Conservation Efforts When Making Listing Decisions (PECE policy; 68 FR 15100).

Status Review and Approach of the BRT

To conduct the comprehensive status review of the Hawaiian insular population of the false killer whale, we formed a Biological Review Team (BRT) comprised of eight federal scientists from our Northwest, Southwest, Alaska, and Pacific Islands Fisheries Science Centers. We asked the BRT to review the best available scientific and commercial information to determine whether the Hawaiian insular false killer whale warrants delineation into a DPS, using the criteria in the joint DPS policy. We asked the BRT to then assess the level of extinction risk facing the species at the DPS level, describing its confidence that the DPS is at high risk, medium risk, or low risk of extinction. The BRT defined the level of risk based on thresholds that have been used to assess other marine mammal species, and consistent with the criteria used by the International Union for the Conservation of Nature (IUCN) Red List of Threatened Species (IUCN, 2001). In evaluating the extinction risk, we asked the BRT to describe the threats facing the species, according to the statutory factors listed under section 4(a)(1) of the ESA, and qualitatively assess the severity, geographic scope, and level of certainty of each threat (Oleson *et al.,* 2010).

In compiling the best available information, making a DPS determination, and evaluating the status of the DPS, the BRT considered a variety of scientific information from the literature, unpublished documents, and direct communications with researchers working on false killer whales, as well as technical information submitted to NMFS. The BRT formally reviewed all information not previously peer-reviewed, and only that information found to meet the standard of best available science was considered further. Analyses conducted by individual BRT members were subjected to independent peer review, as required by the Office of Management and Budget Peer Review and Bulletin and under the 1994 joint NMFS/FWS peer review policy for ESA activities (59 FR 34270), prior to incorporation into the status review report.

The BRT acknowledged that considerable levels of uncertainty are present for all aspects of the Hawaiian insular false killer whale's biology, abundance, trends in abundance, and threats. Such uncertainties are expected for an uncommon species that is primarily found in the open ocean where research is expensive and knowledge is consequently poor. The BRT decided to treat the uncertainty explicitly by defining where it exists and using a point system to weigh various plausible scenarios, taking into account all of the best available data on false killer whales, but also considering information on other similar toothed whales. The BRT's objectives in taking this approach were to make the process of arriving at conclusions detailed in the status review report as transparent as possible and to provide assurance that the BRT was basing its conclusions on a common understanding of the evidence. Details of this approach can be found in Appendix A of the status review report.

The report of the BRT deliberations (Oleson *et al.,* 2010) (hereafter "status review report") thoroughly describes Hawaiian false killer whale biology, ecology, and habitat, provides input on the DPS determination, and assesses past, present, and future potential risk factors, and overall extinction risk. The key background information and findings of the status review report are summarized below.

Biology and Life History of False Killer Whales

The following section presents biology and life history information gathered from throughout the range of false killer whales. A later section focuses on information specific to the Hawaiian insular false killer whale.

Description

The false killer whale, *Pseudorca crassidens* (Owen, 1846) is a member of the family Delphinidae, and no subspecies have been identified. The species is a slender, large delphinid, with maximum reported sizes of 610 cm for males (Leatherwood and Reeves, 1983) and 506 cm for females (Perrin and Reilly, 1984). Length at birth has been reported to range from 160–190 cm, and length at sexual maturity is 334 through 427 cm in females and 396–457

cm in males (Stacey *et al.,* 1994; Odell and McClune, 1999). Estimated age at sexual maturity is about 8 to 11 years for females, while males may mature 8 to 10 years later (Kasuya, 1986). The maximum reported age has been estimated as 63 years for females and 58 years for males (Kasuya, 1986), with females becoming reproductively senescent at about age 44 (Ferreira, 2008). Both sexes grow 40 to 50 percent in body length during their first year of life, but males subsequently grow faster than females. Growth ceases between 20 and 30 years of age, and there is evidence of geographic variation in final asymptotic body size. Off the coast of Japan, asymptotic length is 46 cm (females) and 56 cm (males) longer than off the coast of South Africa (Ferreira, 2008). Large individuals may weigh up to 1,400 kg. Coloration of the entire body is black or dark gray, although lighter areas may occur ventrally between the flippers or on the sides of the head. A prominent, falcate dorsal fin is located at about the midpoint of the back, and the tip can be pointed or rounded. The head lacks a distinct beak, and the melon tapers gradually from the area of the blowhole to a rounded tip. In males, the melon extends slightly further forward than in females. The pectoral fins have a unique shape among the cetaceans, with a distinct central hump creating an S-shaped leading edge.

Global Distribution and Density

False killer whales are found in all tropical and warm-temperate oceans, generally in deep offshore waters, but also in some shallower semi-enclosed seas and gulfs (e.g., Sea of Japan, Yellow Sea, Persian Gulf), and near oceanic islands (e.g., Hawaii, Johnston Atoll, Galapagos, Guadeloupe, Martinique) (Leatherwood *et al.,* 1989). Sightings have also been reported as "common" in Brazilian shelf waters (IWC, 2007) where animals could be seen from shore from Rio de Janeiro feeding in an upwelling zone that concentrates prey. There are occasional records in both the northern and southern hemispheres of animals at latitudes as high as about 50 degrees (Stacey and Baird, 1991; Stacey *et al.,* 1994). In the western Pacific off the coast of Japan, false killer whales appear to move north-south seasonally, presumably related to prey distribution (Kasuya, 1971), but seasonal movements have not been documented elsewhere. Densities in the central and eastern Pacific range from 0.02 to 0.38 animals per 100 km^2 (Wade and Gerrodette, 1993; Mobley *et al.,* 2000; Ferguson and Barlow, 2003; Carretta *et al.,* 2007), with the lowest densities reported for waters north of about 15 degrees north off Baja California, Mexico, and within the U.S. EEZ around Hawaii, and highest densities reported in waters surrounding Palmyra Atoll. Unlike other species that can be found both along continental margins and in offshore pelagic waters (e.g., bottlenose dolphins (*Tursiops truncatus*)), false killer whale densities generally do not appear to increase closer to coastlines.

Although false killer whales are found globally, genetic, morphometric, and life history differences indicate there are distinct regional populations (Kitchener *et al.,* 1990; Mobley *et al.,* 2000; Chivers *et al.,* 2007; Ferreira, 2008). Within waters of the central Pacific, four Pacific Islands Region management stocks of false killer whales are currently recognized for management under the U.S. MMPA: The Hawaii insular stock, the Hawaii pelagic stock, the Palmyra Atoll stock, and the American Samoa stock (Carretta *et al.,* 2010).

Life History

False killer whales are long-lived social odontocetes. Much of what is known about their life history comes either from examination of dead animals originating from drive fisheries in Japan (Kasuya and Marsh, 1984; Kasuya, 1986) or strandings (Purves and Pilleri, 1978; Ferreira, 2008). The social system has been described as matrilineal (Ferreira, 2008). However, this is not consistent with two known characteristics of false killer whales: Males leave their natal group when they begin to become sexually mature; and research showing females within a single group have different haplotypes, indicating that even among females, groups are composed of more than near-relatives (Chivers *et al.,* 2010). Ferreira (2008) suggested the mating system may be polygynous based on the large testes size of males, but actual understanding of the mating system remains poor.

The only reported data on birth interval, 6.9 years between calves, is from Japan (Kasuya, 1986). However, annual pregnancy rates were reported for Japan as 11.4 percent and 2.2 percent for South Africa (Ferreira, 2008). A rough interbirth interval can be calculated by taking the inverse of the annual pregnancy rate, which yields intervals of 8.8 and 45 years for Japan and South Africa, respectively. A single stranding group where 1 out of 37 adult females was pregnant was the source of the South African data, which may not be a representative sample and could be insufficient to estimate pregnancy rates in that population.

Comparisons of the life history parameters inferred from the Japanese drive fishery samples and the South African stranding sample indicated that the whales in Japan attained a larger asymptotic body size and grew faster. Also, a suite of characteristics of the whales in Japan indicated a higher reproductive rate: The ratio of reproductive to post-reproductive females was higher and the pregnancy rate was higher than in South Africa. Possible reasons given by Ferreira (2008) for the apparently higher reproductive rate in Japan are: The Japan whales are exhibiting a density-dependent response to population reduction as a result of exploitation; the colder waters near Japan are more productive; or differences in food quality. The estimated reproductive rates in both Japan and South Africa are low compared to those of other delphinids and especially to the two species with the most similar life history: Short-finned pilot whales (*Globicephala macrorhynchus*), and Southern Resident killer whales (*Orcinus orca*) (Olesiuk *et al.,* 1990).

Little is known about the breeding behavior of false killer whales in the wild, but some information is available from false killer whales held in oceanaria (Brown *et al.,* 1966). Gestation has been estimated to last 11 to 16 months, (Kasuya, 1986; Odell and McClune, 1999). Females with calves lactate for 18 to 24 months (Perrin and Reilly, 1984). In captive settings, false killer whales have mated with other delphinids, including short-finned pilot whales and bottlenose dolphins. Bottlenose dolphins in captivity have produced viable offspring with false killer whales (Odell and McClune, 1999).

Reproductive senescence is quite rare in cetaceans but has been documented in false killer whales and other social odontocetes. The two primary reasons given for reproductive senescence are increasing survival of offspring as a result of care given by multiple females of multiple generations (grandmothering), and transmission of learning across generations allowing survival in lean periods by remembering alternative feeding areas or strategies (McAuliffe and Whitehead, 2005; Ferreira, 2008).

Wade and Reeves (2010) argue that odontocetes have delayed recovery as compared to mysticetes when numbers are reduced because of the combination of their life history, which results in exceptionally low maximum population growth rates, and the potential for social disruption. Particularly if older females are lost, it may take decades to rebuild the knowledge required to achieve maximum population growth rates.

Wade and Reeves (2010) give numerous examples, both from cetaceans (beluga whales (*Delphinapterus leucas*), killer whales, and sperm whales (*Physeter macrocephalus*) are particularly pertinent) and elephants, which are similarly long-lived social animals with reproductive senescence.

Feeding Ecology

False killer whales are top predators, eating primarily fish and squid, but also occasionally taking marine mammals (see references in Oleson *et al.,* 2010). These conclusions are based on relatively limited data from various parts of the species' range.The large, widely spread groups in which false killer whales typically occur (Baird *et al.,* 2008a; Baird *et al.,* 2010) and their patchily distributed prey suggest that this species forages cooperatively. Further evidence for the social nature of false killer whale foraging is the observation of prey sharing among individuals in the group (Connor and Norris, 1982; Baird *et al.,* 2008a). False killer whales feed both during the day and at night (Evans and Awbrey, 1986; Baird *et al.,* 2008a).

Diving Behavior

Limited information is available on the diving behavior of false killer whales. Maximum dive depth was estimated at 500 m (Cummings and Fish, 1971). Time depth recorders have been deployed on four false killer whales (R. Baird, pers. comm., Cascadia Research Collective) totaling approximately 44 hours. The deepest dive recorded during a 22-hour deployment was estimated to have been as deep as 700 m (estimate based on duration past the recorder's 234 m limit and ascent and descent rates). However, only 7 dives were to depths greater than 150 m, all of them accomplished in the daytime. Nighttime dives were all shallow (30–40 m maximum), but relatively lengthy (approximately 6–7 minutes).

Indirect evidence of dive depths by false killer whales can be inferred from prey. Mahimahi has been noted as a prominent prey item (Baird, 2009). Based on the catch rates of longlines instrumented with depth sensors and capture timers (Boggs, 1992) in the daytime, mahimahi are caught closer to the surface than other longline-caught fish, primarily in the upper 100 m. Other prey species, such as bigeye tuna, typically occur much deeper, from the surface down to at least 400 m (Boggs, 1992). The deepest dives by the instrumented false killer whales approach the daytime swimming depth limit of swordfish (*Xiphias gladius*), a prey item, near 700 m (Carey and Robinson, 1981).

Social Behavior

There is quite a bit of variance in estimates of group size of false killer whales. At least some of the variability stems from estimation methods and time spent making the group size estimate. Most group sizes estimated from boats or planes vary from 1 to over 50 animals with an average from 20 to 30, and group size estimates increase with encounter duration up to 2 hours (Baird *et al.,* 2008a). Group size tends to increase with encounter duration because the species often occurs in small subgroups that are spread over tens of square miles. It is possible that the groups seen on typical boat or plane surveys are only part of a larger group spread over many miles (see e.g., Baird *et al.,* 2010) that are in acoustic contact with one another. These widespread aggregations of small groups can total hundreds of individuals (Wade and Gerrodette, 1993; Carretta *et al.,* 2007; Baird, 2009; Reeves *et al.,* 2009). Mass strandings of large groups of false killer whales (range 50–835; mean = 180) have been documented in many regions, including New Zealand, Australia, South Africa, the eastern and western North Atlantic, and Argentina (Ross, 1984). Groups of 2–201 individuals (mean = 99) have also been driven ashore in Japanese drive fisheries (Kasuya, 1986). The social organization of smaller groups has been studied most extensively near the main Hawaiian Islands (Baird *et al.,* 2008a), where individuals are known to form strong long-term bonds. False killer whales are also known to associate with other cetacean species, especially bottlenose dolphins (Leatherwood *et al.,* 1988). Interestingly, records also show false killer whales attacking other cetaceans, including sperm whales and bottlenose dolphins (Palacios and Mate, 1996; Acevedo-Gutierrez *et al.,* 1997).

Biology and Life History of Hawaiian Insular False Killer Whales

Current Distribution

The boundaries of Hawaiian insular false killer whale distribution have been assessed using ship and aerial survey sightings and location data from satellite-linked telemetry tags. Satellite telemetry location data from seven groups of individuals tagged off the islands of Hawaii and Oahu indicate that the whales move widely and quickly among the main Hawaiian Islands and use waters up to at least 112 km offshore (Baird *et al.,* 2010; Forney *et al.,* 2010). Regular movement throughout the main Hawaiian Islands was also documented by re-sightings of photographically-identified individuals over several years (Baird *et al.,* 2005; Baird, 2009; Baird *et al.,* 2010). Individuals use both windward and leeward waters, moving from the windward to leeward side and back within a day (Baird, 2009; Baird *et al.,* 2010; Forney *et al.,* 2010). Some individual false killer whales tagged off the Island of Hawaii have remained around that island for extended periods (days to weeks), but individuals from all tagged groups eventually ranged widely throughout the main Hawaiian Islands, including movements to the west of Kauai and Niihau (Baird, 2009; Forney *et al.,* 2010). Based on locations obtained from 20 satellite-tagged insular false killer whales, the minimum convex polygon range for the insular population was estimated to encompass 77,600 km^2 (M.B. Hanson, unpublished data).

The greatest offshore movements occurred on the leeward sides of the islands, although on average, similar water depths and habitat were utilized on both the windward and leeward sides of all islands (Baird *et al.,* 2010). Individuals utilize habitat overlaying a broad range of water depths, varying from shallow (<50 m) to very deep (>4,000 m) (Baird *et al.,* 2010). Tagged insular false killer whales have often demonstrated short- to medium-term residence in individual island areas before ranging widely among islands and adopting another short-term residency pattern. It is likely that movement and residency patterns of the whales vary over time depending on the density and movement patterns of their prey species (Baird, 2009).

A genetically distinct population of pelagic false killer whales occurs off Hawaii (Chivers *et al.,* 2007). Hawaiian insular false killer whales share a portion of their range with the genetically distinct pelagic population (Forney *et al.,* 2010). Satellite telemetry locations from a single tagged individual from the pelagic population, as well as shipboard and small boat survey sightings, suggest that the ranges of the two populations overlap in the area between 42 km and 112 km from shore (Baird *et al.,* 2010; Forney *et al.,* 2010). Based on this evidence, it is clear that the region from about 40 km to at least 112 km from the main Hawaiian Islands is an overlap zone, in which both insular and pelagic false killer whales can be found. However, a small sample size of satellite-tracked individuals creates some uncertainty in these boundaries. In particular, the offshore boundary of the insular stock is

likely to be farther than 112 km because their documented offshore extent has increased as sample sizes of satellite-tracked individuals have increased. It is likely that additional deployments in the future will continue to result in greater maximum documented distances for insular false killer whales. Thus, an additional geographic "buffer" beyond the present maximum distance of 112 km has been recognized out to 140 km. Moreover, 140 km is approximately 75 nmi which follows the original boundary recommendation of Chivers *et al.* (2008). Therefore, the draft 2010 SAR for false killer whales recognizes an overlap zone between insular and pelagic false killer whales between 40 km and 140 km from the main Hawaiian Islands based on sighting, telemetry, and genetic data (based on justification in Forney *et al.,* 2010; Carretta *et al.,* 2010). We recognize that boundary for this status review as well.

Life History

There is no information available to assess whether the life history of Hawaiian insular false killer whales differs markedly from other false killer whale populations. However, there is also no evidence to show they are similar. As discussed earlier, false killer whales in Japan were larger and had a higher reproductive output than those in South Africa, and these differences were attributed to one or more of the following: colder more productive waters, response to exploitation, and different food in the two regions (Ferreira, 2008). It remains uncertain whether Hawaiian insular false killer whales are more like those from Japan or those from South Africa.

Social Structure

Molecular genetic results support the separation of Hawaiian insular false killer whales from the more broadly distributed Hawaiian pelagic false killer whales (Chivers *et al.,* 2007; 2010). Matches from photo-identification of individuals in groups of insular false killer whales also suggests functional isolation of the insular population from the overlapping pelagic population of false killer whales (Baird *et al.,* 2008a). Based on 553 identifications available as of July 2009, with the exception of observations of four small groups (two observed near Kauai and two off the Island of Hawaii), all false killer whales observed within 40 km of the main Hawaiian Islands link to each other through a single large social network that makes up the insular population. A large group of 19 identified individuals of the pelagic population (or presumed to be) seen 42 km from shore and identifications from a number of other sightings of smaller groups do not link into the social network (Baird, 2009).

The social cohesion of insular false killer whales is likely important to maintaining high fecundity and survival as it is in other highly social animals. Although some aspects of the behavior and "culture" of Hawaiian insular false killer whales have been investigated or discussed, the mechanisms by which they might influence population growth rates are not well understood. The situation of this population could be analogous to those of other populations of large mammals in which females live well beyond their reproductive life spans (*e.g.,* elephants, higher primates, and some other toothed cetaceans such as pilot whales) (McComb *et al.,* 2001; Lahdenpera *et al.,* 2004). The loss of only a few key individuals—such as the older, post-reproductive females—could result in a significant loss of inclusive fitness conveyed by "grandmothering" behavior (*i.e.,* assistance in care of the young of other females in the pod). In addition, cultural knowledge (*e.g.,* how to cope with environmental changes occurring on decadal scales) could be lost, leading to reduced survival or fecundity of some or all age classes. Wade and Reeves (2010) document the special vulnerability of social odontocetes giving examples of killer whales, belugas, sperm whales, and dolphins in the eastern tropical Pacific.

Historical Population Size

Historical population size is unknown. BRT members used density estimates from other areas together with the range inferred from telemetry data (*see* above) to suggest plausible ranges for historical abundance. Using the estimated density of false killer whales around the Palmyra Atoll EEZ, 0.38 animals/100 km^2, where the highest density of this species has been reported (Barlow and Rankin, 2007), and extrapolating that density out to the 202,000 km^2 area within 140 km of the main Hawaiian Islands (proposed as a stock boundary for Hawaiian insular false killer whales in the draft 2010 SAR), a point-estimate, or a plausible historical abundance, for the insular population is around 769. Alternatively, using one standard deviation above the point-estimate of the density around Palmyra Atoll to account for uncertainty in that density estimate, the upper limit of the abundance of Hawaiian insular false killer whales could have reached 1,392 animals. The BRT placed the lower limit of plausible population size in 1989 at 470 based on the estimated number of animals observed in the 1989 aerial surveys (see above).

There are several important caveats. Even though Palmyra has a density that is high relative to other areas, it is unlikely that this represented a pristine population during the 2005 survey on which the estimate is based. Given the depredation tendencies of false killer whales, known long-lining in the Palmyra area, and the fact that false killer whales are known to become seriously injured or die as a result of interactions with longlines, the possibility that current densities are lower than historical densities cannot be discounted. Although Palmyra is situated in more productive waters than the Hawaiian Islands, we do not understand enough about the feeding ecology, behavior, and social system(s) of false killer whales to know how or whether productivity might be related to animal density for false killer whales. This caveat is true for all other areas where population density estimates exist for false killer whales. Therefore, we used and view data from Palmyra as a conservative estimate of pristine density.

Current Abundance

The draft 2010 SAR for Hawaiian insular false killer whales (Carretta *et al.,* 2010) gives the best estimate of current population size as 123 individuals (coefficient of variation, or CV = 0.72), citing Baird *et al.* (2005). Recent reanalysis of photographic data has yielded two new estimates of population size for the 2006–2009 period. Two estimates are presented because two groups photographed near Kauai have not yet been observed to associate into the social network of false killer whales seen at the other islands. These animals may come from the pelagic population, may come from another undocumented population in the Northwestern Hawaiian Islands, or may represent a portion of the insular population that has not been previously documented photographically. The current best estimates of population size for Hawaiian insular false killer whales are 151 individuals (CV = 0.20) without the animals photographed at Kauai, or 170 individuals (CV = 0.21) with them. As a comparison, the Hawaiian pelagic population is estimated to be 484 individuals (CV = 0.93) within the U.S. EEZ surrounding Hawaii (Barlow and Rankin, 2007).

Although the absolute abundance of Hawaiian insular false killer whales is small, the core-area (within 40 km) population density (0.12 animals/100 km^2) is among the highest reported for this species. The high density of the Hawaiian insular population suggests a unique habitat capable of supporting a

larger population density than nearby oligotrophic waters.

Trends in Abundance

Aerial survey sightings since 1989 suggest that the Hawaiian insular false killer whale population has declined over the last 2 decades. A survey was conducted in June and July 1989 on the leeward sides of Hawaii, Lanai, and Oahu to determine the minimum population size of false killer whales in Hawaiian waters. False killer whales were observed on 14 occasions with 3 large groups (group sizes of 470, 460, and 380) reported close to shore off the Island of Hawaii on 3 different days (Reeves *et al.,* 2009). As described in the Current Abundance section, the current best estimates of population size for Hawaiian insular false killer whales are 151 individuals without the animals photographed at Kauai, or 170 with them. Therefore, the largest group seen in 1989 is much larger than the current best estimate of the size of the insular population. Although the animals seen during the 1989 surveys are assumed to come from the insular population based on their sighting location within 55 km of the Island of Hawaii, it is possible that they represent a short-term influx of pelagic animals to waters closer to the islands. Moreover, because photographic or genetic identification of individuals is often required to determine the population identity of false killer whales in Hawaiian waters, we cannot be absolutely certain that sightings from the 1989 or 1993 to 2003 aerial surveys came from the insular population. Similarly, false killer whale bycatch or sightings by observers aboard fishing vessels cannot be attributed to the insular population when no identification photographs or genetic samples are obtained. Nevertheless, because of the location of the sightings and lack of evidence of pelagic animals occurring that close to the islands, it is most likely that this group did consist of insular animals.

With respect to trends in group size, the average group size during the 1989 survey (195 animals) is larger than the typical average group size for the insular population (25 animals for encounters longer than 2 hours) during more recent surveys (Baird *et al.,* 2005). The 1989 average group size is also larger than the more recent average of that observed for the pelagic population (12 animals) (Barlow and Rankin, 2007).

Five additional systematic aerial surveys were conducted between 1993 and 2003 covering both windward and leeward sides of all of the main Hawaiian Islands, including channels between the islands, out to a maximum distance of about 46 km from shore (Mobley *et al.,* 2000; Mobley, 2004). A regression of sighting rates from these surveys suggests a significant decline in the population size (Baird, 2009). The large groups sizes observed in 1989, together with the declining encounter rates from 1993 through 2003 suggest that Hawaiian insular false killer whales have declined substantially in recent decades.

It is possible that weather or other survey conditions are at least partially responsible for the decline in sighting rates from 1993 through 2003; however, there was no downward trend in the sighting rates for the four most commonly seen species of small cetaceans (spinner dolphin (*Stenella longirostris*), bottlenose dolphin, spotted dolphin (*Stenella attenuata*), and short-finned pilot whale). These four species represent nearshore and pelagic habitat preferences and span a range of body sizes from smaller to larger than false killer whales. It can be inferred from this evidence that variability in sighting conditions during the survey period did not have a major effect on sighting rates and therefore the sighting rate for insular false killer whales has, in fact, declined.

A number of additional lines of evidence, summarized in Baird (2009), support a recent decline in Hawaiian insular false killer whale population size. Individual researchers in Hawaii have noted a marked decline in encounter rates since the 1980s and the relative encounter rate of false killer whales during the 1989 aerial survey was much higher than current encounter rates.

Population Structure

Chivers *et al.* (2007) delineated false killer whales around Hawaii into two separate populations: Hawaiian insular and Hawaiian pelagic. That work has recently been extended with new samples, the addition of nuclear markers, and an analysis with a broader interpretation of the data (Chivers *et al.,* 2010). The new analysis examined mitochondrial DNA (mtDNA) using sequences of 947 base pairs from the d-loop and nuclear DNA (nDNA) using eight microsatellites. These additional samples help confirm the delineation of these two populations.

Three stratifications of the mtDNA data examined genetic differentiation at different spatial scales (Chivers *et al.,* 2010). The broad-scale stratification recognized three groups: Hawaiian insular, central North Pacific, and eastern North Pacific. In the fine-scale stratification, five strata were recognized: Hawaiian insular, Hawaiian pelagic, Mexico, Panama, and American Samoa. The finest-scale stratification recognized each of the main Hawaiian Islands as strata.

All but one Hawaiian insular false killer whale had one of two closely related haplotypes that have not been found elsewhere. The presence of two distinct, closely related haplotypes in Hawaiian insular false killer whales is consistent with Hawaiian insular false killer whales having little gene flow from other areas. This pattern differs from those of Hawaiian stocks of bottlenose, spinner, and spotted dolphins that all have evidence suggesting multiple successful immigration events. The pattern of primarily closely related haplotypes shown in Hawaiian insular false killer whales is consistent with a strong social system or strong habitat specialization that makes survival of immigrants or their offspring unlikely. One single individual, a male, was found in among Hawaiian insular false killer whales with a different haplotype. Although there is no photograph of that male to connect it directly to Hawaiian insular false killer whales, it was sampled within a group with such strong connections that assignment tests could not exclude that it belongs to the insular group. Given the low power of the current assignment test (with few microsatellite markers), the possibility of immigration (permanent membership with Hawaiian insular false killer whales but with an origin outside the group) cannot be ruled out. Likewise, the possibility that this individual was a temporary visitor (*i.e.,* not a true immigrant) from the pelagic population cannot be excluded. The rare haplotype is sufficiently distantly related that it seems most plausible that this resulted from a separate immigration event (i.e., that immigrants are accepted on rare occasions).

The mtDNA data also show strong differentiation between Hawaiian insular false killer whales (n = 81) and both broad-scale strata (central North Pacific (n = 13) and eastern North Pacific (n = 39)) and fine-scale strata (Hawaiian pelagic (n = 9), Mexico (n = 19), Panama (n = 15), and American Samoa (n = 6)). Genetic divergence between the Hawaiian insular false killer whales and other strata examined showed magnitudes of differentiation that were all consistent with less than one migrant per generation. No significant differences were found among the main Hawaiian Islands with sufficient data for statistical analysis (Hawaii, Oahu, and Maui).

Nuclear DNA results also showed highly significant differentiation among

the broad and fine strata (Hawaiian insular (n = 69), central North Pacific (n = 13), eastern North Pacific (n = 36), Hawaiian pelagic (n = 9), Mexico (n = 19), Panama (n = 12), and American Samoa (n = 6)). The estimates of divergence between the Hawaiian insular strata and other strata demonstrate that the magnitude of differentiation was less for nDNA than for mtDNA, indicating the potential for some male-mediated gene flow. Tests for differences between currently living males and females in level of differentiation were not significant for either mtDNA or nDNA. However, this test has no ability to detect differences in male versus female gene flow in the past. Chivers *et al.* (2010) give a number of hypotheses for the apparently different magnitude of signals between mtDNA and nDNA: (1) There is a low level of male-mediated gene flow that was not apparent because of insufficient sampling of nearby groups of false killer whales and/or the test for male-mediated gene flow can only detect first-generation male migrants; (2) the magnitude of nDNA differentiation is underestimated because of the high mutation rate of microsatellites; or (3) the magnitude of differentiation is not inconsistent with cases where selection has been shown to be strong enough for local adaptation.

The aforementioned uncertainties will best be resolved with additional sampling of nearby pelagic waters. Although the sample distribution is improved since the 2007 analysis, it remains poor in pelagic areas. The only full-scale cetacean survey of Hawaiian pelagic waters resulted in only two sightings of false killer whales in four months of effort, and the weather was too poor to obtain any high-quality identification photographs or biopsies (J. Barlow, pers. comm., NMFS SWFSC). Fisheries observers are trained to obtain identification photographs and biopsy samples; however, conditions during disentanglement usually result in photographs difficult to identify due to darkness, and prevent successful biopsy.

The strongest data with which to evaluate population structure are the mtDNA data. Approximately half of the population of Hawaiian insular false killer whales has been sampled, and all but one individual has one of two closely related haplotypes that have not been found elsewhere.

Chivers *et al.* (2010) used the analytical method of Piry *et al.* (1999) to test for evidence of a recent decline in abundance within the Hawaiian insular population. The analysis takes advantage of the fact that when the effective size of a population is reduced, the allelic diversity of the population is reduced more rapidly than its heterozygosity, resulting in an apparent excess of heterozygosity given the number of alleles detected. Chivers *et al.* (2010) detected statistically significant evidence of a recent decline in Hawaiian insular false killer whales using this method, with all eight microsatellite loci exhibiting heterozygosity excess.

The microsatellite data were also used to estimate the effective population size of Hawaiian insular false killer whales as 46 (95 percent CI = 32–69). Because this population may have recently declined and the animals are long-lived, many of those individuals still alive likely were born prior to the decline. Thus, the estimate of effective population size is likely too high. Nevertheless, domestic animals have been shown to start displaying deleterious genetic effects (lethal or semi-lethal traits) when effective population size reaches about 50 individuals (Franklin, 1980). While negative genetic effects cannot be predicted for a group of individuals that are probably naturally uncommon with a strong social structure that limits genetic diversity, the current low effective population size is a concern.

DPS Determination

We have determined that Hawaiian insular false killer whales are discrete from other false killer whales based on genetic discontinuity and behavioral factors (the uniqueness of their behavior related to habitat use patterns). We have also determined that Hawaiian insular false killer whales are significant to the taxon, based on their unique ecological setting, marked genetic characteristic differences, and cultural factors.

Both mitochondrial DNA (mtDNA) and nuclear DNA (nDNA) provide support for genetic discontinuity. As explained in the Population Structure section of this proposed rule, genetic differentiation was examined at different spatial scales. The mtDNA data show strong differentiation between Hawaiian insular false killer whales and other false killer whale groups at both broad-scale strata (central North Pacific and eastern North Pacific) and fine-scale strata (Hawaiian pelagic, Mexico, Panama, and American Samoa). The strongest DNA data come from mtDNA. The Hawaiian insular false killer whales have approximately half of the population sampled, and all but one individual has one of the two closely related haplotypes that have not been found elsewhere. The BRT concluded that this pattern alone argues for a strong possibility of a high degree of separation. Nuclear DNA (microsatellite) data are also consistent with little gene flow between Hawaiian insular false killer whales and other false killer whales and support discreteness. Nuclear DNA results showed highly significant differentiation among the Hawaiian insular, North Pacific, eastern North Pacific, Hawaiian pelagic, Mexico, Panama, and American Samoa strata.

Hawaiian insular false killer whales are behaviorally unique because they are the only population of the species known to have movements restricted to the vicinity of an oceanic island group. This behavioral separation is supported by their linkage through a tight social network, without any linkages to animals outside of the Hawaiian Islands. Phylogeographic analysis also indicates an isolated population with nearly exclusive haplotypes, and telemetry data show that all 20 satellite-linked telemetry tagged Hawaiian insular false killer whales remained within the main Hawaiian Islands (Baird *et al.,* 2010; Baird *et al.,* unpublished data), in contrast with a single tagged pelagic false killer whale, which ranged far from shore. Although it is not unusual for false killer whales to be observed close to land, long-term history of exclusive use of a specific mainland or island system has not been documented elsewhere.

Hawaiian insular false killer whales are significant to the taxon based on persistence in a unique ecological setting, marked genetic characteristic differences, and cultural factors. Hawaiian insular false killer whales persist in an ecological setting unusual or unique from other false killer whale populations because they are found primarily in island-associated waters that are relatively shallow and productive compared to surrounding oligotrophic waters. The following lines of evidence supporting this unique ecological setting include: Utilization of prey associated with island habitat that may require specialized knowledge of locations and seasonal conditions that aggregate prey or make them more vulnerable to predation. In an insular habitat, such foraging grounds may occur more regularly or in more predictable locations than on the high seas. The contaminant levels found in insular animals also suggest that both insular false killer whales and their prey may be associated with the urban island environment. And despite their small population size, the density (animals per km^2) of Hawaiian insular false killer whales is high relative to other false killer whale populations, suggesting the

nearshore habitat or a unique habitat-use strategy may support a higher density of animals, which may have implications for differences in social structure and interactions within the population or with the pelagic population. Additionally, movement and photographic resighting data suggest Hawaiian insular false killer whales employ a unique foraging strategy compared to other false killer whales.

Hawaiian insular false killer whales differ markedly from other populations of the species in their genetic characteristics. Hawaiian insular false killer whales exhibit strong phylogeographic patterns that are consistent with local evolution of mitochondrial haplotypes. Eighty of 81 individuals had one of two closely related haplotypes found nowhere else. These haplotypes are a sequence of a non-coding portion of the mtDNA and as such do not provide direct evidence for selection. The BRT found that the magnitude of mtDNA differentiation is large enough to infer that time has been sufficient and gene flow has been low enough to allow adaptation to the local Hawaiian habitat. The BRT noted that geneticists use one effective migrant per generation as a rule of thumb for the level of gene flow below which adaptation to local habitat is likely. Comparisons using mtDNA of the Hawaiian insular animals to those in all other geographic strata indicate less than one migrant per generation.

Finally, culture, or knowledge passed through learning from one generation to the next, is likely to play an important role in the evolutionary potential of false killer whales. The insular population contributes to cultural diversity in the species, and this may provide the capacity for different amounts of cultural capabilities such as the ability of false killer whales to adapt to environmental change. Evidence in support of the significance of cultural diversity includes: Insular false killer whales may have unique knowledge of nearshore foraging areas and foraging tactics that are transmitted through learning. Learning is a common feature of other social odontocetes. False killer whales are highly social mammals with long interbirth intervals and reproductive senescence suggesting transfer of knowledge is important to successfully persist in this unique Hawaiian habitat. Learning to persist in this unique habitat, and knowing the intricacies of localized prey distribution and prey movements, may take many generations.

Overall, the combination of genetic and behavioral discreteness coupled with ecological, genetic, and cultural significance led us to conclude that Hawaiian insular false killer whales are a DPS. There was some uncertainty in the genetic discontinuity factor of the discreteness conclusion based primarily on the lack of information on the adjacent population of pelagic false killer whales off the coast of Hawaii, and due to gaps in genetic sampling to the west of Hawaii. However, the BRT did not find this lack of information sufficient to alter the significance finding for Hawaiian insular false killer whales. We agree with the BRT's conclusion that the Hawaiian insular population of the false killer whale is a DPS.

Extinction Risk Assessment

Evaluating Threats

The BRT qualitatively assessed potential individual threats to Hawaiian insular false killer whales and organized its assessment of threats according to the five factors listed under ESA section 4(a)(1). They evaluated the potential role that each factor may have played in the decline of Hawaiian insular false killer whales and the degree to which each factor is likely to limit population growth in the foreseeable future. Within the five factors, specific threats were individually ranked by considering the severity, geographic scope, the level of certainty that insular false killer whales are affected, and overall current and future (60 years) risk imposed by that threat. Consideration of future threats was limited to 60 years duration as this corresponds roughly to the life span of a false killer whale and represents a biologically relevant time horizon for projecting current conditions into the future.

Section 4(a)(1) of the ESA and NMFS's implementing regulations (50 CFR 424) state that the agency must determine whether a species is endangered or threatened because of any one or a combination of the five factors described under the ESA Statutory Provisions. The BRT was not asked to determine whether the DPS was endangered or threatened; it was only asked to assess the risk of extinction and the impact of factors affecting the DPS. The following discussion briefly summarizes the BRT's findings regarding threats to the Hawaiian insular false killer whale DPS. More details, including how the BRT voted, can be found in the status review report (Oleson *et al.,* 2010). Overall, there were 29 threats identified to have either a historical, current, or future risk to Hawaiian insular false killer whales. Of these, 15 are believed to contribute most significantly to the current or future decline of Hawaiian insular false killer whales. The following is a summary of each of the 15 current and/or future potential threats that could result in either a high risk or medium risk of extinction, categorized according to the five section 4(a)(1) factors.

A: The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Reduced Total Prey Biomass and Reduced Prey Size

The impacts of reduced total prey biomass and reduced prey size represent a medium risk for insular false killer whales. Although declines in prey biomass were more dramatic in the past when the insular false killer whale population may have been higher, the total prey abundance remains very low compared to the 1950s and 1960s as evidenced by catch-per-unit-effort (CPUE) data from Hawaii longline fisheries and biomass estimates from tuna stock assessments (Oleson *et al.,* 2010). Long-term declines in prey size from the removal of large fish have been recorded from the earliest records to the future (Oleson *et al.,* 2010).

Competition With Commercial Fisheries

Competition with commercial fisheries is rated as a medium level of risk to current and future Hawaiian insular false killer whales. This risk exists because false killer whale prey includes many of the same species targeted by Hawaii's commercial fisheries, especially the fisheries for tuna, billfish, wahoo, and mahimahi.

Until 1980, distant-water longliners from Japan caught between 1,300 and 5,000 t of tuna and billfish annually within the U.S. EEZ around Hawaii (Yong and Wetherall, 1980). Since 1980 no foreign longline fishing has been legally conducted in this zone, but the U.S. Hawaii-based longline fisheries now harvest similar quantities of tuna and billfish in the EEZ. In terms of total hooks deployed by the U.S. domestic fisheries, the fisheries declined slightly in the 1960s and 1970s, and then began to grow again in the 1980s. Total hooks in the U.S. EEZ around the main Hawaiian Islands in the period of 1965 and 1977 were around 1.6 to 2.9 million hooks per year. As the domestic fisheries declined in the 1960s and 1970s, foreign fishing in the U.S. EEZ around the main Hawaiian Islands increased, and then ceased in 1980. Domestic longlining was revitalized in the 1980s based on new markets for fresh tuna and the introduction of new shallow-set swordfish fishing methods.

Hooks deployed inside the U.S. EEZ around the main Hawaiian Islands in the 1990s were double that estimated for the 1970s, and doubled again in the 2000s. Participation in the Hawaii longline fisheries approximately doubled from 37 vessels in 1987 to 75 in 1989 and doubled again to 156 (vessels with permits) by the end of 1991. As the Hawaii-based longline fisheries expanded during the late 1970s through the early 1990s, longline fishing effort increased in waters near the Hawaiian Islands and within the range of insular false killer whales. The expansion in these nearshore waters within the 40 km core habitat of the Hawaiian insular false killer whales was pronounced during an influx of new fisheries participants in the late 1980s (Ito, 1991) and this led to conflicts in the fishing areas previously dominated by troll and handline fishermen. The growing conflict between commercial longliners and near-shore troll and handliners was finally resolved in 1992 with a prohibited area limiting nearshore longlining. Although the fraction of total Pacific longline tuna catches that are from the EEZ around the main Hawaiian Islands has declined from about half to about a quarter over the last two decades, the absolute quantity caught in the EEZ continued to increase through 2005, declining moderately thereafter (WPRFMC, 2010).

The present-day Hawaiian insular false killer whale population requires an estimated 1.3 to 1.8 million kg of prey per year (Oleson *et al.,* 2010). Competition with longline fisheries for potential prey within the insular false killer whale habitat seems to have represented a higher risk prior to the early 1990s when the longline fisheries were harvesting many millions of pounds of fish per year, and where reported catch locations were almost all in what is now the longline prohibited area. In the core nearshore habitat (<40 km from shore), the troll and handline fisheries now harvest as much as is estimated to be consumed annually by the Hawaiian insular false killer whale population.

Competition With Recreational Fisheries

The potential limiting factor of reduced food due to catch removals by recreational fisheries was rated lower than for troll, handline, shortline, and kaka line fisheries in the status review report (Oleson *et al.,* 2010). The BRT did not consider the estimates of recreational fishing for pelagic species ranging from 15–25 million lbs (7–11 million kg) per year for 2003–2008 provided by the Marine Recreational Fisheries Survey (WPRFMC, 2010). Although the methods used to extrapolate statewide totals from the survey are being overhauled following a critical review, and although it is difficult to know what proportion of surveyed fishers' catch may be marketed surreptitiously, the extrapolated Hawaii recreational fisheries catch totals are many times higher than the reported commercial catch totals for the troll, handline, shortline, and kaka line fisheries considered by the BRT (Oleson *et al.,* 2010). Reported commercial catches may be under-reported, and some may be included in the recreational estimates, but if the nominal recreational estimates from the survey are even somewhat representative, then the recreational sector would represent at least as much competition for fish as the reported commercial troll handline, shortline, and kaka line fisheries. Thus, we believe competition with recreational fisheries should be rated as a medium level of current and future risk to Hawaiian insular false killer whales.

Natural or Anthropogenic Contaminants

The threat of the accumulation of natural or anthropogenic contaminants, such as exposure to persistent organic pollutants (POPs), heavy metals (*e.g.,* mercury, cadmium, lead), chemicals of emerging concern (industrial chemicals, current-use pesticides, pharmaceuticals, and personal care products), plastics, and oil, is rated as a medium level of current and future risk to Hawaiian insular false killer whales.

Many toxic chemical compounds and heavy metals degrade slowly in the environment and thus tend to biomagnify in marine ecosystems, especially in lipid-rich tissues of top-level predators (McFarland and Clarke, 1989). In marine mammals, exposure to high levels of POPs has been associated with immunosuppression (Ross *et al.,* 1995; Beckmen *et al.,* 2003), reproductive dysfunction (Helle *et al.,* 1976; Subramanian *et al.,* 1987), and morphological changes (Zakharov and Yablokov, 1990; Sonne *et al.,* 2004). Heavy metals have also been shown to accumulate in marine mammals and, in some cases, may cause deleterious biological effects, including alterations in steroid synthesis and liver damage (O'Hara and O'Shea, 2001). Many of these chemicals have been banned in the U.S. from production and use due to their toxic effects on wildlife and laboratory animals. As a result, the levels of these compounds in marine environmental samples in the U.S. have declined since the bans, including fish from Hawaii (Brasher and Wolff, 2004). However, some of these chemicals continue to be used in other regions of the world and can be transported to other areas via atmospheric transport or ocean currents (Fiedler, 2008; van den Berg, 2009). Even though these contaminants have been banned in the U.S. for more than 25 years, they continue to be measured in marine animals from Hawaii (Hunter, 1995; Kimbrough *et al.,* 2008; Ylitalo *et al.,* 2009).

Independently the threat of bioaccumulation of chemicals is a cause for concern, but when coupled with the threat of reduced prey quantities or qualities also affected by the contaminants, the risk associated with exposure to lipophilic POPs may increase. Thus, animals that are nutritionally challenged could be at higher risk as a result of increased mobilization of these compounds to other organs where damage could result. It is suspected that body condition can influence POP burdens in the blubber of marine mammals even though the dynamics of blubber POPs during changes in physiological conditions of these animals are complex and poorly understood (Aguilar *et al.,* 1999). Marine mammals can lose weight during various stages of their life cycles due to different stresses such as disease, migration, or reduced prey abundance. The mobilization of lipids associated with weight loss could result in redistribution of POPs to other tissues, or to retention of these compounds in blubber that would result in a concentration increase (Aguilar *et al.,* 1999). Thus, animals that are nutritionally challenged could be at higher risk as a result of increased mobilization of these compounds to other organs where damage could result. And although levels of POPs have decreased since their bans in the U.S., they continue to be measured in biota from the main Hawaiian Islands, including Hawaiian insular false killer whales. Recently, summed polychlorinated biphenyls (PCBs) measured in some of these whales were above a marine mammal threshold value (17,000 ng/g, lipid) associated with deleterious health effects (*e.g.,* thyroid dysfunction, immunosuppression) (Kannan *et al.,* 2009).

With human population growth and increasing commercial development, there has been an increased demand for industrial chemicals, current-use pesticides, pharmaceuticals, and personal care products. Many of these chemicals of emerging concern (CECs) are used in high volumes in various applications and, as a result, are capable of entering marine environments via

various routes. Currently, it is unclear what risk CECs pose to Hawaiian insular false killer whales or their habitat as little is known about the current occurrence, fate, and transport of CECs in the main Hawaiian Island region.

Marine litter and debris has become an increasing problem in the oceans, with plastic debris being the most abundant (Derraik, 2002). Although marine litter has been identified by the BRT as a threat related to habitat, it could also be identified as a threat under disease as well as other manmade factors. For direct threats to false killer whales, ingestion of plastics can obstruct or damage the esophagus and the digestive or intestinal tracts, block gastric enzymatic secretions, and have other effects that could reduce an animal's ability to feed and ultimately its overall fitness (Derraik, 2002). Ingestion of chemical light sticks used on swordfish longlines in Hawaii may pose an additional risk of chemical contamination. There is one documented case of ingestion of a net fragment by a false killer whale on the British Columbia coast (R. Baird, pers. comm., Cascadia Research Collective). For threats related to disease, risks include exposure to environmental contaminants contained in plastic resins. For threats related to other manmade factors, risks linked to plastic debris include entanglement, and introduction of alien species (Derraik, 2002; Rios *et al.,* 2007). These threats are not only possible for false killer whales, but for their prey as well.

Oil is made up of thousands of different chemicals and some of the most toxic of these petroleum-related compounds are the polycyclic aromatic hydrocarbons (PAHs). These compounds are prevalent in coastal waters, especially in urban embayments, and have been shown to alter normal physiological function in marine biota (Varanasi *et al.,* 1989; Stein *et al.,* 1993). Concerns have been raised over the effects of exposure to PAHs, alone or in combination with other toxic contaminants, in marine mammals because of the worldwide use of fossil fuels (Geraci and Aubin, 1990) and the occurrence of oil spills in areas that support marine mammal populations. Marine mammals can be exposed to oil by various routes, such as inhalation of volatile PAHs, direct ingestion of oil, and consumption of contaminated prey (O'Hara and O'Shea, 2001). Vertebrates, such as fishes and cetaceans, rapidly take up PAHs present in the environment and quickly metabolize these compounds. The PAH metabolites are then concentrated in the bile for elimination (Varanasi *et al.,* 1989). However, if a marine mammal has been exposed to a large amount of petroleum (*e.g.,* after an oil spill) and the liver enzyme system has been overwhelmed such that it cannot efficiently metabolize the PAHs, there is the possibility that petroleum-related PAHs could pose a risk. After the *Exxon Valdez* oil spill in March 1989, several killer whales were observed to transit through oiled waters (Dahlheim and Matkin, 1994) in the region and 14 killer whales (33 percent) from the local AB pod disappeared between 1989 and 1991. There was no clear evidence to link the oil exposure to the disappearance (and presumably deaths) of these whales, but it is plausible (Matkin *et al.,* 2008). Oil spills have been reported in the main Hawaiian Islands. In May 1996, for example, an oil spill occurred in Pearl Harbor after a pipeline broke and spilled more than 25,000 gallons of oil (Honolulu Star Bulletin, 1996). The impact of this spill and other main Hawaiian Island oil spills (*e.g.,* Barbers Point in 2009) on Hawaiian insular false killer whales and their prey is not known.

B: Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

As previously mentioned, this factor may have contributed to the historical decline of Hawaiian insular false killer whales with live-capture operations occurring prior to 1990. However, there are no current and/or future threats identified for this listing factor. Interactions with fisheries are discussed under Factor D (below).

C: Disease or Predation

Environmental Contaminants or Environmental Changes

Disease and predation play a role in the success of any population, but small populations in particular can be extremely susceptible as this threat can have a disproportionate effect on small populations. Anthropogenic influences can potentially increase the risk of exposure to these pressures by lowering animals' immune system defenses, which may have detrimental effects to the population as a whole and result in mortality and reduced reproductive potential. Disease-related impacts of individual threats, such as exposure to environmental contaminants, parasites, pathogens, and harmful algal blooms pose a medium threat to Hawaiian insular false killer whales.

Although little is known about the occurrence of parasites in Hawaiian insular false killer whales, Hawaiian monk seals from the main Hawaiian Islands were exposed to protozoan and coccidian parasites. Discharge of raw or partially treated sewage effluent and contaminated freshwater runoff into marine coastal waters can increase the risk of pathogen transmission to animals that reside in nearshore areas, such as Hawaiian insular false killer whales. Additionally, insular false killer whales may be at an increased risk for exposure to biotoxins produced during harmful algal blooms (HAB) potentially caused from eutrophication and rising ocean temperature. Several Hawaiian monk seals died in the late 1970s and these deaths were attributed to exposure to the marine biotoxins ciguatoxin and maitotoxin from a HAB. HABs appear to be increasing in frequency and geographical distribution worldwide and pose a future threat to Hawaiian insular false killer whales.

Short and Long-term Climate Change

The threats from climate change are separated into two parts: In this section as it relates to an increase in disease vectors, and in Factor E as it relates to changes in sea level, ocean temperature, ocean pH, and expansion of low-productivity areas. Climate change poses a medium threat to Hawaiian insular false killer whales due to the possible increase in disease vectors. Increased water temperature could change the composition of microbial communities in the main Hawaiian Islands. This may create an environment that could support new microbes not usually found in the region, thus exposing Hawaiian insular false killer whales to novel pathogens.

D: The Inadequacy of Existing Regulatory Mechanisms

The Lack of Reporting/Observing of Nearshore Fisheries Interactions

As described previously, a high rate of fin disfigurements (Baird and Gorgone, 2005) and other observations suggest interactions between fisheries and Hawaiian insular false killer whales. The continued lack of reporting/observing of nearshore fisheries interactions with insular false killer whales is rated by the BRT as a medium level of current and future risk to Hawaiian insular false killer whales. The State of Hawaii does not monitor bycatch of marine mammals in any of its state fisheries. The federally-managed Hawaii-based shallow-set longline fishery maintains approximately 100 percent observer coverage, and the federally-managed Hawaii-based deep-set longline fishery maintains approximately 20 percent observer coverage. Troll, handline, pole-and-line,

shortline, and kaka line fisheries do not have observer coverage, whether they are state or federal. Even if all state and federal fisheries maintained 100 percent observer coverage, that would likely only eliminate possible intentional harm by fishermen; it would not necessarily reduce or eliminate incidental hooking or entanglement. Although each of these fisheries is required by law under the MMPA to report interactions with marine mammals, the low number of reports strongly suggests that interactions are occurring and are not being reported. However, there is also no way to enforce self-reporting.

The Longline Prohibited Area Not Reversing the Decline of the DPS

In addition to what the BRT identified as an inadequate regulatory mechanism as described above, we considered whether any other regulatory mechanisms directly or indirectly address what are deemed as the highest threats to the insular DPS: Small population size, and hooking, entanglement, or intentional harm by fishermen. Small population size is considered a high risk threat because of reduced genetic diversity, inbreeding depression, and other Allee effects, but these are inherent biological characteristics of the current population that cannot be altered by existing regulatory mechanisms. No legal protection is in place, nor could one be implemented, to reduce the threats of small population size.

Regarding addressing the high threat of hooking and entanglement, a regulatory mechanism exists to partially address this threat from commercial longline fisheries. The longline prohibited area around the main Hawaiian Islands was implemented in 1992 through Amendment 5 to the Western Pacific Pelagic Fisheries Management Plan to alleviate gear conflicts between longline fishermen versus handline and troll fishermen, charter boat operators, and recreational fishermen. Although characterized as a "25–75 nm" longline exclusion boundary, the boundary was not set at a precise distance from shore and in fact varies from 42.4 nm (78.6 km) to 104.4 nm (193.4 km) from shore from February through September (median distance 61.1 nm, 113.1 km). For the remaining four months of the year (October through January) approximately two-thirds (66.3 percent) of the boundary contracts towards the islands, such that the boundary ranges from 24.3 nm (45.1 km) to 104 nm from shore (median distance 48.7 nmi, 90.2 km) (Baird, 2009).

Longline fishing has thus been effectively excluded from the insular DPS's entire core range (<40 km). This prohibited area thus indirectly benefits insular false killer whales by decreasing the amount of longline fishing in insular false killer whale habitat. However, the decline of the insular DPS has occurred mostly since then, in spite of the prohibited area. In addition, and discussed further in the Protective Efforts section, the prohibited area is being proposed for complete closure to longline fishing out to the current February–September boundary, year-round. If implemented, this would exclude longline fishing from most of the geographic range of the insular stock as it is defined in the draft 2010 SAR, including most of the pelagic/insular stock overlap zone (Carretta *et al.,* 2010). Nevertheless, although the longline prohibited area and the proposed expansion, which is anticipated to protect the pelagic false killer whale, could also benefit the insular DPS by reducing incidental serious injury and mortality, there is no evidence that existence of the prohibited area is reversing, or will reverse, the decline of the DPS. Thus, this regulatory mechanism alone is inadequate to protect the insular DPS of Hawaiian false killer whales from further decline and is ranked a high risk threat.

In summary, following a review of the best available information, the greatest threats to the species are still insufficiently addressed. This is either because the efforts can't or don't address all of the threats, or because enforcement of regulatory mechanisms is limited. Protective efforts from regulatory mechanisms, such as the MMPA, Clean Water Act, etc., are discussed in a later section. However, given the size of the U.S. EEZ surrounding the main Hawaiian Islands, adequate enforcement of laws in such a vast area is difficult. Therefore, we find that existing regulations are inadequate to protect the species from further declines throughout all of its range, and thus the inadequacy of existing regulatory mechanisms is itself a high threat to the Hawaiian insular false killer whale.

E: Other Natural or Manmade Factors Affecting Its Continued Existence

Short and Long-term Climate Change

Climate change poses a medium threat to Hawaiian insular false killer whales and could be manifested in many ways, including changes in sea level, ocean temperature, ocean pH, and expansion of low-productivity areas (*i.e.,* "dead zones"). Sea level change, however, is unlikely to affect false killer whales. In contrast, ocean temperature plays a key role in determining habitat for many species, and changes in the parameter would likely have a strong impact on false killer whales. Many prey species and competitor species have ranges closely linked to ocean temperature characteristics, including isotherms and gradients. Changes in temperature regimes could have severe impacts on pelagic ecosystems, in general. For false killer whales, specifically, many of their forage species are migratory and/or mobile (*i.e.,* few benthic species) and could alter their distribution. The movement of other large predatory marine species' ranges is likely to change, which could impact competition with false killer whales. However, a much better understanding is needed of prey preferences and predator-prey dynamics before speculating on the possible impacts of warming or cooling trends on insular false killer whales. Temperature may also have a direct linkage to productivity and growth rate, but again it remains difficult to establish directionality of net effect.

Climate change related ocean acidification could alter the productivity and composition of the main Hawaiian Island ecosystem. Increases in low-productivity areas (*e.g.,* Polovina *et al.,* 2008; Brewer and Peltzer, 2009) would probably have the strongest impacts on false killer whales. Lower productivity resulting in decreases in forage abundance would have a negative impact unless mobile forage species were concentrated into smaller regions that could then be exploited more easily. Again, presumed effects are large but net directionality is difficult to predict. One of the largest unknowns is whether the insular population would remain in the same location if conditions became less favorable.

Interactions With Commercial Longline Fisheries

Interactions with commercial longline fisheries was rated as a high level of current and/or future risk to Hawaiian insular false killer whales. The BRT concluded that the intense and increased fishing activity within the known range of insular false killer whales since the 1970s suggests a high risk of fisheries interactions, even though the extent of interactions with almost all of the fisheries is unquantified or unknown. The only fisheries occurring within the range of the insular DPS for which there are recent quantitative estimates of hooking

and entanglement of false killer whales are the Hawaii-based federal commercial longline fisheries. These fisheries have been largely excluded from the known range of Hawaiian insular false killer whales since the early 1990s, suggesting the current and future risk from longlining (assuming the current restrictions remain in place), although high, is somewhat lower compared to the historic risk. It is likely that unobserved interactions with these longline fisheries represented an even higher risk up until the early 1990s.

Beginning in 1994, onboard observers in Hawaii-based longline fisheries have systematically recorded information on interactions with protected species, including marine mammals. Observer coverage initially was about 4 percent for all longline effort combined, but increased beginning in 1999. Since 2004, observer coverage has been 100 percent for shallow-set trips and 20 percent for deep-set trips. Both fisheries operate on the high seas and within the U.S. EEZ. False killer whales have been the most frequently hooked or entangled cetacean, primarily during tuna-targeting longline sets (Forney and Kobayashi, 2007; McCracken and Forney, 2010). Average mortality and serious injury, based on 31 observed interactions between 1994 and 2008, has been about 13 (CV = 0.37) false killer whales per year (calculated from estimates in Forney and Kobayashi, 2007; McCracken and Forney, 2010). Eleven additional false killer whales were observed injured or killed during 2009 throughout the range of the fisheries.

Most of the observed interactions with false killer whales in the Hawaii-based longline fisheries occurred more than 140 km from the Hawaiian Islands, beyond the known range of insular false killer whales; however, a few interactions occurred closer to the Hawaiian Islands and may have involved insular animals. Following a review of insular false killer whale movements and other factors, the 2004 through 2008 takes have been prorated to insular versus pelagic animals based on geographic location (McCracken and Forney, 2010). Given current observer coverage levels, only approximately 20 percent of all takes are observed and have known locations. Annually during this 5-year period, one false killer whale was determined to have a non-serious injury within the 140 km extended range and an average of 0.60 insular false killer whales were estimated to have been killed or seriously injured (McCracken and Forney, 2010). This estimate assumes that the probability of taking Hawaiian insular versus pelagic false killer whales is proportional to the estimated density of each population in the area where the takes occurred (NMFS, 2005). There are presently no data available to evaluate this assumption or whether there are other potential differences that might cause the two populations to behave differently with respect to longline gear. Historically, more frequent takes may have occurred when there was much greater overlap between insular false killer whales and longline fisheries.

Interactions With Troll, Handline, Shortline, and Kaka Line Fisheries

A high level of current and future risk was found by the BRT for these fisheries. This is based on the large scale and distribution of the troll and handline fisheries, and on anecdotal reports of interactions with cetaceans, although interactions specific to false killer whales are known only for the troll fishery. The troll fishery has by far the greatest participation and effort in fishing days of any fishery within the known range of insular false killer whales, followed by the handline fishery, with the kaka line and shortline fisheries a distant third and fourth. The kaka line and shortline fishing methods have been implicated as a threat based on the similarity of these fishing gears and methods to longline fishing. Potential threats associated with these activities include hooking or entanglement of false killer whales in gear, gear ingestion, direct shooting or injury of false killer whales by fishermen, and competition with fisheries for prey species, such as tuna and billfish.

False killer whales have been documented taking catch or bait during non-longline commercial and recreational fishing operations around the Hawaiian Islands since at least the 1940s (Shallenberger, 1981; Nitta and Henderson, 1993), but little information is available to document the effects of these interactions on false killer whales. Animals may become hooked or entangled, and in some cases, fishermen have reported shooting at false killer whales and other dolphins or using explosives or chemicals to avoid losing catch or bait (Schlais, 1985; Nitta and Henderson, 1993; TEC, 2009). Based on photographs of Hawaiian insular false killer whales, Baird and Gorgone (2005) documented a high rate of dorsal fin disfigurements that were consistent with injuries from unidentified fishing line (3 out of 80 individuals or 3.75 percent, compared to 0–0.85 percent for other studied cetacean populations). Interactions with false killer whales have been reported for troll fisheries (Shallenberger, 1981; Zimmerman, 1983; Nitta and Henderson, 1993), and possibly shortline or kaka line fisheries (anecdotal reports of "blackfish" interactions that may have been false killer whales; cited in Baird, 2010). Some of these recreational fisheries in Hawaii target the same species as commercial fisheries (*e.g.,* tuna, billfish) and use the same or similar gear, and might also be expected to experience interactions with insular false killer whales.

Although there are only a few published reports of interactions between false killer whales and troll fisheries, anecdotal evidence indicates that false killer whales have been associated with troll fisheries for decades, often taking catch or bait from lines. It is unknown whether animals get hooked or entangled in troll gear (as they do in longline gear). Fishermen have reported shooting at animals or taking other measures to protect their bait, catch, or gear (Shallenberger, 1981), although it has been illegal to intentionally kill or injure cetaceans since the MMPA was passed in 1972.

Anecdotal reports indicate that interactions between handline fisheries and cetaceans have been common since at least the 1970s. Bottlenose dolphins or rough-toothed dolphins (*Steno bredanensis*) have generally been implicated rather than false killer whales. No information is available to determine whether handline fishermen shoot at cetaceans or take other harmful measures to try to prevent the loss of bait or catch, as has been reported for the other fisheries (Shallenberger, 1981; Zimmerman, 1983; Nitta and Henderson, 1993). No interactions with false killer whales have been reported to NMFS under the Marine Mammal Authorization Program (required for fisheries listed on the List of Fisheries (LOF)) even though the troll and handline fisheries are listed as Category III fisheries. There is currently no independent observer reporting system. Self-reporting is the only method currently available to document potential marine mammal interactions in these fisheries. The shortline fishery was added to the LOF in 2010 by analogy as a Category II fishery and the kaka line fishery is proposed to be added to the 2011 LOF as a Category III fishery. No interactions between the shortline or kaka line fishery and false killer whales have been reported to NMFS, and currently there is no independent observer program for monitoring bycatch in either the shortline or the kaka line fishery. There are anecdotal reports of interactions with cetaceans off the north side of

Maui, but the species and extent of interactions are unknown (74 FR 58879, Nov. 16, 2009). Based on the similarity of these fisheries to longline fisheries (with respect to gear type and target species), it is likely that false killer whales are involved; however, the nature and extent of any such interactions are unknown. Although there is no evidence to suggest a disproportionate threat from the shortline and kaka line fisheries compared with other, much larger fisheries operating within the known range of insular false killer whales, the 2008 increase in catch suggests that the shortline fishery could expand rapidly.

Small Population Size

Reduced genetic diversity, inbreeding depression, and other Allee effects associated with small population size represent a high risk to current and future Hawaiian insular false killer whales. The current estimated number of breeding adults (46 individuals) is so small that inbreeding depression could have increasingly negative effects on population growth rate and other traits, including social factors (such as reduced efficiency in group foraging and potential loss of knowledge needed to deal with unusual environmental events), may further compromise the ability of Hawaiian insular false killer whales to recover to healthy levels.

The processes that cause small populations to have a greater risk of extinction include genetic and behavioral problems, as well as chance processes like demographic and environmental stochasticity (Shaffer, 1981; Gilpin and Soule, 1986; Goodman, 1987; Simberloff, 1988; Lande, 1993). The decrease in per capita population growth as population size declines is often referred to as the "Allee effect" or "depensation" (see references in Oleson *et al.,* 2010) . In essence, as the number of individuals decreases there are costs from a lack of predator saturation, impaired anti-predator vigilance or defence, a breakdown of cooperative feeding, an increased possibility of inbreeding depression or other genetic issues, decreased birth rates as a result of not finding mates, or a combination of these effects. The Allee effect increases risk to small populations directly by contributing to the risk of extinction, and indirectly by decreasing the rate of recovery of exploited populations and, therefore, maintaining populations at a smaller size where extinction risk is higher for a variety of reasons (Dennis, 1989; Stephens and Sutherland, 1999).

In addition, social odontocetes (such as false killer whales) may be particularly vulnerable over and beyond the numerical loss of individuals to the population (Wade and Reeves, 2010). Some of these effects may act in a similar fashion to Allee effects or have a more pronounced effect at low population sizes. Survival and reproductive success may depend on such things as social cohesion and social organization, mutual aid in defence against predators, and possible alloparental care such as "babysitting" and communal nursing, sufficient opportunities for transfer of "knowledge" (learned behavior) from one generation to the next, and leadership by older individuals that know where and when to find scarce prey resources and how to avoid high-risk circumstances (*e.g.,* ice entrapment, stranding, predation).

False killer whales share several life history traits with killer whales and belugas that make them prone to problems associated with small population size: A low intrinsic growth rate (a consequence of late maturity and a low birth rate), strong social structure demonstrated through close associations of individuals over long time periods, the potential for high adult survival enabled by the intergenerational cultural transmission of certain types of awareness or specialized behavior, and a low effective population size compared to abundance. This last feature leads to low genetic diversity, which increases the probability that inbreeding depression will occur at a higher level of total abundance than is the case for many other species. Franklin (1980) found that inbreeding depression increases substantially when the number of reproductive animals becomes fewer than 50. The adult population of Hawaiian insular false killer whales is likely approaching the level at which the effects of inbreeding depression become a factor in determining whether the population is able to maintain itself or increase.

Anthropogenic Noise

Anthropogenic noise, caused from sonar and seismic exploration from sources including military, oceanographic, and fishing sonar, is rated as a medium level of current and future risk to Hawaiian insular false killer whales. Odontocete cetaceans, including false killer whales, have a highly evolved acoustic sensory system. False killer whales rely heavily on their acoustic sensory capabilities for navigation, foraging, and communicating with conspecifics. Potential and measured impacts of anthropogenic noise on cetaceans have been reviewed by a number of authors (Richardson *et al.,* 1995; Nowacek *et al.,* 2004; Hildebrand, 2005; Weilgart, 2007). No specific studies or observations of the impacts of noise on wild false killer whales are available. However, intense anthropogenic sounds have the potential to interfere with the acoustic sensory system of false killer whales by causing permanent or temporary hearing loss, thereby masking the reception of navigation, foraging, or communication signals, or through disruption of reproductive, foraging, or social behavior. Experiments on a captive false killer whale have revealed that it is possible to disrupt echolocation efficiency in this species with the level of disruption related to the specific frequency content of the noise source as well as the magnitude and duration of the exposure (Mooney *et al.,* 2009).

In recent years there has been increasing concern that active sonar and seismic operations are harmful to beaked whales (Cox *et al.,* 2006) and other cetaceans, including melon-headed whales (*Peponocephala electra*) (Southall *et al.,* 2006), and pygmy killer whales (*Feresa attenuata*) (Wang and Yang, 2006). The use of active sonar from military vessels has been implicated in mass strandings of beaked whales and delphinids. A 2004 mass-stranding of melon-headed whales in Hanalei Bay, Kauai, occurred during a multi-national sonar training event around Hawaii (Southall *et al.,* 2006). Although data limitations preclude a conclusive finding regarding the role of Navy sonar in triggering this event, sonar transmissions were considered a plausible, if not likely, cause of the mass stranding. False killer whales have been herded using loud sounds in drive fisheries off Japan (Kishiro and Kasuya, 1993; Brownell *et al.,* 2008), suggesting that high-intensity noise can affect the behavior of false killer whales in Hawaiian waters. The U.S. Navy's Hawaii Range Complex surrounds the main Hawaiian Islands and is regularly used for training exercises that broadcast high-intensity, mid-frequency sonar sounds (U.S. Navy, 2008). NMFS regularly reviews these exercises and the potential for exposure of mid-frequency sonar and may issue a Letter of Authorization (LOA) allowing incidental take (MMPA; 16 USC 1362(18)(B)). In 2010, NMFS authorized Level B harassment (*i.e.,* having the potential to disturb) for 51 false killer whales; no Level A harassment (*i.e.,* having the potential to injure) or mortality was authorized for false killer whales.

Population Viability Analysis

In addition to the qualitative analysis of possible threats to insular false killer whales, the BRT also conducted a quantitative analysis of extinction risk using a Population Viability Analysis (PVA), a model used to quantify extinction risk by integrating and analyzing the various risks a population may face. This PVA was conducted to evaluate the probability of actual and near extinction, with "near extinction" defined as fewer than 20 animals within 75 years, or three false killer whale generations. The PVA took into account measured, estimated, and inferred information on basic life history, population size and trends, as well as varying impacts of catastrophes, environmental stochasticity, and Allee effects. A variety of alternative scenarios were evaluated, and most models indicated a probability of greater than 50 percent likelihood of the DPS declining to fewer than 20 individuals within 75 years. Even though the evaluation of individual threats to the insular population was limited to 60 years duration (the approximate lifespan of a false killer whale), the PVA results modeled probability of reaching near extinction by 50 years (2 generations), 75 years (3 generations), and 125 years (5 generations). Although 60 years wasn't specifically modeled, the results from reaching near extinction by 50 years still showed a high risk of extinction for Hawaiian insular false killer whales. The PVA results are described in greater detail in Appendix B of the status review report (Oleson *et al.,* 2010).

Extinction Risk Assessment Conclusion by the BRT

Given the results of the PVA analysis and the possible threats to the insular population, the BRT agreed by consensus that Hawaiian insular false killer whales are at a high risk of extinction due to either small-scale incremental impacts over time (*e.g.,* reduced fecundity or survivorship due to direct or indirect effects of fisheries, and small population size) or a single catastrophic event (*e.g.,* disease outbreak). Uncertainty as to the causes of the recent decline, the current threats, and current viability of the population increases concern for this group of whales.

Summary of Findings

After considering all elements in the status review report and, in particular, the PVA and the five ESA section 4(a)(1) factors, we have determined that the Hawaiian insular false killer whale DPS is in danger of extinction throughout all of its range. Overall, most PVA models indicated a probability of greater than 50 percent likelihood of the DPS declining to fewer than 20 individuals within 75 years, which would result in functional extinction beyond the point where recovery is possible. The risk table provided in the status review report identifies small population size, and hooking, entanglement, or intentional harm by fishermen as the two threats that pose the most significant risk to Hawaiian insular false killer whales, while a number of other threats potentially pose a medium and high risk to this population. The decline in abundance of Hawaiian insular false killer whales likely resulted from a number of factors acting synergistically. This description of risk and the level of concern for Hawaiian insular false killer whales are similar to those described for other species of social odontocetes listed as endangered under the ESA (*e.g.,* Southern Resident killer whales and Cook Inlet beluga whales).

Protective Efforts

Section 4(b)(1)(A) of the ESA requires consideration of efforts being made to protect a species that has been petitioned for listing. Accordingly, we assessed conservation measures being taken to protect the Hawaiian insular false killer whale DPS to determine whether they ameliorate this species' extinction risk (50 CFR 424.11(f)). In judging the efficacy of conservation efforts, identified in conservation agreements, conservation plans, management plans, or similar documents, that have yet to be implemented or to show effectiveness, the agency considers the following: the substantive, protective, and conservation elements of such efforts; the degree of certainty that such efforts will reliably be implemented; the degree of certainty that such efforts will be effective in furthering the conservation of the species; and the presence of monitoring provisions that track the effectiveness of recovery efforts, and that inform iterative refinements to management as information is accrued (Policy for Evaluating Conservation Efforts (PECE); 68 FR 15100).

The conservation or protective efforts that met the aforementioned criteria and are currently in place include the following: (1) Take prohibitions under the MMPA; (2) authorization and control of incidental take under the MMPA; (3) protection under other statutory authorities (i.e., the Clean Water Act, MARPOL); (4) the longline prohibited area; (5) Watchable Wildlife Viewing Guidelines; and (6) active research programs. The conservation or protective efforts that also met the aforementioned criteria but are not yet in place include the following: (7) The draft False Killer Whale Take Reduction Plan; and (8) possible expansion of the Hawaiian Islands Humpback Whale National Marine Sanctuary. Each of these efforts is further described below.

(1) Take Prohibitions Under the MMPA

Various sections of the MMPA provide for protection of false killer whales. A goal of the MMPA is to maintain marine mammal species or stocks at or above their optimum sustainable population level. The MMPA established a moratorium on the taking of marine mammals by any person or vessel subject to U.S. jurisdiction. It defines "take" to mean "to hunt, harass, capture, or kill" any marine mammal or attempt to do so. Exceptions to the moratorium can be made through permitting actions for take incidental to commercial fishing and other non-fishing activities; for scientific research; and for public display at licensed institutions such as aquaria and science centers.

(2) Authorization and Control of Incidental Take Under the MMPA

In 1981, Congress amended the MMPA to provide for incidental take authorizations for maritime activities, provided NMFS found the takings would be of small numbers and have no more than a "negligible impact" on those marine mammal species not listed as depleted under the MMPA (*i.e.,* listed under the ESA or below the optimum sustainable population). These incidental take authorizations, also known as Letters of Authorization or LOAs, have requirements for monitoring and reporting, and when appropriate include mitigation measures. Incidental take from the use of sonar by the U.S. Navy (Navy) is regulated under the MMPA. In 2007, the Navy requested a 5-year LOA for the incidental harassment of marine mammals incidental to the training events within the Hawaii Range Complex (HRC) for the period July 2008 through July 2013. The LOA was sought since the training events may expose certain marine mammals that may be present within the HRC to sound from hull-mounted mid-frequency active tactical sonar or to pressures from underwater detonations. In 2010, NMFS authorized Level B harassment for 51 false killer whales; no Level A harassment or mortality was authorized for false killer whales. For military readiness activities, Level A harassment is defined in the MMPA as "any act that injures or has the

significant potential to injure a marine mammal or marine mammal stock in the wild", and Level B harassment is defined as "any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered" (16 U.S.C. 1362(18)(B)).

The MMPA has various requirements related to take of marine mammals incidental to commercial fisheries. First, section 118 requires NMFS to place all U.S. commercial fisheries into one of three categories in the LOF based on the level of incidental serious injury and mortality of marine mammals occurring in each fishery. The classification of a fishery on the LOF determines whether participants in that fishery may be required to comply with certain other provisions of the MMPA. Owners of vessels or gear engaging in a Category I or II fishery are required to register with NMFS and obtain a marine mammal authorization under the Marine Mammal Authorization Program to lawfully take a non-endangered and non-threatened marine mammal incidental to commercial fishing. Participants in Category I or II fisheries are also required to carry an observer onboard if requested, and comply with any applicable take reduction plans. Participants in Category I, II, or III fisheries must report to NMFS all incidental injuries and mortalities of marine mammals that occur during commercial fishing operations.

The Hawaii-based deep-set longline fishery is classified as a Category I (frequent incidental mortality and serious injury) and has 20 percent observer coverage; the Hawaii-based shallow-set longline fishery and the Hawaii shortline fishery are both classified as Category II fisheries (occasional incidental mortality and serious injury) and have 100 percent and 0 percent observer coverage, respectively. The troll and handline fisheries are all classified as Category III fisheries (remote likelihood of/no known incidental mortality and serious injury) and the kaka line fishery is proposed to be listed as Category III; each has 0 percent observer coverage. Compliance with reporting requirements is likely low and reports provide only a minimum estimate of the number of interactions. However, without observer programs for most of the fisheries, self-reporting of incidental take is the only option currently available to document interactions.

The insular population has been designated as the Hawaii insular stock for the purposes of management under the MMPA. As of the draft 2010 SAR (Carretta *et al.,* 2010), the Hawaii insular stock is not listed as "threatened" or "endangered" under the ESA, nor is it considered "depleted" under the MMPA. In addition, the estimated average annual human-caused mortality and serious injury for this stock (0.60 animals per year) is slightly less than the potential biological removal (PBR) (0.61); therefore, the insular false killer whale stock is not considered "strategic" under the MMPA. Since the insular stock is neither "depleted" nor "strategic" under the MMPA, no conservation plan to foster recovery has been developed.

(3) Protection Under Other Statutory Authorities (i.e., the Clean Water Act, MARPOL)

Other statutory authorities, such as the Federal Clean Water Act (CWA) and MARPOL (International Convention for the Prevention of Pollution from Ships), offer some protection to Hawaiian insular false killer whales. Federal programs carried out under the CWA help to ensure that water quality is maintained or improved. Section 402 (discharge of pollutants into water bodies) regulates activities that might degrade false killer whale habitat or prey. Although programs carried out under the CWA are well funded and enforcement of this law occurs, albeit limited, it is unlikely that programs are sufficient to fully protect false killer whale habitat or prey. MARPOL was designed to minimize pollution of the seas, including dumping of debris and plastics, oil, and exhaust pollution. All ships flagged under countries that are signatories to MARPOL are subject to its requirements. Although this is an international convention with a large number of signatories, the large expanse of the oceans make enforcement of illegal marine pollution difficult to enforce.

(4) The Longline Prohibited Area

The Main Hawaiian Islands Longline Prohibited Area was implemented in 1992 through Amendment 5 to the Western Pacific Pelagic Fisheries Management Plan to alleviate gear conflicts between Hawaii-based longline fishermen versus handline and troll fishermen, charter boat operators, and recreational fishermen. The prohibited area varies from 25–75 nm offshore seasonally and excludes longline fishing in much of the range of the Hawaiian insular false killer whale for 8 months of the year. Since implementation of the prohibited area, however, decline of the insular DPS has still occurred.

(5) Watchable Wildlife Viewing Guidelines

Watchable Wildlife Viewing Guidelines exist for other species of marine mammals in Hawaiian waters, including false killer whales. The recommended distance for observation is 150 ft when on the beaches or on the water and 1,000 ft when operating an aircraft. These viewing guidelines, however, are only recommendations and are not legally enforceable.

(6) Active Research Programs

Finally, there are a number of active research programs that are currently identifying Hawaiian false killer whale data gaps and improving our understanding of possible risk factors. For example, research priorities include a need for better understanding of movements, stock structure, population genetics, contaminant levels, etc. Valuable data is being collected, however, data collection and analysis can take a considerable amount of time.

(7) Draft False Killer Whale Take Reduction Plan

The Hawaii pelagic stock of false killer whales was designated as a "strategic stock" in 2000, but is not considered "depleted" under the MMPA. Current levels of human-caused mortality and serious injury (7.3 animals per year) exceed the stocks PBR level (2.5). In 2009 NMFS convened a false killer whale take reduction team to develop a Take Reduction Plan pursuant to section 118 of the MMPA. The take reduction team submitted its consensus recommendations (draft Take Reduction Plan, or Plan) to NMFS on July 19, 2010. NMFS is currently evaluating the Plan. NMFS will then issue a proposed rule and implementing regulations based on the team's recommendations, gather public comments, and publish a final rule and implementing regulations in the **Federal Register**.

The immediate goal of the Plan is to reduce, within 6 months of its implementation, incidental mortality and serious injury occurring within the U.S. EEZ surrounding the Hawaiian Islands of the Hawaii pelagic stock of false killer whales in the Hawaii-based longline fisheries to less than the stock's PBR level of 2.5 false killer whales per year. The long-term goal of the Plan is to reduce, within 5 years of its implementation, the incidental mortality and serious injury of the Hawaii pelagic, Hawaii insular, and Palmyra Atoll stocks of false killer whales to insignificant levels

approaching a zero mortality and serious injury rate.

Although there are other U.S. fisheries that may have incidental mortality and serious injury of false killer whales, such as commercial and recreational trolling and other hook-and-line fisheries, the Plan does not include recommendations for reducing bycatch in these other fisheries. Instead, the Plan focuses on the fisheries that are known to pose significant risk to the region's stocks of false killer whales.

The Hawaii insular stock, which is being proposed as the insular DPS, is known to interact or geographically (partially) overlap with the Hawaii-based longline fisheries. The draft Take Reduction Plan contains a recommendation for the year-round closure of a portion of the Longline Fishing Prohibited Area that lies to the north of the main Hawaiian Islands and is currently open to longline fishing for four months of the year. This closure of the northern Prohibited Area, if implemented, would exclude longline fishing from most of the geographic range of the Hawaii insular stock as it is defined in the draft 2010 SAR (Carretta *et al.,* 2010). It is anticipated that this proposed closure would therefore reduce the incidental serious injury and mortality of Hawaiian insular false killer whales in the Hawaii-based longline fisheries. Other Take Reduction Plan recommendations include a combination of additional area closures to the south of the Hawaiian Islands, as well as the use of circle hooks, weak hooks, increased observer coverage, and captains' education and outreach, which if instituted would primarily benefit pelagic false killer whales outside the longline prohibited area, but may also provide some benefits to the insular DPS.

(8) Possible Expansion of the Hawaiian Islands Humpback Whale National Marine Sanctuary

With respect to the State of Hawaii, the Hawaiian Islands Humpback Whale National Marine Sanctuary is currently undergoing a multi-year management plan review to assess the Sanctuary's programs and effectiveness. The plan was last revised in 2002 and the Sanctuary is required by law to periodically update it. The Sanctuary, formed by Congress in 1992, is also proposing to "expand its scope and direction to protect and conserve other living marine resources besides humpback whales." Currently, only humpback whales (*Megaptera novaeangliae*) are afforded additional Federal protections within the Sanctuary, which includes prohibiting approaches closer than 300 ft when on the water and 1,000 ft when operating an aircraft (15 CFR 922.184).

Summary of Protective Efforts

We support all conservation efforts currently in effect and those that are planned for the near future, as mentioned above. However, these efforts lack the certainty of implementation and effectiveness so as to remove or reduce threats specifically to Hawaiian insular false killer whales. Specifically, the MMPA, CWA, and MARPOL are all certain and effective regulatory measures, but they do not cover indirect or cumulative threats, such as non-point source pollution, and enforcement capacity is extremely limited in such a vast EEZ around the main Hawaiian Islands. The longline prohibited area has also been effective by reducing interactions with the insular DPS since 1992, yet interactions have still been documented and the total population size of the insular DPS has declined since then. The Watchable Wildlife Viewing Guidelines are only recommendations and thus aren't legally enforceable. The active research programs have gathered valuable data, but many data gaps still remain and research is costly and could take decades. The draft Take Reduction Plan has not yet been implemented, although it will likely be beneficial to the insular DPS. It, however, will not address indirect or cumulative effects. Finally, the possible expansion of the Hawaiian Islands Humpback Whale National Marine Sanctuary is not definite. It is unknown whether false killer whales will be added as a species under protection, nor is it certain that it will be able to address indirect or cumulative threats. Therefore, we have determined that these conservation efforts are not comprehensive in addressing the many other issues now confronting insular false killer whales (*e.g.,* small population effects) and thus will not alter the extinction risk of the species. In developing our final listing determination, we will consider the best available information concerning these efforts, and any other efforts by the State of Hawaii or local entities, for which we have information (see description of PECE above).

Proposed Listing Determination

Section 4(b)(1) of the ESA requires that the listing determination be based solely on the best scientific and commercial data available, after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any state or foreign nation to protect and conserve the species. We have reviewed the petition, the report of the BRT (Oleson *et al.,* 2010), and other available published and unpublished information.

Based on this review, we agree with the BRT's assessment and conclude that the Hawaiian insular false killer whale meets the discreteness and significance criteria for a DPS (Oleson *et al.,* 2010). The Hawaiian insular false killer whale is discrete from the pelagic population based on genetic discontinuity and the uniqueness of its behavior related to habitat use patterns. This population of Hawaiian false killer whales is significant to the species as a whole based on its existence in a unique ecological setting, including diet and habitat and how it differs from that of other false killer whales, the potential for marked genetic characteristic differences leading to adaptive traits, and maintenance of cultural diversity. We also agree with the BRT's assessment of possible threats and their current and/or future risk to the insular DPS. The greatest threats to the insular population are small population effects and hooking, entanglement, or intentional harm by fishermen. Lastly, we also agree with the BRT's assessment of extinction risk analysis where most PVA models indicated a probability of greater than 50 percent likelihood of the DPS declining to fewer than 20 individuals within 75 years, which would result in functional extinction beyond the point where recovery is possible.

Proposed conservation efforts, including those to protect the pelagic population of Hawaiian false killer whales as described in the previous section, may also benefit the insular population. Taken together, however, we have determined that these conservation efforts are not holistic or comprehensive in addressing the many other issues now confronting insular false killer whales and thus will not alter the extinction risk of the species.

Based on the best scientific and commercial information available, including the status review report, we conclude that the Hawaiian insular false killer whale DPS is presently in danger of extinction throughout all of its range because of: (1) The present or threatened destruction, modification, or curtailment of its habitat or range (reduced total prey biomass; competition with commercial fisheries; competition with recreational fisheries; reduced prey size; and accumulation of natural or anthropogenic contaminants); (2) disease or predation (exposure to environmental contaminants or environmental changes; and increases in

disease vectors as a result of short and long-term climate); (3) the inadequacy of existing regulatory mechanisms (the lack of reporting/observing of nearshore fisheries interactions; and the longline prohibited area not reversing the decline of the insular DPS); and (4) other natural or manmade factors affecting its continued existence (climate change; hooking, entanglement, or intentional harm by fishermen; small population size (reduced genetic diversity, inbreeding depression, and other Allee effects); and anthropogenic noise (sonar and seismic exploration)). See the "Summary of Factors Affecting the Species" section above for a description of the specific risks associated with section 4(a)(1).

In sum, future declines in insular population abundance may occur as a result of multiple threats, particularly those of small population size, and hooking, entanglement, or intentional harm by fishermen. Current trends and projections in abundance indicate that the Hawaiian insular false killer whale DPS is in danger of extinction throughout all of its range. Therefore, we propose to list the Hawaiian insular false killer whale DPS as endangered.

Effects of Listing

Conservation measures provided for species listed as endangered or threatened under the ESA include recovery actions (16 U.S.C. 1536(f)), Federal agency consultation requirements (16 U.S.C. 1536), critical habitat designations, and prohibitions on taking (16 U.S.C. 1538). Recognition of the species' plight through listing promotes conservation actions by Federal and state agencies, foreign entities, private groups, and individuals. Should the proposed listing be made final, a recovery plan may be developed, unless such plan would not promote the conservation of the species.

Identifying Section 7 Consultation Requirements

Section 7(a)(2) of the ESA and NMFS/FWS regulations require Federal agencies to confer with us on actions likely to jeopardize the continued existence of species proposed for listing, or that result in the destruction or adverse modification of proposed critical habitat. If a proposed species is ultimately listed, Federal agencies must consult on any action they authorize, fund, or carry out if those actions may affect the listed species or its critical habitat. Examples of Federal actions that may affect the Hawaiian insular false killer whale DPS include, but are not limited to: Alternative energy projects, discharge of pollution from point sources, non-point source pollution, contaminated waste and plastic disposal, dredging, pile-driving, water quality standards, vessel traffic, aquaculture facilities, military activities, and fisheries management practices.

Critical Habitat

Critical habitat is defined in section 3 of the ESA as: "(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species" (16 U.S.C. 1532(5)(A)). "Conservation" means the use of all methods and procedures needed to bring the species to the point at which listing under the ESA is no longer necessary (16 U.S.C. 1532(3)). Section 4(a)(3)(A) of the ESA requires that, to the maximum extent prudent and determinable, critical habitat be designated concurrently with the final listing of a species (16 U.S.C. 1533(a)(3)(A)(i)). Designations of critical habitat must be based on the best scientific data available and must take into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat.

Once critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure that they do not fund, authorize, or carry out any actions that are likely to destroy or adversely modify that habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure that their actions do not jeopardize the continued existence of listed species.

At this time, critical habitat is not determinable for the Hawaiian insular false killer whale DPS. We are currently compiling information to prepare a critical habitat proposal for the Hawaiian insular false killer whale DPS in a separate rulemaking. Therefore, we seek public input and information to assist in gathering and analyzing the best available scientific data to support a critical habitat designation. We will continue to meet with co-managers and other stakeholders to review this information and the overall designation process. We will then initiate rulemaking with the publication of a proposed designation of critical habitat in the **Federal Register**, opening a period for public comment and the opportunity for public hearings.

Joint NMFS/FWS regulations for listing endangered and threatened species and designating critical habitat at 50 CFR 424.12(2)(b) state that the agency "shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection." Pursuant to the regulations, such requirements include, but are not limited to the following: (1) Space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. The regulations also state that the agency shall focus on the principal biological or physical essential features within the specific areas considered for designation. These essential features may include, but are not limited to: "roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types."

Take Prohibitions

Because we are proposing to list this species as endangered, all of the take prohibitions of section 9(a)(1) of the ESA will apply. These include prohibitions against the import, export, use in foreign commerce, or "take" of the species. "Take" is defined under the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." These prohibitions apply to all persons subject to the jurisdiction of the U.S., including in the U.S. or on the high seas.

Role of Peer Review

The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under

the Information Quality Act (Pub. L. 106–554), is intended to enhance the quality and credibility of the Federal government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, the BRT obtained independent peer review of the draft status review report. Independent specialists were selected from the academic and scientific community, Federal and state agencies, and the private sector for this review. All peer reviewer comments were addressed prior to dissemination of the final status review report and publication of this proposed rule.

On July 1, 1994, the NMFS and USFWS published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270). The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. Prior to a final listing, NMFS will solicit the expert opinions of three qualified specialists selected from the academic and scientific community, Federal and state agencies, and the private sector on listing recommendations to ensure the best biological and commercial information is being used in the decisionmaking process, as well as to ensure that reviews by recognized experts are incorporated into the review process of rulemakings developed in accordance with the requirements of the ESA.

Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

The intent of identifying those activities that would constitute a violation of section 9 of the ESA is to increase public awareness of the effect of this listing on proposed and ongoing activities within the species' range. We will identify, to the extent known at the time of the final rule, specific activities that will not be considered likely to result in violation of section 9, as well as activities that will be considered likely to result in violation. Activities that we currently believe could result in violation of section 9 prohibitions against "take" of the Hawaiian insular false killer whale DPS include, but are not limited to, the following: (1) Importation, (2) exportation, (3) take, (4) sale, and (5) delivery that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations, and agencies subject to U.S. jurisdiction.

Public Comments Solicited on Listing

To ensure that the final action resulting from this proposal will be as accurate and effective as possible, we solicit comments and suggestions from the public, other governmental agencies, the scientific community, industry, environmental groups, and any other interested parties. Comments are encouraged on this proposal (*See* **DATES** and **ADDRESSES**). Specifically, we are interested in information regarding: (1) Habitat within the range of the insular DPS that was present in the past, but may have been lost over time; (2) biological or other relevant data concerning any threats to the Hawaiian insular false killer whale DPS; (3) the range, distribution, and abundance of the insular DPS; (4) current or planned activities within the range of the insular DPS and their possible impact on this DPS; (5) recent observations or sampling of the insular DPS; and (6) efforts being made to protect the Hawaiian insular false killer whale DPS.

Public Comments Solicited on Critical Habitat

We request quantitative evaluations describing the quality and extent of habitats for the Hawaiian insular false killer whale DPS as well as information on areas that may qualify as critical habitat for the proposed DPS. Specific areas that include the physical and biological features essential to the conservation of the DPS, where such features may require special management considerations or protection, should be identified. We also solicit biological and economic information relevant to making a critical habitat designation for the insular DPS. ESA implementing regulations at 50 CFR 424.12(h) specify that critical habitat shall not be designated within foreign countries or in other areas outside of U.S. jurisdiction. Therefore, we request information only on potential areas of critical habitat within the U.S. or waters within U.S. jurisdiction.

Section 4(b)(2) of the ESA requires the Secretary to consider the "economic impact, impact on national security, and any other relevant impact," of designating a particular area as critical habitat. For this process, section 4(b)(2) authorizes the Secretary to exclude from a critical habitat designation those particular areas where the Secretary finds that the benefits of exclusion outweigh the benefits of designation, unless excluding that area will result in extinction of the species. We seek information regarding the conservation benefits of designating areas within the main Hawaiian Islands as critical habitat. We also seek information on the economic and other benefits of excluding areas from the critical habitat designation, and the economic and other benefits of including an area as part of the critical habitat designation. In keeping with the guidance provided by the OMB (2000; 2003), we seek information that would allow us to monetize these effects to the extent possible, as well as information on qualitative impacts to economic values. We also seek information on impacts to national security and any other relevant impacts of designating critical habitat in these areas.

Data reviewed may include, but are not limited to: (1) Scientific or commercial publications; (2) administrative reports, maps or other graphic materials; (3) information received from experts; and (4) comments from interested parties. Comments and data particularly are sought concerning: (1) Maps and specific information describing the amount, distribution, and use type (e.g., foraging or migration) of the Hawaiian insular false killer whale DPS, as well as any additional information on occupied and unoccupied habitat areas; (2) the reasons why any habitat should or should not be determined to be critical habitat as provided by sections 3(5)(A) and 4(b)(2) of the ESA; (3) information regarding the benefits of designating particular areas as critical habitat; (4) current or planned activities in the areas that might be proposed for designation and their possible impacts; (5) any foreseeable economic or other potential impacts resulting from designation, and in particular, any impacts on small entities; (6) whether specific unoccupied areas may be essential to provide additional habitat areas for the conservation of this DPS; and (7) potential peer reviewers for a proposed critical habitat designation, including persons with biological and economic expertise relevant to the species, region, and designation of critical habitat. We seek information regarding critical habitat for the Hawaiian insular false killer whale DPS as soon as possible, but no later than February 15, 2011.

Public Hearings

50 CFR 424.16(c)(3) requires the Secretary to promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed rule to list a species. Such hearings provide the opportunity for interested individuals and parties to give opinions, exchange information, and engage in a constructive dialogue

concerning this proposed rule. We encourage the public's involvement in this matter and therefore have scheduled a public hearing to be held in Honolulu, Oahu, Hawaii. This public hearing will be held on January 20, 2011, at the McCoy Pavilion at the Ala Moana Park, 1201 Ala Moana Blvd, Honolulu, HI 96814 from 6:30 to 9 p.m. NMFS will consider requests for additional public hearings that are made in writing and received (see **ADDRESSES**) by January 31, 2011. If additional public hearings are requested and will be held, details regarding location(s), date(s), and time(s) will be published in a forthcoming **Federal Register** notice.

References

A complete list of all references cited herein is available upon request (see **FOR FURTHER INFORMATION CONTACT**).

Classification

National Environmental Policy Act

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus,* 657 F. 2d 829 (6th Cir. 1981), we have concluded that ESA listing actions are not subject to the environmental assessment requirements of the National Environmental Policy Act (*See* NOAA Administrative Order 216–6).

Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this proposed rule is exempt from review under Executive Order 12866. This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13132, Federalism

In accordance with E.O. 13132, we determined that this proposed rule does not have significant Federalism effects and that a Federalism assessment is not required. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, this proposed rule will be given to the relevant state agencies in each state in which the species is believed to occur, and those states will be invited to comment on this proposal. We have conferred with the state of Hawaii in the course of assessing the status of the Hawaiian insular false killer DPS, and considered, among other things, Federal, state, and local conservation measures. As we proceed, we intend to continue engaging in informal and formal contacts with the state, and other affected local or regional entities, giving careful consideration to all written and oral comments received.

List of Subjects in 50 CFR Part 224

Endangered marine and anadromous species.

Dated: November 10, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 224 is proposed to be amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

§ 224.101 [Amended]

2. In § 224.101, amend paragraph (b) by adding, "False killer whale (*Pseudorca crassidens*), Hawaiian insular distinct population segment" in alphabetical order.

[FR Doc. 2010–28843 Filed 11–16–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100804323–0544–01]

RIN 0648–BA03

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Specifications and Management Measures

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

ACTION: Proposed rule, request for comments.

SUMMARY: NMFS proposes 2011 specifications and management measures for Atlantic mackerel, squid, and butterfish (MSB). This action proposes to modify the measure that transfers *Loligo* squid (*Loligo*) quota underages from Trimester I to Trimesters II and III by limiting the Trimester II quota increase to no more than 50 percent. This action also proposes to revise the 72-hr pre-trip observer notification requirement for the *Loligo* fishery to accommodate vessels departing for multiple day trips in a week. These proposed specifications and management measures promote the utilization and conservation of the MSB resource.

DATES: Public comments must be received no later than 5 p.m., eastern standard time, on December 17, 2010.

ADDRESSES: Copies of supporting documents used by the Mid-Atlantic Fishery Management Council (Council), including the Environmental Assessment (EA) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19904–6790. The EA/RIR/IRFA is accessible via the Internet at *http://www.nero.noaa.gov.*

You may submit comments, identified by 0648–BA03, by any one of the following methods:

Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking portal *http://www.regulations.gov;*

Fax: (978) 281–9135, Attn: Aja Peters-Mason;

Mail to NMFS, Northeast Regional Office, 55 Great Republic Dr, Gloucester, MA 01930. Mark the outside of the envelope "Comments on 2011 MSB Specifications."

Instructions: No comments will be posted for public viewing until after the comment period has closed. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (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.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed

rule may be submitted to NMFS, Northeast Regional Office and by e-mail to *OIRA_Submission@omb.eop.gov,* or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Aja Peters-Mason, Fishery Policy Analyst, 978–281–9195, fax 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

Regulations implementing the MSB Fishery Management Plan (FMP) appear at 50 CFR part 648, subpart B. Regulations governing foreign fishing appear at 50 CFR part 600, subpart F. The regulations at §§ 648.21 and 600.516(c) require that NMFS, based on the maximum optimum yield (Max OY) of each fishery as established by the regulations, annually publish a proposed rule specifying the amounts of the initial optimum yield (IOY), allowable biological catch (ABC), domestic annual harvest (DAH), and domestic annual processing (DAP), as well as, where applicable, the amounts for total allowable level of foreign fishing (TALFF) and joint venture processing (JVP) for the affected species managed under the FMP. In addition, these regulations allow specifications to be specified for up to 3 years, subject to annual review. The regulations at § 648.21 also specify that IOY for *Illex* and *Loligo* squid is equal to the combination of research quota (RQ) and DAH, with no TALFF specified for squid. For butterfish, the regulations specify that a butterfish bycatch TALFF will be specified only if TALFF is specified for mackerel.

At its June 8–10, 2010, meeting in New York, NY, the Council recommended MSB specifications for the 2011 fishing year. The Council considered the recommendations made by its Monitoring Committee and Scientific and Statistical Committee (SSC). The SSC recommends ABC. SSC advice accounts for scientific uncertainty regarding stock status and biological reference points in recommending the ABC, and the Council relies on that ABC recommendation to set other specifications. In addition to 2011 specifications for each of the MSB species, the Council recommended a modification in the provision that transfers Trimester I quota underages to Trimesters II and III for the *Loligo* fishery. The Council submitted these recommendations, along with the required analyses, for agency review on July 19, 2010, with final submission on September 23, 2010.

Research Quota

The Mid-Atlantic Research Set-Aside (RSA) Program allows research projects to be funded through the sale of fish that has been set aside from the total annual quota. The RQ may vary between 0 and 3 percent of the overall quota for each species. The Council has recommended that 3 percent of the 2011 *Illex* squid (*Illex*), butterfish, and Atlantic mackerel (mackerel) IOY be set aside to fund projects selected under the 2011 Mid-Atlantic RSA Program. For *Loligo,* only 330 mt (1.65 percent) is proposed to be available for RSA, to reduce impacts on butterfish from RSA *Loligo* fishing.

NMFS solicited research proposals under the 2011 Mid-Atlantic RSA Program through the **Federal Register** (75 FR 3092, January 19, 2010). The deadline for submission was March 22, 2010. The project selection and award process for the 2011 Mid-Atlantic RSA Program has not concluded and, therefore, the research quota awards are not known at this time. When the selection process has been concluded, projects requesting RQ will be forwarded to the NOAA Grants Office for award. If any portion of the RQ is not awarded, NMFS will return any un-awarded RQ to the commercial fishery either through the final 2011 MSB specification rulemaking process or through the publication of a separate notice in the **Federal Register** notifying the public of a quota adjustment.

Vessels harvesting RQ in support of approved research projects would be issued exempted fishing permits (EFP) authorizing them to exceed Federal possession limits and to fish during Federal quota closures. The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that interested parties be provided an opportunity to comment on all proposed EFPs. These exemptions are necessary to allow project investigators to recover research expenses, as well as adequately compensate fishing industry participants harvesting RQ. Vessels harvesting RQ would operate within all other regulations that govern the commercial fishery, unless otherwise exempted through a separate EFP.

2011 Proposed Specifications and Management Measures

TABLE 1—PROPOSED SPECIFICATIONS, IN METRIC TONS (MT), FOR ATLANTIC MACKEREL, SQUID, AND BUTTERFISH FOR 2011 FISHING YEAR

Specifications	*Loligo*	*Illex*	Mackerel	Butterfish
Max OY	32,000	Unknown	Unknown	Unknown
ABC	24,000	24,000	47,395	1,500
IOY	20,000	23,328	46,779	500
DAH	20,000	23,328	[1] 46,779	500
DAP	20,000	23,328	31,779	500
JVP	N/A	N/A	0	0
TALFF	N/A	N/A	0	0

[1] Includes a 15,000-mt catch of Atlantic mackerel by the recreational fishery.

Atlantic Mackerel

The status of the mackerel stock was assessed by the Transboundary Resources Assessment Committee (TRAC) in March 2010. Though the 2010 TRAC Status Report indicated reduced productivity in the stock and a lack of older fish in both the survey and catch data, the status of the mackerel stock is unknown, because biomass reference points could not be determined. According to the FMP, mackerel ABC must be calculated using the formula U.S. ABC = T − C, where C is the estimated catch of mackerel in Canadian waters for the upcoming fishing year, and T is the yield associated with a fishing mortality rate that is equal to the target fishing mortality rate (F). Due to uncertainty in the assessment, the TRAC recommended that total annual catches not exceed the average total landings (80,000 mt) over the last 3 years (2006–2008) until new information is available. Since there is no calculation of yield at target F available from the most recent assessment, the Council's SSC recommended specifying the stock-wide ABC for 2011 at 80,000 mt,

consistent with the TRAC recommendation.

Expected Canadian catch (32,605 mt) was derived by examining the relationship between U.S. landings in one year for the years 1994–2008 and the Canadian landings in the next year (1995–2009); the two landings series were found to be strongly correlated (correlation coefficient = 0.86). During this time series, Canadian landings in one year were on average 1.71 times higher than U.S. landings the previous year; the relationship can thus be used as a scaling factor for determining expected Canadian catch. Analysis revealed that multiplying U.S. catch in one year by 3.218 (95th percentile of scaling factors 1994–2009) would have underestimated Canadian catch in the following year in only 1 out of 15 of those "year pairs." The 95th percentile scaling factor was applied to 2010 U.S. mackerel catch (10,000 mt prior to July 1) to derive expected Canadian catch for 2011 (32,180 mt); this was increased to 32,605 mt to account for Canadian mackerel discards. Subtracting the expected 2011 Canadian catch of 32,605 mt from the stock-wide ABC of 80,000 mt yields a proposed 2011 U.S. ABC of 47,395 mt.

The Magnuson-Stevens Act provides that the specification of TALFF, if any, shall be that portion of the optimum yield (OY) of a fishery that will not be harvested by vessels of the United States. TALFF would allow foreign vessels to harvest U.S. fish and sell their product on the world market, in direct competition with the U.S. industry efforts to expand exports. While a surplus existed between ABC and DAH for many years, that surplus has disappeared due to downward adjustments of the specifications in recent years. Based on analysis and a review of the state of the world mackerel market and possible increases in U.S. production levels, the Council concluded that specifying an IOY resulting in zero TALFF will yield positive social and economic benefits to both U.S. harvesters and processors, and to the Nation. For these reasons, consistent with the Council's recommendation, NMFS proposes to specify IOY at a level that can be fully harvested by the domestic fleet, thereby precluding the specification of a TALFF, in order to support the U.S. mackerel industry. NMFS concurs that it is reasonable to assume that in 2011 the commercial fishery has the ability to harvest 46,779 mt of mackerel.

The 2010 TRAC assessment also estimated U.S. mackerel discards from 1989–2008. For the most recent 5 years for which complete data are available (2004–2008), total discards accounted for 1.3 percent of total catch. In order to account for discards, the Council recommended, and NMFS is proposing, specifying the mackerel IOY and DAH at 46,779 m (ABC minus 1.3 percent for discards). The DAH includes commercial harvest plus the 15,000 mt available for the recreational fishery.

NMFS proposes to maintain JVP at zero (the most recent allocation was 5,000 mt of JVP in 2004), consistent with the Council's recommendation. In the past, the Council recommended a JVP greater than zero because it believed U.S. processors lacked the ability to process the total amount of mackerel that U.S. harvesters could land. However, for the past 7 years, the Council has recommended zero JVP because U.S. shoreside processing capacity for mackerel has expanded. The Council concluded that processing capacity was no longer a limiting factor relative to domestic production of mackerel, even at the higher DAP of 100,000 mt; this is even more true with the proposed DAP of 31,779 mt.

Atlantic Squids

Loligo

Because *Loligo* is a sub-annual species (*i.e.,* has a lifespan of less than 1 year), the stock is solely dependent on sufficient recruitment year to year to prevent stock collapse. Based on advice provided in November 2001 by the most recent *Loligo* stock assessment review committee meeting (SARC 34), the FMP uses fishing mortality rate (F) proxies that are fixed values based on average fishing mortality rates achieved during a time period when the stock biomass was fairly resilient (1987–2000). The use of a proxy is necessary because it is currently not possible to accurately predict *Loligo* stock biomass, because recruitment, which occurs throughout the year, is highly variable inter-annually and influenced by changing environmental conditions. To determine if overfishing is occurring, the $F_{Threshold}$ proxy is the 75th percentile of fishing mortality rates during 1987–2000. The F_{Target} proxy used to determine OY is the average F during the same period.

Using these proxies, the SSC recommended a *Loligo* Max OY of 32,000 mt, and recommended that 75 percent of that value, 24,000 mt, be used for an ABC. SARC 34 also recommended that the Council limit total landings and discards to 20,000 mt. Therefore, the Council proposed that IOY, DAH, and DAP be set at 20,000 mt.

NMFS concurs with the Council's recommendation; therefore, this action proposes a 2011 *Loligo* Max OY of 32,000 mt, an ABC of 24,000 mt, and an IOY, DAH, and DAP of 20,000 mt. The FMP does not authorize the specification of JVP and TALFF for the *Loligo* fishery because of the domestic industry's capacity to harvest and process the OY for this fishery.

Distribution of the *Loligo* DAH

The proposed 2011 *Loligo* DAH would be allocated into trimesters, according to percentages specified in the FMP, as follows:

TABLE 2—PROPOSED TRIMESTER ALLOCATION OF LOLIGO QUOTA IN 2011

Trimester	Percent	Metric tons
I (Jan–Apr)	43	8,600
II (May–Aug)	17	3,400
III (Sep–Dec)	40	8,000
Total	100	20,000

This action proposes to adjust how Trimester I underages would be distributed among the remaining Trimesters. Currently, Trimester I *Loligo* underages greater than 25 percent of the Trimester I quota are distributed evenly between Trimesters II and III. The Council expressed concern that the butterfish mortality cap on the *Loligo* fishery, established in 2010 by MSB Amendment 10 (75 FR 11441, March 11, 2010), could result in a substantial Trimester I underage if the *Loligo* fishery is closed because the Trimester I butterfish catch cap is reached. Under current management, this could result in a large roll-over of *Loligo* quota to Trimester II, when the butterfish catch cap cannot close the fishery. To avoid this situation, the Council recommended, and NMFS is proposing, that the roll-over of quota from Trimester I to Trimester II should be no more than 50 percent of the Trimester II allocation. This proposed adjustment will continue to prevent an underharvest of the annual quota by distributing the quota across the remaining trimesters, while reducing management uncertainty related to the implementation of the butterfish mortality cap for the *Loligo* fishery.

Adjustment to the *Loligo* Pre-trip Trip Notification Requirement

The rule proposes to change the 72-hr pre-trip observer notification requirement established through Amendment 10 for vessels issued a *Loligo* and butterfish moratorium permit. Starting January 1, 2011, such vessels intending to land more than 2,500 lb of *Loligo* will be required to

notify the NMFS Northeast Fishery Observer Program (NEFOP) at least 72 hr prior to departing on a trip. A large number of the *Loligo* vessels embark on multiple trips that last less than 24 hr during a single week. In order to reduce the burden of this requirement for these vessels, this action proposes to streamline the requirement such that vessels must notify NEFOP at least 72 hr, but not more than 10 days before embarking on a *Loligo* trip.

Illex Squid

The *Illex* stock was most recently assessed at SARC 42 in late 2005. While it was not possible to evaluate current stock status because there are no reliable current estimates of stock biomass or F, qualitative analyses determined that overfishing had not likely been occurring. The SSC recommended an ABC of 24,000 mt based on observations that catches in this range, and up to 26,000 mt, have not caused any apparent harm to the stock. The Council recommended that the IOY be reduced to 23,328 mt to account for discards (2.8 percent of catch) based on the discard estimate ratios from the last assessment.

Consistent with the Council's recommendation, NMFS proposes to specify the *Illex* ABC as 24,000 mt, and to specify IOY, DAH, and DAP as 23,328 mt. The FMP does not authorize the specification of JVP and TALFF for the *Illex* fishery because of the domestic fishing industry's capacity to harvest and to process the IOY from this fishery.

Butterfish

The status of the butterfish stock was most recently assessed at SARC 49 in February 2010. The estimates of butterfish fishing mortality and total biomass resulting from SARC 49 are highly uncertain, and the final assessment report states that it would be inappropriate to compare the previous status determination criteria from SARC 38 in 2004 with the current assessment estimates of spawning stock biomass and fishing mortality, because measures of population abundance in the current assessment are scaled much higher than those in the previous assessment.

The current status of the butterfish stock is unknown, because biomass reference points could not be determined in the SARC 49 assessment. Though the butterfish population appears to be declining over time, fishing mortality does not seem to be the major cause. Butterfish have a high natural mortality rate, and the current estimated F (F = 0.02) is well below all candidate overfishing threshold reference points. The assessment report noted that predation is likely an important component of the butterfish natural mortality rate (currently assumed to be 0.8), but also noted that estimates of consumption of butterfish by predators appear to be very low. In short, the underlying causes for population decline are unknown.

Given the uncertainty in the assessment, the SSC recommended a status quo ABC of 1,500 mt. Assuming that butterfish discards equal twice the level of landings, the amount of butterfish discards associated with 500 mt of landings is approximately 1,000 mt.

Therefore, the proposed specifications would set the ABC at 1,500 mt, and the IOY, DAH, and DAP at 500 mt. Additionally, consistent with MSB regulations, the Council recommended, and NMFS is proposing, zero TALFF for butterfish in 2010 because zero TALFF is proposed for mackerel.

Amendment 10 created a butterfish mortality cap for the *Loligo* fishery which will go into effect on January 1, 2011. If the butterfish mortality cap is harvested during Trimester I (January–April) or Trimester III (September–December), the directed *Loligo* fishery will close for the remainder of that trimester. The mortality cap is equal to 75 percent of the butterfish ABC (1,125 mt).

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Atlantic Mackerel, Squid, and Butterfish FMP, other provision of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Council prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A summary of the analysis follows. A copy of this analysis is available from the Council or NMFS (see **ADDRESSES**) or via the Internet at *http://www.nero.noaa.gov.*

Statement of Objective and Need

This action proposes 2011 specifications and management measures for mackerel, squid, and butterfish, proposes to modify accounting procedures for underages of Trimester I quotas in the *Loligo* fishery, and proposes to adjust the 72-hr pre-trip observer notification requirement for *Loligo* vessels. A complete description of the reasons why this action is being considered, and the objectives of and legal basis for this action, are contained in the preamble to this proposed rule and are not repeated here.

Description and Estimate of Number of Small Entities to Which the Rule Will Apply

Based on permit data for 2010, the numbers of potential fishing vessels in the 2011 fisheries are as follows: 360 *Loligo*/butterfish moratorium permits, 76 *Illex* moratorium permits, 2,156 mackerel permits, 1,844 incidental squid/butterfish permits, and 1,844 MSB party/charter permits. There are no large entities participating in this fishery, as defined in section 601 of the RFA. Therefore, there are no disproportionate economic impacts on small entities. Many vessels participate in more than one of these fisheries; therefore, permit numbers are not additive.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This proposed rule contains a change to an information collection previously approved by the Office of Management and Budget (OMB) under OMB Control Number 0648–0601: Atlantic Mackerel, Squid, and Butterfish Amendment 10 Data Collection. This action proposes to require that vessels intending to embark on *Loligo* trips notify NEFOP at least 72 hr, but no more than 10 days before their intended departure dates. The adjustment will also allow vessels to submit an email address for contact. A change request has been submitted to OMB for approval. This action does not duplicate, overlap, or conflict with any other Federal rules.

Minimizing Significant Economic Impacts on Small Entities

Proposed Actions

The mackerel IOY proposed in this action (46,779 mt, with 15,000 mt allocated to recreational catch) represents a reduction from status quo (115,000 mt). Despite the reduction, the proposed IOY is above recent U.S. landings; mackerel landings for 2007–2009 averaged 23,310 mt. Thus, the reduction does not pose a constraint to vessels relative to the landings in recent years. Accordingly, no reductions in revenues for the mackerel fishery are expected as a result of this proposed action.

The *Loligo* IOY (20,000 mt) represents a slight increase from the status quo (19,000 mt). *Loligo* landings for 2007–2009 averaged 11,019 mt. This provides

an opportunity to increase landings, though if recent trends continue, there may be no increase in landings despite the increase in the allocation. No reductions in revenues for the *Loligo* fishery are expected as a result of this proposed action.

The *Illex* IOY (23,328 mt) proposed in this action represents a slight decrease compared to status quo (24,000 mt). Though annual *Illex* landings have been increasing over the past 3 years (9,002 mt for 2007, 15,900 mt for 2008, and 18,419 mt for 2009), the landings were lower than the level proposed. Thus, implementation of this proposed action should not result in a reduction in revenue or a constraint on expansion of the fishery in 2011.

The butterfish IOY proposed in this action (500 mt) represents status quo, as compared to 2010, and represents only a minimal constraint to vessels relative to the landings in recent years. Due to market conditions, there has not been a directed butterfish fishery in recent years; therefore, recent landings have been low. Given the lack of a directed butterfish fishery and low butterfish landings, the proposed action is not expected to reduce revenues in this fishery more than minimally.

As discussed in the Final Regulatory Flexibility Analysis (FRFA) for MSB Amendment 10, the butterfish mortality cap has a potential for economic impact on fishery participants. The *Loligo* fishery will close during Trimesters I and III, if the butterfish mortality cap is reached. If the *Loligo* fishery is closed in response to butterfish catch before the entire *Loligo* quota is harvested, then a loss in revenue is possible. The potential for *Loligo* revenue loss is dependent upon the size of the butterfish mortality cap, which is based on the level of butterfish abundance. As the butterfish stock rebuilds, the mortality cap will increase, and the potential for lost *Loligo* revenue should decrease. When the butterfish stock rebuilds, a directed butterfish fishery could resume, provided discards are kept low, and would have economic benefits for fishery participants.

The accounting methods for *Loligo* trimester underages proposed in this action would distribute any substantial underage in Trimester I (greater than 25 percent of the Trimester I quota) between Trimester II and III, but would limit the transfer of quota such that the Trimester II quota could increase by 50 percent, at most. The proposed adjustment may provide some economic benefit to the fishery during Trimesters II and III because it will allow access to underutilized Trimester I quota later in the fishing year.

The proposed change to the pre-trip observer notification requirement, which would allow vessels to notify at least 72 hr, but no more than 10 days prior to fishing trips, is an administrative measure to facilitate the placement of observers aboard the *Loligo* fleet, and is intended to reduce the burden of the notification requirement for vessels that depart on multiple trips in a short period by allowing for advance notification. The economic burden on fishery participants associated with this measure is expected to be minimal.

Alternatives to the Proposed Rule

The Council analysis evaluated two alternatives to the proposed action for mackerel. Based on recent harvest levels, neither of the ABC and IOY alternatives would represent a constraint on vessels in this fishery. The first alternative (status quo; least restrictive), which would have set the ABC at 156,000 mt, and IOY at 115,000 mt, was not selected because the ABC would have exceeded the SSC's recommendation.

As in the proposed action (intermediately restrictive), the second alternative (most restrictive) started from the SSC recommended stockwide ABC of 80,000 mt, but instead subtracted an estimated 41,556 mt for Canadian landings. This would have resulted in a U.S. ABC of 38,444 mt, and an IOY and DAH of 37,944 mt (U.S. ABC minus 1.3 percent for discards). For this alternative, expected Canadian catch (41,556 mt) was derived by examining the relationship between Canadian landings in one year (*e.g.,* 1994) and the Canadian landings 2 years later (*e.g.,* 1996); this analysis was chosen so that 2009 Canadian landings could be used to determine expected Canadian landings for 2011. The years examined included 1962–2009. Though the two landings series were found to be strongly correlated (correlation coefficient = 0.71), this method of deriving expected Canadian catch (and the resulting specifications alternative) was not selected over the proposed alternative. The landings series compared in the method used to derive 2011 Canadian catch in the proposed alternative (U.S. landings in one year and Canadian landings in the next year) were found to have a stronger correlation (correlation coefficient = 0.86) than the landings series compared in this alternative. Thus, using the Canadian catch derivation method in the proposed alternative provides a more reliable estimate of 2011 Canadian catch.

There were two alternatives to the proposed action evaluated for *Loligo.* Both alternatives set the Max OY at 32,000 mt, the same level as the proposed action. The first alternative (status quo) would have set the ABC and IOY at 19,000 mt; this alternative was not chosen, because it was not consistent with the ABC recommended by the SSC. The second alternative (least restrictive) would have set the ABC at the level recommended by the SSC (24,000 mt), but would have set the IOY at 22,560 mt (ABC reduced by 6 percent to account for discards). This alternative was not adopted by the Council because two sources of uncertainty, namely the uncertainty regarding the discard estimate and the management uncertainty regarding the operation of the *Loligo* fishery in 2011, given the impending implementation of the butterfish mortality cap, warranted setting the IOY at the more precautionary level specified in the proposed action (intermediately restrictive).

The alternatives also differed in how Trimester I underages and overages would be applied to the *Loligo* quotas in the following Trimesters. The first alternative (status quo) would maintain the current measure to distribute an underage in Trimester I greater than 25 percent of the Trimester I quota evenly between Trimesters II and III. The current measure was not considered to be sufficient to address management uncertainty related to the implementation of the butterfish mortality cap in 2011.

Two non-selected alternatives were considered for *Illex;* both would have set the ABC at 24,000 mt. The first alternative would have set IOY, DAH, and DAP at 24,000 mt (status quo; least restrictive) rather than 23,328 mt specified in the proposed action (intermediately restrictive). This alternative was not selected because the higher specifications were inconsistent with the results of the most recent stock assessment. The second alternative (most restrictive) would have set IOY, DAH, and DAP at 22,656 mt (ABC reduced by 5.6 percent, based on double the discard ratio estimate). The Council considered this alternative unnecessarily restrictive.

One non-selected alternative was considered for butterfish that would maintain the status quo, which only differs from the proposed alternative in that it would have set Max OY at 12,175 mt. The proposed alternative would remove the specification of Max OY, because it is no longer supported by available science. All other

specifications are identical to the status quo alternative.

This proposed rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA), which was previously approved by OMB under OMB Control Number 0648–0601. The public reporting burden for the phone call to declare a *Loligo* fishing trip is estimated to average 2 min per call per trip. Public burden for the phone call to cancel a *Loligo* trip is estimated to average 1 min. Send comments regarding these burden estimates 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 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: November 12, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.21, paragraph (f)(2) is revised to read as follows:

§ 648.21 Procedures for determining initial annual amounts.

* * * * *

(f) * * *

(2) Any underages of commercial period quota for Trimester I that are greater than 25 percent of the Trimester I quota will be reallocated to Trimesters II and III of the same year. The reallocation of quota from Trimester I to Trimester II is limited, such that the Trimester II quota may only be increased by 50 percent; the remaining portion of the underage will be reallocated to Trimester III. Any underages of commercial period quota for Trimester I that are less than 25 percent of the Trimester I quota will be applied to Trimester III of the same year. Any overages of commercial quota for Trimesters I and II will be subtracted from Trimester III of the same year.

* * * * *

3. In § 648.22, paragraph (a)(2)(i) is revised to read as follows:

§ 648.22 Closure of the fishery.

(a) * * *

(2) * * *

(i) If the Regional Administrator determines that the Trimester I closure threshold has been underharvested by 25 percent or more, then the amount of the underharvest shall be reallocated to Trimesters II and III, as specified at § 648.21(f)(2), through notice in the **Federal Register**.

* * * * *

4. Section 648.26 as amended at 75 FR 11450, March 11, 2010, effective January 1, 2011, and is further amended by revising paragraphs (a) and (d) to read as follows:

§ 648.26 Observer requirements for the Loligo fishery.

(a) A vessel issued a *Loligo* and butterfish moratorium permit, as specified at § 648.4(a)(5)(i), must, for the purposes of observer deployment, have a representative provide notice to NMFS of the vessel name, vessel permit number, contact name for coordination of observer deployment, telephone number or email address for contact; and the date, time, port of departure, and approximate trip duration, at least 72 hr, but no more than 10 days prior to beginning any fishing trip, unless it complies with the possession restrictions in paragraph (c) of this section.

* * * * *

(d) If a vessel issued a *Loligo* and butterfish moratorium permit, as specified at § 648.4(a)(5)(i), intends to possess, harvest, or land 2,500 lb (1.13 mt) or more of *Loligo* per trip or per calendar day, has a representative notify NMFS of an upcoming trip, is selected by NMFS to carry an observer, and then cancels that trip, then the representative is required to provide notice to NMFS of the vessel name, vessel permit number, contact name for coordination of observer deployment, and telephone number or email for contact, and the intended date, time, and port of departure for the cancelled trip prior to the planned departure time. In addition, if a trip selected for observer coverage is canceled, then that vessel is required to carry an observer, provided an observer is available, on its next trip.

[FR Doc. 2010–29002 Filed 11–16–10; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 101029427–0427–01]

RIN 0648–XY82

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; 2011 Summer Flounder, Scup, and Black Sea Bass Specifications; 2011 Research Set-Aside Projects

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

ACTION: Proposed specifications; request for comments.

SUMMARY: NMFS proposes specifications for the 2011 summer flounder, scup, and black sea bass fisheries and provides notice of three projects that may be requesting Exempted Fishing Permits (EFPs) as part of the Mid-Atlantic Fishery Management Council's (Council) Research Set-Aside (RSA) program. The implementing regulations for the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) require NMFS to publish specifications for the upcoming fishing year for each of these species and to provide an opportunity for public comment. Furthermore, regulations under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.,* require a notice to be published to provide interested parties the opportunity to comment on applications for EFPs. The intent of this action is to establish 2011 specifications for the summer flounder, scup, and black sea bass fisheries, and to provide notice of EFP requests, in accordance with the FMP and Magnuson-Stevens Act.

DATES: Comments must be received on or before December 2, 2010.

ADDRESSES: You may submit comments, identified by RIN 0648–XY82, 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.
- *Mail and Hand Delivery:* Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: "Comments on 2011 Summer Flounder,

Scup, and Black Sea Bass Specifications."

Instructions: No comments will be posted for public viewing until after the comment period has closed. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (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 the specifications document, including the Environmental Assessment and Initial Regulatory Flexibility Analysis (EA/IRFA) and other supporting documents for the specifications are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. These documents are also accessible via the Internet at *http://www.nero.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Ruccio, Fishery Policy Analyst, (978) 281–9104.

SUPPLEMENTARY INFORMATION:

Background

The summer flounder, scup, and black sea bass fisheries are managed cooperatively by the Council and the Atlantic States Marine Fisheries Commission (Commission). The management units specified in the FMP include summer flounder (*Paralichthys dentatus*) in U.S. waters of the Atlantic Ocean from the southern border of North Carolina northward to the U.S./Canada border, and scup (*Stenotomus chrysops*) and black sea bass (*Centropristis striata*) in U.S. waters of the Atlantic Ocean from 35E13.3' N. lat. (the latitude of Cape Hatteras Lighthouse, Buxton, North Carolina) northward to the U.S./Canada border. Implementing regulations for these fisheries are found at 50 CFR part 648, subpart A (General Provisions), subpart G (summer flounder), subpart H (scup), and subpart I (black sea bass).

Specifications, as referred to in this proposed rule, are the combined suite of catch levels established for one or more fishing years. These catch levels include the commercial fishery quota, recreational harvest limit, and RSA. The specification process also allows for modification of a select number of management measures such as minimum size for commercially caught fish and minimum trawl net mesh sizes. The Council's process for establishing specifications relies on provisions within the FMP and its implementing regulations as well as requirements established by the Maguson-Stevens Act. Specifically, section 302(g)(1)(B) of the Magnuson-Stevens Act states that a Scientific and Statistical Committee (SSC) for each Regional Fishery Management Council shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch (ABC), preventing overfishing, maximum sustainable yield (MSY), and achieving rebuilding targets. The ABC is a level of catch that accounts for the scientific uncertainty in the estimate of that stock's defined overfishing level. The Council's SSC met on July 28 and 29, 2010, to recommend ABCs for the 2011 summer flounder, scup, and black sea bass specifications.

The FMP's implementing regulations require the involvement of a monitoring committee in the specification process for each species. Since the Magnuson-Stevens Act requirements for the SSC to recommend ABC became effective, the monitoring committees' role has largely been to recommend any reduction in catch limits from the SSC-recommended ABCs to offset management uncertainty, and to recommend other management measures (e.g., mesh requirements, minimum commercial fish sizes, gear restrictions, possession restrictions, and area restrictions) needed for the efficient management of these three species' fisheries. The Summer Flounder Monitoring Committee, Scup Monitoring Committee, and Black Sea Bass Monitoring Committee met on July 30, 2010, to discuss specification-related recommendations for the 2011 fisheries.

Following the above meetings, the Council and the Commission's Summer Flounder, Scup, and Black Sea Bass Management Board (Board) considered the recommendations of the SSC and the three monitoring committees' and public comments, and made their specification recommendations. The Council and Board made their recommendations at a meeting held August 18, 2010. While the Board action on specifications was finalized at the August meeting, the Council's recommendations must be reviewed by NMFS to assure that they comply with the FMP and applicable law. NMFS also must conduct notice-and-comment rulemaking to propose and implement the final specifications.

The FMP also contains formulas to divide the specification catch limits into commercial and recreational fishery allocations, state-by-state quotas, and quota periods, depending on the species in question. The FMP allocation provisions cannot be modified through the specification process. Rather, the Council would be required to develop and recommend allocation changes by amending the FMP. This proposed rule outlines the application of the existing allocation provisions for each species and provides the resulting allocations, by state and sector, as appropriate, for each species.

The involvement of the SSC in the specifications process and the evolving role of the monitoring committees has substantially modified the manner in which specifications are developed and considered by the Council. There is increased discussion and documentation regarding each species' stock status, scientific uncertainty associated with the stock and/or stock assessment, the risk of overfishing, management issues, and the derivation of each group's respective recommendation to the Council. In previous years' specification process, NMFS often provided extensive summarization of these issues in the proposed specification rule; however, doing so duplicates the extensive record established by the Council process. As such, only a nominal overview of each step of the specification process is provided in this proposed rule. Persons seeking more detailed information on the Council-related aspects of the specifications process, including the issues considered by the SSC and monitoring committees, are encouraged to obtain documents on these subjects, which are available from the Council or by consulting the Council's EA/IRFA (*see* **ADDRESSES** section). NMFS has participated in and relied on the documentation from the updated stock assessment proceedings, SSC and monitoring committee meetings and recommendations, and Council meeting in completing this proposed rule.

Explanation of RSA

Background: In 2001, regulations were implemented under Framework Adjustment 1 to the FMP to allow up to 3 percent of the Total Allowable Landings (TAL) for each species to be set aside each year in support of scientific research. For the 2011 fishing year, NMFS published a **Federal Register** notice soliciting research proposals based upon research priorities

identified by the Council (75 FR 3092, January 19, 2010).

NMFS intends to conditionally approve three research projects for the harvest of the portion of the set-aside quota that has been recommended by the Council and the Commission. In anticipation of receiving applications for EFPs to conduct this research and harvest set-aside quota, the Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator), has made a preliminary determination that the activities authorized under the EFPs would be consistent with the goals and objectives of the FMP. However, further review and consultation may be necessary before a final determination is made to issue any EFP.

For informational purposes, these proposed specifications include a statement indicating the amount of quota that has been preliminarily set aside for research purposes (a percentage of the TAL for each fishery, not to exceed 3 percent, as recommended by the Council and Board), and a brief description of the likely 2011 Mid-Atlantic RSA projects, including exemptions that will likely be required to conduct the proposed research. The RSA amounts may be adjusted, following consultation with RSA applicants, in the final rule establishing the 2011 specifications for the summer flounder, scup, black sea bass, *Loligo* squid, butterfish, and Atlantic bluefish fisheries. If the total amount of RSA is not awarded, NMFS will publish a document in the **Federal Register** to restore the unused amount to the applicable TAL.

For 2011, the conditionally approved projects may collectively be awarded the following amounts of RSA: 884,400 lb (401 mt) of summer flounder; 600,000 lb (272 mt) of scup; 108,000 lb (49 mt) of black sea bass; 727,527 lb (330 mt) of *Loligo* squid; 818,790 lb (371 mt) of bluefish; and 33,069 lb (15 mt) of butterfish. The harvest of RSA quota would occur January 1–December 31, 2011, by vessels conducting compensation fishing. Vessels harvesting research quota in support of approved research projects would be issued EFPs authorizing them to exceed Federal possession limits and to fish during Federal quota closures. These exemptions are necessary to facilitate compensation fishing and to allow project investigators to recover research expenses, as well as to adequately compensate fishing industry participants harvesting research quota. Vessels harvesting research quota would operate under all other regulations that govern the fishery, unless specifically exempted in a separate EFP.

2011 RSA Proposal Summaries: Project number 1 would conduct a fishery-independent scup and black sea bass survey that would utilize unvented fish pots fished on hard bottom areas in southern New England waters to characterize the size composition of the scup and black sea bass populations. Survey activities would be conducted June 15–October 15, 2011, at 15 hard bottom study sites. Up to two vessels would conduct the research survey. Sampling would occur off the coasts of Rhode Island and southern Massachusetts, with the furthest west site off of Block Island near Southwest Shoals. To achieve the research objectives, the principal investigators would require exemptions from gear requirements (excluding marine mammal avoidance and/or release devices) in order to sample small scup and black sea bass, and from minimum fish sizes and possession limits for data collection purposes.

Project number 2 would conduct a near-shore trawl survey between Aquinnah, Massachusetts, and Cape Hatteras, North Carolina, including both Block Island and Rhode Island Sounds. Two survey cruises would occur (spring and fall) with stratified random sampling of approximately 150 stations in depths between 18–120 feet (8–37 m). The function of the survey would be to provide stock assessment data for summer flounder, scup, black sea bass, *Loligo* squid, butterfish, bluefish, several species managed by the Commission such as weakfish and Atlantic croaker, and unmanaged forage species. The research aspects of the trawl survey would be conducted by one scientific research vessel, which could operate under a Letter of Acknowledgment (LOA), as established by experimental fishing regulations found at 50 CFR 600.745.

Project number 3 would conduct a black sea bass mark-recapture study using commercial pot and hook-and-line fishing gear to monitor changes in the size at age and sex distribution of black sea bass at three sites off New Jersey during the spawning season (May through August). Sampling would be conducted on the following three artificial reef sites off southern New Jersey: Ocean City; Wildwood; and Cape May reefs. Vessels conducting research trips would tag black sea bass with conventional and acoustic tags, and clustered hydrophones would be placed in the study area for 2.5 months. Subsequent research trips would conduct fishing with commercial pots and hook and line gear to re-capture tagged fish, and to monitor the movement of fish with the acoustic tags. One commercial pot vessel and several party boats would conduct the research. Vessels conducting research activities would require exemption from commercial and recreational black sea bass quota closures to ensure the ability to sample during such closures, and exemption from black sea bass minimum fish size and possession limits for the purpose of collecting scientific data.

Summer Flounder

The summer flounder stock is currently under a rebuilding program, and rebuilding must be complete by January 1, 2013. The stock assessment update utilized to derive specification recommendations indicates that summer flounder were not overfished and that overfishing did not occur in 2009, the most recent year of available data. Furthermore, stock projections in the assessment update indicate that the rebuilding objective is likely to be attained ahead of schedule.

Based on this information, the SSC recommended to the Council that the 2011 ABC for summer flounder be set no higher than 33.95 million lb (15,399 mt). This results in a Total Allowable Catch (TAC; combined landings and discards) established at the ABC level (i.e, 33.95 million lb, 15,399 mt). Estimated commercial and recreational discards of 4.47 million lb (2,028 mt) are removed from the TAC to produce a 2011 TAL of 29.48 million lb (13,372 mt). This TAL is projected to have a 50-percent probability of achieving the $F_{TARGET} = F_{40\ percent} = 0.255$ in 2011, and is projected to have a 98-percent probability of preventing overfishing of the stock (*i.e.,* preventing an F higher than $F_{THRESHOLD} = F_{35\ percent} = 0.310$). The Summer Flounder Monitoring Committee concurred with the SSC's ABC recommendation, and did not recommend any additional changes to either the TAC or to the 2011 summer flounder management measures that may be modified through the specification process.

The Council and Board considered the SSC and Summer Flounder Monitoring Committee recommendations before concurring with ABC/TAC and TAL of 29.48 million lb (13,372 mt) that results after removal of estimated discards. Fishing under this TAC/TAL level in 2011 is not expected to compromise summer flounder stock rebuilding, nor will fishing at this level present a high likelihood of overfishing the stock. The proposed TAL would be a 33.2-percent increase from the 2009 TAL of 22.13

million lb (10,038 mt). All other management measures were recommended by the Council to remain status quo.

The summer flounder regulations at 50 CFR 648.100 (a) state that the Council shall recommend, and NMFS shall implement, measures (including the TAL) necessary to achieve, with at least a 50-percent probability of success, a fishing mortality rate that produces the maximum yield per recruit (F_{MAX}). Framework Adjustment 7 to the FMP (Framework 7) was implemented on October 1, 2007 (72 FR 55704), to allow the best available scientific information be adopted without delay by the Council for use in managing summer flounder. The updated SDWG assessment recommended $F_{MSY} = F_{35\ percent}$ as the best available fishing mortality rate estimate to produce the optimum yield per recruit and this assessment is now the threshold value for determining whether overfishing is occurring on summer flounder, replacing F_{MAX}. A 2000 Federal Court Order (*Natural Resources Defense Council* v. *Daley,* Civil No. 1:99 CV 00221 (JLG)) also requires the annual summer flounder TAL to have at least a 50-percent probability of success. As previously stated, the Council and Board's recommended TAL of 29.48 million lb (13,372 mt) has a 98-percent probability of constraining fishing mortality below the overfishing threshold, and a 50-percent probability of achieving the assessment-recommended management target. NMFS therefore proposes to implement a TAL of 29.48 million lb (13,372 mt) for 2011, consistent with the Council's and Board's recommendation.

Based on the allocation scheme contained in the FMP, the TAL is divided 60 percent to the commercial fishery and 40 percent to the recreational fishery. This division results in an initial commercial quota of 17.69 million lb (8,024 mt), and a recreational harvest limit of 11.79 million lb (5,349 mt); however, the FMP also specifies that up to 3 percent of the TAL may be set aside for research activities before the remaining TAL is allocated to the commercial and recreational sectors. The Council and Board agreed to set aside up to 3 percent of the TAL, or 884,400 lb (401 mt). After deducting 3 percent of the 2011 TAL as RSA, the resulting sector allocations would be a commercial quota of 17.2 million lb (7,782 mt) and a recreational harvest limit of 11.4 million lb (5,188 mt).

Table 1 presents the proposed allocations by state with and without the commercial portion of the RSA deduction. These state quota allocations are preliminary and are subject to reductions if there are overages of states quotas carried over from a previous fishing year. Any commercial quota adjustments to account for overages will be included in the final rule implementing the 2011 specifications.

TABLE 1—2011 PROPOSED INITIAL SUMMER FLOUNDER STATE COMMERCIAL QUOTAS

State	Percent share	Initial commercial quota		Commercial quota less RSA [1]	
		lb	kg [2]	lb	kg [2]
ME	0.04756	8,412	3,816	8,160	3,701
NH	0.00046	81	37	79	36
MA	6.82046	1,206,403	547,224	1,170,211	530,808
RI	15.68298	2,774,006	1,258,289	2,690,785	1,220,540
CT	2.25708	399,232	181,092	387,255	175,659
NY	7.64699	1,352,600	613,539	1,312,022	595,133
NJ	16.72499	2,958,316	1,341,892	2,869,567	1,301,635
DE	0.01779	3,147	1,427	3,052	1,385
MD	2.03910	360,676	163,603	349,856	158,695
VA	21.31676	3,770,509	1,710,303	3,657,393	1,658,994
NC	27.44584	4,854,620	2,202,056	4,708,982	2,135,994
Total [3]	100.00001	17,688,002	8,023,278	17,157,362	7,782,579

[1] Preliminary Research Set-Aside amount is 884,400 lb (401 mt).
[2] Kilograms are as converted from pounds and do not sum to the converted total due to rounding.
[3] Rounding of quotas results in totals exceeding 100 percent.

The Commission is maintaining in place the voluntary measures to reduce regulatory discards that occur as a result of landing limits established by the states. The Commission established a system whereby a percent of each state's quota would be voluntarily set aside each year to enable vessels to land an incidental catch allowance after the directed fishery has been closed. The intent of the incidental catch set-aside is to reduce discards by allowing fishermen to land summer flounder caught incidentally in other fisheries during the year, while also ensuring that the state's overall quota is not exceeded. These Commission set-asides are not included in these proposed specifications because these measures are not authorized by the Federal FMP and NMFS does not have authority to implement them.

Scup

The scup stock is not subject to a rebuilding plan at this time. The updated scup stock assessment indicates that the stock was not overfished nor subject to overfishing in 2009, the most recent year of complete data available in the assessment update.

The SSC recommended an ABC for scup based on 75 percent of F_{MSY} (F = 0.133), resulting in an ABC/TAC of 51.7 million lb (23,451 mt). The SSC also conveyed concern about rapid increases in catches to achieve the MSY value for the scup stock. The cautionary statement to not increase catches to the full MSY quickly was originally issued by the peer review panel that reviewed a 2009 Data Poor Stocks Working Group assessment of the scup stock.

The Scup Monitoring Committee proposed a range of TACs derived from the ABC recommendation. The range spanned from the landings associated with the MSY value for the scup stock of 35.1 million lb (15,921 mt) to the status quo TAC of 17.09 million lb (7,752 mt). The Scup Monitoring Committee also shared the concerns of the SSC and the assessment peer review panel that had cautioned against rapidly increasing scup catches to meet the MSY value of 35.1 million lb (15,921 mt).

The Council adopted a TAC for scup of 24.1 million lb (10,932 mt) as their recommendation for 2011. In turn, NMFS is proposing this TAC as the 2011 catch level for scup. This TAC

level would provide for a 20.0 million lb TAL (9,072 mt), and would be divided into the commercial and recreational allocations as outlined in the scup regulations. The FMP specifies that the established TAC be allocated 78 percent to the commercial sector and 22 percent to the recreational sector. The commercial TAC, discards, and TAL (i.e., final commercial quota, after reduced for any RSA) are then allocated on a percentage basis to three quota periods, as specified in the FMP: Winter I (January–April)—45.11 percent; Summer (May–October)—38.95 percent; and Winter II (November–December)—15.94 percent.

The proposed TAL would be subdivided into an initial commercial quota of 15.6 million lb (7,076 mt) and a recreational harvest limit of 4.4 million lb (1,996 mt). The Council voted to set up to 3 percent of the TAL or 600,000 lb (272 mt), aside for 2011 RSA. If it is, the commercial quota would be reduced to 15.1 million lb (6,864 mt), with a recreational harvest limit of 4.3 million lb (1,936 mt).

The proposed 2011 specifications would maintain the status quo base scup possession limits, i.e., 30,000 lb (13,608 kg) per trip for Winter I, to be reduced to 1,000 lb (454 kg) per trip when 80 percent of the quota is projected to be reached, and 2,000 lb (907 kg) per trip for Winter II.

Table 2 presents the 2011 commercial allocation recommended by the Council, with and without the preliminary RSA deduction. These 2010 allocations are preliminary and may be adjusted in the final rule implementing these specifications due to previously unaccounted for overages, based on the procedures for calculating overages.

TABLE 2—2011 PROPOSED INITIAL TAC, INITIAL COMMERCIAL SCUP QUOTA, AND POSSESSION LIMITS

Period	Percent	TAC in lb (mt)	Discards in lb (mt)	Initial commercial quota in lb (mt)	Commercial quota less RSA in lb (mt)	Possession limits in lb (kg)
Winter I	45.11	8,479,778 (3,846)	1,442,618 (654)	7,037,160 (3,192)	6,826,045 (3,096)	[1] 30,000 (13,608)
Summer	38.95	7,321,821 (3,321)	1,245,621 (565)	6,076,200 (2,756)	5,893,914 (2,673)	n/a
Winter II	15.94	2,996,401 (1,359)	509,761 (231)	2,486,640 (1,128)	2,412,041 (1,094)	2,000 (907)
Total [2]	100.00	18,798,000 (8,527)	3,198,000 (1,451)	15,600,000 (7,076)	15,132,000 (6,864)	n/a

[1] The Winter I landing limit would drop to 1,000 lb (454 kg) upon attainment of 80 percent of the seasonal allocation.
[2] Totals subject to rounding error.
n/a—Not applicable.

The final rule to implement Framework 3 to the FMP (68 FR 62250, November 3, 2003) implemented a process, for years in which the full Winter I commercial scup quota is not harvested, to allow unused quota from the Winter I period to be rolled over to the quota for the Winter II period. As shown in Table 3, the proposed specifications would maintain the status quo Winter II possession limit-to-rollover amount ratios (i.e., 1,500 lb (0.68 mt) per 500,000 lb (227 mt) of unused Winter I period quota).

TABLE 3—POTENTIAL INCREASE IN WINTER II POSSESSION LIMITS BASED ON THE AMOUNT OF UNHARVESTED SCUP ROLLED OVER FROM WINTER I TO WINTER II PERIOD

Initial Winter II possession limit		Rollover from Winter I to Winter II		Increase in initial Winter II possession limit		Final Winter II possession limit after rollover from Winter I to Winter II	
lb	kg	lb	mt	lb	kg	lb	kg
2,000	907	0–499,999	0–227	0	0	2,000	907
2,000	907	500,000–999,999	227–454	1,500	680	3,500	1,588
2,000	907	1,000,000–1,499,999	454–680	3,000	1,361	5,000	2,268
2,000	907	1,500,000–1,999,999	680–907	4,500	2,041	6,500	2,948
2,000	907	2,000,000–2,500,000	907–1,134	6,000	2,722	8,000	3,629

Black Sea Bass

Black sea bass are not subject to a stock rebuilding program. The updated stock assessment indicates that black sea bass were not overfished and overfishing did not occur in 2009.

The SSC recommended that ABC for black sea bass remain at the status quo level of 4.5 million lb (2,041 mt) for 2011. The SSC stated that there remains a high degree of uncertainty surrounding the overfishing limit estimate for the black sea bass stock, as well as considerable uncertainties about the black sea bass stock structure, life history, and retrospective patterns within the stock assessment.

The Black Sea Bass Monitoring Committee concurred with the ABC recommendation, and recommended a TAC of 4.5 million lb (2,041 mt) to the Council.

The Council and Board considered the SSC and Black Sea Bass Monitoring Committee recommendations at their August meeting. The Council and Board concurred with the ABC/TAC recommendation of 4.5 million lb (2,041 mt) for 2011. After estimated commercial fishery and recreational landings are removed from the ABC/TAC, the TAL for black sea bass would be 3.6 million lb (1,633 mt).

NMFS is proposing a 2011 TAC of 4.5 million lb (2,041 mt) and TAL of 3.6 million lb (1,633 mt) for the 2011 black sea bass fisheries, consistent with the recommendations of the Council and Board. The FMP specifies that the TAL is to be allocated 49 percent to the commercial sector and 51 percent to the recreational sector; therefore, the initial TAL would be allocated 1.76 million lb (798 mt) to the commercial sector as a commercial quota and 1.84 million lb (835 mt) to the recreational sector as a recreational harvest limit. The Council and Board voted to set aside up to 3 percent of the TAL, or 108,000 lb (49 mt), as RSA. This would adjust the commercial quota to 1.7 million lb (776 mt) and the recreational harvest limit to 1.8 million lb (808 mt). Only the ABC/TAC is the same as last year, the overall TAL being proposed for 2011 (3.6 million lb (1,633 mt)) is 100,000 lb (45 mt) less than the status quo because the updated discard estimate is higher for 2011 than for 2010.

Summary of NMFS' Proposed 2011 Summer Flounder, Scup, and Black Sea Bass Specifications

Summer Flounder: TAL of 29.48 million lb (13,372 mt); RSA of 884,400 lb (401 mt); commercial quota of 17,157,360 lb (7,782 mt); and a recreational harvest limit of 11,438,240 lb (5,188 mt).

Scup: 20.0 million lb TAL (9,072 mt); RSA of 600,000 lb (272 mt); commercial quota to 15,132,000 lb (6,864 mt); and a recreational harvest limit of 4,268,000 lb (1,936 mt).

Black Sea Bass: TAL of 3,600,000 lb (1,633 mt); RSA of 108,000 lb (49 mt); commercial quota 1,711,080 lb (776 mt); and recreational harvest limit of 1,780,920 (808 mt).

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

These proposed specifications are exempt from review under Executive Order 12866.

An IRFA was prepared by the Council, as required by section 603 of the Regulatory Flexibility Act (RFA), to examine the impacts of these proposed specifications on small business entities, if adopted. A description of the specifications, why they are being considered, and the legal basis for proposing and implementing specifications for the summer flounder, scup, and black sea bass fisheries are contained in the preamble to this proposed rule. A copy of the detailed RFA analysis is available from NMFS or the Council (see **ADDRESSES**). The Council's analysis made use of quantitative approaches when possible. Where quantitative data on revenues or other business-related metrics that would provide insight to potential impacts were not available to inform the analyses, qualitative analyses were conducted. A summary of the 2011 specifications RFA analysis follows.

Small businesses operating in commercial and recreational (i.e., party and charter vessel operations) fisheries have been defined by the Small Business Administration as firms with gross revenues of up to $4.0 and $6.5 million, respectively. The categories of small entities likely to be affected by this action include commercial and charter/party vessel owners holding an active Federal permit for summer flounder, scup, or black sea bass, as well as owners of vessels that fish for any of these species in state waters. All federally permitted vessels fall into the definition of small businesses; thus, there would be no disproportionate impacts between large and small entities as a result of the proposed rule.

The Council estimates that the proposed 2011 specifications could affect 2,206 vessels that held a Federal summer flounder, scup, and/or black sea bass permit in 2009 (the most recent year of complete permit data). However, the more immediate impact of this rule will likely be realized by the 810 vessels that actively participated in these fisheries (*i.e.,* landed these species) in 2009.

There are no new reporting or recordkeeping requirements contained in any of the alternatives considered for this action. In addition, NMFS is not aware of any relevant Federal rules that may duplicate, overlap, or conflict with this proposed rule.

If the Council took no action regarding the 2011 specifications, several indefinite measures would remain in effect until otherwise changed; however, many components of the 2010 specifications expire on December 31, 2010. These include TALs for all three species and TAC for scup. There are no roll-over provisions for the 2010 quotas if the 2011 specifications are not made effective, and so, without specified quotas, NMFS would have no mechanism to close fisheries if management limits were exceeded. This would give rise to a situation in which the goals and objectives of the FMP, its implementing regulations, and the Magnuson-Stevens Act would all be violated. Therefore, the no action alternative is not considered to be a reasonable alternative to the preferred action of developing and implementing 2011 specifications and, as such, it was excluded from detailed analysis in the Council's EA/RFA analyses.

The Council analyzed three sets of combined TAL alternatives for the 2010 summer flounder, scup, and black sea bass fisheries. Of these, one alternative, labeled Alternative 2 for each species, contained the most restrictive TAL options (*i.e.,* lowest total landing levels—summer flounder, 22.13 million lb (10,038 mt); scup, 14.11 million lb (6,400 mt); black sea bass, 2.30 million lb (1,043 mt)). While the Alternative 2 measures would achieve the objectives of the proposed action for each of three species, they have the highest potential adverse economic impacts on small entities in the form of potential foregone fishing opportunities. Alternative 2 was not preferred by the Council because the other alternatives considered are expected have lower adverse impacts on small entities while achieving the stated objectives of rebuilding the summer flounder stock and sustaining the scup and black sea bass stocks, consistent with the FMP and Magnuson-Stevens Act. Accordingly, Alternative 2 was excluded from this analysis.

The Council analyzed two sets of TAL alternatives for the three species that would accomplish the stated objectives of the proposed action, and that would minimize the adverse economic impacts of the proposed rule on small entities. Alternative 1 (Council's preferred) would implement the following TALs in 2011: Summer Flounder, 29.48 million lb (13,372 mt); scup, 20.0 million lb (9,072 mt); and black sea bass, 3.6 million lb (1,633 mt). Alternative 3 (least restrictive/highest quota levels) would implement the following TALs in 2011: Summer flounder, 35.05 million lb (15,898 mt); scup, 28.96 million lb (13,136 mt); and black sea bass, 4.35 million lb (1,973 mt).

Commercial Fishery Impacts

To analyze the potential impacts of the proposed alternatives, the Council examined the total revenue earned by an individual vessel in 2009 (as a proxy for 2010), and compared the potential revenue in 2011 given the changes in fishing opportunity available through changes in harvest levels from 2010 to 2011. While there are caveats to such an approach—for example a vessel may hold multiple permits and supplement losses of opportunity in one fishery with another comparable species; or ex-vessel prices may change from levels utilized

in the analysis—the approach taken provides a rational basis for explaining the potential financial impact to participating vessels. It is important to note that actual impacts to individual vessels will likely differ as a product of the many variables that cannot be easily accounted for in the Council's analyses.

Under Alternative 1 (Council's preferred), assuming the increase in total ex-vessel gross revenues associated with the increased commercial quota for summer flounder is equally distributed among the 673 vessels that landed summer flounder in 2009, the potential average revenue could increase by $12,036 per vessel. For scup, the expected revenue across the 398 vessels that landed scup in 2009 could increase by an average of $8,492 per vessel. Revenues are projected to decrease by $304 across the 460 vessels that landed black sea bass in 2009, due to the slight commercial quota decrease under Alternative 1. The Council's analysis indicated that this decrease in black sea bass would comprise less than 5 percent of these vessels' expected revenue.

Under Alternative 3 (least restrictive TALs), analysis indicates that the 2011 commercial quotas could increase revenues per vessel as follows: Summer flounder, $21,085; scup, $21,432; and black sea bass, $1,826. The potential average increase in revenue per vessel for the combined suite of summer flounder, scup, and black sea bass landed by 810 vessels in 2009 was estimated to be $29,086 per vessel.

Recreational Fishery Impacts

While the specifications proposed would establish a 2011 recreational harvest limit for summer flounder, scup, and black sea bass, the management measure details for recreational fisheries will be decided by the Council in December 2010, followed by NMFS rulemaking in the first quarter of 2011. A comprehensive analysis of the impacts associated with the recommended recreational management measures will be provided to NMFS from the Council to support these activities.

The Council also examined the potential impact on the demand for recreational for-hire party/charter vessel trips resulting from Alternatives 1 and 3. While impacts are also likely to occur for individual private recreational fishery participants and fishing-related businesses such as bait and tackle shops, these are neither regulated small-business entities under NMFS' jurisdiction, nor is there participation cost or other economic metric data available to assess potential impact on such groups. The Council's analysis indicates that demand for for-hire trips and general saltwater recreational angler participation has trended upward slightly over the past decade. The Council's analysis also indicated that it was not possible to reasonably predict behavioral or demand changes in response to the recreational harvest limits proposed under any of the three alternatives. However, under Alternatives 1 and 3, it is not expected that, based on current recreational landings data, 2011 management measures (*i.e.,* minimum fishing size, possession limits, and fishing seasons) would need to be made more constraining, except for potential restrictions under the Alternative 1 black sea bass recreational harvest limit. As previously stated, the Council will undertake additional recreational management measures development and analysis in December 2010.

Summary

The Council selected Alternative 1 (preferred) over Alternative 3 (least restrictive) stating that, while Alternative 3 measures would provide higher economic benefits than the preferred measures of Alternative 1, the Alternative 3 measures were expected to result in long-term negative impacts for the summer flounder, scup, and black sea bass stocks, and were inconsistent with the advice provided to the Council from the SSC and its monitoring committees. NMFS agrees with the Council's IRFA analysis and rationale for recommending the TALs in Alternative 1. As such, NMFS is proposing to implement the Alternative 1 TALs for 2011: Summer flounder, 35.05 million lb (15,898 mt); scup, 28.96 million lb (13,136 mt); and black sea bass, 4.35 million lb (1,973 mt).

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

Dated: November 12, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–29000 Filed 11–16–10; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 75, No. 221
Wednesday, November 17, 2010

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

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 10, 2010.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Aquaculture Survey.

OMB Control Number: 0535–0150.

Summary of Collection: The primary function of the National Agricultural Statistics Service is to estimate production and stocks of agricultural food, fiber, and specialty commodities. Congress has mandated the collection of basic data for aquaculture and provides funding for these surveys. Public Law 96–362 was passed to increase the overall effectiveness and productivity of federal aquaculture programs by improving coordination and communication among Federal agencies involved in those programs. Aquaculture is an alternative method to produce a high protein, low fat product demanded by the consumer. Aquiculture surveys provide information on trout and catfish inventory, acreage and sales as well as catfish processed.

Need and Use of the Information: The survey results are useful in analyzing changing trends in the number of commercial operations and production levels by State. The information collected is used to demonstrate the growing importance of aquaculture to officials of Federal and State government agencies who manage and direct policy over programs in agriculture and natural resources. The type of information collected and reported provides extension educators and research scientists with data that indicates important areas that require special educational and/or research efforts, such as causes for loss of fish and pond inventories of fish of various sizes. The data gathered from the various reports provide information to establish contract levels for fishing programs and to evaluate prospective loans to growers and processors.

Description of Respondents: Farms; Business or other for-profit.

Number of Respondents: 2,955.

Frequency of Responses: Reporting: Monthly; Semi-Annually; Annually.

Total Burden Hours: 961.

National Agriculture Statistics Service

Title: Agricultural Surveys Program.

OMB Control Number: 0535–0213.

Summary of Collection: National Agriculture Statistics Service (NASS) primary functions are to prepare and issue state and national estimates of crop and livestock production and collect information on related environmental and economic factors. The Agricultural Surveys Program is a series of surveys that contains basic agricultural data from farmers and ranchers throughout the Nation for preparing agricultural estimates and forecasts. The surveys results provide the foundation for setting livestock and poultry inventory numbers. Estimates derived from the surveys supply information needed by farmers to make decisions for both short and long-term planning. The General authority for these data collection is granted under U.S. Code Title 7, Section 2204.

Need and Use of the Information: The surveys provide the basis for estimates of the current season's crop and livestock production and supplies of grain in storage. Crop and livestock statistics help develop a stable economic atmosphere and reduce risk for production, marketing, and distribution operations. These commodities affect the well being of the nation's farmers, commodities markets, and national and global agricultural policy. Users of agricultural statistics are farm organizations, agribusiness, state and national farm policy makers, and foreign buyers of agricultural products but the primary user of the statistical information is the producer. Agricultural statistics are also used to plan and administer other related federal and state programs in such areas as school lunch program, conservation, foreign trade, education, and recreation. Collecting the information less frequent would eliminate needed data to keep the government and agricultural industry abreast of changes at the state and national levels.

Description of Respondents: Farms.

Number of Respondents: 525,000.

Frequency of Responses: Reporting: Quarterly; Semi-annually; Monthly; Annually.

Total Burden Hours: 192,027.

National Agriculture Statistics Service

Title: Cotton Ginning Survey.

OMB Control Number: 0535–0220.

Summary of Collection: Primary function of the National Agricultural Statistics Services (NASS) is to prepare and issue state and national estimates of crop and livestock production, disposition and prices as well as

specialty agricultural and environmental statistics. The Cotton Ginning Survey provides statistics concerning cotton ginning for specific dates and geographic regions and aids in forecasting cotton production, which is required under U.S.C. Title 13, Section 42(a).

Need and Use of the Information: The ginning data collected provides (1) all segments of the cotton industry—buyers, brokers, crushers, shippers, textile firms, and researches with exact quantities of cotton available at specific geographic locations within the U.S. on a regular basis; (2) precise statistics, especially when at least 50 percent of the forecasted cotton production has been ginned in a state; and (3) final season ginning data is used to establish final production. If the information were collected less frequent, the cotton industry would be without county level quantities ginned that could seriously affect transportation costs and marketing strategies.

Description of Respondents: Business or other for-profit.

Number of Respondents: 826.

Frequency of Responses: Reporting: Other (biweekly Sept.–Jan).

Total Burden Hours: 819.

National Agricultural Statistics Service

Title: Equine Survey.

OMB Control Number: 0535–0227.

Summary of Collection: The primary objective of the National Agricultural Statistics Service (NASS) is to prepare and issue current official State and national estimates of crop and livestock production, disposition, and prices. Services such as statistical consultation, data collection, summary tabulation, and analysis are performed for other Federal and State agencies on a reimbursable basis as the need arises. In the past, equine surveys have been conducted in twelve States where equine is a significant portion of their agriculture. The results are used to provide an assessment of the equine industry's contribution to the State's economy in terms of infrastructure and value.

Need and Use of the Information: NASS will collect information on equine inventories, by category; equine revenue, by activity; and equine related expenditures, by purpose. In addition, these surveys will provide NASS with names and addresses of equine operations that can be used for Census of Agriculture enumeration and for the NASS program that seeks to cover 99 percent of U.S. agricultural cash receipts.

Description of Respondents: Farms.

Number of Respondents: 106,000.

Frequency of Responses: Reporting: One-time.

Total Burden Hours: 23,744.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2010–28889 Filed 11–16–10; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Forest Service

Nevada and Placer Counties Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of Meeting.

SUMMARY: The Nevada and Placer Counties Resource Advisory Committee (RAC) will meet in Nevada City, California. 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 discuss projects submitted for funding and the expenditure of Title II funds benefiting National Forest System lands in Nevada and Placer Counties.

DATES: The meeting will be held Monday, December 6, 2010, at 9 a.m. with a backup meeting planned for Thursday, December 9, 2010, at 9 a.m. if necessary.

ADDRESSES: The meeting will be held at the Tahoe National Forest Headquarters, 631 Coyote St., Nevada City, CA.

FOR FURTHER INFORMATION CONTACT: Ann Westling, Committee Coordinator, USDA, Tahoe National Forest, 631 Coyote St., Nevada City, CA 95959, (530) 478–6205, e-mail: *awestling@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Welcome and Introductions; (2) Review of Past Meeting Notes and Agenda Discussion; (3) Discussion of Proposed Projects; (4) Vote on Proposed Projects; and (5) Comments from the Public. The meeting is open to the public and the public will have an opportunity to comment at the meeting.

Dated: November 9, 2010.

Tom Quinn,

Forest Supervisor.

[FR Doc. 2010–28939 Filed 11–16–10; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Central Idaho Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of Meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. L. 110–343), the Salmon-Challis National Forest's Central Idaho Resource Advisory Committee will conduct a business meeting which is open to the public.

DATES: Friday December 10, 2010, beginning at 10 a.m.

ADDRESSES: Public Lands Center, 1206 South Challis Street, Salmon, Idaho.

SUPPLEMENTARY INFORMATION: Agenda topics will include a discussion of the project approval process, evaluation of project proposals, and approval and recommendation of some projects for Title II funding for 2011 and 2012.

Some RAC members may attend the meeting by conference call, telephone, or electronically. The meeting is open to the public.

FOR FURTHER INFORMATION CONTACT: Frank V. Guzman, Forest Supervisor and Designated Federal Officer, at 208–756–5111.

Dated: November 1, 2010.

Frank V. Guzman,

Forest Supervisor, Salmon-Challis National Forest.

[FR Doc. 2010–28721 Filed 11–16–10; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Davy Crockett National Forest Resource Advisory Committee; Public Meeting

AGENCY: Forest Service.

ACTION: Notice.

SUMMARY: In accordance with the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. L. 106–393), [as reauthorized as part of Pub. L.110–343] and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of Agriculture, Forest

Service, Davy Crockett National Forest Resource Advisory Committee (RAC) meeting will meet as indicated below.

DATES: The Davy Crockett National Forest RAC meeting will be held on Thursday, December 9, 2010.

ADDRESSES: The Davy Crockett National Forest RAC meeting will be held at the Davy Crockett Ranger Station located on State Highway 7, approximately one-quarter mile West of FM 227 in Houston County, Texas. The meeting will begin at 6 p.m. and adjourn at approximately 8 p.m. A public comment period will begin at 7:45 p.m.

FOR FURTHER INFORMATION CONTACT: Gerald Lawrence, Jr., Designated Federal Officer, Davy Crockett National Forest, 18551 State Hwy. 7 E., Kennard, TX 75847: *Telephone:* 936–655–2299 ext. 225 or e-mail at: *glawrence@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The Davy Crockett National Forest RAC proposes projects and funding to the the Secretary of Agriculture under Section 203 of the Secure Rural Schools and Community Self Determination Act of 2000, (as reauthorized as part of Pub. L. 110–343). The purpose of the December 9, 2010 meeting is to discuss stewardship projects, new Title II projects, and the status of carry over funding. These meetings are open to the public. The public may present written comments to the RAC. Each formal RAC meeting will also have time, as identified above, for persons wishing to comment. The time for individual oral comments may be limited.

Gerald Lawrence, Jr.,

Designated Federal Officer, Davy Crockett National Forest RAC.

[FR Doc. 2010–28798 Filed 11–16–10; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Fresno County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Fresno County Resource Advisory Committee will be meeting in Prather, California, January 12, 2011 and in Clovis, California, January 26, 2011. The purpose of the January 12 meeting will be to review new project proposals that were submitted by the January 7, 2011 deadline. The purpose of the meeting on January 26 will be to vote and approve projects to be funded under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 110–343).

DATES: The meeting will be held on January 12, 2011 from 6 p.m. to 8:30 p.m. in Prather, CA and January 26, 2011 from 6 p.m. to 8:30 p.m. in Clovis, CA.

ADDRESSES: The meeting on January 12th will be held at the High Sierra Ranger District, 29688 Auberry Rd. Prather, CA. The meeting on January 26th will be held at the Sierra National Forest Supervisor's Office, 1600 Tollhouse Rd. Clovis, CA. Send written comments to Darcy Brown, Fresno County Resource Advisory Committee Coordinator, do Sierra National Forest, High Sierra Ranger District, 29688 Auberry Road, Prather, CA 93651 or electronically to *dlbrown02@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Darcy Brown, Fresno County Resource Advisory Committee Coordinator, (559) 855–5355 ext. 3374.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring Payments to States Fresno County Title II project matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Final project submissions are due by January 7, 2011 to the Forest Service. Agenda items to be covered include: (1) Review project proposals and (2) Vote on projects to be funded.

Dated: November 8, 2010.

Ray Porter,

District Ranger.

[FR Doc. 2010–28799 Filed 11–16–10; 8:45 am]

BILLING CODE 3410–11–M

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: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order

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

SUMMARY: Based on affirmative final determinations by the Department of Commerce ("the Department") and the International Trade Commission ("ITC"), the Department is issuing a countervailing duty order on certain coated paper suitable for high-quality print graphics using sheet-fed presses ("coated paper") from the People's Republic of China ("PRC"). Also, as explained in this notice, the Department is amending its final determination to correct certain ministerial errors.

DATES: *Effective Date:* November 17, 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.

Background

On September 27, 2010, the Department published its final determination that countervailable subsidies are being provided to producers and exporters of coated paper from the PRC. *See 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,* 75 FR 59212 (September 27, 2010) ("*Final Determination*").

On November 10, 2010, the ITC notified the Department of its final determination pursuant to sections 705(b)(1)(A)(ii) and 705(d) of the Tariff Act of 1930, as amended ("the Act"), that an industry in the United States is threatened with material injury by reason of subsidized imports of subject merchandise from the PRC. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From China and Indonesia,* USITC Investigation Nos. 701–TA–470–471 and 731–TA–1169–1170 (Final), Inv., USITC Publication 4192 (November 2010).

Scope of the Order

The merchandise covered by this order includes 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]

[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 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

Continued

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.

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 that meets this scope definition; and (c) any other coated paper and paperboard that meets this scope definition.

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 order is dispositive.

Amendment to the Final Determination

On October 6, 2010, 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") filed timely allegations that the Department made ministerial errors in its *Final Determination.* In summary, Petitioners alleged that the Department made certain errors in the calculations of the preferential lending to the coated paper industry program and the adjusted consolidated sales denominator for respondent Gold East (Jiangsu) Co., Ltd. ("GE"). No interested party filed a rebuttal to Petitioners' allegations.

After analyzing the allegations, we have determined, in accordance with 19 CFR 351.224(e), that we made certain ministerial errors that Petitioners alleged in the calculations. *See* Memorandum to Susan H. Kuhbach, Acting Deputy Assistant Secretary, AD/CVD Operations, from The Team, Office 1, AD/CVD Operations, "*Countervailing Duty Investigation: Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China:* Ministerial Errors for Final Determination" (November 12, 2010) ("Ministerial Error Memo"). Parties can find a complete discussion of all issues raised by Petitioners and the corresponding recommendations in this memorandum, a public version of which is on file in the Central Records Unit, Room 7046 of the main Commerce building.

After correcting the ministerial errors above, we determine the *ad valorem* subsidy rates for the relevant programs are: (1) 10.54 percent under "Preferential Lending to the Coated Paper Industry;" (2) 1.11 percent under "Two Free, Three Half;" (3) 1.38 percent under "Income Tax Subsidies for FIEs Based on Geographic Location;" (4) 0.35 percent under "Exemption from Maintenance and Construction Taxes and Education Surcharges for FIEs;" and (5) 3.51 percent under the "Value Added-Tax and Tariff Exemptions on Imported Equipment." *See* Attachments 4–5 of the Ministerial Error Memo.

As a result of these corrections, the countervailing duty rate for GE, Gold Huasheng Paper Co., Ltd., and its reported affiliated cross-owned companies (collectively, "Gold companies") changed from 17.64 percent to 19.46 percent. The countervailing duty rate for the other respondent in the coated paper investigation, Shandong Sun Paper Industry Co., Ltd. and Yanzhou Tianzhang Paper Industry Co., Ltd. (collectively, "Sun companies"), also changed because the Gold companies' rates for certain programs, which are included in the calculation of Sun companies' adverse facts available rate, were revised based on the Ministerial Error Memo. The Sun companies' rate changed from 178.03 percent to 202.84 percent. Because the all-others rate is based on the Gold companies' rate, the countervailing duty rate for all-others changed from 17.64 percent to 19.46 percent. In accordance with 19 CFR 351.224(e), we are amending the *Final Determination* to reflect these changes.

Countervailing Duty Order

According to section 706(b)(2) of the Act, duties shall be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination if that determination is based upon the threat of material injury. Section 706(b)(1) of the Act states, "{l}f the Commission, in its final determination under section 705(b), finds material injury or threat of material injury which, but for the suspension of liquidation under section 703(d)(2), would have led to a finding of material injury, then entries of the merchandise subject to the countervailing duty order, the liquidation of which has been suspended under section 703(d)(2), shall be subject to the imposition of countervailing duties under section 701(a)." In addition, section 706(b)(2) of the Act requires U.S. Customs and Border Protection ("CBP") to refund any cash deposits or bonds of estimated countervailing duties posted before the date of publication of the ITC's final affirmative determination, if the ITC's final determination is based on threat other than the threat described in section 706(b)(1) of the Act. Because the ITC's final determination in this case is based on the threat of material injury and is not accompanied by a finding that injury would have resulted but for the imposition of suspension of liquidation of entries since the Department's *Preliminary Determination* [3] was published in the **Federal Register,** section 706(b)(2) of the Act is applicable.

As a result of the ITC's determination and in accordance with section 706(a)(1) of the Act, the Department will direct CBP to assess, upon further instruction by the Department, countervailing duties equal to the amount of the net countervailable subsidy for all relevant entries of coated paper from the PRC. In accordance with section 706 of the Act, the Department will direct CBP to reinstitute suspension of liquidation,[4]

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.

[3] *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*").

[4] The Department instructed CBP to discontinue the suspension of liquidation on July 7, 2010, in accordance with section 703(d) of the Act. Section 703(d) states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months. Entries of coated paper from the PRC made on or after July 7, 2010, and prior to the date of publication of the ITC's final determination in the **Federal Register**

effective on the date of publication of the ITC's notice of final determination in the **Federal Register,** and to require a cash deposit for each entry of subject merchandise in an amount equal to the net countervailable subsidy rates listed below. *See* section 706(a)(3) of the Act. The all-others rate applies to all producers and exporters of subject merchandise not specifically listed.

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.	19.46
Shandong Sun Paper Industry Joint Stock Co., Ltd. and Yanzhou Tianzhang Paper Industry Co., Ltd.	202.84
All Others	19.46

Termination of the Suspension of Liquidation

The Department will instruct CBP to terminate the suspension of liquidation for entries of coated paper from the PRC entered, or withdrawn from warehouse, for consumption prior to the publication of the ITC's notice of final determination. The Department will instruct CBP to refund any cash deposits made and release any bonds posted with respect to entries of coated paper entered of withdrawn from warehouse for consumption on or after March 9, 2010 (*i.e.,* the date of publication of the Department's *Preliminary Determination*), but before the date of publication of the ITC's final determination in the **Federal Register.**

This notice constitutes the countervailing duty order with respect to coated paper from the PRC, pursuant to section 706(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 7046 of the main Commerce Building, for copies of an updated list of countervailing duty orders currently in effect.

This order is issued and published in accordance with section 706(a) of the Act, 19 CFR 351.224(e), and 19 CFR 351.211(b).

Dated: November 12, 2010.

Carole A. Showers,

Acting Deputy Assistant Secretary for Import Administration.

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BILLING CODE 3510–DS–P

are not liable for the assessment of countervailing duties because of the Department's discontinuation, effective July 7, 2010, of the suspension of liquidation.

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: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Order

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

DATES: *Effective Date:* November 17, 2010.

SUMMARY: Based on affirmative final determinations by the Department of Commerce ("Department") and the International Trade Commission ("ITC"), the Department is issuing an antidumping duty order on certain coated paper suitable for high-quality print graphics using sheet-fed presses ("coated paper") from the People's Republic of China ("PRC"). On November 10, 2010, the ITC notified the Department of its affirmative determination of threat of material injury to a U.S. industry. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China* (Investigation No. 731–TA–1159 (Final), USITC Publication 4192 (November 2010). In addition, the Department is amending its final determination as a result of ministerial errors.

FOR FURTHER INFORMATION CONTACT: Demitri Kalogeropoulos or Lindsey Novom, 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) 482–2623 or (202) 482–5256, respectively.

SUPPLEMENTARY INFORMATION: In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended ("Act"), the Department published the final determination of sales at less than fair value in the antidumping investigation of coated paper from the PRC. *See 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,* 75 FR 59217 (September 27, 2010) ("*Final Determination*").

Amendment to the Final Determination

On September 27, 2010, the Department published its affirmative final determination in this proceeding. *See Final Determination.* On September 28, 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," a mandatory respondent, and Petitioners [1] submitted ministerial error allegations and requested, pursuant to 19 CFR 351.224, that the Department correct the alleged ministerial errors in the calculation of APP-China's dumping margin. Petitioners submitted rebuttal comments on October 1, 2010. No other interested party submitted ministerial error allegations or rebuttal comments.

After analyzing all interested party comments and rebuttals, we have determined, in accordance with section 735(e) of the Act and 19 CFR 351.224(e), that we made ministerial errors in our calculations for the *Final Determination* with respect to APP-China. For a detailed discussion of these ministerial errors, as well as the Department's analysis of the errors and allegations, see the Memorandum to the File, "Ministerial Error Memorandum, Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of

[1] 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 are the petitioners (collectively "Petitioners") in this investigation.

China, Final Determination of Sales at Less Than Fair Value," dated October 27, 2010 ("Ministerial Error Memo").

Additionally, in the *Final Determination,* we determined that Shandong Chenming Paper Holdings Ltd. qualified for a separate rate. *See Final Determination.* Because the cash deposit rate for Shandong Chenming Paper Holdings Ltd. was based on the calculated rate of the mandatory respondent, APP-China, and the margin for APP-China has changed since the *Final Determination,* the separate rate has changed as well. *See* Ministerial Error Memo. In addition, one of the ministerial errors affected the calculation of the labor rate, which was used in the calculation of the PRC-wide rate. Therefore, the PRC-wide rate has also changed since the *Final Determination. See* Ministerial Error Memo. The amended weighted-average dumping margins are as follows:

Exporter	Producer	Final percent margin	Amended final percent margin
Gold East Paper (Jiangsu) Co., Ltd	Gold East Paper (Jiangsu) Co., Ltd.;		
Gold Huasheng Paper Co., Ltd	Gold Huasheng Paper Co., Ltd.;	7.60	7.62
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	7.62
PRC-Wide Entity *		135.83	135.84

* The PRC-Wide Entity includes 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").

Antidumping Duty Order

On November 10, 2010, in accordance with section 735(d) of the Act, the ITC notified the Department of its final determination in this investigation. In its determination, the ITC found a threat of material injury. According to section 736(b)(2) of the Act, duties shall be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination if that determination is based on the threat of material injury and is not accompanied by a finding that injury would have resulted without the imposition of suspension of liquidation of entries since the Department's preliminary determination. In addition, section 736(b)(2) of the Act requires U.S. Customs and Border Protection ("CBP") to refund any cash deposits or bonds of estimated antidumping duties posted since the preliminary antidumping determination if the ITC's final determination is threat-based. Therefore, in accordance with section 733(d) of the Act and our practice, we will instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of coated paper from the PRC entered, or withdrawn from warehouse, for consumption on or after May 6, 2010,[2] and before the date of publication of the ITC's final determination in the **Federal Register**. Suspension of liquidation will continue starting the date of publication of the ITC's final determination in the **Federal Register**. *See* the Continuation of Suspension of Liquidation section below.

Scope of the Order

The merchandise covered by this order 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 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 investigations is dispositive.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we will instruct CBP to suspend liquidation on all entries of subject merchandise from the PRC effective the date of publication of the ITC final determination in the **Federal Register**. We will also instruct CBP to require cash deposits equal to the estimated amount by which the normal value exceeds the U.S. price as

[2] *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).

[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.

indicated in the chart above. These instructions suspending liquidation will remain in effect until further notice.

Accordingly, effective on the date of publication of the ITC's final affirmative determination, CBP will require, at the same time as importers would normally deposit estimated duties on this subject merchandise, a cash deposit equal to the estimated weighted-average antidumping duty margins as discussed above. *See* section 736(a)(3) of the Act. The PRC-wide rate applies to all exporters of subject merchandise not specifically listed.

In accordance with section 736 of the Act, the Department will also direct CBP to assess antidumping duties on all unliquidated entries of coated paper from the PRC entered, or withdrawn from warehouse, for consumption on or after the date on which the ITC published its notice of final determination of threat of material injury in the **Federal Register**.

This notice constitutes the antidumping duty order with respect to coated paper from the PRC pursuant to section 736(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 7046 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect.

This order is published in accordance with section 736(a) of the Act and 19 CFR 351.211.

Dated: November 12, 2010.

Carole A. Showers,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–29121 Filed 11–16–10; 8:45 am]

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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: Antidumping Duty Order

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

SUMMARY: Based on an affirmative final determination by the Department of Commerce (the Department) and the International Trade Commission (the ITC), the Department is issuing an antidumping duty order on certain coated paper suitable for high-quality print graphics using sheet-fed presses (certain coated paper) from Indonesia.

DATES: *Effective Date:* November 17, 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 September 27, 2010, the Department published its affirmative final determination of sales at less-than-fair-value 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: Final Determination of Sales at Less Than Fair Value,* 75 FR 59223 (September 27, 2010) (*Certain Coated Paper Final Determination*).

On November 10, 2010, the ITC notified the Department of its final determination pursuant to section 735(d) of the Tariff Act of 1930, as amended (the Act), that an industry in the United States is threatened with material injury by reason of less-than-fair-value imports of certain coated paper from Indonesia. *See* section 735(b)(1)(A)(ii) of the Act.

Scope of the Order

The scope of the order covers 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 order is dispositive.

Antidumping Duty Order

On November 10, 2010, in accordance with section 735(d) of the Act, the ITC notified the Department of its final determination that an industry in the United States is threatened with material injury within the meaning of section 735(b)(1)(A)(ii) of the Act by reason of less-than-fair-value imports of certain coated paper from Indonesia. Therefore, in accordance with section 736(a)(1) of the Act, the Department will direct U.S. Customs Border and Protection (CBP) to assess, upon further instruction by the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the U.S. price of the merchandise for all relevant entries of certain coated paper from Indonesia.

For all manufacturers/exporters, pursuant to section 736(b)(2) of the Act, duties shall be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination, given that that determination is based on the threat

[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.

of material injury, other than threat of material injury described in section 736(b)(1) of the Act. Section 736(b)(1) of the Act states that, "{i}f the Commission, in its final determination under section 735(b), finds material injury or threat of material injury which, but for the suspension of liquidation under section 733(d)(2) would have led to a finding of material injury, then entries of the subject merchandise, the liquidation of which has been suspended under section 733(d)(2), shall be subject to the imposition of antidumping duties under section 731." In addition, section 736(b)(2) of the Act requires CBP to release any bond or other security and refund any cash deposit made of estimated antidumping duties posted since the Department's preliminary antidumping duty determination (*i.e.,* May 6, 2010). *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 24885 (May 6, 2010).

Because the ITC's final determination is based on the threat of material injury and is not accompanied by a finding that injury would have resulted but for the imposition of suspension of liquidation of entries since the Department's preliminary determination, section 736(b)(2) of the Act is applicable. According to section 736(b)(2) of the Act, where the ITC finds threat of material injury, duties shall only be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination. In addition, section 736(b)(2) of the Act requires CBP to refund any cash deposits or bonds of estimated antidumping duties posted since the preliminary antidumping determination and prior to the ITC's notice of final determination.

Therefore, on or after the date of publication of the ITC's notice of final determination in the **Federal Register** CBP will require a cash deposit equal to the estimated dumping margins listed below, pursuant to section 736(a)(3) of the Act, at the same time that importers would deposit estimated normal customs duties on this merchandise. The "All Others" rate for Indonesia applies to all Indonesian producers or exporters not specifically listed and not specifically excluded. The Department will also instruct CBP to terminate the suspension of liquidation for entries of certain coated paper from Indonesia entered or withdrawn from warehouse, for consumption prior to November 10, 2010, and refund any cash deposits made and release any bonds posted between the publication of the Department's preliminary determinations on May 6, 2010, and the publication of the ITC's final determination.

Final Determination Margins

The margins and cash deposit rates are as follows:

Exporter or producer	Margin (percent)
PT. Pabrik Kertas Tjiwi Kimia Tbk./PT. Pindo Deli Pulp and Paper Mills/PT. Indah Kiat Pulp and Paper Tbk.	20.13
All Others	20.13

This notice constitutes the antidumping duty order with respect to certain coated paper from Indonesia, pursuant to section 736(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 7046 of the main Commerce Building, for copies of an updated list of antidumping duty orders currently in effect.

This order is issued and published in accordance with section 736(a) of the Act and 19 CFR 351.211(b).

Dated: November 12, 2010.

Carole A. Showers,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–29116 Filed 11–16–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–560–824]

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Countervailing Duty Order

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

SUMMARY: Based on affirmative final determinations by the Department of Commerce (the Department) and the U.S. International Trade Commission (ITC), the Department is issuing a countervailing duty order on certain coated paper suitable for high-quality print graphics using sheet-fed presses (certain coated paper) from Indonesia.

DATES: *Effective Date:* November 17, 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:

Background

In accordance with section 705(d) of the Tariff Act of 1930, as amended (the Act), on September 27, 2010, the Department published its final determination in the countervailing duty investigation of certain coated paper from Indonesia. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet–Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination,* 75 FR 59209 (September 27, 2010), and accompanying Issues and Decision Memorandum (Decision Memorandum).

On November 10, 2010, the Department placed on the record of this investigation a memorandum,[1] which identifies an unintentional misstatement regarding our discount rate calculation for allocable subsidies received by the mandatory company respondents, PT Pabrik Kertas Tjiwi Kimia Tbk., PT Pindo Deli Pulp and Paper Mills, and PT Indah Kiat Pulp and Paper, Tbk. Specifically, in the Decision Memorandum, we stated that "{t}he discount rate is intended to calculate a present value of a future stream of benefits based on a company's own internal rate of return or cost of borrowing (or approximation thereof) and is based on lending rates in the respondent's home market currency. * * *"[2] However, we should have stated that the discount rate in this investigation is based on lending rates in U.S. dollars.

On November 10, 2010, the ITC notified the Department of its final determination, pursuant to sections 705(b)(1)(A)(ii) and 705(d) of the Act, that a U.S. industry is threatened with material injury by reason of subsidized imports of subject merchandise from Indonesia. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia,* USITC Publication 4192, Investigation Nos. 701–TA–470–471 and 731–TA–1169–1170 (Final) (November 2010). Pursuant to section 706(a) of the

[1] *See* the memorandum to Barbara E. Tillman, Director, AD/CVD Operations, Office 6, "Ministerial Error Allegation and Identification of Misstatement in the Issues and Decision Memorandum in the Instant Investigation," dated November 10, 2010. This public document is available in the Central Records Unit, Room 7046, of the main Department of Commerce building.

[2] *See Decision Memorandum* at 59.

Act, the Department is publishing a countervailing duty order on the subject merchandise.

Scope of the Order

The scope of this order 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 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 order is dispositive.

Countervailing Duty Order

In accordance with section 706(a)(1) of the Act, the Department will direct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by the Department, countervailing duties equal to the amount of the net countervailable subsidy for all relevant entries of certain coated paper from Indonesia.

According to section 706(b)(2) of the Act, duties shall be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the ITC's notice of final determination if that determination is based upon threat of material injury. Section 706(b)(1) of the Act states, "If the Commission, in its final determination under section 705(b), finds material injury or threat of material injury which, but for the suspension of liquidation under section 703(d)(2), would have led to a finding of material injury, then entries of the merchandise subject to the countervailing duty order, the liquidation of which has been suspended under section 703(d)(2), shall be subject to the imposition of countervailing duties under section 701(a)." In addition, section 706(b)(2) of the Act requires CBP to refund any cash deposits or bonds of estimated countervailing duties posted since the Department's preliminary countervailing duty determination, if the ITC's final determination is threat-based. Because the ITC's final determination in this case is based on the threat of material injury and is not accompanied by a finding that injury would have resulted but for the imposition of suspension of liquidation of entries since the Department's *Preliminary Determination* was published in the **Federal Register,**[5] section 706(b)(2) of the Act is applicable.

Therefore, the Department will direct CBP to reinstitute suspension of liquidation,[6] and to assess, upon further instruction from the Department, countervailing duties on all unliquidated entries of certain coated paper from Indonesia entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination of threat of injury in the **Federal Register.**

Cash Deposit Requirements

Pursuant to section 706(a)(3) of the Act, effective on the date of publication of the ITC's notice of final determination in the **Federal Register,** CBP will require, at the same time as importers would normally deposit estimated duties, cash deposits for the subject merchandise equal to the net subsidy rates listed below. The all-others rate applies to all producers and exporters of subject merchandise not specifically listed.

Producer/exporter	Net subsidy rate (percent)
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

Termination of the Suspension of Liquidation

The Department will instruct CBP to terminate the suspension of liquidation for entries of coated paper from the PRC entered, or withdrawn from warehouse, for consumption prior to the publication of the ITC's notice of final determination. The Department will also instruct CBP to refund any cash deposits made, and to release any bonds posted between March 9, 2010 (*i.e.,* the date of publication of the Department's *Preliminary Determination*) and on or before July 7, 2010, the date on which the Department discontinued the suspension of liquidation pursuant to section 703(d) of the Act.

This notice constitutes the countervailing duty order with respect to certain coated paper from Indonesia, pursuant to section 706(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 7046 of the main Commerce Building, for copies of an updated list of countervailing duty orders currently in effect.

[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.

[5] *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*).

[6] The Department instructed CBP to discontinue the suspension of liquidation on July 7, 2010, in accordance with section 703(d) of the Act. Section 703(d) states that suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months. Entries of certain coated paper from Indonesia made on or after July 7, 2010, and prior to the date of publication of the ITC's final determination in the **Federal Register** are not liable for the assessment of countervailing duties because of the Department's discontinuation of the suspension of liquidation, effective July 7, 2010.

This order is issued and published in accordance with section 706(a) of the Act, and 19 CFR 351.211(b).

Dated: November 12, 2010.

Carole A. Showers,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–29120 Filed 11–16–10; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–904]

Certain Activated Carbon From the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review

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

SUMMARY: On May 13, 2010, the Department of Commerce ("Department") published in the **Federal Register** the preliminary results of the second administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China ("PRC"). *See Certain Activated Carbon From the People's Republic of China: Notice of Preliminary Results of the Second Antidumping Duty Administrative Review, and Preliminary Rescission in Part,* 75 FR 26927 (May 13, 2010) ("*Preliminary Results*"). We gave interested parties an opportunity to comment on the *Preliminary Results.* Based upon our analysis of the comments and information received, we made changes to the margin calculations for the final results. We continue to find that certain exporters have sold subject merchandise at less than normal value during the period of review ("POR"), April 1, 2008, through March 31, 2009.

DATES: *Effective Date:* November 17, 2010.

FOR FURTHER INFORMATION CONTACT: Robert Palmer and Katie Marksberry, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–9068 and (202) 482–7906 respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 29, 2009, the Department initiated this review with respect to 187 companies upon which an administrative review was requested. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 74 FR 25711 (May 29, 2009). Subsequently, pursuant to 19 CFR 351.213(d)(1), the Department rescinded the administrative review with respect to 155 companies, based upon Petitioners' [1] timely withdrawal of review requests.[2] On September 16, 2009, the Department rescinded the administrative review with respect to an additional 13 companies, based on Petitioners' timely withdrawal of review requests.[3] Thus, 19 companies remained subject to this review.

On June 2, 2010, Jacobi Carbons AB ("Jacobi") and Ningxia Huahui Activated Carbon Co., Ltd. ("Huahui"), the mandatory respondents in this review, and Petitioners submitted additional surrogate value ("SV") information. On June 14, 2010, Petitioners submitted rebuttal SV information.

At the *Preliminary Results,* we set the deadline for interested parties to submit case briefs and rebuttal briefs to June 14, 2010, and June 21, 2010, respectively. On June 7, 2010, we extended the deadlines for case and rebuttal briefs to June 21, 2010, and June 28, 2010, respectively. Additionally, on June 25, 2010, we extended the deadline for rebuttal briefs by an additional two days to June 30, 2010. On June 21, 2010, Petitioners, Jacobi, and Huahui filed case briefs. On June 21, 2010, Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. ("GHC") filed comments on the Department's wage rate methodology. On June 28, 2010, Shanxi DMD Corporation ("Shanxi DMD") filed a rebuttal brief. On June 30, 2010, Huahui filed a rebuttal brief. On July 1, 2010, Jacobi and Petitioners filed rebuttal briefs. On August 3, 2010, the Department placed wage rate data to value the input of labor on the record for comment by interested parties. On September 27, 2010, the Department issued industry-specific wage rate data for comment. On October 4, 2010, the Department issued a memorandum regarding the Department's industry-specific wage rate methodology for comment. On October 7, 2010, the Department issued a correction to the October 4, 2010, data. On October 4, 2010, Huahui provided comments on the September 27, 2010, data. On October 13, 2010, Petitioners, Jacobi, and Huahui provided comments on the October 4, 2010, and October 7, 2010, memoranda. On October 18, 2010, Huahui provided rebuttal comments. The Department did not hold a public hearing pursuant to 19 CFR 351.310(d), as any hearing requests made by interested parties were withdrawn.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to these reviews are addressed in the "Certain Activated Carbon from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Second Antidumping Duty Administrative Review," which is dated concurrently with this notice ("Decision Memo"). A list of the issues which parties raised and to which we respond in the Decision Memo is attached to this notice as an Appendix. The Decision Memo is a public document and is on file in the Central Records Unit, main Commerce building, Room 7046, and is accessible on the Department's Web site at *http://www.trade.gov/ia.* The paper copy and electronic version of the memorandum are identical in content.

Scope of the Order

The merchandise subject to the order is certain activated carbon. Certain activated carbon is a powdered, granular, or pelletized carbon product obtained by "activating" with heat and steam various materials containing carbon, including but not limited to coal (including bituminous, lignite, and anthracite), wood, coconut shells, olive stones, and peat. The thermal and steam treatments remove organic materials and create an internal pore structure in the carbon material. The producer can also use carbon dioxide gas (CO_2) in place of steam in this process. The vast majority of the internal porosity developed during the high temperature steam (or CO_2 gas) activated process is a direct result of oxidation of a portion of the solid carbon atoms in the raw material, converting them into a gaseous form of carbon.

The scope of the order covers all forms of activated carbon that are activated by steam or CO_2, regardless of the raw material, grade, mixture, additives, further washing or post-activation chemical treatment (chemical or water washing, chemical impregnation or other treatment), or product form. Unless specifically excluded, the scope of the order covers all physical forms of certain activated carbon, including powdered activated carbon ("PAC"), granular activated

[1] Norit Americas Inc. and Calgon Carbon Corporation.

[2] *See Certain Activated Carbon from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review,* 74 FR 31690 (July 2, 2009).

[3] *See Certain Activated Carbon From the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review,* 74 FR 47558 (September 16, 2009).

carbon ("GAC"), and pelletized activated carbon.

Excluded from the scope of the order are chemically activated carbons. The carbon-based raw material used in the chemical activation process is treated with a strong chemical agent, including but not limited to phosphoric acid, zinc chloride sulfuric acid or potassium hydroxide, that dehydrates molecules in the raw material, and results in the formation of water that is removed from the raw material by moderate heat treatment. The activated carbon created by chemical activation has internal porosity developed primarily due to the action of the chemical dehydration agent. Chemically activated carbons are typically used to activate raw materials with a lignocellulosic component such as cellulose, including wood, sawdust, paper mill waste and peat.

To the extent that an imported activated carbon product is a blend of steam and chemically activated carbons, products containing 50 percent or more steam (or CO_2 gas) activated carbons are within the scope, and those containing more than 50 percent chemically activated carbons are outside the scope. This exclusion language regarding blended material applies *only* to mixtures of steam and chemically activated carbons.

Also excluded from the scope are reactivated carbons. Reactivated carbons are previously used activated carbons that have had adsorbed materials removed from their pore structure after use through the application of heat, steam and/or chemicals.

Also excluded from the scope is activated carbon cloth. Activated carbon cloth is a woven textile fabric made of or containing activated carbon fibers. It is used in masks and filters and clothing of various types where a woven format is required.

Any activated carbon meeting the physical description of subject merchandise provided above that is not expressly excluded from the scope is included within the scope. The products subject to the order are currently classifiable under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 3802.10.00. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Changes Since the Preliminary Results

Based on a review of the record as well as comments received from parties regarding our *Preliminary Results,* we have made revisions to certain SVs and the margin calculations for Jacobi and Huahui in the final results. Specifically, we have updated the SV for labor and the calculation of the surrogate financial ratios.[4] *See* Decision Memo at Comment 4. For all changes to the margin calculations, *see* Decision Memo and the company specific analysis memoranda.

Wage Rate Methodology

Pursuant to a recent decision by the United States Court of Appeals for the Federal Circuit, we have calculated a revised hourly wage rate to use in valuing Jacobi's and Huahui's reported labor. The revised wage rate is calculated by averaging earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise. *See* Decision Memo at Comment 4f; *see also* Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, Import Administration, from Bob Palmer, Case Analyst, Office 9, Import Administration, Subject: Second Administrative Review of Activated Carbon from the People's Republic of China: Surrogate Values for the Final Results, dated November 9, 2010, for the details of the calculation and supporting data.

Per-Unit Assessment

In the *Preliminary Results,* we analyzed Jacobi's submitted entered values because Petitioners argued that the Department should calculate specific, per-kilogram cash deposit and importer-specific assessment rates for all respondents in this review based on an allegation that parties are selling the subject merchandise (or importing it) at prices significantly below prevailing market prices to evade assessment of antidumping duties. At the time of the *Preliminary Results,* we did not find that there was a substantial difference between the average U.S. sales price for activated carbon and the average entered value reported to U.S. Customs and Border Protection ("CBP") for Jacobi. However, since the *Preliminary Results,* Jacobi has submitted revised entered value data and, based on a further analysis of the record of this review, we have determined that there is a substantial difference between Jacobi's net unit price for its entries of certain activated carbon and the entered value reported to CBP. While the Department normally directs CBP to collect cash deposits and liquidate entries on an *ad valorem* basis, we are not required to do so by statute or by our regulations, and have in the past used quantity-based rates where appropriate.[5] Furthermore, the Department has determined in past cases that it would be extremely burdensome to determine whether to apply an *ad valorem* or a per-unit rate on a company-specific basis.[6] Therefore, consistent with the Department's practice, we are calculating per-unit cash deposit and assessment rates for the mandatory respondents, separate rate companies and companies that are part of the PRC-wide entity. *See* Decision Memo at Comment 3. To arrive at a per-kilogram rate for the PRC-wide rate entity, we began with the *ad valorem* PRC-wide rate of 228.11 percent. The Department then multiplied the *ad valorem* rate of 228.11 percent by the average unit value ("AUV") for all imports of subject merchandise into the United States during the POR. For the PRC-wide entity, this calculation results in a per-kilogram assessment rate of $2.42.[7] The quantity-based collection and assessment method will begin upon completion of these final results, and will be employed thereafter for all future reviews of this order.[8]

Separate Rates

In our *Preliminary Results,* we determined that the following companies met the criteria for separate rate status: Datong Juqiang Activated Carbon Co., Ltd., Datong Municipal

[4] Petitioners and Jacobi both submitted Kalpalka's 2007–2008 financial statements in their post-preliminary SV submissions, which we will rely upon for the final results as they are more contemporaneous than the 2006–2007 Kalpalka financial statements. *See* Petitioners' Post-Prelim SV Submission, dated June 2, 2010 at Attachment 18; *see also* Jacobi's Post-Prelim SV Submission, dated June 2, 2010 at Exhibit 1.

[5] *See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review,* 67 FR 19546, 19549 (April 22, 2002); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part,* 66 FR 36551 (July 12, 2001); *Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review,* 70 FR 38873 (July 6, 2005); and *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 70 FR 34082 (June 13, 2005).

[6] *See Certain Frozen Fish* Fillets *From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review,* 72 FR 13242 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 6.

[7] *See* Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, from, Bob Palmer, Case Analyst, Office 9, "Calculation of Per-Kilogram PRC–Wide Rate," dated November 9, 2010.

[8] *See Notice of Antidumping Duty Order: Certain Activated Carbon From the People's Republic of China,* 72 FR 20988 (April 27, 2007).

Yunguang Activated Carbon Co., Ltd., Jilin Bright Future Chemicals Company, Ltd., Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd.,[9] Ningxia Mineral & Chemical Limited, Shanxi DMD, Shanxi Industry Technology Trading Co., Ltd., and Shanxi Qixian Foreign Trade Corporation.

Additionally, in the *Preliminary Results,* we also noted that the Department received completed responses to the Section A portion of the non-market economy questionnaire from the individually reviewed respondents (Jacobi and Huahui), which contained information pertaining to the companies' eligibility for a separate rate. With respect to Jacobi, we preliminarily determined that there is no PRC ownership of this company and, because the Department has no evidence indicating that Jacobi is under the control of the PRC, a separate rates analysis is not necessary to determine whether it is independent from government control. With respect to Huahui, we preliminarily granted separate rate status to it based on the submitted information. We also preliminarily determined that one of the exporters under review not selected for individual examination, Tangshan Solid Carbon Co., Ltd., reported that it is 100-percent foreign owned. Accordingly, the Department also preliminarily granted separate rate status to Tangshan Solid Carbon Co. Ltd. *See Preliminary Results.*

With the exception of comments regarding the Department's treatment of Shanxi DMD, we have not received any information since the issuance of the *Preliminary Results* that provides a basis for the reconsideration of these preliminary determinations. Therefore, the Department continues to find that Jacobi, Huahui, Datong Juqiang Activated Carbon Co., Ltd., Datong Municipal Yunguang Activated Carbon Co., Ltd., Jilin Bright Future Chemicals Company, Ltd., Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Ningxia Mineral & Chemical Limited, Shanxi Industry Technology Trading Co., Ltd., Shanxi Qixian Foreign Trade Corporation, and Tangshan Solid Carbon Co., Ltd. meet the criteria for a separate rate.

With respect to Shanxi DMD, for the *Preliminary Results* the Department found that Shanxi DMD had cooperated to the best of its ability and, accordingly, we did not apply adverse facts available ("AFA") by assigning the PRC-wide rate to Shanxi DMD. Since the *Preliminary Results,* Petitioners filed comments in their case brief and Shanxi DMD filed a rebuttal brief concerning whether the Department should apply total AFA to Shanxi DMD for these final results. After full consideration of the facts on the record of this review, we have determined that it is not appropriate to apply total AFA to Shanxi DMD. Therefore, because we continue to find that Shanxi DMD cooperated to the best of its ability, we are continuing to grant Shanxi DMD separate rate status. For a full discussion of parties' arguments and the Department's position on this matter, please *see* Decision Memo at Comment 10.

Additionally, in the *Preliminary Results,* we stated that, United Manufacturing International (Beijing) Ltd. ("UMI"), Datong Yunguang Chemicals Plant, Hebei Foreign Trade and Advertising Corporation, and Shanxi Newtime Co., Ltd., all companies with an active review request, did not timely submit either a separate rate application or certification. Thus, we preliminarily determined that these companies did not demonstrate their eligibility for separate rate status, and were included as part of the PRC-wide entity. *See Preliminary Results* at 26932 and 26933. Because we have not received any information since the issuance of the *Preliminary Results* that provides a basis for a reconsideration of that finding, we continue to find UMI, Datong Yunguang Chemicals Plant, Hebei Foreign Trade and Advertising Corporation, and Shanxi Newtime Co., Ltd., did not meet the criteria for a separate rate for the final results. Thus, these companies will be subject to the PRC-wide entity rate.

In the *Preliminary Results,* the Department determined that those companies which did not demonstrate eligibility for a separate rate are properly considered part of the PRC-wide entity. Since the *Preliminary Results,* none of the companies which did not file separate rate applications or certifications submitted comments regarding these findings. Therefore, we continue to treat these entities as part of the PRC-wide entity.

Final Partial Rescission

In the *Preliminary Results,* the Department preliminarily rescinded this review with respect to Ningxia Lingzhou Foreign Trade Co., Ltd. ("Lingzhou") because the Department preliminarily determined that it had no shipments of subject merchandise to the United States during the POR. Subsequent to the *Preliminary Results,* Petitioners pointed out that Lingzhou submitted its certification of no shipments past the deadline established by the Department. However, no party submitted information on the record indicating that Lingzhou made sales to the United States of subject merchandise during the POR. The Department acknowledges that it erred in not noticing the submission was late and rejecting it at the time of filing. However, because the Department actually reviewed the submission, confirmed with CBP that Lingzhou did not have any shipments during the instant POR, and preliminarily rescinded the review with respect to Lingzhou, the Department now finds that it would be unfair to the respondent to reject the submission for being untimely filed it after it has been on the record for over a year. Therefore, in this particular instance, the Department will allow Lingzhou's no shipment certification to remain on the record. Thus, in accordance with 19 CFR 351.213(d)(3), and consistent with our practice, we are rescinding this review with respect to Lingzhou. For a full discussion of parties' comments and the Department's determination with regard to Lingzhou's no shipments certification, *see* Decision Memo at Comment11.

Duty Absorption

In the *Preliminary Results,* we conducted a duty absorption inquiry with regard to Jacobi, pursuant to section 751(a)(4) of the Tariff Act of 1930, as amended ("Act"), and preliminarily found that Jacobi has absorbed antidumping duties on U.S. sales made through its affiliated importer. *See Preliminary Results.* We have not received any further information which would provide a basis for the reconsideration of our determination. Therefore, the Department continues to find that Jacobi has absorbed antidumping duties on U.S. sales made through its affiliated

[9] In the previous administrative review, the Department found Beijing Pacific Activated Carbon Products Co., Ltd., GHC, and Ningxia Guanghua Activated Carbon Co., Ltd. as a single entity and because there were no changes from the previous review, we will assign this rate to the companies in the single entity *See Certain Activated Carbon From the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results,* 74 FR 21317 (May 7, 2009), unchanged in *First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 74 FR 57995 (November 10, 2009). Additionally, in a previous review, the Department found that Cherishmet Inc. is affiliated with GHC, however, it has not been found to be part of the single entity. *See* Memorandum to The File, from Robert Palmer, Case Analyst, through Catherine Bertrand, Program Manager; regarding First Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China: Affiliation Memorandum of Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., dated April 30, 2009.

importer, pursuant to section 751(a)(4) of the Act.

Final Results of Review

The dumping margins for the POR are as follows:

CERTAIN ACTIVATED CARBON FROM THE PEOPLE'S REPUBLIC OF CHINA

Manufacturer/Exporter	Margin [10] (dollars per kilogram)
Jacobi Carbons AB [11]	0.11
Ningxia Huahui Activated Carbon Co., Ltd	0.44
Datong Juqiang Activated Carbon Co., Ltd	0.28
Datong Municipal Yunguang Activated Carbon Co., Ltd	0.28
Jilin Bright Future Chemicals Company, Ltd	0.28
Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd [12]	0.28
Ningxia Mineral & Chemical Limited	0.28
Shanxi DMD Corporation	0.28
Shanxi Industry Technology Trading Co., Ltd	0.28
Shanxi Qixian Foreign Trade Corporation	0.28
Tangshan Solid Carbon Co., Ltd	0.28
PRC–Wide Rate [13]	2.42

[10] For the separate rate calculation, *see* Memorandum to the File, from Bob Palmer, Case Analyst Office IX, re: Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results Simple-Average Per-Unit Rate for Separate Rate Respondents, dated November 9, 2010.

[11] In the *Preliminary Results,* we found that Jacobi Carbons Industry (Tianjin) ("JCC") and Tianjin Jacobi International Trading Co. Ltd. ("Tianjin Jacobi") both act as export facilitators for Jacobi Carbons AB. Therefore, as we have done in earlier segments of this antidumping duty order, we are continuing to find it appropriate that Jacobi Carbons AB, Tianjin Jacobi and JCC receive the antidumping duty rate assigned to Jacobi Carbons AB.

[12] As stated above, GHC is a single entity with Beijing Pacific Activated Carbon Products Co., Ltd. and Ningxia Guanghua Activated Carbon Co., Ltd.

[13] As discussed in the Separate Rates section of this notice, the PRC–Wide entity includes Datong Yunguang Chemicals Plant, Hebei Foreign Trade and Advertising Corporation, Shanxi Newtime Co., Ltd., and United Manufacturing International (Beijing) Ltd.

Assessment

The Department will determine, and CBP shall assess, antidumping duties on all appropriate entries, pursuant to 19 CFR 351.212(b). We have calculated importer-specific duty assessment rates on a per-unit basis.[14] In this and future reviews, we will direct CBP to assess importer-specific assessment rates based on the resulting per-unit (*i.e.,* per-kilogram) rates by the weight in kilograms of each entry of the subject merchandise during the POR. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of this administrative review.

Cash Deposit Requirements

The following cash-deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for each of the reviewed companies that received a separate rate in this review will be the rate listed in the final results of review (except that if the rate for a particular company is *de minimis, i.e.,* less than 0.5 percent, no cash deposit will be required for that company); (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period of review; (3) if the exporter is not a firm covered in this review, a prior review, or the original less than fair value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will be the PRC-wide rate of $2.42 per kilogram. These deposit requirements, when imposed, shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: November 9, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix I—Decision Memorandum

General Issues

Comment 1: Assignment of Combination Rates
Comment 2: Treatment of Sales with Negative Margins
Comment 3: Per-Unit Assessment Rates
Comment 4: Surrogate Values
a. Coconut Shell Charcoal
b. Steam Coal
c. Electricity
d. Steam
e. Expense Exclusion in Kalpalka Financial Ratios
f. Wage Rate Methodology

Company-Specific Issues

Jacobi

Comment 5: Issues Regarding Ningxia Guanghua Activated Carbon
a. Facts Available for Water
b. Transport Bag Surrogate Value
Comment 6: Corrections to Submitted Data
a. Treatment of Indirect Labor
b. Treatment of U.S. Indirect Selling Expenses
Comment 7: Freight Revenue Expense Calculation

Huahui

Comment 8: Ministerial Error for Truck Freight Unit of Measure
Comment 9: Treatment of Domestic Freight Expenses

Shanxi DMD

Comment 10: Application of Total Adverse Facts Available

Ningxia Lingzhou

Comment 11: Status of No Shipment Certification

[FR Doc. 2010–29017 Filed 11–16–10; 8:45 am]

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[14] We divided the total dumping margins (calculated as the difference between normal value and export price or constructed export price) for each importer by the total quantity of subject merchandise sold to that importer during the POR to calculate a per-unit assessment amount.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–898]

Chlorinated Isocyanurates From the People's Republic of China: Final Results of 2008–2009 Antidumping Duty Administrative Review

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

DATES: *Effective Date:* November 17, 2010.

SUMMARY: The Department of Commerce ("the Department") is conducting an administrative review of the antidumping duty order on chlorinated isocyanurates from the People's Republic of China ("PRC") covering the period June 1, 2008, through May 31, 2009. We invited interested parties to comment on our preliminary results. Based on our analysis of the comments received, we have made changes to our margin calculations. Therefore, the final results differ from the preliminary results. The final dumping margin for this review is listed in the "Final Results of Review" section below.

FOR FURTHER INFORMATION CONTACT: Brandon Petelin or Charles Riggle, 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) 482–8173 or (202) 482–0650, respectively.

Background

On May 14, 2010, the Department published its preliminary results of review of the antidumping order on chlorinated isocyanurates from the PRC.[1] On June 3, 2010, Hebei Jiheng Chemical Corporation, Ltd. ("Jiheng") provided additional information on the appropriate surrogate values to use as a means of valuing factors of production. On June 14, 2010, the Department received a request for a hearing from Clearon Corporation and Occidental Chemical Corporation (collectively "Petitioners"), Petitioners in the underlying investigation. On June 15, 2010, the Department placed additional surrogate value information on the record of this review for valuation of the labor wage rate. On June 24, 2010, the Department received case briefs from Petitioners and Jiheng. On June 29, 2010, the Department received rebuttal briefs from Petitioners and Jiheng. On July 2, 2010, Petitioners withdrew their request for a public hearing. On July 20, 2010, the Department placed additional surrogate value information on the record for valuation of the labor wage rate. On July 23, 2010, the Department received comments from Petitioners and Jiheng on the additional wage rate surrogate value information. On July 27, 2010, the Department received rebuttal comments from Petitioners and Jiheng, limited to comments related to valuation of the labor wage rate. On September 28, 2010, the Department placed additional surrogate value information on the record for valuation of the labor wage rate. On October 4, 2010, the Department received comments from Jiheng on the industry specific wage rate information. We have conducted this administrative review in accordance with section 751 of the Tariff act of 1930, as amended ("the Act"), and 19 CFR 351.213.

Scope of the Order

The products covered by this order are chlorinated isocyanurates, as described below: Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s-triazine triones. There are three primary chemical compositions of chlorinated isocyanurates: (1) Trichloroisocyanuric acid ($Cl_3(NCO)_3$), (2) sodium dichloroisocyanurate (dihydrate) ($NaCl_2(NCO)_3 \bullet 2H_2O$), and (3) sodium dichloroisocyanurate (anhydrous) ($NaCl_2(NCO)_3$). Chlorinated isocyanurates are available in powder, granular, and tableted forms. This order covers all chlorinated isocyanurates.

Chlorinated isocyanurates are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.40.50, 3808.50.40 and 3808.94.50.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"). The tariff classification 2933.69.6015 covers sodium dichloroisocyanurates (anhydrous and dehydrate forms) and trichloroisocyanuric acid. The tariff classifications 2933.69.6021 and 2933.69.6050 represent basket categories that include chlorinated isocyanurates and other compounds including an unfused triazine ring. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Analysis of Comments Received

All issues raised in the post-preliminary comments by parties in this review are addressed in the memorandum from Susan H. Kuhbach, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, "Issues and Decision Memorandum for the 2008–2009 Administrative Review of Chlorinated Isocyanurates from the People's Republic of China," ("Issues and Decision Memorandum") dated concurrently with this notice, which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum is attached to this notice as an appendix. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit ("CRU") in room 7046 in the main Commerce Department building, and is also accessible on the Web at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made changes in the margin calculations for Jiheng. *See* Issues and Decision Memorandum at Comments 1–9.

As a consequence of the decision of the Court of Appeals for the Federal Circuit ("Federal Circuit") in *Dorbest Ltd.* v. *United States,* 604 F. 3d 1363 (Fed. Cir. 2010), the Department is no longer relying on the regression-based wage rate described in 19 CFR 351.408(c)(3). For these final results, we have calculated an hourly wage rate to use in valuing Jiheng's reported labor input by averaging earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise. To calculate the hourly wage rate, we used wage data reported by the International Labor Organization ("ILO"). Because an industry-specific dataset relevant to this proceeding exists within the Department's preferred ILO source, we will be using industry-specific data to calculate a surrogate wage rate for this review, in accordance with section 773(c)(1) of the Act.

Therefore, for this review, the Department has calculated the wage rate using a simple average of the data provided to the ILO under Sub-Classification 24 of the ISIC–Revision.3 standard[2] by countries determined to be

[1] *See Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review,* 75 FR 27302 (May 14, 2010) ("*Preliminary Results*").

[2] The ILO industry-specific data is reported according to the International Standard Industrial Classification of all Economic Activities ("ISIC") code, which is maintained by the United Nations Statistical Division and is periodically updated. These updates are referred to as "Revisions." The

both economically comparable to the PRC and significant producers of comparable merchandise. Specifically, the Department finds the two-digit description under ISIC–Revision.[3] ("Manufacture of Chemicals and Chemical Products") to be the best available surrogate wage rate on the record because it is specific and derived from industries that produce merchandise comparable to the subject merchandise.[3] Further, because this wage rate does not separate the labor rates into different skill levels or types of labor, the Department has applied the same wage rate to all skill levels and types of labor reported by Jiheng.[4]

We revised the surrogate financial ratio calculations by making certain adjustments to Kanoria Chemicals and Industries Limited's ("Kanoria's") selling, general, and administrative expenses and profit.[5] In addition, we are only relying on Kanoria's financial statements for the year ended March 31, 2009. We did not rely on the financial statements of Aditya Birla Chemicals Limited for the year ended March 31, 2009.[6]

We corrected certain ministerial errors in the calculations for the Preliminary Results.[7]

Final Results of Review

We determined that the following dumping margin exists for the period June 1, 2008, through May 31, 2009.

Exporter	Weighted-average margin percentage
Hebei Jiheng Chemical Corporation, Ltd.	2.66

Assessment Rates

The Department intends to issue assessment instructions to U.S. Customs and Border Protection ("CBP") 15 days after the date of publication of these final results of review. In accordance with 19 CFR 351.212(b)(1), we have calculated importer-specific assessment rates for merchandise subject to this review.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) For subject merchandise exported by Jiheng, the cash deposit rate will be 1.76 percent; (2) for previously reviewed or investigated exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise, which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 285.63 percent; and (4) for all non-PRC exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements shall remain in effect until further notice.

Notification of Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties. This notice also serves as a reminder to parties subject to administrative protective orders ("APOs") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation that is subject to sanction.

We are issuing and publishing these final results of review and notice in accordance with sections 751(a) and 777(i) of the Act.

Dated: November 10, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix

List of Comments and Issues in the Issues and Decision Memorandum

I. *Surrogate Values*
- Comment 1: Surrogate Value for Steam Coal
- Comment 2: Wage Rate
- Comment 3: Selection of Financial Statements

II. *Specific Financial Statement Issues: Aditya*
- Comment 4: Interest Income

III. *Specific Financial Statement Issues: Kanoria*
- Comment 5: Miscellaneous Receipts
- Comment 6: Gross Interest Income
- Comment 7: Profit Ratio

IV. *Ministerial Errors*
- Comment 8: Kanoria's SG&A Expense Calculation
- Comment 9: Domestic Brokerage and Handling

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ILO, an organization under the auspices of the United Nation, utilizes this classification for reporting purposes. Currently, wage and earnings data are available from the ILO under the following revisions: ISIC–Rev.2, ISIC–Rev.3, and most recently, ISIC–Rev.4. The ISIC code establishes a two-digit breakout for each manufacturing category, and also often provides a three- or four-digit sub-category for each two-digit category. Depending on the country, data may be reported at the two-, three-, or four-digit subcategory. Sub-Classification 24 of the ISIC–Revision.3 covers "Manufacture of Chemicals and Chemical Products."

[3] *See* Issues and Decision Memorandum at Comment 2; *see also* Memorandum Regarding: Final Results of the 2008–2009 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Final Results Surrogate Value Memorandum, dated concurrently with this notice ("Final Surrogate Value Memo").

[4] *See* Issues and Decision Memorandum at Comment 2; *see also* Final Surrogate Value Memo.

[5] *See* Issues and Decision Memorandum at Comment 5 and Comment 7; *see also,* Final Surrogate Value Memo.

[6] *See* Issues and Decision Memorandum at Comment 3; *see also* Final Surrogate Value Memo.

[7] *See* Issues and Decision Memorandum at Comments 8–9; *see also* Memorandum Regarding: Final Results of the 2008–2009 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Analysis Memorandum for the Final Results: Hebei Jiheng Chemical Company, Ltd., dated concurrently with this notice ("Final Analysis Memo").

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA043

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene two webinars of the Gag Update Assessment Work Group.

DATES: The first webinar will convene at 9 a.m. on Monday, December 6, 2010 and conclude by 1 p.m. and the second will convene at 9 a.m. on Thursday,

December 9, 2010 and conclude by 1 p.m.

ADDRESSES: The meetings will convene via webinar.

Council Address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Steven Atran, Population Dynamics Statistician; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Gag Update Assessment Work Group will convene to re-run a gag update assessment that was originally run in 2009. The purpose of the re-run is to address two issues recently discovered in the assessment inputs. In the original run, an incorrect size distribution estimate of undersized caught-and-released fish from the recreational private and for-hire fishery was used. In addition, the original update assessment estimated dead discards from the commercial gag fishery to be about 5,000 fish per year based on logbook reports and depth distribution of the catch. However, more recent estimates of dead discards based on observer data have been on the order of 200,000 pounds of fish. A re-run of the assessment with adjustments to these inputs could result in a revision to the catch limits needed to rebuild the stock, which has been declared to be overfished and undergoing overfishing.

At the first webinar, on December 6, 2010, the Work Group and National Marine Fisheries Service assessment biologists will determine what changes to the assessment inputs are needed to address the above issues. At the second webinar, on December 9, 2010, the Work Group will review the results of the assessment re-run. The results of the assessment re-run will be reviewed by the Council's Scientific and Statistical Committee in January 2011, and the Scientific and Statistical Committee may recommend a revised level of acceptable biological catch to the Council when it meets in February 2011.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630 or can be downloaded from the Council's ftp site, *ftp.gulfcouncil.org.*

Although other non-emergency issues not on the agenda may come before the Gag Update Assessment Work Group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Gag Update Assessment Work Group will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Trish Kennedy at the Council (*see* **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: November 12, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–28955 Filed 11–16–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

Renewable Energy and Energy Efficiency Advisory Committee

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The Renewable Energy and Energy Efficiency Advisory Committee (RE&EEAC) will hold its inaugural meeting to provide an orientation of new committee members, discuss administrative procedures and future work products to fulfill the RE&EEAC's mandate.

DATES: December 7, 2010, from 9 a.m. to 3:30 p.m. Eastern Standard Time (EST).

ADDRESSES: The meeting will be held at the U.S. Department of Commerce, Room 4830, 1401 Constitution Avenue, NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Brian O'Hanlon, Office of Energy and Environmental Technologies Industries (OEEI), International Trade Administration, U.S. Department of Commerce at (202) 482–3492; *e-mail: Brian.OHanlon@doc.gov.* This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to OEEI at (202) 482–5225.

SUPPLEMENTARY INFORMATION: *Background:* The Secretary of Commerce established the RE&EEAC pursuant to his discretionary authority and in accordance with the Federal Advisory Committee Act (5 U.S.C. App.) on July 14, 2010. RE&EEAC is to provide the Secretary of Commerce with consensus advice from the private sector on the development and administration of programs and policies to expand the international competitiveness of the U.S. renewable energy and energy efficiency industries.

Topics to be considered: The agenda for the December 7, 2010, RE&EEAC meeting is as follows:

1. Welcome and introduction of members.

2. Orientation.

3. Discussion of RE&EEAC priority issues.

4. Public comment period.

Public Participation: The meeting is open to the public and the room is disabled-accessible. Public seating is limited and available on a first-come, first-served basis. Members of the public wishing to attend the meeting must notify Brian O'Hanlon at the contact information above by 5 p.m. EST on Thursday, December 2, in order to pre-register for clearance into the building. Please specify any requests for reasonable accommodation at least five business days in advance of the meeting. Last minute requests will be accepted, but may be impossible to fill. A limited amount of time, from 3 p.m.–3:30 p.m., will be available for pertinent brief oral comments from members of the public attending the meeting.

Any member of the public may submit pertinent written comments concerning the RE&EEAC's affairs at any time before or after the meeting. Comments may be submitted to the Renewable Energy and Energy Efficiency Advisory Committee, Office of Energy and Environmental Technologies Industries (OEEI), International Trade Administration, Room 4830, 1401 Constitution Avenue, NW., Washington, DC 20230. To be considered during the meeting, comments must be received no later than 5 p.m. EST on Thursday, December 2, 2010, to ensure transmission to the Committee prior to the meeting. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of RE&EEAC meeting minutes will be available within 30 days of the meeting.

Dated: November 10, 2010.

Edward A. O'Malley,

Director, Office of Energy and Environmental Industries.

[FR Doc. 2010–28878 Filed 11–16–10; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

Environmental Technologies Trade Advisory Committee (ETTAC), Request for Nominations

AGENCY: International Trade Administration, DOC.

ACTION: Notice of solicitation of nominations for membership on the Environmental Technologies Trade Advisory Committee (ETTAC).

SUMMARY: The Environmental Technologies Trade Advisory Committee (ETTAC) was established under the Federal Advisory Committee Act, as amended, 5 U.S.C. App., and pursuant to Section 2313(c) of the Export Enhancement Act of 1988, as amended, 15 U.S.C. 4728(c). ETTAC was first chartered on May 31, 1994. By statute, the ETTAC advises, through the Secretary of Commerce, the Environmental Trade Working Group (ETWG) of the Trade Promotion Coordinating Committee (TPCC). The Secretary appoints the chair of the ETWG from among the employees of the Department. Although the ETWG is not currently active, the Department continues to function as chair of the ETWG, and the Department, as ETWG chair, utilizes the advice of the ETTAC and shares it with the TPCC or relevant TPCC member agencies as appropriate. ETTAC advises on the development and administration of policies and programs to expand U.S. exports of environmental technologies, goods, and services. The Department of Commerce rechartered the ETTAC on October 25, 2010 and is currently seeking nominations for membership on the ETTAC for the new charter term.

DATES: Nominations for membership must be received on or before December 3, 2010.

ADDRESSES: All nominations should be submitted either: Via e-mail to *ellen.bohon@trade.gov;* via fax to the attention of Ellen Bohon at 202–482–5665; or via mail to Ellen Bohon, Office of Energy & Environmental Industries, Room 4053, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Ellen Bohon, Office of Energy & Environmental Industries, Room 4053, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; phone 202–482–03859; fax 202–482–5665; e-mail *Ellen.Bohon@trade.gov*

SUPPLEMENTARY INFORMATION: The Secretary of Commerce invites nominations to ETTAC for the charter term beginning October 25, 2010 for appointments for a two-year term concurrent with the charter term. Members will be selected, in accordance with applicable Department of Commerce Guidelines, based upon their ability to advise the Secretary of Commerce on the development and administration of programs to expand United States exports of environmental technologies, products, and services that comply with United States environmental, safety, and related requirements, as articulated in ETTAC's Charter. The ETTAC shall advise on matters including: Trade policy development and negotiations relating to U.S. environmental technologies exports; U.S. Government policies and programs on the export of U.S. environmental products, technologies, and services; the effect of foreign governments' policies and practices on the export of U.S. environmental products, technologies, and services; the competitiveness of U.S. industry and its ability to compete for environmental technologies, products and services opportunities in international markets; and the identification of priority environmental technologies, products and services markets with high immediate returns for U.S. exports. More information on the advisory duties of ETTAC members can be found on ETTAC's Charter, which is available on the Internet at *http://www.environment.ita.doc.gov* under the tab: *Advisory Committee.*

Members of the ETTAC shall be selected in a manner that ensures that the ETTAC is balanced in terms of points of view, product lines, company size, and geographic location. Members of the ETTAC shall be drawn from U.S. environmental technologies manufacturing and services companies, U.S. trade associations, and U.S. private sector organizations involved in the promotion of exports of environmental technologies, products, and services, provided that, the ETTAC shall include at least one individual representing each of the following: Environmental businesses, including small businesses; trade associations in the environmental sector; private sector organizations involved in the promotion of environmental exports, including products that comply with U.S. environmental, safety, and related requirements; States and associations representing the States; and other appropriate interested members of the public, including labor representatives.

Members shall serve in a representative capacity, expressing the views and interests of a U.S. company or organization, as well as its particular sector; they are, therefore, not Special Government Employees. Each member of the ETTAC must be a U.S. citizen, not a federally-registered lobbyist, and not registered as a foreign agent under the Foreign Agents Registration Act.

Members of the ETTAC will not be compensated for their services or reimbursed for their travel expenses. The ETTAC shall, to the extent practicable, meet approximately three times a year. Most ETTAC meetings are held in Washington, DC.

Members of the ETTAC who have experience in exporting the full range of environmental technologies products and services are sought, including experience in the following sectors:

(1) Air Pollution Control/Monitoring;

(2) Analytic Devices and Services;

(3) Environmental Engineering and Consulting Services;

(4) Financial Services for the Environmental Sector;

(5) Process and Prevention Technologies;

(6) Solid and Hazardous Waste; and

(7) Water and Wastewater Treatment.

All appointments are made without regard to political affiliation. Members shall serve at the pleasure of the Secretary from the date of appointment to the Committee to the date on which the Committee's charter terminates (normally two years).

Self-nominations are accepted. If you are interested in nominating someone to become a member of ETTAC, please provide the following information (2 pages maximum):

(1) Name;

(2) Title;

(3) Work phone, fax, and e-mail address;

(4) Name and Address of entity to be represented by the applicant, including Web site address;

(5) Short biography of nominee including the applicant's personal resume demonstrating knowledge and experience relevant to the work of the ETTAC;

(6) Brief description of the entity to be represented, and, as applicable, its business activities; company size (number of employees and annual sales); and export markets served;

(7) 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;

(8) An affirmative statement that the applicant is not a federally-registered lobbyist, and that the applicant understands that if appointed, the applicant will not be allowed to continue to serve as an ETTAC member if the applicant becomes a federally-registered lobbyist; and

(9) An affirmative statement that the applicant meets all ETTAC eligibility requirements, including that the applicant represent a U.S. company or U.S. organization.

(a) For purposes of ETTAC eligibility, a U.S. company is at least 51 percent owned by U.S. persons.

(b) For purposes of ETTAC eligibility, a U.S. organization is controlled by U.S. persons, as determined based on its board of directors (or comparable governing body), membership, and funding sources, as applicable.

Please, do not send entity brochures or any other information.

Nominations may be e-mailed to *ellen.bohon@trade.gov* or faxed to the attention of Ellen Bohon at 202–482–5665, and must be received before the deadline of Friday, December 3, 2010. Nominees selected for appointment to ETTAC will be notified.

Dated: November 9, 2010.

Edward A. O'Malley,

Director, Office of Energy and Environmental Industries.

[FR Doc. 2010–28877 Filed 11–16–10; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA042

Fisheries of the Gulf of Mexico and South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Assessment Process Webinar for Highly Migratory Species (HMS) Fisheries Sandbar, Dusky, and Blacknose Sharks

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

ACTION: Notice of SEDAR 21 HMS of sandbar, dusky, and blacknose sharks assessment webinar.

SUMMARY: The SEDAR 21 assessments of the HMS of sandbar, dusky, and blacknose sharks will consist of a series of workshops and webinars: A Data Workshop, a series of Assessment webinars, and a Review Workshop. *See* **SUPPLEMENTARY INFORMATION**.

DATES: A SEDAR 21 Assessment Process webinar will be held on Thursday, December 2, 2010 from 10 a.m. to approximately 2 p.m. (Eastern). The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from, or completed prior to the time established by this notice.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie Neer at SEDAR (*See* **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator, 4055 Faber Place, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366; e-mail: *Julie.neer@safmc.net*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop, (2) Assessment Process utilizing webinars and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

SEDAR 21 Assessment Webinar

Using datasets recommended from the Data Workshop, participants will employ assessment models to evaluate stock status, estimate population benchmarks and management criteria, and project future conditions. Participants will recommend the most appropriate methods and configurations for determining stock status and estimating population parameters.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (*see* **ADDRESSES**) at least 3 business days prior to the meeting.

Dated: November 12, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–28935 Filed 11–16–10; 8:45 am]

BILLING CODE 3510–22–P

COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION

[OJP (OJJDP) Docket No. 1533]

Meeting of the Coordinating Council on Juvenile Justice and Delinquency Prevention

AGENCY: Coordinating Council on Juvenile Justice and Delinquency Prevention.

ACTION: Notice of meeting.

SUMMARY: The Coordinating Council on Juvenile Justice and Delinquency Prevention (Council) announces its December 2010 meeting.

DATES: Friday, December 3, 2010 from 12 p.m. to 1 p.m.

ADDRESSES: The meeting will take place in the third floor main conference room at the U.S. Department of Justice, Office of Justice Programs, 810 7th St., NW., Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Visit the Web site for the Coordinating Council at *http://www.juvenilecouncil.gov* or contact Robin Delany-Shabazz, Designated Federal Official, by telephone at 202–307–9963 [**Note:** this is not a toll-free telephone number], or by e-mail at *Robin.Delany-Shabazz@usdoj.gov.* The meeting is open to the public.

SUPPLEMENTARY INFORMATION: The Coordinating Council on Juvenile Justice and Delinquency Prevention, established pursuant to Section 3(2)A of the Federal Advisory Committee Act (5 U.S.C. App. 2) will meet to carry out its advisory functions under Section 206 of the Juvenile Justice and Delinquency Prevention Act of 2002, 42 U.S.C. 5601, *et seq.* Documents such as meeting announcements, agendas, minutes, and reports will be available on the Council's Web page, *http://www.JuvenileCouncil.gov,* where you may also obtain information on the meeting.

Although designated agency representatives may attend, the Council membership is composed of the Attorney General (Chair), the Administrator of the Office of Juvenile Justice and Delinquency Prevention (Vice Chair), the Secretary of Health and Human Services (HHS), the Secretary of Labor, the Secretary of Education, the Secretary of Housing and Urban Development, the Director of the Office of National Drug Control Policy, the Chief Executive Officer of the Corporation for National and Community Service, and the Assistant Secretary of Homeland Security for U.S. Immigration and Customs Enforcement. The nine additional members are appointed by the Speaker of the House of Representatives, the Senate Majority Leader, and the President of the United States. Other federal agencies take part in Council activities including the Departments of Agriculture, Defense, the Interior, and the Substance and Mental Health Services Administration of HHS.

Meeting Agenda

The agenda for this meeting will include: (a) Report from the Council's Executive Committee, discussion and action; and (b) presentations on the Chicago South Side Drill Team and the interagency Forum on Youth Violence Prevention.

Registration

For security purposes, members of the public who wish to attend the meeting must pre-register online at *http://www.juvenilecouncil.gov* no later than Monday, November 29, 2010. Should problems arise with web registration, call Daryel Dunston at 240–221–4343 or send a request to register to Mr. Dunston. Include name, title, organization or other affiliation, full address and phone, fax and e-mail information and send to his attention either by fax to 301–945–4295, or by e-mail to *ddunston@edjassociates.com.* [**Note:** these are not toll-free telephone numbers.] Additional identification documents may be required. Space is limited.

Note: Photo identification will be required for admission to the meeting.

Written Comments: Interested parties may submit written comments and questions by Monday, November 29, 2010, to Robin Delany-Shabazz, Designated Federal Official for the Coordinating Council on Juvenile Justice and Delinquency Prevention, at *Robin.Delany-Shabazz@usdoj.gov.* The Coordinating Council on Juvenile Justice and Delinquency Prevention expects that the public statements presented will not repeat previously submitted statements.

Dated: November 10, 2010.

Marilyn Roberts,

Deputy Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 2010–28956 Filed 11–16–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2010–OS–0034]

Defense Transportation Regulation, Part IV

AGENCY: United States Transportation Command (USTRANSCOM), DoD.

ACTION: Response to comments received.

SUMMARY: The Department of Defense has issued an interim response and disposition of comments received in connection with the Defense Personal Property Program (DP3), Phase III Final-Draft Business Rules. The notice was published in the **Federal Register** April 1, 2010 (75 FR 16445–16446). The interim response and disposition of comments can be viewed on the USTRANSCOM Web site (under misc) at *http://www.transcom.mil/dtr/part-iv/misc.cfm.*

Additional review of remaining comments received is on-going. Any subsequent changes will be published in a **Federal Register** Announcement and incorporated into the Defense Transportation Regulation (DTR) Part IV (DTR 4500.9R).

FOR FURTHER INFORMATION CONTACT: Mr. Jim Teague, United States Transportation Command, TCJ5/4–PI, 508 Scott Drive, Scott Air Force Base, IL 62225–5357; (618) 229–1985.

SUPPLEMENTARY INFORMATION: A complete version of the DTR is available via the Internet on the USTRANSCOM homepage at *http://www.transcom.mil/j5/pt/dtr_part_iv.cfm.*

Dated: November 10, 2010.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–28927 Filed 11–16–10; 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 December 17, 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: November 12, 2010.

James Hyler,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Elementary and Secondary Education

Type of Review: Extension.

Title of Collection: Teacher Incentive Fund Grant Program.

OMB Control Number: 1810–0700.

Agency Form Number(s): N/A.

Frequency of Responses: Annually.

Affected Public: Business or other for-profit; Not-for-profit institutions; State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

Total Estimated Number of Annual Responses: 120.

Total Estimated Annual Burden Hours: 29,760.

Abstract: The Teacher Incentive Fund (TIF) is a competitive grant program. The purpose of the TIF program is to support projects that develop and implement performance-based compensation systems (PBCSs) for teachers and principals in order to increase educator effectiveness and student achievement in high-need schools. The Department will use the data collected through the application process to award discretionary grants. The grants will be reviewed through a peer review process.

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 4386. 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. 2010–29015 Filed 11–16–10; 8:45 am]

BILLING CODE 4000–01–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 December 17, 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: November 12, 2010.

James Hyler,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title of Collection: 2011–2012 Federal Student Aid Application.

OMB Control Number: 1845–0001.

Agency Form Number(s): N/A.

Frequency of Responses: Weekly; Monthly; Annually.

Affected Public: Individuals or households.

Total Estimated Number of Annual Responses: 35,818,915.

Total Estimated Annual Burden Hours: 32,239,328.

Abstract: Public Law 89–329, Sections 401–495, the Higher Education Act of 1965, as amended (HEA), mandates that the Secretary of Education "* * * shall produce, distribute, and process free of charge common financial reporting forms as described in this subsection to be used for application and reapplication to determine the need and eligibility of a student for financial assistance."

The determination of need and eligibility are for the following Title IV, HEA, federal student financial assistance programs: the Federal Pell Grant Program; the Campus-Based programs; Federal Supplemental Educational Opportunity Grant, Federal Work-Study, and the Federal Perkins Loan Program; the William D. Ford Federal Direct Loan Program; the Teacher Education Assistance for College and Higher Education Grant; and the Iraq and Afghanistan Service Grant.

Federal Student Aid, an office of the U.S. Department of Education (hereafter "the Department"), subsequently developed an application process to collect and process the data necessary to determine a student's eligibility to receive Title IV, HEA program assistance. The application process involves an applicant's submission of the Free Application for Federal Student Aid (FAFSA). After submission of the FAFSA, an applicant receives a Student Aid Report (SAR) which is a summary of the data they submitted on the FAFSA. The applicant reviews the SAR,

and, if necessary, will make corrections or updates to their submitted FAFSA.

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 4391. 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. 2010–29018 Filed 11–16–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC10–574–001]

Commission Information Collection Activities (FERC–574); Comment Request; Submitted for OMB Review

November 8, 2010.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission or FERC) has submitted the information collection described below to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission issued a Notice in the **Federal Register** (75FR 47805, 08/09/2010) requesting public comments. FERC received no comments on the FERC–574 and has made this notation in its submission to OMB.

DATES: Comments on the collection of information are due by December 17, 2010.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to Created by OMB should be filed electronically, c/o *oira_submission@omb.eop.gov* and include OMB Control Number 1902–0116 for reference. The Desk Officer may be reached by telephone at 202–395–4638.

A copy of the comments should also be sent to the Federal Energy Regulatory Commission and should refer to Docket No. IC10–574–001. Comments may be filed either electronically or in paper format. Those persons filing electronically do not need to make a paper filing. Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines. Complete filing instructions and acceptable filing formats are available at *http://www.ferc.gov/help/submission-guide.asp.* To file the document electronically, access the Commission's website and click on Documents & Filing, E–Filing *(http://www.ferc.gov/docs-filing/efiling.asp),* and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

For paper filings, the comments should be submitted to the Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426, and should refer to Docket No. IC10–574–001.

Users interested in receiving automatic notification of activity in FERC Docket No. IC10–574 may do so through eSubscription at *http://www.ferc.gov/docs-filing/esubscription.asp.* All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the "eLibrary" link. For user assistance, contact ferconlinesupport@ferc.gov or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by e-mail at DataClearance@FERC.gov, by telephone at (202) 502–8663, and by fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–574, "Gas Pipeline Certificates: Hinshaw Exemption" (OMB No. 1902–0116), is used by the Commission to implement the statutory provisions of Sections 1(c), 4 and 7 of the Natural Gas Act (NGA) (Pub. L. 75–688) (15 U.S.C. 717–717w). Natural gas pipeline companies file applications with the Commission furnishing information in order for a determination to be made as to whether the applicant qualifies for an exemption under the provisions of the Natural Gas Act (Section 1(c)). If the exemption is granted, the natural gas pipeline company is not required to file certificate applications, rate schedules, or any other applications or forms prescribed by the Commission.

The exemption applies to companies engaged in the transportation or sale for resale of natural gas in interstate commerce if: (a) They receive gas at or within the boundaries of the state from another person at or within the boundaries of that state; (b) such gas is ultimately consumed in such state; (c) the rates, service and facilities of such company are subject to regulation by a State Commission; and (d) that such State Commission is exercising that jurisdiction. The data required to be filed by pipeline companies for an exemption are specified by Title 18 Code of Federal Regulations (CFR) Part 152.

Action: The Commission is requesting a three-year extension of the FERC–574 reporting requirements, with no changes.

Burden Statement: The estimated annual public reporting burden for FERC–574 is reduced from the estimate made three years ago due to the results of an analysis of recent filings showing that 60 hours per response is a more accurate estimate for the average burden hours per response than the 245 hours used in the 2007 estimate.

FERC data collection	Number of respondents	Average number of responses per respondent	Average burden hours per response	Total annual burden hours
	(1)	(2)	(3)	(1)×(2)×(3)
FERC–574	1	1	60	60

The total estimated annual cost burden to respondents is $3,977 (60 hours/2,080 hours [1] per year, times $137,874 [2]).

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) 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) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28916 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

[1] Estimated Number of hours an employee works each year.

[2] Estimated average annual cost per employee.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL10–77–000]

City of Pella, Iowa v. Midwest Independent Transmission System Operator, Inc. and MidAmerican Energy Company, Inc.; Notice of Amended Petition for Declaratory Order and Complaint

November 8, 2010.

Take notice that on November 5, 2010, the City of Pella, Iowa (Complainant) amended its July 2, 2010 filed petition for declaratory order and formal complaint against Midwest Independent System Operator, Inc. and MidAmerican Energy Company, Inc. (Respondents), by adding an exhibit.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 6, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28904 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 344–023]

Southern California Edison Company; Notice of Application Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

November 8, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Types of Application:* Surrender of License.

b. *Project No.:* 344–023.

c. *Date Filed:* September 29, 2010 and supplemented November 3, 2010.

d. *Applicants:* Southern California Edison Company.

e. *Name of Projects:* San Gorgonio Hydroelectric Project.

f. *Location:* San Gorgonio River, in San Bernardino and Riverside Counties, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Russ Krieger, Vice President, Power Production, Southern California Edison Company, 300 N. Lone Hill Ave., San Dimas, CA 91773, (909) 394–8714.

i. *FERC Contact:* Mr. Jeremy Jessup, (202) 502–6779, *Jeremy.Jessup@ferc.gov*.

j. *Deadline for filing comments, motions to intervene, and protests, is 30 days from the issuance date of this notice:* All documents may be filed electronically via the Internet. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. 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.

Please include the project numbers (P–344–023) on any comments, motions, or recommendations filed.

k. *Description of Request:* The applicant proposes to surrender the license for the San Gorgonio Project and transfer some of the Project's water conveyance system and powerhouse structures to the Participating Entities: San Gorgonio Pass Water Agency (a California special district), Banning Heights Mutual Water Company (a California mutual benefit corporation), and the City of Banning (a California municipal corporation). As part of the Surrender, the applicant intends to decommission selected FERC-licensed Project facilities, repair selected FERC-licensed Project facilities, abandon in place some FERC-licensed Project facilities, and then transfer ownership of the FERC-licensed Project (including recently re-constructed elements that are outside of the jurisdiction of the FERC license) to the Participating Entities to be used solely for water conveyance purposes.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208- 3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE", as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene or protests should relate to project works which are the subject of the license amendment. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

p. As provided for in 18 CFR 4.34(b)(5)(i), the applicant must file, no later than 60 days following the date of issuance of this notice of acceptance: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28901 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6688–002]

City of Upland Public Works Department; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, and Terms and Conditions

November 8, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Surrender of Conduit Exemption.

b. *Project No.:* 6688–002.

c. *Date Filed:* September 7, 2010.

d. *Applicant:* City of Upland Public Works Department.

e. *Name of Project:* Upland Hydrogeneration Project, "Hydrogenerator No. 1."

f. *Location:* Northwest of the City of Upland, San Bernardino County, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Anthony M. La, Public Works Director, City of Upland Public Works Department, 1370 North Benson Avenue, Upland, CA 91786. Phone (909) 219–2931.

i. *FERC Contact:* Alyssa Dorval, (212) 273–5955.

j. *Deadline for filing motions to intervene and protests, comments, recommendations, and terms and conditions, is 30 days from the issuance date of this notice. All documents (original and seven copies) should be filed with:* Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–6688–002) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on

each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the applicant specified in a particular application.

k. *Description of Request:* The City of Upland Public Works Department requests surrender of its exemption, stating that the facility has been inoperable since 1988. The project consists of: (1) A centrifugal turbine connected to a 46-kilowatt generating unit housed in an existing building and located on a 12-inch-diameter pipeline, and (2) a bypass conduit. The average annual energy generation was estimated to be 403,000 kilowatt-hours.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp*. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. *Mailing List:* Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application (see item (j) above).

o. *Filing and Service of Responsive Documents:* All filings must (1) bear in all capital letters the title "PROTEST", "MOTION TO INTERVENE", "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," or "TERMS AND CONDITIONS"; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene or protests should relate to project works which are the subject of the license surrender. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

p. Comments and motions to intervene may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii)(2008) and the instructions on the Commission's Web site under the "e-Filing" link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.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. More information about this project can be viewed or printed on the eLibrary link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–6688–002) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28905 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13847–000]

Qualified Hydro 28, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

November 8, 2010.

On September 29, 2010, Qualified Hydro 28, LLC filed an application, pursuant to Section 4(f) of the Federal Power Act, proposing to study the feasibility of the J. Edward Roush Lake Dam Hydroelectric Project No. 13847, to be located at the existing J. Edward Roush Lake Dam on the Wabash River, in the City of Huntington, in Huntington County, Indiana. The J. Edward Roush Lake Dam is owned by the United States government and operated by the U.S. Army Corps of Engineers.

The proposed project would consist of: (1) The existing earth and rock-filled dam which is 91 feet in height with an overall length of 6,500 feet; (2) a new 40 foot-wide, 25-foot-long concrete intake structure; (3) a new reinforced concrete powerhouse, 50 feet by 60 feet, to be located downstream of the existing stilling basin; (4) a new 300-foot-long, 12.0-foot-diameter penstock; (5) two vertical Kaplan turbine-generator units with a combined capacity of 3.0 megawatts; (6) a new 4–MVA substation adjacent to the powerhouse; (7) a new 4,600-foot-long, 12.5 to 34.5-kilovolt transmission line; and (8) appurtenant facilities. The project would have an estimated annual generation of 9.0 gigawatt-hours.

Applicant Contact: Ramya Swaminathan, 33 Commercial Street, Gloucester, MA 01930, (978) 252–7112.

FERC Contact: Tyrone A. Williams, (202) 502–6331.

Deadline for filing comments, motions to intervene, and competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance

date of this notice. Comments, motions to intervene, notices of intent, and competing applications 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/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "eComment." For assistance, please contact FERC Online Support at *FERCOnlineSupport.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly recommends electronic filing, documents may also be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*.

More information about this project, including a copy of the application can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13847) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28907 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Clean River Power 13, LLC; Project No. 13864–000; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

November 9, 2010.

On October 15, 2010, Clean River Power 13, 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 Barclay Creek Hydroelectric Project (Barclay Creek project) to be located on Barclay Creek in the vicinity of Baring, in Snohomish County, Washington. 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 will consist of the following: (1) A 6-foot-high, 60-foot-long reinforced concrete diversion weir; (2) a 15-foot-wide, 45-foot-long, 12-foot-high reinforced concrete intake structure with a trash rack, fish screen, and closure gate; (3) a 11,000-foot-long, 40-inch-diameter steel penstock; (4) a 50-foot by 40-foot reinforced concrete powerhouse containing one vertical impulse turbine with a capacity of 6.8 megawatts (MW); (5) a 7.2/115 kilovolt (kV) three stage step up transformer; (6) an approximately 1,500-foot-long, 115 kV transmission line which will tie into an undetermined interconnection; and (7) appurtenant facilities. The estimated annual generation of the Barclay Creek project would be 22.0 gigawatt-hours.

Applicant Contact: Ramya Swaminthan, Clean River Power 13, LLC, 33 Commercial St., Gloucester, MA 01930; phone: (978) 283–2822.

FERC Contact: Ryan Hansen (202) 502–8074.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications 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 Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13864–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28909 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–19–000]

Trunkline Gas Company, LLC; Notice of Application

November 9, 2010.

Take notice that on October 29, 2010, Trunkline Gas Company, LLC (Trunkline), P.O. Box 4967, Houston, Texas 77210–4967, filed an application in Docket No. CP11–19–000 pursuant to section 7 of the Natural Gas Act (NGA), to isolate its South Texas System (System), make minor modifications to convert the System to bi-directional flow, provide for liquids-rich gas transportation and abandon certain facilities, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Any questions regarding the applications should be directed to Stephen T. Veatch, Sr., Director, Certificates and Tariffs, at Trunkline Gas Company, LLC, 544 Westheimer Road, Houston, Texas 77056.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party

to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: November 30, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28911 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13846–000]

Qualified Hydro 29, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

November 9, 2010.

On September 29, 2010, Qualified Hydro 29, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Mississinewa Lake Dam Hydroelectric Project No. 13846, to be located at the existing Mississinewa Lake Dam on the Mississinewa River, in the City of Peru, in Miami County, Indiana. The Mississinewa Lake Dam is owned by the United States government and operated by the U.S. Army Corps of Engineers.

The proposed project would consist of: (1) The existing earth filled dam which is 140 feet in height with an overall length of 8,000 feet; (2) a new reinforced concrete powerhouse, 45 feet by 65 feet, to be located downstream of the existing stilling basin; (3) a new 75 foot-long, 10.0-foot diameter penstock; (4) two vertical Kaplan turbine-generator units with a combined capacity of 7.0 megawatts; (5) a new 8 MVA substation; (6) a new two mile-long, 12.5 to 34.5-kilovolt transmission line; and (7) appurtenant facilities. The project would have an estimated annual generation of 21.0 gigawatt-hours.

Applicant Contact: Ramya Swaminathan, 33 Commercial Street, Gloucester, MA 01930, (978) 252–7112.

FERC Contact: Tyrone A. Williams, (202) 502–6331.

Deadline for filing comments, motions to intervene, and competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance date of this notice. Comments, motions to intervene, notices of intent, and competing applications 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/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "Quick Comment." For assistance, please contact FERC Online Support at *FERCOnlineSupport.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly recommends electronic filing, documents may also be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.*

More information about this project, including a copy of the application can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13846) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28915 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12665–003]

New York Tidal Energy Company; Notice Concluding Pre-Filing Process and Approving Process Plan and Schedule

November 9, 2010.

a. *Type of Filing:* Notice of Intent to File Application for License for a Hydrokinetic Pilot Project.

b. *Project No.:* 12665–003.

c. *Dated Filed:* June 1, 2009.

d. *Submitted By:* New York Tidal Energy Company.

e. *Name of Project:* East River Tidal Energy Pilot Project.

f. *Location:* In the East River at Hell Gate, in New York City, New York. The project would not occupy Federal lands.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Applicant Contact:* Daniel Power, Oceana Energy Company, 1785 Massachusetts Avenue, NW., Suite 100, Washington, DC 20036; phone: (202) 465–6405.

i. *FERC Contact:* Timothy Konnert (202) 502–6359.

j. *New York Tidal Energy Company (NYTEC) has filed with the Commission:* (1) A notice of intent (NOI) to file an application for a pilot hydrokinetic hydropower project and a draft license application with monitoring plans; (2) a request for waivers of certain Integrated Licensing Process (ILP) regulations necessary for expedited processing of a license application for a hydrokinetic pilot project; (3) a proposed process plan and schedule; and (4) a request to be designated as the non-Federal representative for section 7 of the Endangered Species Act (ESA) consultation and for section 106 consultation under the National Historic Preservation Act.

k. A notice was issued on June 10, 2009 soliciting comments on the draft license application from agencies and stakeholders. Comments were filed by Federal and State agencies, and non-governmental organizations. No comments were filed opposing the request to waive the integrated licensing process regulations or the proposed process plan and schedule.

l. The June 10, 2009 notice approved NYTEC's request to be designated as the non-Federal representative for section 7 of the ESA with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, and its request to initiate consultation under section 106 of the National Historic Preservation Act with the New York State Historic Preservation Officer.

m. The proposed East River Tidal Energy Pilot Project would consist of: (1) A 2-meter-diameter 20-kilowatt (kW) capacity hydrokinetic device during Phase 1, which would be replaced by a 6-meter-diameter 200-kW device in Phase 2; (2) a 1,300-foot-long transmission cable that would interconnect with the existing Wards Island Park System; and (3) appurtenant facilities for operating and maintaining the project. Based on the proposed 250 hours of testing operation per-year, the project is estimated to have an annual generation of 5 megawatt-hours per-year, which would be sold to a local utility.

n. The pre-filing process has been concluded and the requisite regulations have been waived such that the process and schedule indicated below can be implemented.

o. *Post-filing process schedule.* The post-filing process will be conducted pursuant to the following schedule. Revisions to the schedule may be made as needed.

Milestones	Dates
Final license application expected	January 31, 2011.
Issue notice of acceptance and ready for environmental analysis and request for interventions	February 15, 2011.
Issue biological assessment	February 15, 2011.
Comments and interventions due	March 17, 2011.
Issue notice of availability of environmental assessment	May 16, 2011.
Comments due and 10(j) resolution, if needed	June 15, 2011.

p. Register online at *http://ferc.gov/esubscribenow.htm* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28914 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–17–000]

El Paso Natural Gas Company; Notice of Application

November 9, 2010.

Take notice that on October 29, 2010, El Paso Natural Gas Company (EPNG), P.O. Box 1087, Colorado Springs, Colorado 80944, filed in the above referenced docket an application, pursuant to section 7(c)(1)(b) of the Natural Gas Act (NGA) and Rule 207(a)(5) of the Commission's regulations, requesting the temporary deactivation of sixteen compressor units on its South Mainline System in Arizona and New Mexico and five compressor units on its San Juan Triangle and North Mainline System in Arizona and New Mexico, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site Web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Any questions concerning this application may be directed to Susan C. Stires, Director, Regulatory Affairs, El Paso Natural Gas Company, P.O. Box 1087, Colorado Springs, Colorado 80944 at (719) 667–7514 or by fax at (719) 667–7534.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426,

a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: November 30, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28910 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13875–000]

Clean River Power 16, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

November 8, 2010.

On October 22, 2010, Clean River Power 16, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Kitano Water Power Project, located in Kauai County, in the state of Hawaii. 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 the following developments:

(1) The existing Kokee Ditch Irrigation System comprised of multiple intakes, two reservoirs, and a series of ditches and tunnels; (2) a new upper intake including a trashrack and control gate; (3) a new 26,700-foot-long, 36-inch-diameter steel penstock; (4) a proposed 40-foot-long and 75-foot-wide upper powerhouse made with reinforced concrete; (5) a 4 MVA 4.16/695kV three-phase step-up transformer located in a switchyard 50 feet from the powerhouse; (6) dependent on the results of the proposed studies, a new 2-mile transmission line interconnecting with the existing utility transmission line between the Kahaka switchyard and the Kaumakani substation; (7) The proposed development would have an average annual generation of 23,100 megawatt-hours.

Applicant Contact: Daniel Irvin, CEO, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930; *phone:* (978) 252–7631.

FERC Contact: Mary Greene, 202–502–8865.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications 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/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "eComment." For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight 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 Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13875) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28908 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3041–004]

Mackay Bar Corporation; Notice of Authorization for Continued Project Operation

November 9, 2010.

On April 28, 2008 the Mackay Bar Corporation, licensee for the Hettinger Hydroelectric Project, filed an Application to Surrender its License as

well as a Conduit Exemption Application pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. The Hettinger Hydroelectric Project is located on an irrigation system in Idaho County, Idaho.

The license for Project No. 3041 was issued for a period ending October 31, 2010. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 USC 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 3041 is issued to the Mackay Bar Corporation for a period effective November 1, 2010 through October 31, 2011, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before October 31, 2011, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Mackay Bar Corporation, is authorized to continue operation of the Hettinger Hydroelectric Project, until such time as the Commission acts on its application for a subsequent license.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28913 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

November 4, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC11–14–000.
Applicants: Front Range Power Company, LLC.
Description: Application for authorization for disposition of jurisdictional facilities and request for expedited and privileged treatment of Exhibit I re Front Range Power Company.
Filed Date: 10/26/2010.
Accession Number: 20101027–0201.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 16, 2010.

Docket Numbers: EC11–16–000.
Applicants: Cedar Creek II, LLC, Cedar Creek Wind Energy, LLC.
Description: Application of Cedar Creek Wind Energy, LLC, and Cedar Creek II, LLC, for Transaction Approval Per Federal Power Act.
Filed Date: 11/03/2010.
Accession Number: 20101103–5116.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 24, 2010.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG11–8–000.
Applicants: Cedar Creek II, LLC.
Description: Self-Certification of EWG Status of Cedar Creek II, LLC.
Filed Date: 11/03/2010.
Accession Number: 20101103–5101.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 24, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER98–4336–016; ER00–1814–012; ER99–1435–024.
Applicants: Spokane Energy LLC; Avista Corporation; Avista Turbine Power, Inc.
Description: Avista Corporation's et al., submits Tables 8.1a through 8.1f of the Generation Market Power Analysis revised for the correct format specified in Order 697–A.
Filed Date: 10/29/2010.
Accession Number: 20101101–0007.
Comment Date: 5 p.m. Eastern Time on Friday, November 19, 2010.

Docket Numbers: ER10–2664–001.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits tariff filing per 35.17(b): Resubmission of Revised SGIA and SA for FlexEnergy's Lamb Canyon Project to be effective 11/16/2010.
Filed Date: 11/04/2010.
Accession Number: 20101104–5017.
Comment Date: 5 p.m. Eastern Time on Thursday, November 18, 2010.

Docket Numbers: ER10–2815–001.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits tariff filing per 35.17(b): Resubmission of Revised City of Banning Wholesale Dist Load IFA for 3rd 33kV Line to be effective 11/22/2010.
Filed Date: 11/04/2010.
Accession Number: 20101104–5018.
Comment Date: 5 p.m. Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–25–001.
Applicants: Avista Corporation.
Description: Avista Corporation submits the OATT Service Agreement No. T–1084 to be effective 12/31/9998.
Filed Date: 11/04/2010.
Accession Number: 20101104–5088.
Comment Date: 5 p.m. Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2025–000.
Applicants: Safe Harbor Water Power Corporation.
Description: Safe Harbor Water Power Corporation submits request for a continued extension to 12/31/10 to file its baseline electronic tariffs, pursuant to Order 714.
Filed Date: 11/03/2010.
Accession Number: 20101103–0202.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 24, 2010.

Docket Numbers: ER11–2026–000.
Applicants: KCP&L Greater Missouri Operations Company.
Description: KCP&L Greater Missouri Operations Company submits tariff filing per 35: GMO Order 739 Compliance Filing (Section 23.1) to be effective 10/1/2010.
Filed Date: 11/03/2010.
Accession Number: 20101103–5086.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 24, 2010.

Docket Numbers: ER11–2027–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits tariff filing per 35.13(a)(2)(iii): City of Nephi Vickers POD Construction Agreement to be effective 11/4/2010.
Filed Date: 11/03/2010.
Accession Number: 20101103–5091.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 24, 2010.

Docket Numbers: ER11–2028–000.
Applicants: EDF Industrial Power Services (IL), LLC.

Description: EDF Industrial Power Services (IL), LLC submits tariff filing per 35.13(a)(2)(iii): Market Based Rate to be effective 11/3/2010.

Filed Date: 11/03/2010.

Accession Number: 20101103–5097.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 24, 2010.

Docket Numbers: ER11–2029–000.

Applicants: Cedar Creek II, LLC.

Description: Cedar Creek II, LLC submits tariff filing per 35.12: MBR Application of Cedar Creek II, LLC to be effective 12/16/2010.

Filed Date: 11/03/2010.

Accession Number: 20101103–5105.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 24, 2010.

Docket Numbers: ER11–2030–000.

Applicants: Hinson Power Company, LLC.

Description: Hinson Power Company, LLC submits baseline tariff, Electric Sales Rate Schedule No. 1, to be effective 11/3/2010.

Filed Date: 11/04/2010.

Accession Number: 20101104–5001.

Comment Date: 5 p.m. Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2031–000.

Applicants: Southwestern Public Service Company.

Description: Southwestern Public Service Company submits tariff filing per 35.13(a)(2)(iii): 2010_11_4_Coversheet_612–SPS to be effective 11/1/2010 under ER11–02031–000 Filing Type: 10.

Filed Date: 11/04/2010.

Accession Number: 20101104–5083.

Comment Date: 5 p.m. Eastern Time on Friday, November 26, 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. 2010–28922 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

November 9, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1499–000.

Applicants: Kern River Gas Transmission Company.

Description: Kern River Gas Transmission Company submits tariff filing per 154.203: 2010 Conditionally Corrected Compliance Filing 11–04–10 RP04–274 to be effective 8/19/2010.

Filed Date: 11/04/2010.

Accession Number: 20101104–5149.

Comment Date: 5 p.m. Eastern Time on Monday, November 22, 2010.

Docket Numbers: RP11–1505–000.

Applicants: ANR Pipeline Company.

Description: ANR Pipeline Company submits tariff filing per 154.203: RP10–1272 eTariff Compliance to be effective 11/1/2010.

Filed Date: 11/08/2010.

Accession Number: 20101108–5094.

Comment Date: 5 p.m. Eastern Time on Monday, November 22, 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
For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–28921 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

November 8, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–1159–001.
Applicants: ANR Storage Company.
Description: ANR Storage Company submits tariff section 6.11.11–GT&C North American Energy Standards Board, v.3.0 etc., to be effective 11/1/2010.
Filed Date: 11/05/2010.
Accession Number: 20101105–5068.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 17, 2010.

Docket Numbers: RP10–1037–001.
Applicants: Granite State Gas Transmission, Inc.
Description: Granite State Gas Transmission, Inc. Filing Addressing Compliance Obligations in Docket Nos. RP10–963, *et al.*
Filed Date: 11/02/2010.
Accession Number: 20101102–5196.
Comment Date: 5 p.m. Eastern Time on Monday, November 15, 2010.

Docket Numbers: RP10–1174–001.
Applicants: Fayetteville Express Pipeline LLC.
Description: Fayetteville Express Pipeline LLC submits tariff filing per 154.203: NAESB Compliance Filing to be effective 11/1/2010.
Filed Date: 11/02/2010.
Accession Number: 20101102–5170.
Comment Date: 5 p.m. Eastern Time on Monday, November 15, 2010.

Docket Numbers: RP10–1313–001.
Applicants: National Grid LNG, LP.
Description: National Grid LNG, LP submits tariff filing per 154.203: Compliance Filing to Upload Approved Changes From Aug. 31 and Sept. 16 Filings to be effective 11/1/2010.
Filed Date: 11/02/2010.
Accession Number: 20101102–5197.
Comment Date: 5 p.m. Eastern Time on Monday, November 15, 2010.

Docket Numbers: RP10–963–002.
Applicants: Granite State Gas Transmission, Inc.
Description: Granite State Gas Transmission, Inc. Filing Addressing Compliance Obligations.
Filed Date: 11/02/2010.
Accession Number: 20101102–5196.
Comment Date: 5 p.m. Eastern Time on Monday, November 15, 2010.

Docket Numbers: RP11–39–001.
Applicants: Kinder Morgan Interstate Gas Transmission LLC.
Description: Kinder Morgan Interstate Gas Transmission LLC submits tariff filing per 154.205(b): Amendment to RP11–39 Negotiated Rate 11–6–10 Aventine to be effective 10/15/2010.
Filed Date: 11/02/2010.
Accession Number: 20101102–5169.
Comment Date: 5 p.m. Eastern Time on Monday, November 15, 2010.

Docket Numbers: RP10–1341–001.
Applicants: Dauphin Island Gathering Partners.
Description: Dauphin Island Gathering Partners submits tariff filing per 154.203: Baseline Correction to be effective 9/24/2010 under RP10–01341–001 Filing Type: 580.
Filed Date: 11/08/2010.
Accession Number: 20101108–5042.
Comment Date: 5 p.m. Eastern Time on Monday, November 22, 2010.

Docket Numbers: RP10–1341–001.
Applicants: Dauphin Island Gathering Partners.
Description: Dauphin Island Gathering Partners submits tariff filing per 154.203: Baseline Correction to be effective 9/24/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5042.
Comment Date: 5 p.m. Eastern Time on Monday, November 22, 2010.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–28920 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

Monday, November 8, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1498–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: Iroquois Gas Transmission System, L.P., submits tariff filing per 154.204: 11/04/10 Negotiated Rate—Repsol to be effective 11/5/2010.
Filed Date: 11/04/2010.
Accession Number: 20101104–5028.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 16, 2010.

Docket Numbers: RP11–1500–000.
Applicants: Trailblazer Pipeline Company LLC.
Description: Trailblazer Pipeline Company LLC submits tariff filing per 154.203: Compliance Filing in Docket No. RP10–492 to be effective 1/1/2011.
Filed Date: 11/04/2010.
Accession Number: 20101104–5053.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 16, 2010.

Docket Numbers: RP11–1501–000.
Applicants: Destin Pipeline Company, L.L.C.
Description: Destin Pipeline Company, L.L.C., resubmits certain sections of its baseline tariff filing, FERC Gas Tariff, First Revised No. 1, to be effective 9/10/2010.
Filed Date: 11/05/2010.
Accession Number: 20101105–5000.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 17, 2010.

Docket Numbers: RP11–1502–000.
Applicants: East Tennessee Natural Gas, LLC.
Description: East Tennessee Natural Gas, LLC submits tariff filing per 154.204: November 5, 2010 Clean-up Filing to be effective 12/6/2010.
Filed Date: 11/05/2010.
Accession Number: 20101105–5038.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 17, 2010.

Docket Numbers: RP11–1503–000.
Applicants: Texas Eastern Transmission, LP.
Description: Texas Eastern Transmission, LP submits tariff filing per 154.204: TETLP Volume No. 2 Cleanup Filing to be effective 4/22/2010.
Filed Date: 11/05/2010.
Accession Number: 20101105–5039.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 17, 2010.

Docket Numbers: RP11–1504–000.
Applicants: Northern Natural Gas Company.
Description: Northern Natural Gas Company submits tariff filing per 154.204: 20101105 Non-Conforming/Negotiated Rate PDD for 2011 to be effective 10/12/2010.
Filed Date: 11/05/2010.
Accession Number: 20101105–5141.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 17, 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. 2010–28919 Filed 11–16–10; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

November 9, 2010.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG11–9–000.
Applicants: PSEG New Haven LLC.
Description: Notice of Self-Certification of exempt wholesale generator of PSEG New Haven LLC.
Filed Date: 11/08/2010.
Accession Number: 20101108–5080.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER99–2541–010.
Applicants: Carthage Energy, LLC.
Description: Tariff Sheets for Carthage Energy, LLC, FERC Electric Tariff, Third Revised Volume No. 1, inception to date.
Filed Date: 11/09/2010.
Accession Number: 20090110–0834.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2010.

Docket Numbers: ER01–1764–007.
Applicants: PEI Power II LLC.
Description: Tariff Sheets for PEI Power II, LLC, FERC Electric Tariff, First Revised Volume 1, inception to date.
Filed Date: 11/09/2010.
Accession Number: 20090110–0846.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2010.

Docket Numbers: ER11–1944–001.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits DomVa Termination Deferral Recovery Charge—ATT H–16E, to be effective 1/1/2011.
Filed Date: 11/05/2010.
Accession Number: 20101105–5074.
Comment Date: 5 p.m. Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–1988–001.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.17(b): Amendment to ER11–1988–000 to be effective 1/1/2011.
Filed Date: 11/05/2010.
Accession Number: 20101105–5148.
Comment Date: 5 p.m. Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–1997–001.
Applicants: Ohio Power Company.
Description: Ohio Power Company submits tariff filing per 35.17(b): OPCo Rate Schedule 101 to be effective 1/1/2011.
Filed Date: 11/05/2010.
Accession Number: 20101105–5043.
Comment Date: 5 p.m. Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2028–001.
Applicants: EDF Industrial Power Services (IL), LLC.
Description: EDF Industrial Power Services (IL), LLC submits tariff filing per 35.17(b): Market Based Rate Tariff Amendment to be effective 9/22/2010.
Filed Date: 11/05/2010.
Accession Number: 20101105–5121.
Comment Date: 5 p.m. Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER10–2411–001.
Applicants: Meadow Lake Wind Farm III LLC.
Description: Meadow Lake Wind Farm III LLC submits its baseline tariff sheets, to be effective 8/26/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5043.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER10–2412–001.
Applicants: Meadow Lake Wind Farm IV LLC.
Description: Meadow Lake Wind Farm IV LLC submits tariff filing per 35: Meadow Lake Wind Farm IV LLC MBR Tariff to be effective 8/26/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5044.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER10–3024–001.
Applicants: Pace Global Asset Management, LLC.
Description: Pace Global Asset Management, LLC submits tariff filing per 35: Market Baseline to be effective 9/27/2010.
Filed Date: 11/09/2010.
Accession Number: 20101109–5047.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2010.

Docket Numbers: ER10–3046–001.
Applicants: Camp Grove Wind Farm LLC.
Description: Camp Grove Wind Farm LLC submits tariff filing per 35: Camp Grove MBR Baseline to be effective 9/27/2010.
Filed Date: 11/09/2010.
Accession Number: 20101109–5016.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2010.

Docket Numbers: ER11–2046–000.
Applicants: MATEP LLC.
Description: MATEP LLC submits revisions to its market-based rate tariff, to be effective 9/29/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5079.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER11–2047–000.
Applicants: MATEP Limited Partnership.
Description: MATEP Limited Partnership submits tariff filing per 35: MATEP Limited Partnership Revised MBR Tariff to be effective 9/29/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5082.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER11–2048–000.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator, Inc. submits tariff filing per 35: Compliance Filing order 890 OATT Attachment C ATC filing—Patka 11/08/10 to be effective 6/30/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5104.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER11–2048–001.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator, Inc. submits tariff filing per 35: compliance filing resubmission ATC Attachment C OATT to be effective 4/1/2011.
Filed Date: 11/08/2010.
Accession Number: 20101108–5181.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER11–2049–000.
Applicants: UNS Electric, Inc.
Description: UNS Electric, Inc. submits tariff filing per 35.1: Amended and Restated Non-Firm Interchange Agreement Between UNSE and Aha MaCav to be effective 11/9/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5107.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER11–2049–000.
Applicants: UNS Electric, Inc.
Description: UNS Electric, Inc. submits tariff filing per: Supplemental Information in Docket No. ER11–2049 to be effective N/A.
Filed Date: 11/08/2010.
Accession Number: 20101108–5182.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER11–2050–000.
Applicants: The Dayton Power and Light Company.
Description: The Dayton Power and Light Company submits tariff filing per 35.1: FERC Rate Schedule No. 41, City of Piqua to be effective 11/8/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5112.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER11–2051–000.
Applicants: Pure Energy Inc.
Description: Pure Energy Inc. submits tariff filing per 35: Pure Energy, Inc. FERC Electric Market Based Rate Tariff to be effective 11/8/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5156.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER11–2052–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): WMPA No. 2659, Queue V4–069, Flemington Solar, LLC and JCPL to be effective 10/12/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5179.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER11–2053–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 11–8–10 Interface LMP Filing to be effective 11/9/2010.
Filed Date: 11/08/2010.
Accession Number: 20101108–5180.
Comment Date: 5 p.m. Eastern Time on Monday, November 29, 2010.

Docket Numbers: ER11–2054–000.
Applicants: Ameren Illinois Company.
Description: Ameren Illinois Company submits tariff filing per 35.13(a)(2)(iii): Amendment to Rate Schedules and Agreements to be effective 12/31/9998.
Filed Date: 11/09/2010.
Accession Number: 20101109–5045.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2010.

Docket Numbers: ER11–2055–000.
Applicants: Energy Plus Holdings LLC.
Description: Request for Waiver of Energy Plus Holdings LLC.
Filed Date: 11/09/2010.
Accession Number: 20101109–5058.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2010.

Docket Numbers: ER11–2056–000.
Applicants: Constellation Mystic Power, LLC.
Description: Constellation Mystic Power, LLC submits tariff filing per 35.1: Baseline MBR Filing Constellation Mystic Power, LLC to be effective 11/9/2010.
Filed Date: 11/09/2010.
Accession Number: 20101109–5091.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2010.

Docket Numbers: ER11–2057–000.
Applicants: OGE Energy Resources LLC.
Description: Notice of Cancellation of Cost-Based Power Sales Tariff and Request for Waiver of Notice Period of OGE Energy Resources LLC.
Filed Date: 11/09/2010.
Accession Number: 20101109–5096.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2010.

Docket Numbers: ER11–2058–000.
Applicants: PJM Interconnection, L.L.C., Commonwealth Edison Company.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): Interconnection Upgrade Agmt No. 2703 between ComEd and ATC to be effective 11/9/2010.
Filed Date: 11/09/2010.
Accession Number: 20101109–5116.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2010.

Docket Numbers: ER11–2059–000.
Applicants: Midwest Independent Transmission System.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 11–9–10 LTTR Filing to be effective 1/9/2011.
Filed Date: 11/09/2010.
Accession Number: 20101109–5118.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2010.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES11–7–000.
Applicants: Baltimore Gas and Electric Company.
Description: Amendment to Application of Baltimore Gas and Electric Company.
Filed Date: 11/09/2010.
Accession Number: 20101109–5038.
Comment Date: 5 p.m. Eastern Time on Friday, November 19, 2010.

Take notice that the Commission received the following foreign utility company status filings:

Docket Numbers: FC11–1–000.
Applicants: Covanta Burnaby Renewable Energy, Inc.
Description: Covanta Burnaby Renewable Energy, Inc's Notification of Self-Certification of Foreign Utility Company Status.
Filed Date: 11/08/2010.
Accession Number: 20101108–5196.
Comment Date: 5 p.m. Eastern Time on Monday, November 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.

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. 2010–28918 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

November 8, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–105–000.
Applicants: Exelon Corporation, Exelon Generation Company, LLC, EXELON VENTURES CO, LLC, Exelon Ventures Company, LLC, DEERE & CO, John Deere Renewables, LLC, Cassia Gulch Wind Park, Cow Branch Wind Power, LLC, CR Clearing, LLC, Harvest WindFarm, LLC, JD WIND 4, LLC, Michigan Wind 1, LLC, Tuana Springs Energy, LLC, Wind Capital Holdings, LLC.
Description: Supplement to Joint Application for Section 203 Approval and Request for Shortened Notice Period.
Filed Date: 11/08/2010.
Accession Number: 20101108–5078.
Comment Date: 5 *p.m.* Eastern Time on Thursday, November 18, 2010.

Docket Numbers: EC11–17–000.
Applicants: Morgan Stanley Capitol Group Inc., TAQA Gen X LLC, MS TGX, LLC.
Description: Joint Application for Authorization under Section 203 of the Federal Power Act, Request for Expedited Action, and Request for Confidential Treatment of TAQA Gen X LLC, Morgan Stanley Capital Group Inc. and MS TGX, LLC.
Filed Date: 11/04/2010.
Accession Number: 20101104–5144.
Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER98–4109–006, ER03–394–008, ER09–1453–003, ER03–427–008, ER04–170–010, ER99–3426–012, ER07–265–013, ER08–100–012, ER05–440–004, ER03–175–010.
Applicants: El Dorado Energy, LLC, Elk Hills Power, LLC, Gateway Energy Services, Corp., Mesquite Power, LLC, MXenergy Electric Inc., San Diego Gas & Electric Company, Sempra Energy Solutions LLC, Sempra Energy Trading LLC, Sempra Generation, Termoelectrica.
Description: Errata to Supplement to Triennial Update of Sempra Market-Based Rate Sellers.
Filed Date: 11/05/2010.
Accession Number: 20101105–5213.
Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER04–925–023.
Applicants: Merrill Lynch Commodities, Inc.
Description: Notification of Nonmaterial Change in Status Notice.
Filed Date: 11/05/2010.
Accession Number: 20101105–5208.
Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2032–000.
Applicants: New Harvest Wind Project, LLC.
Description: New Harvest Wind Project, LLC submits tariff filing per 35.12: Initial Market-Based Rate Application to be effective 1/3/2011.
Filed Date: 11/04/2010.
Accession Number: 20101104–5112.
Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2033–000.
Applicants: BNP Paribas Energy Trading GP.
Description: BNP Paribas Energy Trading GP submits tariff filing per 35.13(a)(2)(iii): BNP Paribas Tariff Amendment to be effective 1/3/2011.
Filed Date: 11/04/2010.
Accession Number: 20101104–5119.
Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2034–000.
Applicants: Columbus Southern Power Company.
Description: Columbus Southern Power Company submits tariff filing per 35.13(a)(2)(iii): CSP Rate Schedule 39 to be effective 1/1/2011.
Filed Date: 11/05/2010.
Accession Number: 20101105–5041.
Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2035–000.
Applicants: American PowerNet Management, LP.
Description: American PowerNet Management, LP submits tariff filing per 35.12: American PowerNet

Management, LP Rate Schedule FERC No. 1 to be effective 11/5/2011.

Filed Date: 11/05/2010.

Accession Number: 20101105–5042.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2036–000.

Applicants: AES Laurel Mountain, LLC.

Description: AES Laurel Mountain, LLC submits tariff filing per 35.12: AES Laurel Mountain MBR Application to be effective 1/4/2011.

Filed Date: 11/05/2010.

Accession Number: 20101105–5050.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2037–000.

Applicants: Elk City II Wind, LLC.

Description: Elk City II Wind, LLC submits tariff filing per 35.12: Elk City II Wind, LLC MBR Application to be effective 12/15/2010.

Filed Date: 11/05/2010.

Accession Number: 20101105–5093.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2038–000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii): Enhancements to the Forward Reserve Market to be effective 6/1/2011.

Filed Date: 11/05/2010.

Accession Number: 20101105–5139.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2039–000.

Applicants: E–T Global Energy, LLC.

Description: E–T Global Energy, LLC submits tariff filing per 35.12: FERC Electric Tariff to be effective 11/5/2010.

Filed Date: 11/05/2010.

Accession Number: 20101105–5140.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2040–000.

Applicants: Schuylkill Energy Resources, Inc.

Description: Schuylkill Energy Resources, Inc. submits tariff filing per 35.12: Application for MBR Authority to be effective 11/5/2010.

Filed Date: 11/05/2010.

Accession Number: 20101105–5149.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2041–000.

Applicants: Innovative Energy Systems, LLC.

Description: Innovative Energy Systems, LLC submits tariff filing per 35.12: FERC Electric Tariff, Volume No. 1 to be effective 11/6/2010.

Filed Date: 11/05/2010.

Accession Number: 20101105–5190.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2042–000.

Applicants: Seneca Energy, II LLC.

Description: Seneca Energy, II LLC submits tariff filing per 35.12: FERC Electric Tariff, Volume No. 1 to be effective 11/6/2010.

Filed Date: 11/05/2010.

Accession Number: 20101105–5191.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2043–000.

Applicants: MidAmerican Energy Company.

Description: MidAmerican Energy Company submits tariff filing per 35.15: Cancel Tariff ID to be effective 9/30/2010.

Filed Date: 11/05/2010.

Accession Number: 20101105–5192.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2044–000.

Applicants: MidAmerican Energy Company.

Description: MidAmerican Energy Company submits tariff filing per 35.12: Market-Based Rate Tariff & Capacity and Energy Sales Tariff—Baseline to be effective 9/30/2010.

Filed Date: 11/05/2010.

Accession Number: 20101105–5193.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 2010.

Docket Numbers: ER11–2045–000.

Applicants: The Royal Bank of Scotland plc.

Description: The Royal Bank of Scotland plc Notice of Cancellation.

Filed Date: 11/05/2010.

Accession Number: 20101105–5211.

Comment Date: 5 *p.m.* Eastern Time on Friday, November 26, 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. 2010–28923 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Lakefield Wind Project, LLC, EG10–57–000; Constellation Mystic Power, LLC, EG10–58–000; Pattern Gulf Wind, LLC, EG10–59–000; New Harvest Wind Project, LLC, EG10–60–000; Dry Lake Wind Power, II LLC, EG10–61–000; Learning Jupiter Wind Power, LLC, EG10–62–000; Hardscrabble Wind Power LLC, EG10–63–000; Baldwin Wind, LLC, EG10–64–000]

Notice of Effectiveness of Exempt Wholesale Generator Status

November 8, 2010.

Take notice that during the month of October 2010, the status of the above-captioned entities as Exempt Wholesale Generators became effective by operation of the Commission's regulations. 18 CFR 366.7(a).

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28903 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12775–001]

City of Spearfish, SD; Notice of Availability of Final Environmental Assessment

November 8, 2010.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 Code of Federal Regulations (CFR) Part 380 (Order No. 486, 52 **Federal Register** (FR) 47897), the Office of Energy Projects has reviewed the city of Spearfish's application for license for the Spearfish Hydroelectric Project (FERC Project No. 12775–001), located on Spearfish Creek near the city of Spearfish, in Lawrence County, South Dakota. The existing, but unlicensed project occupies a total of 57.26 acres of federal lands within the Black Hills National Forest managed by the U.S. Forest Service.

Staff prepared a final environmental assessment (EA), which analyzes the potential environmental effects of licensing the project, and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the final EA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support. For further information, contact Joseph Adamson by telephone at (202) 502–8085 or by e-mail at *joseph.adamson@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28906 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ11–3–000]

East Kentucky Power Cooperative, Inc.; Notice of Filing

November 8, 2010.

Take notice that on October 25, 2010, East Kentucky Power Cooperative, Inc. submitted its Revised Open Access Transmission Tariff (OATT) section 23 pursuant to Order No. 739,[1] to be effective 10/9/2010.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 15, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28917 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

[1] *Promoting a Competitive Market for Capacity Reassignment,* 132 FERC ¶ 61,238 (2010).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2106–059]

Pacific Gas & Electric Company; Notice of Section 10j Meeting and Providing Teleconference Information

November 9, 2010.

a. *Date and Time of Meeting:* Wednesday, November 17, 2010, 9 a.m.–5 p.m.

b. *Place:* John E. Moss Federal Building, Huntington Room, 650 Capitol Mall, Sacramento, CA 95814.

c. *FERC Contact:* Emily Carter, 202–502–6512 or *emily.carter@ferc.gov.*

d. *Purpose of Meeting:* Resolve the remaining section 10j issues associated with the McCloud-Pit Hydroelectric Project licensing proceeding.

e. *Teleconference information:* While we encourage all local, state, and federal agencies, Indian tribes, and other interested parties to participate in person, we also will have a teleconference line available. Please contact Emily Carter at (202) 502–6512 or *emily.carter@ferc.gov* by *Friday, November 12, 2010* to RSVP and to receive specific instructions on how to participate by telephone.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28912 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–15–000]

Columbia Gas Transmission, LLC; Notice of Request Under Blanket Authorization

November 8, 2010.

Take notice that on October 26, 2010, Columbia Gas Transmission, LLC (Columbia) 5151 San Felipe, Suite 2500, Houston, Texas 77056, filed in Docket No. CP11–15–000, an application pursuant to sections 157.205 and 157.210 of the Commission's Regulations under the Natural Gas Act (NGA) as amended, to construct certain natural gas facilities in Lincoln County, West Virginia, under Columbia's blanket certificate issued in Docket No. CP83–76–000, [1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Columbia proposes to construct approximately 1.1 miles of 16-inch diameter pipeline and appurtenances as a parallel loop to Columbia's Line SM–116 in Lincoln County. Columbia states that the new pipeline would be constructed beginning at a point approximately 1.1 miles south of the Hamlin compressor station and tie in with Line SM–116 at the suction side of the Hamlin compressor station. Columbia estimates that the proposed new pipeline and appurtenances would cost $3,900,000 to construct and would create an additional 38,535 dekatherms per day of capacity.

Any questions concerning this application may be directed to Fredric J. George, Senior Counsel, Columbia Gas Transmission, LLC, P.O. Box 1273, Charleston, West Virginia 25325–1273 or via telephone at (304) 357–2359 or by facsimile (304) 357–3206.

This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, please contact FERC Online Support at FERC *OnlineSupport@ferc.gov* or call toll-free at (866) 206–3676, or, for TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–28902 Filed 11–16–10; 8:45 am]

BILLING CODE 6717–01–P

[1] 22 FERC ¶ 62,029 (1983).

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9227–9]

Access to Confidential Business Information by Industrial Economics, Incorporated

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Access to Data and Request for Comments.

SUMMARY: EPA will authorize its contractor, Industrial Economics, Incorporated (IEc) to access Confidential Business Information (CBI) which has been submitted to EPA under the authority of all sections of the Resource Conservation and Recovery Act (RCRA) of 1976, as amended. EPA has issued regulations that outline business confidentiality provisions for the Agency and require all EPA Offices that receive information designated by the submitter as CBI to abide by these provisions.

DATES: Access to confidential data submitted to EPA will occur no sooner than November 29, 2010.

FOR FURTHER INFORMATION CONTACT: LaShan Haynes, Document Control Officer, Office of Resource Conservation and Recovery, (5305P), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, 703–605–0516.

SUPPLEMENTARY INFORMATION:

1. *Access to Confidential Business Information*

Under EPA Contracts Nos. GS–10F–0061N (EP10H000898) and EP–W–06–065/0013, Industrial Economics, Incorporated (IEc) will assist the Office of Enforcement and Compliance Assurance, Office of Civil Enforcement, Special Litigation and Projects Division with performing financial analyses on respondents in EPA civil and criminal enforcement cases to delineate the ability to pay penalties. The analyses may extend to the level of expert testimony in support of EPA's enforcement actions. OECA is involved directly and indirectly in bringing enforcement actions against violators of environmental regulations. These cases typically, involve one or more of the following statutes: CAA, CWA, RCRA, TSCA, FIFRA, EPCRA and the SDWA. Some of the data collected from industry are claimed by industry to contain trade secrets or CBI. In accordance with the provisions of 40 CFR Part 2, Subpart B, ORCR has established policies and procedures for handling information collected from industry, under the authority of RCRA, including RCRA Confidential Business Information Security Manuals.

Industrial Economics, Incorporated (IEc), shall protect from unauthorized disclosure all information designated as confidential and shall abide by all RCRA CBI requirements, including procedures outlined in the RCRA CBI Security Manual.

The U.S. Environmental Protection Agency has issued regulations (40 CFR Part 2, Subpart B) that outline business confidentiality provisions for the Agency and require all EPA Offices that receive information designated by the submitter as CBI to abide by these provisions. Industrial Economics, Incorporated (IEc) will be authorized to have access to RCRA CBI under the EPA "Contractor Requirements for the Control and Security of RCRA Confidential Business Information Security Manual."

EPA is issuing this notice to inform all submitters of information under all sections of RCRA that EPA will provide Industrial Economics, Incorporated access to the CBI records located in the RCRA Confidential Business Information Center. Access to RCRA CBI under this contract will take place at EPA Headquarters only. Contractor personnel will be required to sign non-disclosure agreements and will be briefed on appropriate security procedures before they are permitted access to confidential information.

Dated: November 4, 2010.

Suzanne Rudzinski,

Acting Director, Office of Resource Conservation & Recovery.

[FR Doc. 2010–28965 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0829; FRL–8850–7]

Hop Beta Acids; Receipt of Application for Emergency Exemption, Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption regional request from the Washington State Department of Agriculture, Idaho State Department of Agriculture, and the Oregon Department of Agriculture to use hop beta acids (CAS Reg. No. none specified) to treat up to 181,000 honey bee colonies in the Pacific North West (PNW) to control varroa mites. The applicants propose the use of a new chemical which has not been registered by the EPA. EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments must be received on or before December 2, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0829, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2010–0829. 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 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 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Stacey M. Groce, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 305–2505; *fax number:* (703) 605–0781; *e-mail address: groce.stacey@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

II. What action is the agency taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the Administrator determines that emergency conditions exist which require the exemption. The Washington Department of Agriculture, Idaho State Department of Agriculture, and the Oregon Department of Agriculture have requested the Administrator to issue a specific exemption regional request for use of hop beta acids in honey bee hives to control varroa mites. Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the applicants assert that the varroa mite is a highly destructive pest and is having a catastrophic effect on honey bee populations. The parasitic mite is considered the primary pest of honeybees and its control is necessary for successful beekeeping in the PNW. According to the applicants, the currently available registered products no longer successfully control varroa mites, because repeated use has contributed to widespread development of mite resistance. Further, some of the alternative products have been reported to cause bee mortality, have labeling limitations which make them impractical for large beekeeping operations, or provide inconsistent mite control. Varroa mite outbreaks are also associated with colony viruses, which result in large colony losses.

The Applicants propose to make no more than three treatments per year of two cardboard strips, coated with liquid product per brood super, during the spring, summer and fall. Approximately 181,000 honey bee colonies could be treated in all counties throughout Washington, Idaho, and Oregon, requiring 2,172,000 strips for three treatments. The total amount of hop beta acids applied would be 4,170 kilograms (2,172,000 × 1.92 grams of hop beta acids per strip), which is equivalent to 9,194 pounds, if all honey bee colonies in the PNW were treated.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 of FIFRA require publication of a notice of receipt of an application for this specific exemption regional request which proposes use of a new chemical (*i.e.,* an active ingredient) which has not been registered by EPA. The notice provides an opportunity for public comment on the application. The Agency will review and consider all comments received during the comment period in determining whether to issue the specific exemption requested by the Washington, Oregon, and Idaho Departments of Agriculture.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 4, 2010.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–28816 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9228–3]

California State Motor Vehicle Pollution Control Standards; California Heavy-Duty On-Highway Otto-Cycle Engines and Incomplete Vehicle Regulations; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Decision Granting a Waiver of California's Heavy-Duty On-Highway Otto-Cycle Engines and Incomplete Vehicle Regulations.

SUMMARY: The Environmental Protection Agency (EPA), pursuant to section 209(b) of the Clean Air Act (Act), is granting California its request for a waiver of Clean Air Act preemption for three sets of amendments applicable to its heavy-duty Otto-cycle engines and incomplete vehicle regulations for the 2004, 2005 through 2007, and 2008 and subsequent model year regulations. These amendments align each of California's exhaust emission standards and test procedures with its federal counterpart in an effort to streamline and harmonize the California and federal programs.

ADDRESSES: Materials relevant to this decision are contained in Docket ID No. EPA–HQ–OAR–2006–0018. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open to the public on all federal government work days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566–1744. The Air and Radiation Docket and Information Center's Web site is *http://www.epa.gov/oar/docket.html.* The electronic mail (e-mail) address for the Air and Radiation Docket is: *a-and-r-Docket@epa.gov,* the telephone number is (202) 566–1742, and the fax number is (202) 566–9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at *http://www.regulations.gov.* After opening the *http://www.regulations.gov* Web site, enter EPA–HQ–OAR–2006–0018 in the "Enter Keyword or ID" fill-in box to view documents in the record of CARB's amendments to its heavy-duty Otto-cycle engines and incomplete vehicle regulations. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality also maintains a Web page that contains general information on its review of California waiver requests. Included on that page are links to several of the prior waiver **Federal Register** notices which are cited throughout today's notice; the page can be accessed at *http://www.epa.gov/otaq/cafr.htm.*

FOR FURTHER INFORMATION CONTACT: David Dickinson, Compliance and Innovative Strategies Division, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue (6405J), NW., Washington, DC 20460. *Telephone:* (202) 343–9256. *Fax:* (202) 343–2800. *E-mail: dickinson.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. CARB's 2000 and 2002 Amendments

On December 7, 2005, the California Air Resources Board ("CARB") submitted a request to the Environmental Protection Agency ("EPA") for confirmation that CARB's amendments, adopted in 2000 and 2002, to the California heavy-duty Otto-cycle regulations for 2004, 2005–2007, and 2008 and subsequent model years (MYs) are within-the-scope of previously granted waivers of preemption under section 209(b) of the Act, 42 U.S.C. 7543(b). On June 15, 2006, CARB supplemented its original request of December 7, 2005, with a letter adding to its rationale and additionally requesting, in the alternative, for EPA to consider the request as a new waiver of preemption under section 209(b) of the Act.

EPA first granted waivers for the alignment of California's heavy-duty engine and vehicle emission standards and test procedures in 1988, separately for the diesel engine standards and the gasoline engine standards.[1] Since the 1988 waivers, CARB has requested and received confirmation that various amendments to the standards and test procedures for the current CARB categories of heavy-duty vehicles are within-the-scope of the previously granted waivers. Significant among these, in 1997 CARB requested a within-the-scope determination for a revision to its heavy-duty engine emission standards for NO_X and PM for both diesel and Otto-cycle (gasoline) engines applicable in the 1998 and subsequent model years.[2] EPA approved the request on October 6, 2004.[3]

CARB's current request concerns its amendments to the exhaust emission standards for heavy-duty Otto-cycle engines and vehicles above 8,500 pounds gross vehicle weight rating (GVWR) for the 2004, 2005 through 2007, and the 2008 and subsequent MYs. California amended its heavy-duty Otto-cycle regulations through two separate CARB rulemakings: one in 2000 (hereinafter the "2000 amendments") and the other in 2002 (hereinafter the "2002 amendments").[4] Both rulemakings followed EPA rulemakings increasing the stringency of federal emission standards, which surpassed the stringency of California's previous requirements for 2005 and all subsequent model years. Therefore, CARB believes its effort to harmonize standards with the federal heavy-duty Otto-cycle engine standards allows manufacturers to make one vehicle to meet both California and federal standards and participate in the federal averaging, banking, and trading program without compromising the stringency or efficacy of its emission standards.[5]

CARB's 2000 and 2002 amendments affect the heavy-duty Otto-cycle standards for oxides of nitrogen (NO_X), non-methane hydrocarbons plus oxides of nitrogen (NMHC+NO_X), and carbon monoxide (CO). Specifically, the amendments: (1) Harmonize the California and federal MY 2005 and beyond NO_X standards at 1.0 grams per brake horsepower-hour (g/bhp-hr); (2) align the California and federal standards for 0.14 g/bhp-hr for NMHC, 0.20 g/bhp-hr for NO_X, 14.4 g/bhp-hr for CO; and (3) create a new 0.01 g/bhp-hr standard for particulate matter (PM). These changes amend title 13, California Code of Regulations (CCR), section 1956.8[6] and the incorporated amended "California Exhaust Emission Standards and Test Procedures for 1987 through 2003 Model Heavy-Duty Otto-cycle Engines and Vehicles," and the adoption and the amendments to the incorporated in "California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Otto-cycle Engines."

B. Clean Air Act Waivers of Preemption

Section 209(a) of the Act preempts states and local governments from setting emission standards for new motor vehicles and engines; it provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Through operation of section 209(b) of the Act, California is able to seek and receive a waiver of section 209(a)'s preemption. If certain criteria are met, section 209(b) (1) of the Act requires the Administrator, after notice and opportunity for public hearing, to waive application of the prohibitions of section 209(a). Section 209(b) (1) only allows a waiver to be granted for a State that had adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards (this is known as California's "protectiveness determination"). Because California was the only state to have adopted standards prior to 1966, it is the only state that is qualified to seek and receive a waiver.[7] The Administrator must grant a waiver unless she finds that: (A) California's above-noted "protectiveness determination" is arbitrary and capricious;[8] (B) California does not need such State standards to meet compelling and extraordinary conditions;[9] or (C) California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.[10] Regarding consistency with section 202(a), EPA reviews California's standards for technological feasibility and evaluates testing and enforcement procedures to determine whether they would be inconsistent with federal test procedures (*e.g.,* if manufacturers would be unable to meet both California and federal test requirements using the same test vehicle).[11]

If California amends regulations that were previously granted a waiver of preemption, EPA can confirm that the amended regulations are within-the-scope of the previously granted waiver when three conditions are met. First, the amended regulations must not undermine California's determination that its standards, in the aggregate, are

[1] 52 FR 20777 (June 3, 1987), 53 FR 7021 (March 4, 1988).

[2] 53 FR 6197 (March 1, 1988) (Diesel) and 53 FR 7022 (March 4, 1988) (Otto-cycle).

[3] 69 FR 59920 (October 6, 2004).

[4] The 2004/5 Standards were formally adopted December 27, 2000, by Executive Order G–00–069 (CARB, Item 7). The 2008 Standards were formally adopted December 12, 2002, by Executive Order G–03–016 issued September 5, 2003. (CARB, Item 20).

[5] California Air Resources Board Request for Confirmation that Amendments Are Within the Scope of Previous Waivers of Preemption Under Clean Air Act Section 209(b), December 7, 2005, pg. 2.

[6] See California Air Resources Board Request for Confirmation that Amendments Are Within the Scope of Previous Waivers of Preemption Under Clean Air Act Section 209(b), December 7, 2005, pg. 2.

[7] *See* S.Rep. No. 90–403 at 632 (1967).

[8] CAA section 209(b)(1)(A).

[9] CAA section 209(b)(1)(B).

[10] CAA section 209(b)(1)(C).

[11] *See, e.g.,* 74 FR at 32767 (July 8, 2009); *see also Motor and Equip. Mfrs. Assoc.* v. *EPA,* 627 F.2d 1095, 1126 (DC Cir. 1979).

as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 202(a) of the Act. Third, the amended regulations must not raise any "new issues" affecting EPA's prior waivers. CARB, in its Resolutions 00–45 and 02–31, expressly found that its amendments met each of these criteria.[12]

C. EPA's Consideration of CARB's Request

Because EPA believed it possible that CARB's amendments did in fact raise "new issues" through the imposition of more stringent standards for heavy-duty Otto-cycle engines above 8,500 pounds GVWR for the 2004, 2005 through 2007, and the 2008 and subsequent MYs, EPA offered the opportunity for a public hearing and requested public comments on these new requirements.[13] EPA received no request for a public hearing, nor were any comments received on the CARB amendments at issue. Therefore, EPA has made this determination based on the information submitted by CARB in its request.

D. Standard and Burden of Proof in Clean Air Act Section 209 Proceedings

In *Motor and Equip. Mfrs. Assoc.* v. *EPA,* 627 F.2d 1095 (DC Cir. 1979) (herein "*MEMA I*"), the United States Court of Appeals stated that the Administrator's role in a section 209 proceeding is to: [C]onsider all evidence that passes the threshold test of materiality and * * * thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial * * * have shown that the factual circumstances exist in which Congress intended a denial * * *.[14]

The court in *MEMA I* considered the standards of proof pursuant to section 209 for the two findings necessary to grant a waiver for an "enforcement procedure" (as opposed to the standards themselves): (1) "Protectiveness in the aggregate" and (2) "consistency with section 202(a)" findings. The court instructed that, "the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision."[15]

The court upheld the Administrator's position that, to deny a waiver, "there must be 'clear and compelling evidence' to show that proposed procedures undermine the protectiveness of California's standards."[16] The court noted that this standard of proof "also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare."[17]

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all section 209 proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. MEMA I made clear that: [E]ven in the two areas concededly reserved for Federal judgment by this legislation—the existence of "compelling and extraordinary" conditions and whether the standards are technologically feasible—Congress intended that the standards of EPA review of the State decision to be a narrow one."[18]

Furthermore, Congress intended that EPA's review of California's decision-making be narrow in scope.[19] This has led EPA in the past to reject arguments that are not specified within the statute as grounds for denying a waiver or authorization:

> The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.[20]

Thus, EPA's consideration of all the evidence submitted concerning this waiver decision is circumscribed by its relevance to those questions which the Administrator is directed to consider by section 209.

Finally, opponents of the waiver bear the burden of showing whether California's waiver request is inconsistent with section 202(a). As found in *MEMA I,* this obligation rests firmly with opponents in a section 209 proceeding; the court held that:

> The language of the statute and its legislative history indicate that California's regulations, and California's determinations that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing, and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.[21]

The Administrator's burden, on the other hand, is to determine that she has made a reasonable and fair evaluation of the information in the record when coming to the waiver decision. As the court in *MEMA I* stated, "[h]ere, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if [s]he seeks to overcome that evidence with unsupported assertions of [her] own, [s]he runs the risk of having [her] waiver decision set aside as arbitrary and capricious."[22] Therefore, the Administrator's burden is to act "reasonably."[23]

E. Within-the-Scope Waivers

CARB suggests in its request letter(s) that since these amendments are standards and test procedures that EPA previously issued waivers for, that the amendments should be found to be within-the-scope of previous EPA waivers.[24] As noted above, if California acts to amend a previously authorized standard or accompanying enforcement procedure, the amendment may be considered within-the-scope of a previously issued waiver provided that it: (1) Does not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards, (2) does not affect consistency with section 202 of the Act, and (3) raises no new issues affecting EPA's previous waiver.[25]

[12] CARB –determinations affirmed in Executive Orders G–00–069 and G–03–016.

[13] 72 FR 27114 (May 14, 2007).

[14] *Motor and Equip. Mfrs. Assoc.* v. *EPA (MEMA I),* 627 F.2d 1095, 1122 (DC Cir. 1979).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See, e.g.,* 40 FR 23, 102–103 (May 28, 1975).

[19] *See, e.g.,* MEMA I, 627 F.2d at 1110–11, *citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301–02 (1977).

[20] 36 FR 17458 (August 31, 1971). Note that the "more stringent" standard expressed here in 1971, was superseded by the 1977 amendments to section 209, which established that California's standards must be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

[21] *MEMA I* at 1121.

[22] *Id.* at 1126.

[23] *Id.*

[24] CARB Request for Confirmation that Amendments Are Within the Scope of Previous Waivers of Preemption Under Clean Air Act Section 209(b), December 7, 2005, at 1 citing 68 FR 19811 and 60 FR 22034 (April 28, 2005).

[25] *See, e.g.,* 51 FR 12391 (April 10, 1986) and 65 FR 69673, 69674 (November 20, 2000). The first within-the-scope determination stated that a CARB request made subsequent to an EPA waiver, "exists within the meaning and intent of the waiver granted." 37 FR 14831 (July 25, 1972).

Regardless of whether the first two criteria can be established, the third criterion alone prevents EPA from considering this request as within-the-scope of EPA's prior waivers. EPA has previously stated that if CARB's amendments raise "new issues" affecting previously granted waiver, we cannot confirm that those amendments are within-the-scope of previous waivers.[26] Further, EPA has stated in prior waiver and authorization determinations that increases in the numerical stringency of standards are "new issues" for which a full waiver or authorization is required.[27] Here, CARB increased the stringency of its exhaust emission standards for heavy-duty Otto-cycle engines and vehicles above 8,500 pounds GVWR for the 2004, 2005 through 2007, and the 2008 and subsequent MYs. Therefore, EPA believes it appropriate to go beyond an examination of whether the new standards affect the prior consistency with section 202(a) findings and, in this context, require a new analysis of whether (A) California's above-noted "protectiveness determination" is arbitrary and capricious; [28] (B) California does not need such State standards to meet compelling and extraordinary conditions; [29] or (C) California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.[30]

II. Discussion

As detailed below, EPA finds that CARB has demonstrated that it meets the requirements for a new section 209(b) waiver for heavy-duty Otto-cycle engines and vehicles above 8,500 pounds GVWR and, therefore, believes a new waiver is appropriate.

A. California's Protectiveness Determination

Section 209(b)(A)(1) of the Act instructs that EPA cannot grant a waiver if the agency finds that CARB was arbitrary and capricious in its determination that its standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. CARB's Board made protectiveness determinations in Resolutions 00–45 and 02–31, dated December 7, 2000 and December 12, 2002. Resolution 00–45 found that amendments to sections 1956.8 and 1961 of title 13, California Code of Regulations (CCR), as set forth in its Attachment A, the amendments to (and adoption of) the documents incorporated by those regulations as set forth in Attachments B, C, and D, with the modifications set forth in Attachment E to Resolution 00–45 would not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards.[31] Resolution 02–31 found that amendments to sections 1956.1, 1956.8, 1965, and 1978 of title 13, CCR, as set forth in Attachment A and the amendments to, and adoption of, the documents incorporated by reference in those regulations as set forth in Attachments B, D, E, F, G and H to Resolution 02–31, and section 1961, title 13, CCR, as set forth in Attachment A thereto, and the amendments to the document incorporated by that regulation as set forth in Attachment C, with the modifications set forth in Attachment I to the Resolution would not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards.[32] CARB's protectiveness determinations in both rulemakings were, therefore, based on comparisons to the Federal standards thereby demonstrating that CARB's standards and test procedures align with the Federal program.

EPA did not receive any comments stating that CARB's amendments are not, in the aggregate, as stringent as applicable Federal standards. Therefore, based on the record before me, I cannot find that CARB's amendments, as noted, would cause the California heavy-duty Otto-cycle exhaust emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards.

B. Need for California Standards to Meet Compelling and Extraordinary Conditions

Section 209(b)(1) of the Act also instructs that EPA cannot grant a waiver if the agency finds that California "does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section [202(a)] of the Act." This criterion restricts EPA's inquiry to whether California needs its own mobile source pollution program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions.[33] As to the need for the particular standards that are the subject of this decision, California is entrusted with the power to select "the best means to protect the health of its citizens and the public welfare." [34] CARB has repeatedly demonstrated the existence of compelling and extraordinary conditions in California.[35]

EPA has not received any adverse comments to suggest that California no longer suffers from serious and unique air pollution problems. In its supplemental waiver request letter, CARB concluded that "California needs its own on-road engine and vehicle program to meet serious air pollution problems unique to the State." [36] EPA has repeatedly declined to find fault in California's demonstrations of "compelling and extraordinary conditions" when waiving preemption for motor vehicle emission standards under section 209(b) and authorization for California's nonroad regulations under section 209(e) of the CAA.[37] Moreover, because EPA has not received adverse public comment challenging California's need for its own mobile source pollution control program or asserting any change from California's previous demonstrations, I cannot deny the waiver based on a lack of

[26] *See, e.g.,* 75 FR 8056 (February 23, 2010); 70 FR 22034 (April 28, 2005).

[27] *See, e.g.,* 71 FR 44027 at 44028 (August 3, 2006) ("EPA believed it possible that CARB's amendments do in fact raise "new issues" as they impose new more stringent standards ***") and 51 FR 6308 at 6309 (February 21, 1986) ("[T]hese amendments do raise significant new issues not considered in prior waiver decisions. In effect, California's amendments establish new standards ***. ").

[28] CAA section 209(b)(1)(A).

[29] CAA section 209(b)(1)(B).

[30] CAA section 209(b)(1)(C).

[31] "Be it further resolved that the Board hereby determines that the California motor vehicle emission standards for passenger cars, light-duty trucks and medium duty engines, and for heavy-duty Otto-cycle engines, with the amendments approved herein, are, in the aggregate, at least as protective of public health and welfare than applicable federal standards." CARB Resolution 00–45 at 6 (December 7, 2000).

[32] "Be it further resolved that the Board hereby determines that the regulations approved and adopted herein will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards." CARB Resolution 02–31 at 6 (December 12, 2002).

[33] *See* 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889–18890 (May 3, 1984).

[34] H.R. Rep. No. 95–294, 95th Cong., 1st Sess., 301–02 (1977) (cited in *MEMA I,* 627 F.2d at 1110).

[35] CARB expressed its needs for its own emission control program in both of the rulemakings at issue here. ("Be It Further Resolved that the Board hereby finds that separate California emission standards and test procedures are necessary to meet compelling and extraordinary conditions." CARB Resolution 00–45 at 6 (December 7, 2000), CARB's Item 5; CARB Resolution 02–31 at 6 (December 12, 2002), CARB's Item 19.

[36] CARB's Supplemental Request Letter dated June 15, 2006 at 1.

[37] *See, e.g.,* 41 FR 44209, 42213 (October 7, 1976); 49 FR 18887, 18892 (May 3, 1984). *See also Final 209(e) Rule*, 59 FR at 36982.

compelling and extraordinary conditions.

C. Consistency with Section 202(a) of the Clean Air Act

EPA has stated in the past that California standards and accompanying test procedures would be inconsistent with section 202(a) of the Clean Air Act if: (1) There is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to cost of compliance within the lead time provided, or (2) the federal and California test procedures impose inconsistent certification requirements.[38]

The first prong of EPA's inquiry into consistency with section 202(a) of the Act depends upon technological feasibility. This requires EPA to determine whether adequate technology already exists; or if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect. CARB noted during its rulemakings that the methods that can be used to meet the 2004–2005 standards consist of technologies that have already been developed in response to federal emission standards. The technology changes that were expected to occur as a result of the new regulations include: Improved durability catalysts with increased precious metal loading, optimization of the catalyst and fuel metering systems (including improved fuel injection and heated oxygen sensors), increased use of air injection and retarded spark ignition to control cold start emissions, and improved exhaust gas recirculation for better NO_X control.[39] Additionally, CARB notes that the technological feasibility demonstrations for the exhaust emission standards reflect the technological feasibility in EPA's own analysis for the federal standards.[40] CARB also relied on the federal findings of technological feasibility for technologies that can be used to meet the 2008 and beyond standards.[41] EPA finds that CARB employed appropriate projections of the feasibility of the technologies necessary to meet both the 2004–2005 standards and the 2008 standards. CARB's examination of the technological feasibility findings made by EPA in the federal rulemaking along with subsequent technology developments provide no basis upon which to find that CARB's standards are not consistent with section 202(a) of the Act.

The second prong of EPA's inquiry into consistency with section 202(a) of the Act depends on the compatibility of the federal and California test procedures. CARB points out that its certification requirements are nearly identical to those adopted by EPA.[42] In fact, CARB found that beginning with the 2008 model year, California's test procedures are identical to the federal test procedures for heavy-duty gasoline engines and incomplete vehicles.[43] EPA agrees with this analysis and finds that one set of tests for a heavy-duty engine or vehicle could be used to determine compliance with both California and federal requirements. Therefore, we cannot find California's test procedures to be inconsistent with our own.

For these reasons, I cannot deny the waiver based on a finding that the 2000 and 2002 amendments are inconsistent with section 202(a) of the Clean Air Act.

III. Decision

EPA's analysis finds the criteria for granting a waiver of preemption to be satisfied. The amendments require a new waiver of preemption because "new issues" are presented by the establishment of more stringent numerical standards in efforts to harmonize California standards with federal standards. Upon evaluation, EPA has determined that CARB has met the criteria for a waiver of preemption for the 2000 and 2002 amendments.

The Administrator has delegated the authority to grant California a section 209(b) waiver to enforce its own emission standards for on-road engines to the Assistant Administrator for Air and Radiation. Having given consideration to all the material submitted for this record, and other relevant information, I find that I cannot make the determinations required for a denial of a waiver pursuant to section 209(b) of the Act. Therefore, I grant a waiver of Clean Air Act preemption to the State of California with respect to its heavy-duty Otto-cycle engine and vehicle requirements as set forth above.

My decision will affect not only persons in California but also manufacturers outside the State who must comply with California's requirements in order to produce engines for sale in California. For this reason, I determine and find that this is a final action of national applicability for purposes of section 307(b) (1) of the Act.

Pursuant to section 307(b) (1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by January 18, 2011. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b) (2) of the Act.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Dated: November 10, 2010.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2010–28971 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

[38] *See, e.g.,* 75 FR 8056 (February 23, 2010); 70 FR 22034 (April 28, 2005).

[39] CARB Item 2 at 7–8.

[40] 65 FR 59896 (October 6, 2000).

[41] 66 FR 5002 (January 18, 2001), at pp. 5053 to 5055.

[42] *Id.* And Item 2 at pp. 7–8.

[43] CARB Request for Confirmation that Amendments Are Within the Scope of Previous Waivers of Preemption Under Clean Air Act Section 209(b), December 7, 2005 at 14.

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–UST–2010–0651; FRL–9227–8]

Compatibility of Underground Storage Tank Systems With Biofuel Blends

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed guidance and request for comments.

SUMMARY: EPA's Office of Underground Storage Tanks intends to issue guidance that would clarify EPA's underground storage tank (UST) compatibility requirement as it applies to UST systems storing gasoline containing greater than 10 percent ethanol and diesel containing an amount of biodiesel yet to be determined. Today's **Federal Register** notice solicits comment on the proposed guidance, which provides owners and operators of underground storage tank systems greater clarity in demonstrating compatibility of their tank systems with these fuels.

DATES: Comments must be received on or before December 17, 2010, 30 days after publication in the **Federal Register.**

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–UST–2010–0651, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov.*
- *Mail:* EPA Docket Center, Environmental Protection Agency,

Underground Storage Tank (UST) Docket, Mail Code: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Instructions: Direct your comments to Docket ID No. EPA–HQ–UST–2010–0651. 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. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

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 UST Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the UST Docket is (202) 566–0270.

FOR FURTHER INFORMATION CONTACT: Andrea Barbery, Office of Underground Storage Tanks, Mail Code 5402P, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 603–7137; e-mail address: *barbery.andrea@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action applies to owners and operators of underground storage tank systems regulated by 40 CFR Part 280, who intend to store gasoline blended with greater than 10 percent ethanol. It may also apply to owners and operators storing a to-be-determined percentage of biodiesel blended with diesel fuel.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov or e-mail.* Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Background

A. Statutory Authority

This proposed guidance discusses EPA's underground storage tank (UST) compatibility requirement that was promulgated under the authority of Subtitle I of the Solid Waste Disposal Act (SWDA), as amended. 42 U.S.C. 6991b *et seq.* This requirement, which is referenced and discussed in the guidance, is found in 40 CFR 280.32.

B. Underground Storage Tank Compatibility Requirement

To protect groundwater, a source of drinking water for nearly half of all Americans, the U.S. Environmental Protection Agency (EPA) regulates UST systems storing petroleum or hazardous substances under authority of Subtitle I of the Solid Waste Disposal Act, as amended. Ethanol and biodiesel are not regulated substances under EPA's UST program; however, tanks storing gasoline or diesel mixed with ethanol or biodiesel are regulated by EPA. For the purposes of this guidance, EPA considers an "ethanol blend" to be any amount of ethanol mixed with petroleum gasoline, and a "biodiesel blend" to be any amount of biodiesel mixed with petroleum diesel.

EPA regulations address the prevention and detection of releases from UST systems; one particular provision in the federal UST regulations that aims to prevent releases specifically requires compatibility of stored substances with UST system components. As the U.S. moves toward an increased use of biofuels, such as ethanol and biodiesel, compliance with the UST compatibility requirement becomes even more important, since ethanol and biodiesel blends can compromise the integrity of some UST system materials. Today's **Federal Register** notice solicits comment on proposed guidance and associated issues that will clarify how owners/operators of UST systems storing fuels containing greater than 10 percent ethanol or a to be determined percent of biodiesel can demonstrate compliance with the UST compatibility requirement.

As of March 2010, there are approximately 607,000 regulated USTs

at 221,000 facilities nationwide. States and territories (hereafter referred to as states) are the primary implementers of the UST program because they are in the best position to implement UST program requirements, based on the size and diversity of the regulated community. In order for EPA to approve a State's program, that state's regulations must be at least as stringent as the Federal UST regulations.

An UST system includes the underground storage tank, connected underground piping, underground ancillary equipment, and any containment systems. Fuel dispensers are not part of the UST system, and therefore this guidance does not apply to dispensers.

C. Discussion

The federal UST regulations require that "[o]wners and operators must use an UST system made of or lined with materials that are compatible with the substance stored in the UST system" (40 CFR § 280.32). Because the chemical and physical properties of ethanol and biodiesel can make these fuel blends containing them more degrading to certain UST system materials than petroleum, it is important to ensure that all UST system components in contact with the biofuel blend are materially compatible with that fuel. Industry practice has been for owners and operators to demonstrate compatibility by using equipment certified by an independent testing laboratory, such as Underwriters Laboratories (UL). However, many UST system components in use today, with the exception of most tanks and piping, have not been tested by UL for compatibility. Without certification from a third party that these equipment are compatible with anything beyond conventional fuels, the suitability of these particular components for use with ethanol and biodiesel blends comes into question.

Compatibility of Ethanol-Blended Fuel

Gasoline containing low percentages (10 percent or less) of ethanol has been used in parts of the country for many years. Many tanks and piping have been tested and are listed by UL for compatibility with higher-level ethanol blends. Many other components of the UST system, including leak detection devices, seals, and containment sumps (for example) may not be listed by UL for compatibility with ethanol blends. EPA expects recent federal and state laws encouraging increased use of biofuels to translate into a greater number of UST systems storing biofuels, as well as a greater number of UST systems storing higher percentages of biofuel blends. EPA is aware of material compatibility concerns associated with some UST system equipment storing higher ethanol blends, such as E85 (gasoline containing up to 85 percent ethanol), which is an alternative fuel used in flexible fuel vehicles. EPA understands that in order to avoid compatibility issues with E85, many tank owners who currently store E85 either installed all new equipment designed to store high level ethanol blends or upgraded certain components to handle the higher ethanol content. Because the typical lifespan of an underground storage tank is about 30 years, most UST systems currently in use are likely to contain components that were not designed to store ethanol blends beyond 10 percent. These older systems may not be certified by UL or another independent testing laboratory for use with these blends.

Although very little data exists pertaining to the compatibility of UST equipment with ethanol blends, literature suggests that mid-level ethanol blends may have the most degrading effect on some UST system materials. For example, "Underwriters Laboratories Research Program on Material Compatibility and Test Protocols for E85 Dispensing Equipment," which evaluated the effect of 85 percent ethanol and 25 percent ethanol blends, indicates that some materials used in the manufacture of seals were degraded more when exposed to the 25 percent ethanol test fluid than when exposed to the 85 percent ethanol test fluid (Underwriters Laboratories, 2007). Further, "Compatibility and Permeability of Oxygenated Fuels to Materials in Underground Storage and Dispensing Equipment" (State Water Resources Control Board's Advisory Panel, 1999) confirms that alcohol fuel blends are "more aggressive toward polymers than any of the neat constituents in the fuel," and points specifically to 15 percent ethanol in gasoline as being the blend at which the maximum swelling occurs in polymeric materials. Both of these documents are available in the UST Docket under Docket ID No. EPA–HQ–UST–2010–0651.

In March 2009, EPA received a Clean Air Act (CAA) waiver application to increase the allowable ethanol content of a gasoline-ethanol blended fuel from 10 volume percent ethanol to 15 volume percent ethanol.[1] Please note that this action under the CAA has no bearing on an UST owner or operator's requirement to comply with all applicable EPA UST regulations, including the UST compatibility requirement in 40 CFR 280.32. Specifically, in order to ensure the safe storage of higher ethanol and biodiesel blends under EPA's UST program, owners and operators must meet the compatibility requirement for UST systems. Recently, EPA conditionally granted a partial waiver that allows gasoline-ethanol blends that contain greater than 10 volume percent ethanol up to 15 volume percent ethanol (E15) to be introduced into commerce for use in 2007 and newer model year light-duty motor vehicles, which includes passenger cars, light-duty trucks and medium-duty passenger vehicles such as some sport utility vehicles (SUVs).[2] If other State, Federal, and industry practices also support such introduction, E15 may become available in the marketplace. Thus, EPA anticipates that some UST system owners and operators may choose to store higher percentages of ethanol in their UST systems. For those who intend to store E15 or other amounts of ethanol greater than 10 volume percent, EPA is proposing this guidance to clarify the compatibility requirement with regard to these blends and provide greater flexibility for owners and operators who intend to store E15, including those whose equipment may not be certified as compatible by an independent testing laboratory.

Compatibility of Biodiesel-Blended Fuel

In addition to ethanol, biodiesel is becoming increasingly available across the U.S., though its total use is significantly less compared to that of ethanol-blended gasoline. EPA understands that owners and operators are storing biodiesel/petroleum diesel blends in UST systems, ranging from two percent biodiesel (B2) to 99 percent biodiesel (B99). In this guidance, EPA proposes to include biodiesel blends, based on the fact that many states that already have compatibility policies in place address both ethanol blends and biodiesel blends. At least one state developed a compatibility policy to apply to biodiesel blends greater than B5, meaning owners and operators of UST systems containing biodiesel/petroleum diesel blends greater than 5 percent biodiesel must meet the requirements in the state's guidance. Other states have selected to use B20 as the threshold, since B20 is commonly used in government and military fleets.

EPA is aware that there may be material compatibility issues with some UST system equipment in biodiesel service, but the Agency lacks sufficient

[1] *See* 74 FR 18228 (April 21, 2009).

[2] *See* 75 FR 68043 (November 4, 2010).

data on the compatibility of various biodiesel blends with UST system equipment currently in use across the country. EPA also acknowledges that no UST equipment has a UL-listing for use with biodiesel blends. UL has issued a statement indicating that biodiesel blends up to B5 will not require special investigation by UL, meaning that these fuels may be considered the same as conventional petroleum fuels. According to UL, biodiesel blends greater than 5 percent may have a significant effect on materials. For these reasons, EPA is seeking comment on what percentage of biodiesel in biodiesel blends should be used for including these fuels in the scope of today's proposed guidance.

Testing on Ethanol and Biodiesel Blends

The U.S. Department of Energy is currently performing testing on the compatibility of some UST system materials with mid-level ethanol blends. Depending on results of DOE's research, EPA may change its guidance. EPA is not aware of a testing program to evaluate the compatibility of UST system equipment with biodiesel blends.

Applicability of Proposed Guidance

This guidance clarifies how owners and operators of underground storage tanks (USTs) can comply with EPA's compatibility requirement (40 CFR 280.32) when storing certain biofuels (ethanol-blended fuels greater than 10 percent and biodiesel-blended fuels greater than [TBD] percent). UST owners and operators, as well as other affected stakeholders should be aware that, when final, EPA's proposed guidance will apply in Indian country and in States that do not have State program approval (SPA). States that have SPA must, in 40 CFR 281.32, have a compatibility requirement that is similar to the Federal requirement. Therefore, SPA states could also find this guidance to be relevant and useful to them as well.

Owner and Operator Demonstration of Compatibility

EPA considers the following three methods as effective options for demonstrating compatibility:

- Certification or listing by an independent test laboratory;
- Equipment manufacturer approval; or
- Another method determined by the implementing agency to sufficiently protect human health and the environment.

Implementing agencies may determine there are other acceptable methods for demonstrating compliance with the compatibility requirement, as long as they sufficiently protect human health and the environment. EPA will work with states as they evaluate other acceptable methods.

Some states have developed policies similar to EPA's proposal published today. Some examples of state policies regarding compatibility of UST equipment with biofuels include:

Iowa: http://www.iowadnr.gov/land/ust/technicalresources/ethanol.html.

Wisconsin: http://test.commerce.wi.gov/ER/pdf/bst/Forms_FM/ER-BST-FM-9-AlternativeFuels.pdf.

South Carolina:http://www.scdhec.gov/environment/lwm/forms/d-3885.pdf.

Colorado: http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251616370465&ssbinary=true.

These documents are also available in the UST Docket under Docket ID No. EPA–HQ–UST–2010–0651.

Currently, a note in the Federal UST regulations allows owners and operators to use the American Petroleum Institute's (API) Recommended Practice 1626, an industry code of practice, to meet the compatibility requirement for ethanol-blended fuels. The original version of API 1626 (1st ed. 1985, reaffirmed in 2000) applies to up to 10 percent ethanol blended with gasoline and is not applicable to meet the compatibility requirement for ethanol blends greater than 10 percent. In August, 2010, API published a second edition of API 1626. The second edition does address ethanol blends greater than 10 percent, and may also be used as a method for demonstrating compatibility.

D. Request for Comments

EPA requests public comment on the following issues as well as the proposed guidance that immediately follows:

1—UST Components That May Be Affected by Biofuel Blends—A UST system comprises many components that can be affected by the fuel stored. Some of these components may or may not come into contact with fuel or lead directly to a release. However, the failure of these components could either directly or indirectly lead to a release if they are not compatible. To help owners ensure compatibility, EPA proposes listing the following equipment, at a minimum, to be included in today's proposed guidance to clarify what UST system components may be affected by biofuel blends:

- Tank or internal tank lining;
- Piping;
- Pipe adhesives and glues;
- Line leak detectors;
- Flexible connectors;
- Fill pipe;
- Spill and overfill prevention equipment;
- Submersible turbine pump and components;
- Fittings, gaskets, bushings, couplings, and boots;
- Containment sumps (including submersible turbine sumps and under dispenser containment);
- Release detection floats, sensors, and probes.

This list of components is consistent with lists used by states with compatibility policies, though it is somewhat less inclusive, since the federal UST program does not have authority to regulate dispensers or fuel quality.

Although release detection equipment and overfill prevention equipment do not contain product and failure of these components will not directly lead to a release, EPA proposes including these categories because failure of these equipment may lead indirectly to releases. For example, a failed leak detection device may not detect a release that has occurred; similarly, a malfunctioning overfill prevention device may lead to overfilling of a tank.

Questions for commenters:

- Are there components that should be added to or removed from the list?
- Is it possible to demonstrate compatibility for these components?

2—Methods To Demonstrate Compatibility—Many tanks and piping have been tested and are listed by UL for compatibility with ethanol blends. EPA considers this to be an effective method for demonstrating compatibility. However, many other components of the UST system may not have been tested with ethanol and are not listed by UL for compatibility with ethanol blends. In addition, no UST equipment is UL-listed for use with biodiesel blends. Some existing UST system components might be compatible with ethanol or biodiesel blends, although the equipment may not have a certification or listing from an independent testing laboratory specific to the fuel blend. As a result, EPA is proposing manufacturer approval as another acceptable method for demonstrating compatibility. Also, states may believe that there are other reasonable ways to demonstrate compatibility. With that in mind, EPA is considering providing flexibility for states who wish to take a different approach for demonstrating compatibility, as long as that approach sufficiently protects human health and

the environment. EPA proposes to recommend the following methods for demonstrating compatibility:

• Certification or listing by an independent test laboratory;

• Equipment manufacturer approval; or

• Another method determined by the implementing agency to sufficiently protect human health and the environment. EPA will work with states as they evaluate other acceptable methods.

Although some states allow a professional engineer (P.E.) to make a compatibility determination, EPA does not believe a blanket acceptance of P.E. certification is a good approach. There are numerous types of P.E.s, any one of which is not likely to cover all aspects of materials science and UST equipment compatibility. Further, states that allow this option indicated that it is not being used. If additional states consider allowing a P.E. to make a compatibility determination for UST equipment, EPA will discuss that option with those states.

Questions for commenters:

• Are the methods for demonstrating compatibility, as described above, appropriate?

• Are these options feasible for UST owners?

• Are there other reasonable methods EPA should include?

3—Criteria for Equipment Manufacturer Approval as a Compatibility Method—EPA understands that an independent testing laboratory certification may be the most standardized, consistent, and recognizable way to demonstrate compatibility. However, EPA wants to provide flexibility and is also considering relying on a statement of compatibility by the manufacturer as a secondary method for owners and operators, and to demonstrate compatibility of their UST equipment. EPA is considering numerous forms for manufacturer approvals. For example, EPA is considering items such as product warranties, brochures, or letters from manufacturers as acceptable equipment manufacturer approvals. EPA believes manufacturer approvals should include these three criteria in order to adequately demonstrate compatibility:

• Be in writing;

• Indicate affirmative statements of compatibility; and

• Be from the equipment manufacturer, not another entity (such as the installer or distributor).

Questions for commenters:

• Are these three criteria appropriate?

• Are manufacturers willing and able to produce this approval?

• Are there other tools which might assist UST owners to obtain this information?

4—Applicability to Biodiesel Blends—EPA proposes to include biodiesel blends in its guidance because of the increased use of biodiesel across the U.S., as well as the fact that many states already address biodiesel blends in their compatibility policies. EPA understands compatibility issues with biodiesel-blended fuels may be different than those experienced with ethanol-blended fuels and acknowledges that determining a percentage threshold in the absence of compatibility data may be either unnecessarily stringent or not sufficiently protective. However, lack of compatibility information for biodiesel and biodiesel blends makes it difficult to determine whether UST system materials and equipment are compromised by storing biodiesel blends and at what approximate blend percentage compatibility problems occur. EPA seeks input about the percentage of biodiesel where compatibility becomes a potential concern.

Questions for commenters:

• Should EPA include biodiesel blends in the guidance?

• What biodiesel blend percentage should EPA use in the guidance? Please provide data to support the percentage.

5—Ability To Demonstrate Compatibility Using the Proposed Guidance—Due to the long expected lifetime of USTs and the high turnover rate of owners and operators, EPA understands it will be difficult for many owners and operators to locate documentation for much of their equipment. Without knowing what equipment is installed at the site, demonstrating compatibility may be difficult for those who wish to store and sell biofuel blends. In addition, some equipment may simply not be compatible with some biofuel blends.

Based on the list of UST components and methods described above in issues 1 and 2, respectively, EPA requests comment on the following:

• How difficult will it be for owners and operators to demonstrate compatibility for each of these components?

• How many UST facilities will not be able to demonstrate compatibility based on these criteria?

• What would be necessary for these facilities to come into compliance (for example, replace seals, replace release detection probes, replace the entire UST system, etc.)?

6—Other Options That Sufficiently Protect Human Health and the Environment—In light of the discussion under issue 5 above, EPA recognizes that some owners and operators of UST system components may not be able to demonstrate compatibility or may find it difficult to do so. Because of this, EPA is seeking input on alternatives that would sufficiently protect human health and the environment, even though they are outside the scope of the proposed guidance. For example, there might be additional activities owners and operators could perform in the absence of being able to demonstrate compatibility that would result in sufficient protection of human health and the environment.

Question for commenters:

• Without documentation, are there alternative methods UST owners and operators could rely on or activities they could perform that would sufficiently protect human health and the environment? Please be specific and provide data to support your alternative.

Proposed Guidance

Guidance on the Compatibility of Underground Storage Tank Systems With Ethanol Blends Greater Than Ten Percent and Biodiesel Blends Greater Than [To Be Determined (TBD)] Percent [Insert Date]

This guidance clarifies how owners and operators of underground storage tanks (USTs) can comply with EPA's compatibility requirement (40 CFR 280.32) when storing certain biofuels (ethanol-blended fuels greater than 10 percent and biodiesel-blended fuels greater than [TBD] percent). EPA promulgated this requirement (and all other UST requirements) under the authority of Subtitle I of the Solid Waste Disposal Act, as amended.

In March 2009, EPA received a Clean Air Act (CAA) waiver application to increase the allowable ethanol content of a gasoline-ethanol blended fuel from 10 volume percent ethanol to 15 volume percent ethanol.[3] EPA recently conditionally granted a partial waiver that allows gasoline-ethanol blends that contain greater than 10 volume percent ethanol up to 15 volume percent ethanol (E15) to be introduced into commerce for use in 2007 and newer model year light-duty motor vehicles, which includes passenger cars, light-duty trucks and medium-duty passenger vehicles such as some sport utility vehicles (SUVs).[4] If other state, federal, and industry practices also support such

[3] *See* 74FR18228 (April 21, 2009).

[4] *See* 75FR68043 (November 4, 2010).

introduction, E15 may become available in the marketplace. Thus, EPA anticipates that some UST system owners and operators may choose to store higher percentages of ethanol in their UST systems.

Please note that this action under the CAA has no bearing on an UST owner or operator's requirement to comply with all applicable EPA UST regulations, including the UST compatibility requirement in 40 CFR 280.32. Specifically, in order to ensure the safe storage of higher ethanol and biodiesel blends under EPA's UST program, owners and operators must meet the compatibility requirement for UST systems.

40 CFR 280.32 states that "[o]wners and operators must use an UST system made of or lined with materials that are compatible with the substance stored in the UST system." Because the chemical and physical properties of ethanol and biodiesel blends may make them more aggressive to certain UST system materials than petroleum, it is important to ensure that all UST system components in contact with biofuels are materially compatible with that fuel.

UST System Components That May Be Affected by Biofuel Blends

To meet § 280.32, owners and operators of UST systems storing ethanol-blended fuels greater than 10 percent ethanol or greater than [TBD] percent biodiesel must use compatible equipment. At a minimum, the following UST system equipment must be compatible:

- Tank or internal tank lining;
- Piping;
- Pipe adhesives and glues;
- Line leak detectors;
- Flexible connectors;
- Fill pipe;
- Spill and overfill prevention equipment;
- Submersible turbine pump and components;
- Fittings, gaskets, bushings, couplings, and boots;
- Containment sumps (including submersible turbine sumps and under dispenser containment);
- Release detection floats, sensors, and probes.

Options for Meeting the Compatibility Requirement

Currently, EPA believes that the most effective options for owners and operators of UST systems storing ethanol-blended fuels greater than 10 percent ethanol and biodiesel-blended fuels greater than [TBD] percent biodiesel to ensure compatibility under this requirement are:

- Use components that are certified or listed by an independent test laboratory for use with the fuel stored (for example, Underwriters Laboratories);
- Use components approved by the manufacturer to be compatible with the fuel stored. EPA considers acceptable forms of manufacturer approvals to be:
  - Be in writing;
  - Indicate an affirmative statement of compatibility; and
  - Be from the equipment manufacturer, not another entity (such as the installer or distributor); or
- Use another method determined by the implementing agency to sufficiently protect human health and the environment. EPA will work with states as they evaluate other acceptable methods.

Note About Using API 1626 To Meet the Compatibility Requirement

Currently, a note in the federal UST regulations allows owners and operators to use the American Petroleum Institute's (API) Recommended Practice 1626, an industry code of practice, to meet the compatibility requirement for ethanol blended fuels. The original version of API 1626 (1st ed. 1985, reaffirmed in 2000) applies to up to 10 percent ethanol blended with gasoline and is not applicable to meet the compatibility requirement for ethanol blends greater than 10 percent. In August 2010, API published a second edition of API 1626. The second edition does address ethanol blends greater than 10 percent, and may also be used as a method for demonstrating compatibility.

Please note that state underground storage tank program regulations may be more stringent than the federal UST regulations, so owners and operators should always check with their states about state program requirements. Also, this guidance will apply in Indian country and in states that do not have state program approval (SPA). Because states with SPA must have a compatibility requirement that is similar to the federal compatibility requirement, SPA states could find this guidance relevant and useful to them as well.

If you have questions about this guidance, please contact Andrea Barbery at *barbery.andrea@epa.gov* or (703) 603–7137.

Dated: November 8, 2010.

Mathy Stanislaus,

Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 2010–28968 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2010–0681; FRL–8850–6]

Lead Fishing Sinkers; Disposition of TSCA Section 21 Petition

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: On August 3, 2010, several groups filed a petition under the Toxic Substances Control Act (TSCA) section 21 requesting that EPA prohibit under TSCA section 6(a) the manufacture, processing, and distribution in commerce of (1) lead bullets and shot; and (2) lead fishing sinkers. On August 27, 2010, EPA denied the first request due to a lack of authority to regulate lead in bullets and shot under TSCA. EPA's decision was based on the exclusion of shells and cartridges from the definition of "chemical substance" in TSCA section 3(2)(B)(v). On November 4, 2010, EPA denied the second request. This notice explains EPA's reasons for the denial of the request specific to fishing sinkers.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Christina Wadlington, 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) 566–1859; e-mail address: *wadlington.christina.@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. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to you if you manufacture, process, import, or distribute in commerce lead fishing sinkers or lead fishing tackle. If you have any questions regarding this action, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2010–0681. 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.*, Confidential Business Information (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.

II. Background

A. What is a TSCA section 21 petition?

Under section 21 of TSCA (15 U.S.C. 2620), any person can petition EPA to initiate a rulemaking proceeding for the issuance, amendment, or repeal of a rule under TSCA section 4, 6, or 8 or an order under TSCA section 5(e) or 6(b)(2). A TSCA section 21 petition must set forth the facts that are claimed to establish the necessity for the action requested. EPA is required to grant or deny the petition within 90 days of its filing. If EPA grants the petition, the Agency must promptly commence an appropriate proceeding. If EPA denies the petition, the Agency must publish its reasons for the denial in the **Federal Register**. A petitioner may commence a civil action in a U.S. district court to compel initiation of the requested rulemaking proceeding within 60 days of either a denial or, if the Agency does not resolve the petition, the expiration of the 90-day period.

B. What criteria apply to a decision on a TSCA section 21 petition?

Section 21(b)(1) of TSCA requires that the petition "set forth the facts which it is claimed establish that it is necessary" to issue the rule or order requested. 15 U.S.C. 2620(b)(1). Thus, TSCA section 21 implicitly incorporates the statutory standards that apply to the requested actions. In addition, TSCA section 21 establishes standards a court must use to decide whether to order EPA to initiate rulemaking in the event of a lawsuit filed by the petitioner after denial of a TSCA section 21 petition. 15 U.S.C. 2620(b)(4)(B). Accordingly, EPA generally relies on the standards in TSCA section 21 and in the provisions under which actions have been requested to evaluate petitions.

C. Summary of TSCA Section 21 Petition Received

On August 3, 2010, the Center for Biological Diversity, American Bird Conservancy, Association of Avian Veterinarian, Project Gutpile and Public Employees for Environmental Responsibility filed a petition under TSCA section 21 requesting that EPA prohibit under TSCA section 6(a) the manufacture, processing, and distribution in commerce of (1) lead bullets and shot; and (2) lead fishing gear. With respect to fishing gear, petitioners requested a nationwide, uniform ban on the manufacture, processing, and distribution in commerce of lead for use in all fishing gear, regardless of size, including sinkers, jigs and other tackle. (Ref. 1).

D. Summary of the Disposition of the Request With Respect to Lead in Bullets and Shot

As discussed in the **Federal Register** of September 24, 2010 (75 FR 58377) (FRL–8847–5), on August 27, 2010, EPA denied the first request due to a lack of authority to regulate lead in bullets and shot under TSCA. Today's notice provides EPA's reasons for denying the second portion of the petition: A request to prohibit under TSCA section 6(a)(2)(A)(i) the manufacture, processing, and distribution in commerce of lead for use in all fishing gear.

III. Disposition of the Request With Respect to Lead in Fishing Sinkers

On November 4, 2010, EPA denied the request to prohibit under TSCA section 6(a) the manufacture, processing, and distribution in commerce of lead fishing gear. EPA denied the request because the petitioners have not demonstrated that the action requested is necessary to protect against an unreasonable risk of injury to health or the environment, as required by TSCA section 21. The petitioners do not provide a sufficient justification for why a national ban of lead fishing sinkers and other lead fishing tackle is necessary given the actions being taken to address the concerns identified in the petition. The petitioners also have not demonstrated that the action requested—a uniform national ban of lead for use in all fishing gear—is the least burdensome alternative to adequately protect against the concerns identified in the petition, as required by section 6. There are an increasing number of limitations on the use of lead fishing gear on some Federal lands, as well as Federal outreach efforts. A number of states have established regulations that ban or restrict the use of lead sinkers and have created state education and fishing tackle exchange programs. The emergence of these programs and activities over the past decade calls into question whether the broad rulemaking requested by petitioners would be the least burdensome, adequately protective approach. EPA notes that the prevalence of non-lead alternatives in the marketplace continues to increase.

Lead tackle already is prohibited for use in Yellowstone National Park and at several national wildlife refuges including Patuxent National Wildlife Refuge in Maryland, Rachel Carson National Wildlife Refuge in Maine, Rappahanock National Wildlife Refuge in Virginia, Red Rock Lakes National Wildlife Refuge in Montana, Seney National Wildlife Refuge in Michigan, and Union Slough National Wildlife Refuge in Iowa. Since 1999, the National Fish and Wildlife Service has encouraged the use of non-lead fishing tackle (See "Let's Get the Lead Out" at *http://www.fws.gov/contaminants/Documents/leadpoisoning2.pdf*). The National Park Service is also encouraging the use of alternatives to lead tackle in national parks through an education and outreach program. This program, which has a goal of eliminating the use of lead tackle in parks, focuses on the benefits of using lead-free fishing tackle.

States also have been taking action to ban or limit the use of lead fishing sinkers or have been working to limit the use of lead fishing sinkers through outreach and exchange programs. Since 2000, five states have banned or limited the use of fishing sinkers. Maine, New York, and Vermont have banned the sale of lead fishing sinkers of less than one-half ounce. In Massachusetts, the use of all lead sinkers in the Quabbin and Wachusett Reservoirs, the loons' primary habitat in the state, is prohibited, and starting in 2012, the use of lead sinkers, lead weights, and lead fishing jigs of less than one ounce will be prohibited in all inland waters. In New Hampshire, lead fishing sinkers and jigs are banned for use in all fresh waters. Additionally, the Washington Department of Fish and Wildlife is considering whether to adopt

restrictions on the use of lead tackle in the state. Other states have outreach and education and tackle exchange programs.

The comments that EPA has received from states and a state organization highlight the geographic focus of state controls on lead fishing tackle. According to the Association of Fish and Wildlife Agencies, "the exposure to certain migratory birds (primarily loons, and to a lesser extent, swans) and related impacts to populations of those birds is localized, and where impacts have been substantiated to be significant, state fish and wildlife agencies have acted to regulate the use of lead sinkers and jigs. In the northeast, five states have enacted restrictions (*e.g.,* ban in certain bodies of water; ban on certain weights and sizes) on the use of lead fishing tackle where studies have identified lead toxicosis as a contributing factor to declining loon populations. Some states are also offering a fishing tackle exchange program (non-lead for lead products). States have thus demonstrated a responsible exercise of their authority to regulate or restrict lead fishing tackle under circumstances of exposure where it contributes to decline in loon populations" (Ref. 2).

Several state fish and game agencies submitted comments (Refs. 3–5). All support denial of the petition and provide several reasons why they do not support the actions requested in the petition. These comments assert that mortality from ingestion of lead fishing tackle is rare and is primarily limited to some areas of the country, that states are already working closely with the Fish and Wildlife Service on education and exchange programs, and that where there have been impacts on loons and trumpeter swans, states have already taken action. These states contend that these impacts are best addressed by geographically targeted actions that the states are undertaking. As noted by these commenters, states in the northern part of the country, where the majority of the impacts on loons has been observed, have taken action to limit or ban the use of lead sinkers or have implemented tackle exchange programs.

While it is the case, as petitioners noted, that 16 years ago, in 1994, EPA proposed a ban of lead for use in certain smaller-sized fishing sinkers under TSCA section 6(a)(2)(A), the sweeping alternative requested by petitioners was not one the Agency, as reflected in its proposal, found to be appropriate even then. (59 FR 11122, March 9, 1994). The steps that have been taken at the Federal and State levels since that time make a nationwide ban on all lead fishing gear such as that sought by petitioners even less appropriate today.

Moreover, the market for fishing gear is changing. While lead tackle may still constitute the largest percentage of the fishing sinker market, over the last decade the availability of fishing sinkers made from other materials has expanded. New non-lead products have entered the market, and the market share of lead sinkers has decreased. With improvements in technology, changes in consumer preferences, state-level restrictions, and increased market competition, the market for lead fishing sinkers is expected to continue to decrease while the market for substitutes such as limestone, steel, and tungsten fishing sinkers is expected to continue to increase (Ref. 6).

In sum, EPA is not persuaded that the action requested by the petitioners—a sweeping national uniform rule on lead in all fishing gear—is necessary. The petitioners also have failed to demonstrate that a national ban on lead fishing gear is the least burdensome approach to adequately address the risk to the environment addressed in the petition, as required by TSCA section 6, given the mix of actions that state agencies and the Federal Government already are taking to address the impact of lead fishing sinkers on local environments. The risk described by the petitioners does appear to be more prevalent in some geographic areas than others, and the trend over the past decade has been for increasing state and localized activity regarding lead in fishing gear. For these reasons, EPA denied the petitioners' request for a national ban on lead in all fishing gear.

V. References

1. American Bird Conservancy, Petition to the Environmental Protection Agency to Ban Lead Shot, Bullets and Fishing Sinkers under the Toxic Substances Control Act. August 3, 2010.

2. Association of Fish and Wildlife Agencies. Letter to Honorable Lisa Jackson, Administrator, United States Environmental Protection Agency. September 2, 2010.

3. The State of Arizona Game and Fish Department. Letter to Lisa P. Jackson, Administrator, United States Environmental Protection Agency. September 14, 2010.

4. Kentucky Department of Fish & Wildlife Resources Tourism, Art and Heritage Cabinet. Letter to Honorable Lisa Jackson, Administrator, United States Environmental Protection Agency. September 15, 2010.

5. Commonwealth of Virginia Department of Game and Inland Fisheries. Letter to Honorable Lisa Jackson, Administrator, United States Environmental Protection Agency. September 15, 2010.

6. Background Document—TSCA § 21 Petition; Pb in Fishing Sinkers and Other Components. October 2010.

List of Subjects

Environmental protection, Bird, Lead, Lead bullets, Lead fishing sinkers, Lead shot.

Dated: November 4, 2010.

Steve A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2010–28972 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2009–0477; FRL–8848–7]

Endocrine Disruptor Screening Program; Second List of Chemicals for Tier 1 Screening

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the second list of chemicals and substances for which EPA intends to issue test orders under the Endocrine Disruptor Screening Program (EDSP). EPA established the EDSP in response to section 408(p) of the Federal Food, Drug, and Cosmetic Act (FFDCA). This second list of chemicals expands the EDSP in an effort to include all pesticides, required by FFDCA, and adds priority drinking water chemicals into the program for screening as authorized by SDWA section 1457. Today's publication provides public notice of EPA's tentative decision-making in advance of the actual issuance of EDSP testing orders.

DATES: In order for the Agency to consider information and/or comments that may be relevant to the inclusion or exclusion of chemicals contained on the second EDSP list, this information and/or comments should be received by EPA on or before December 17, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2009–0477, 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 Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2009–0477. 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–2009–0477. 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 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 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket 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:* William Wooge, Office of Science Coordination and Policy, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8476; e-mail address: *wooge.william@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. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you produce, manufacture, use, consume, work with, or import substances included on the second EDSP list. Potentially affected entities may include, but are not limited to:

- Chemical manufacturers, importers and processors (NAICS code 325), *e.g.,* persons who manufacture, import or process chemical substances.
- Pesticide, fertilizer, and other agricultural chemical manufacturers (NAICS code 3253), *e.g.,* persons who manufacture, import or process pesticide, fertilizer and agricultural chemicals.
- Scientific research and development services (NAICS code 5417), *e.g.,* persons who conduct testing of chemical substances for endocrine effects.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Introduction

A. What action is the agency taking?

Today's document announces the second list of chemicals that the Agency intends to include in its EDSP. Through the issuance of orders, the Agency intends to require the submission of Tier 1 Screening data for these chemicals. Elsewhere in today's issue of the **Federal Register**, EPA also is announcing the policies and procedures expected to be followed for certain chemicals on this list. Information on EDSP and Tier 1 Screening data is

available on the Agency's Web site at *http://www.epa.gov/endo.*

B. What is the agency's authority for taking this action?

EPA's authority for taking this action is based on several different Congressional actions, including FFDCA, the Safe Drinking Water Act (SDWA), and the House Appropriations Committee report for EPA's FY 2010 appropriations.

EPA developed the EDSP in 1998 to implement FFDCA section 408(p), which requires EPA to "develop a screening program, using appropriate validated test systems and other scientifically relevant information, to determine whether certain substances may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effect as [EPA] may designate." (21 U.S.C. 346a(p)). The statute generally requires EPA to "provide for the testing of all pesticide chemicals" and gives EPA discretionary authority to "provide for the testing of any other substance that may have an effect that is cumulative to an effect of a pesticide chemical if the Administrator determines that a substantial population may be exposed to such a substance." (21 U.S.C. 346a(p)(3)). The statute also authorizes EPA to exempt a chemical upon a determination that "the substance is anticipated not to produce any effect in humans similar to an effect produced by a naturally occurring estrogen." (21 U.S.C. 346a(p)(4)).

Section 1457 of SDWA provides that "in addition to the substances" referred to in FFDCA section 408(p)(3)(B), "the Administrator may provide for testing under the screening program authorized by section 408(p) of such Act, in accordance with the provisions of section 408(p) of such Act, of any other substance that may be found in sources of drinking water if the Administrator determines that a substantial population may be exposed to such substance." (42 U.S.C. 300j–17). EPA used its authority under SDWA to identify a portion of the chemicals on the second EDSP list.

In addition, in Congress's House Appropriations Committee report for EPA's FY 2010 appropriations (H.R. 2996, H. Rept. 111–180) (Ref. 1), it directed EPA "to publish within 1 year of enactment a second list of no less than 100 chemicals for screening that includes drinking water contaminants, such as halogenated organic chemicals, dioxins, flame retardants (PBDEs, PCBs, PFCs), plastics (BPA), pharmaceuticals and personal care products, and issue 25 orders per year for the testing of these chemicals."

III. Background

EPA developed EDSP in response to a Congressional mandate in FFDCA "to determine whether certain substances may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effect as [EPA] may designate" (21 U.S.C. 346a(p)). As part of EDSP, EPA issues orders to collect certain test data on listed chemical substances. Unit II.B. describes the authority for listing a chemical. Test data requirements are derived from specific test assays, which are divided into two tiers. Tier I test assays are used to screen the chemicals for interaction with the estrogen (E), androgen (A) or thyroid (T) hormonal systems. Tier II test assays are intended to test for more specific chemical effects on the endocrine system, and are currently in the process of being developed and validated. Further information regarding EDSP and requirements for Tier I and Tier II can be found on the Agency's EDSP Web site, at *http://www.epa.gov/endo/.*

IV. Development of the Second EDSP List

In developing the second EDSP list, EPA focused on a subset of chemicals and substances that have been listed as priorities within EPA's drinking water and pesticides programs. While the Agency has not included some chemicals or substances on the second EDSP list as explained in Unit IV.A., non-inclusion does not mean that these other chemicals or substances may not be subject to testing in the near term nor in the future. In addition, based on current information, the public should not presume that the listing of a chemical or substance indicates in any way that EPA currently suspects that such chemical or substance interferes with the endocrine systems of humans or other species simply because it has been listed for screening under the EDSP. At the present time, EPA believes that these chemicals or substances should be candidates, at least for screening purposes, under EDSP testing based only on their pesticide registration status and/or because such substances may occur in sources of drinking water to which a substantial population may be exposed.

A. Basis for Chemical Selection

The Agency considered chemicals contained on the Office of Water (OW) and Office of Pesticide Programs (OPP) priority lists for inclusion on the second EDSP list.

1. *Initial compilation of OW candidate chemicals.* The Agency identified candidate chemicals that are either contaminants regulated with a national primary drinking water regulation (NPDWR) (40 CFR part 141) (Ref. 2) or are unregulated contaminants that are listed on the third Contaminant Candidate List (CCL 3) (USEPA, 2009) (Ref. 3). EPA began with the 85 regulated drinking water contaminants with existing NPDWRs and the 116 unregulated contaminants listed on CCL 3 because these represent many of the priority contaminants for the drinking water program. Most of the regulated drinking water contaminants with NPDWRs were designated by Congress under the 1986 or the1996 SDWA amendments. Because Congress designated these contaminants for regulation due to concerns about occurrence in drinking water and adverse impacts on human health, EPA believes that each such substance meets the statutory testing criteria from SDWA section 1457. SDWA section 1412(b)(9) requires the Agency to periodically review the existing NPDWRs and revise them, if appropriate. Information about the potential for endocrine disruption will assist the Agency in updating human health assessments, which the Agency considers in its periodic review of NPDWRs to ensure that they are protective of human health.

SDWA section 1412(b)(1) requires the Agency to develop a list of unregulated contaminants that are known or anticipated to occur in public water systems (PWSs) and may require regulation under SDWA. The Agency is required to develop the CCL list every 5 years. In determining whether a substance may occur in drinking water, EPA considers not only public water system monitoring data, but also data on ambient concentrations in surface water and ground water, and releases to the environment (e.g., reporting data from the Toxics Release Inventory). The Agency believes that such data are sufficient to anticipate contaminants that may occur in public water systems and furthermore, also represent those substances that may be found in sources of drinking water and to which a substantial population may be exposed. In selecting contaminants for the CCL, SDWA section 1412(b)(1)(C) requires that the Agency "take into consideration, among other factors of public health concern, the effect of such contaminants upon subgroups that comprise a meaningful portion of the general population (such as infants, children, pregnant women, the elderly,

individuals with a history of serious illness, or other subpopulations) that are identifiable as being at greater risk of adverse health effects due to exposure to contaminants in drinking water than the general population." The protocol that EPA used to develop CCL 3 was reviewed by internal experts, as well as external experts such as the National Drinking Water Advisory Council and the Science Advisory Board (Ref. 3). The CCL 3 has undergone a rigorous listing and expert review process, including a public nomination and comment period, and therefore, represent an excellent source of potential drinking water candidates to consider for EDSP screening. The information about the potential for endocrine disruption will assist the Agency in evaluating the human health impacts of unregulated drinking water contaminants. In the CCL listing, EPA already has made the component of the SDWA section 1457 determination that such substances may occur in sources of drinking water. The final CCL 3 listing also represents EPA's determination that a substantial population may be exposed to such substance for the purposes of SDWA 1457.

In listing drinking water contaminants on the CCL 3, EPA closely evaluated the nature of the occurrence and prevalence information supporting each such CCL 3 listing. Evaluating occurrence, EPA considered and evaluated data based on occurrence in finished drinking water and ambient water, as well as based on total releases to the environment, pesticide application rates, and production volumes (73 FR 9628, February 21, 2008) (FRL–8529–7). In deciding whether to move a possible drinking water contaminant from the preliminary CCL 3 to the proposed CCL 3, EPA scored each such contaminant based on, among other attributes, its occurrence attributes (at 73 FR 9640–41, February 21, 2008). The occurrence attributes were weighted more heavily based on a hierarchy representing prevalence of the contaminant in the water environment or likely release to the water environment. The results of that scoring are described at 73 FR 9644, February 21, 2008. The administrative record supporting the CCL 3 ultimately published in 2009 includes contaminant-by-contaminant information sheets that document the occurrence data upon which EPA relied for the listing of CCL 3 contaminants. The basis for EPA's inclusion of the CCL 3 contaminants on its tentative testing list, therefore, also provides the basis for EPA's determination that a substantial population may be exposed to each such substance for the purposes of SDWA section 1457.

2. *Initial compilation of OPP candidate chemicals.* The Agency identified candidate chemicals from OPP based on pesticides that were scheduled for Registration Review during fiscal years 2007 and 2008. This selection is part of the Agency's intent to efficiently expedite the testing of pesticides by conducting the testing in parallel or as part of the OPP Registration Review program.

3. *Streamlining the second EDSP list.* Consolidating the lists of OW and OPP chemicals resulted in over 200 chemicals. A listing of these chemicals is available in the docket for this notice (Ref. 4). The Agency streamlined this initial second EDSP list by excluding any chemical that fell into one or more of the following categories:

i. Biological agent and naturally occurring chemicals (*e.g.,* microbials, microbial toxins, inorganics, radionuclides).

ii. Chemicals for which the manufacturer, importer or registrant cannot be clearly identified (*e.g.,* disinfection byproducts or DBPs, microbes, microbial toxins, degradate compounds with more than one possible source).

iii. Chemicals already included on the first EDSP list because these chemicals have already received an EDSP order. Note however that if no one agreed to provide data in response to that order, additional orders may be issued under a SDWA determination.

iv. Chemicals that are hormones with confirmed endocrine effects.

v. Chemicals not likely to be biologically active or which are incompatible with testing assays for various reasons due to one or more of their physiochemical properties (*e.g.,* gases, strongly acidic or basic, solubility, vapor pressure molecular weight).

vi. Pesticides that are scheduled for registration review after FY 2008.

Although these chemicals have been excluded from the second EDSP list for one or more of these reasons, it is important to note that these exclusions do not imply that the Agency has no interest in the potential for endocrine disruption activity for these chemicals. In some instances, the Agency recognizes that information on endocrine effects is already available (*e.g.,* for the hormones) or the Agency is currently collecting information (*e.g.,* through the first EDSP list). In other cases, the Agency simply realizes that at this time there is some difficulty with collecting the information about endocrine effects through the EDSP (*i.e.,* because of the Agency's inability to identify a manufacturer, importer, or registrant or because the contaminant is incompatible with the testing assays). In addition, EPA recognizes that some of the naturally occurring chemicals also have anthropogenic sources and should be considered for the EDSP. In no way should it be inferred that removal from this initial second EDSP list signifies that a chemical does not have the potential to be placed on a future EDSP chemical list. The Agency intends to reexamine currently excluded chemicals for future EDSP chemical lists.

EPA is interested in receiving information from the public that may help the Agency resolve the difficulties with the currently excluded chemicals so that the Agency will be able to consider adding them to future EDSP chemical lists.

B. Second EDSP List of Chemicals

There are approximately 134 chemicals on the second ESDP list (see Table 1). This list includes a large number of pesticides, two perfluorocarbon compounds (PFCs), and three pharmaceuticals (erythromycin, nitroglycerin, and quinoline). This list also consists of an array of other chemicals, ranging from those used for industrial manufacturing processes, as plasticizers, or in the production of pharmaceutical and personal care products (PPCPs).

EPA is interested in receiving information and/or comment that may inform the exclusion or inclusion of chemicals on the second EDSP list. The Agency does not plan to respond formally to information or comments that may be submitted on this document, but will add such information to the notice docket as public record. EPA will consider such information and/or comment before finalizing the second EDSP list and publishing the Schedule for Issuance of Orders along with the second EDSP list. In addition, please note that by relying on the CCL 3 as part of this effort, the Agency does not intend to re-open CCL 3 for public comment or any of the individual lists used to create the second list of EDSP chemicals and does not intend to respond to any such comments so submitted.

TABLE 1—SECOND EDSP LIST OF CHEMICALS FOR TIER 1 SCREENING

Chemical name	CAS number	SDWA	PAI	RR schedule
1,1,1,2-Tetrachloroethane	630–20–6	X		
1,1,1-Trichloroethane	71–55–6	X		
1,1,2-Trichloroethane	79–00–5	X		
1,1-Dichloroethane	75–34–3	X		
1,1-Dichloroethylene	75–35–4	X		
1,2,3-Trichloropropane	96–18–4	X		
1,2,4-Trichlorobenzene	120–82–1	X		
1,2-Dibromo-3-chloropropane (DBCP)	96–12–8	X		
1,2-Dichloroethane	107–06–2	X		
1,2-Dichloropropane	78–87–5	X		
1,3-Dinitrobenzene	99–65–0	X		
1,4-Dioxane	123–91–1	X		
1-Butanol	71–36–3	X		
2,4,5-TP (Silvex)	93–72–1	X		
2-Methoxyethanol	109–86–4	X		
2-Propen-1-ol	107–18–6	X		
4,4′-Methylenedianiline	101–77–9	X		
Acetaldehyde	75–07–0	X		
Acetamide	60–35–5	X		
Acetochlor	34256–82–1	X	X	
Acetochlor ethanesulfonic acid (ESA)	187022–11–3	X		
Acetochlor oxanilic acid (OA)	194992–44–4	X		
Acrolein	107–02–8	X	X	
Acrylamide	79–06–1	X		
Alachlor	15972–60–8	X	X	
Alachlor ethanesulfonic acid (ESA)	142363–53–9	X		
Alachlor oxanilic acid (OA)	171262–17–2	X		
alpha-Hexachlorocyclohexane	319–84–6	X		
Aniline	62–53–3	X		
Bensulide	741–58–2	X	X	FY 2008
Benzene	71–43–2	X		
Benzo(a)pyrene (PAHs)	50–32–8	X		
Benzyl chloride	100–44–7	X		
Butylated hydroxyanisole	25013–16–5	X		
Carbon tetrachloride	56–23–5	X		
Chlordane	57–74–9	X		
Chlorobenzene	108–90–7	X		
cis-1,2-Dichloroethylene	156–59–2	X		
Clethodim	99129–21–2	X	X	FY 2008
Clofentezine	74115–24–5		X	FY 2007
Clomazone	81777–89–1		X	FY 2007
Coumaphos	56–72–4		X	FY 2008
Cumene hydroperoxide	80–15–9	X		
Cyanamide	420–04–2		X	FY 2008
Cyromazine	66215–27–8		X	FY 2007
Dalapon	75–99–0	X		
Denatonium saccharide	90823–38–4		X	FY 2008
Di(2-ethylhexyl) adipate	103–23–1	X		
Dichloromethane	75–09–2	X		
Dicrotophos	141–66–2	X	X	FY 2008
Dimethipin	55290–64–7	X	X	
Dinoseb	88–85–7	X		
Diuron	330–54–1	X	X	
Endothall	145–73–3	X	X	
Endrin	72–20–8	X		
Epichlorohydrin	106–89–8	X		
Erythromycin	114–07–8	X		
Ethylbenzene	100–41–4	X		
Ethylene dibromide	106–93–4	X		
Ethylene glycol	107–21–1	X		
Ethylene thiourea	96–45–7	X		
Ethylurethane	51–79–6	X		
Etofenprox	80844–07–1		X	FY 2007
Fenamiphos	22224–92–6	X	X	FY 2008
Fenarimol	60168–88–9		X	FY 2007
Fenoxaprop-P-ethyl	71283–80–2		X	FY 2007
Fenoxycarb	72490–01–8		X	FY 2007
Flumetsulam	98967–40–9		X	FY 2008
Fomesafen sodium	108731–70–0		X	FY 2007
Fosetyl-Al (Aliette)	39148–24–8		X	FY 2008
Glufosinate ammonium	77182–82–2		X	FY 2008
HCFC-22	75–45–6	X		

TABLE 1—SECOND EDSP LIST OF CHEMICALS FOR TIER 1 SCREENING—Continued

Chemical name	CAS number	SDWA	PAI	RR schedule
Heptachlor	76–44–8	X		
Heptachlor epoxide	1024–57–3	X		
Hexachlorobenzene	118–74–1	X		
Hexachlorocyclopentadiene	77–47–4	X		
Hexane	110–54–3	X		
Hexythiazox	78587–05–0		X	FY 2007
Hydrazine	302–01–2	X		
Isoxaben	82558–50–7		X	FY 2008
Lactofen	77501–63–4		X	FY 2007
Lindane	58–89–9	X		
Methanol	67–56–1	X		
Methoxychlor	72–43–5	X		
Methyl tert-butyl ether	1634–04–4	X		
Metolachlor ethanesulfonic acid (ESA)	171118–09–5	X		
Metolachlor oxanilic acid (OA)	152019–73–3	X		
Molinate	2212–67–1	X		
Nitrobenzene	98–95–3	X		
Nitroglycerin	55–63–0	X		
N-Methyl-2-pyrrolidone	872–50–4	X		
N-Nitrosodimethylamine (NDMA)	62–75–9	X		
n-Propylbenzene	103–65–1	X		
o-Dichlorobenzene	95–50–1	X		
o-Toluidine	95–53–4	X		
Oxirane, methyl-	75–56–9	X		
Oxydemeton-methyl	301–12–2	X	X	FY 2008
Oxyfluorfen	42874–03–3	X	X	
Paclobutrazol	76738–62–0		X	FY 2007
p-Dichlorobenzene	106–46–7	X	X	
Pentachlorophenol	87–86–5	X	X	
Perchlorate	14797–73–0	X		
Perfluorooctane sulfonic acid (PFOS)	1763–23–1	X		
Perfluorooctanoic acid (PFOA)	335–67–1	X		
Picloram	1918–02–1	X	X	
Polychlorinated biphenyls	1336–36–3	X		
Profenofos	41198–08–7	X	X	FY 2008
Propetamphos	31218–83–4		X	FY 2008
Propionic acid	79–09–4		X	FY 2008
Pyridate	55512–33–9		X	FY 2007
Quinclorac	84087–01–4		X	FY 2008
Quinoline	91–22–5	X		
Quizalofop-P-ethyl	100646–51–3		X	FY 2008
RDX	121–82–4	X		
sec-Butylbenzene	135–98–8	X		
Sodium tetrathiocarbonate	7345–69–9		X	FY 2008
Styrene	100–42–5	X		
Sulfosate	81591–81–3		X	FY 2007
Temephos	3383–96–8		X	FY 2008
Terbufos	13071–79–9	X	X	FY 2008
Terbufos sulfone	56070–16–7	X		
Tetrachloroethylene	127–18–4	X		
Thiophanate-methyl	23564–05–8	X	X	
Toluene diisocyanate	26471–62–5	X		
Toxaphene	8001–35–2	X		
trans-1,2-Dichloroethylene	156–60–5	X		
Trichloroethylene	79–01–6	X		
Triethylamine	121–44–8	X		
Triflumizole	68694–11–1		X	FY 2007
Trinexapac-ethyl	95266–40–3		X	FY 2008
Triphenyltin hydroxide (TPTH)	76–87–9	X	X	
Vinclozolin	50471–44–8	X	X	
Xylenes (total)	1330–20–7	X	X	
Ziram	137–30–4	X	X	

CAS Number = Chemical Abstract Services Registry Number.
SDWA = Drinking water chemical based on CCL 3 List or chemicals with National Primary Drinking Water Regulations.
PAI = Pesticide active ingredient (Current pesticide registration exists).
RR = OPP Registration Review date.

V. References

The following is a list of the documents that are specifically referenced in this document. These references are available in the docket number identified under General Information (Section I.B).

1. U.S. Congress. House Report 111–180. Available at: *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111congreports&docid=f:hr180.111.pdf.*

2. USEPA. 2009. National Primary Drinking Water Regulations. May 2009. EPA 816–F–09–004. Available at: *http://www.epa.gov/safewater/consumer/pdf/mcl.pdf.*

3. USEPA. 2009. Drinking Water Contaminant Candidate List 3—Final Notice. **Federal Register**. Vol, 74. No 194. p. 51850. October 8, 2009.

4. Initial Compilation of Chemicals and Substances Considered for the Second Endocrine Disruptor Screening Program List.

List of Subjects

Environmental protection, Chemicals, Drinking water, Endocrine disruptors, Pesticides.

Dated: September 28, 2010.

Steve A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2010–28818 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0275; FRL–8853–6]

Typographical Error in Summary Notice of Filing in Docket for Polymerized Fatty Acid Esters With Aminoalcohol Alkoxylates; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

SUMMARY: EPA issued a notice in the **Federal Register** of June 8, 2010 (75 FR 32463) (FRL–8827–5), concerning the Notice of Filing (NOF) for Pesticide Petition (PP) 0E7699 for polymerized fatty acid esters with aminoalcohol alkoxylates submitted by Exponent, on behalf of Croda. Although the NOF that appeared in the **Federal Register** was correct, there was a typographical error in the summary NOF that was placed in docket ID number: EPA–HQ–OPP–2010–0275. This document is being issued to announce that the Agency has placed a corrected summary NOF in the docket. Please see docket ID number EPA–HQ–OPP–2010–0275 for the corrected version.

FOR FURTHER INFORMATION CONTACT: Deirdre Sunderland, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 603–0851; e-mail address: *sunderland.deirdre@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

The Agency included in the notice a list of those who may be potentially affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0275. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

II. What Does This Correction Do?

The Notice of Filing (NOF) for Pesticide Petition (PP) 0E7699 for polymerized fatty acid esters with aminoalcohol alkoxylates submitted by Exponent, on behalf of Croda, published in the **Federal Register** (FR Doc. 2010–13689) of June 8, 2010 (75 FR 32463) (FRL–8827–5) is corrected as follows: Although the NOF that appeared in the **Federal Register** was correct, there was a typographical error in the summary NOF that was placed in docket ID number: EPA–HQ–OPP–2010–0275. The summary referenced an incorrect CAS No. 1173188–71–2 as the test chemical for the studies provided in support of the petition, but should have read CAS No. 1173188–81–2. This document is being issued to announce that the Agency has placed the corrected summary NOF in the docket. Please see docket ID number EPA–HQ–OPP–2010–0275 for the corrected version.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 4, 2010.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–28804 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2010–0841; FRL–9228–2]

PSD and Title V Permitting Guidance for Greenhouse Gases

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability and public comment period.

SUMMARY: Notice is hereby given that the EPA has posted its guidance titled, "PSD and Title V Permitting Guidance for Greenhouse Gases" on its significant guidance Internet Web site. EPA invites public comments on this guidance document during the comment period specified below.

DATES: Comments should be submitted on or before December 1, 2010. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0841, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.* Attention Docket ID No. EPA–HQ–OAR–2010–0841.
- *Fax:* 202–566–9744. Attention Docket ID No. EPA–HQ–OAR–2010–0841.
- *Mail:* Air Docket, Attention Docket ID No. EPA–HQ–OAR–2010–0841, Environmental Protection Agency, Mail Code: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, 1301 Constitution Avenue, NW., Room 3334, Washington, DC. Such deliveries are only accepted during the Docket Center's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2010–0841. The 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 *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 email 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 is unable to read your comment and cannot contact you for clarification due to technical difficulties, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to Section II of the **SUPPLEMENTARY INFORMATION** section of this document.

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, *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 at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions concerning this action, please contact David Svendsgaard, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division, C504–03, Research Triangle Park, NC 27711, telephone (919) 541–2380, e-mail at *svendsgaard.dave@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, U.S. EPA, Office of Air Quality Planning and Standards, Mail Code C404–02, Research Triangle Park, NC 27711, telephone (919) 541–0880, e-mail at *morales.roberto@epa.gov,* Attention Docket ID No. OAR–2010–0841.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions. The agency may ask you to respond to specific questions or organize comments by referencing a part or section number in the guidance.
- Explain why you agree or disagree with EPA's guidance; and suggest alternatives and substitute language that would help to clarify or better explain the points made and positions taken in EPA's guidance document.

II. Background

The purpose of this notice is to solicit public comments on EPA's recently posted guidance titled, "PSD and Title V Permitting Guidance for Greenhouse Gases." This document has been determined to be an EPA Significant Guidance Document per the OMB Bulletin definition and is included on the EPA list of significant guidance documents. It is available online at *http://www.epa.gov/regulations/guidance/byoffice-oar.html* or within the associated docket.

The guidance document is intended to assist permit writers and permit applicants in addressing the Prevention of Significant Deterioration (PSD) and title V permitting requirements for greenhouse gases (GHGs) that begin to apply on January 2, 2011, to certain sources.[1] The document: (1) Describes, in general terms and through examples, the requirements of the PSD and title V permit regulations and how these requirements apply to GHGs; (2) reiterates and emphasizes relevant past EPA guidance on the PSD and title V review processes for other regulated air pollutants; and (3) provides additional recommendations and suggested methods for meeting the permitting requirements for GHGs. We believe this guidance provides the basic information that permitting agencies and applicants need to address GHG emissions in permits. In addition, EPA will continue to work closely with all stakeholders to ensure a smooth transition to the permitting of GHGs.

EPA invites public comment on all aspects of its guidance document during the 14-day comment period. The guidance is not a regulation and does not establish binding requirements on EPA or any state, local, or tribal agency that is authorized to issue PSD or title V permits to satisfy requirements of the Clean Air Act; however, this guidance is hereby in effect and, consequently, EPA and other agencies may apply this guidance without, and regardless of, any additional action by EPA specific to this guidance. Although EPA has established a docket and is requesting public comment on the guidance, this procedure does not alter the nature or effect of the guidance and does not constitute a formal rulemaking process or require EPA to respond to public comments on the guidance before EPA or other agencies may apply the guidance in any permitting decision. After considering public comments, EPA retains the discretion to revise its guidance, issue additional guidance, propose regulations as appropriate, and to utilize information submitted in public comments to inform proposed permit decisions. An additional opportunity for public comment is required for any proposed decision by EPA or another agency to issue a PSD or title V permit, and such comments may address the applicability of this guidance to specific permit applications.

Most immediately, EPA seeks comment on whether the guidance

[1] EPA established PSD and title V applicability thresholds for GHG under the GHG Tailoring Rule at 75 FR 31514 (June 3, 2010).

presented in the document contains any technical or calculation errors. EPA also will consider comments on other aspects of the guidance. Because the guidance does not constitute a formal rulemaking action, EPA does not intend to respond to comments, but will take such comments under consideration. To the extent that EPA determines that comments received during the 14-day comment period justify corrections or clarifications to the guidance, EPA may revise and reissue the permitting guidance and post the revised document on the significant guidance Web site.

Please refer to the **ADDRESSES** section above in this document for specific instructions on submitting comments.

III. Internet Web Site for Guidance Information

The guidance titled, "PSD and Title V Permitting Guidance for Greenhouse Gases" can be found at: *http://www.epa.gov/regulations/guidance/byoffice-oar.html.*

Dated: November 10, 2010.

Mary E. Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2010–28962 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0116; FRL–8850–1]

Tralomethrin; Notice of Receipt of Request To Voluntarily Cancel Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of a request by the registrant to voluntarily cancel their registrations of products containing the pesticide tralomethrin. The request would not terminate the last tralomethrin products registered for use in the United States, but this action will cancel the sole technical product registration for tralomethrin. EPA intends to grant this request at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the request, or unless the registrant withdraws its request. If this request is granted, any sale, distribution, or use of products listed in this notice will be permitted after the registration has been cancelled only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before December 17, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0116, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2010–0116. 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 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 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: K. Avivah Jakob, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–1328; fax number: (703) 308–6467; e-mail address: *jakob.kathryn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that

is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background on the Receipt of Request To Cancel Registrations

This notice announces receipt by EPA of a request from registrant Bayer (Bayer CropScience LP and Bayer Environmental Science) to cancel certain tralomethrin product registrations. Tralomethrin is a broad-spectrum Type II systemic pyrethroid ester insecticide registered for use in a variety of residential and commercial settings, and on a small number of agricultural crops including broccoli, cauliflower, cotton, lettuce, peanuts and sunflowers. In a letter dated August 11, 2010, Bayer requested EPA to cancel certain pesticide product registrations identified in Table 1 of Unit III. Specifically, the technical registrant voluntarily requested these cancellations because Bayer has not sold products containing tralomethrin for several years. This action on the registrant's request will not terminate the last tralomethrin products registered in the United States, but this action will cancel the sole technical product registration for tralomethrin.

III. What Action Is the Agency Taking?

This notice announces receipt by EPA of a request from a registrant to cancel certain tralomethrin product registrations. The affected products and the registrant making the request are identified in Tables 1 and 2 of this unit.

Unless a request is withdrawn by the registrant or if the Agency determines that there are substantive comments that warrant further review of this request, EPA intends to issue an order canceling the affected registrations.

TABLE 1—TRALOMETHRIN PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration number	Product name	Company
264–1001	Scout Manufacturing Use Product	Bayer CropScience LP.
264–1003	Scout Insecticide	Bayer CropScience LP.
264–1004	Scout X–Tra Insecticide	Bayer CropScience LP.
264–1005	Scout 0.3 EC Insecticide	Bayer CropScience LP.
264–1009	HR 20900 Insecticide	Bayer CropScience LP.
264–1010	Scout X–Tra Gel Insecticide	Bayer CropScience LP.
432–755	Saga WP Insecticide	Bayer Environmental Science.
432–760	Saga WSB	Bayer Environmental Science.
432–784	Saga RTU–FA Insecticide	Bayer Environmental Science.
432–1278	Tralex Manufacturing Use Product II	Bayer Environmental Science.

Table 2 of this unit includes the name and address of record for the registrant of the products listed in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in Table 1 of this unit.

TABLE 2—REGISTRANT REQUESTING VOLUNTARY CANCELLATION

EPA company No.	Company name and address
264, 432	Bayer CropScience LP & Bayer Environmental Science. 2 T.W. Alexander Drive, PO Box 12014. Research Triangle Park, NC 27709.

IV. What is the Agency's Authority for Taking This Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The tralomethrin registrant has requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-day comment period on the proposed request.

V. Procedures for Withdrawal of Requests

Registrants who choose to withdraw a request for product cancellation or use deletion should submit the withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the product(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the action. If the request for voluntary cancellation is granted, the Agency intends to publish the cancellation order in the **Federal Register**.

In any order issued in response to this request for cancellation of product registrations, EPA proposes to include the following provisions for the treatment of any existing stocks of the products listed in Table 1 of Unit III.

For voluntary product cancellations, registrants will be permitted to sell and distribute existing stocks of voluntarily canceled products for 1 year after the effective date of the cancellation, which will be the date of publication of the cancellation order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the products identified in Table 1 of Unit III., except for export consistent with FIFRA section 17 or for proper disposal.

Once EPA has approved product labels reflecting the requested amendments to delete uses, registrants will be permitted to sell or distribute products under the previously approved labeling for a period of 18 months after the date of **Federal Register** publication of the cancellation order, unless other restrictions have been imposed. Thereafter, registrants will be prohibited from selling or distributing the products whose labels include the deleted uses identified in Table 1 of Unit III., except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant may sell, distribute, or use existing stocks of canceled products until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

List of Subjects

Environmental protection, Pesticides and pests, Tralomethrin.

Dated: November 9, 2010.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–28823 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2007–1145; FRL–9227–7]

Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Oxides of Sulfur

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of comment period.

SUMMARY: The Office of Air Quality Planning and Standards (OAQPS) of EPA recently made available a draft report, *Policy Assessment for the Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Oxides of Sulfur: Second External Review Draft* (75 FR 57463, September 21, 2010). The EPA released this preliminary draft document to seek early consultation with the Clean Air Scientific Advisory Committee (CASAC) and to solicit public comment on the overall structure, framing of key issues and conclusions regarding options for key elements of the standards. Four supplementary materials were released at a later date (75 FR 61486, October 5, 2010). The supplementary materials were: an errata sheet for Chapter 5; an addendum for Chapter 5; an additional Table 7–1 (summary of key uncertainties); and an additional table for Chapter 9 (summary of options for elements of the nitrogen oxides (NO_X) and sulfur oxides (SO_X) standard). Comments were originally scheduled to be submitted on or before November 12, 2010. A request for an extension to the comment period has been received. The EPA is granting this extension to allow stakeholders and the public with adequate time to conduct appropriate analysis and meaningful comments. Therefore, the comment period is being moved from November 12, 2010, to November 26, 2010.

DATES: Comments should be submitted on or before November 26, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2007–1145, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* Comments may be sent by electronic mail (e-mail) to *a-and-r-docket@epa.gov,* Attention Docket ID No. EPA–HQ–OAR–2007–1145.
- *Fax:* Fax your comments to 202–566–9744, Attention Docket ID. No. EPA–HQ–OAR–2007–1145.
- *Mail:* Send your comments to: Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OAR–2007–1145.
- *Hand Delivery or Courier:* Deliver your comments to: EPA Docket Center, 1301 Constitution Ave., NW., Room 3334, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2007–1145. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Docket in the EPA Docket Center, EPA West, Room 3334, 1301

Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays. The Docket telephone number is 202–566–1742; fax 202–566–9744.

FOR FURTHER INFORMATION CONTACT: Dr. Bryan Hubbell, Office of Air Quality Planning and Standards (Mail code C504–02), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; *e-mail: hubbell.bryan@epa.gov; telephone:* 919–541–0621; *fax:* 919–541–0804.

General Information

A. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Make sure to submit your comments by the comment period deadline identified.

Under section 108(a) of the Clean Air Act (CAA), the Administrator identifies and lists certain pollutants which "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." The EPA then issues air quality criteria for listed pollutants, which are commonly referred to as "criteria pollutants." The air quality criteria are to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air, in varying quantities." Under section 109 of the CAA, EPA establishes national ambient air quality standards (NAAQS) for each listed pollutant, with the NAAQS based on the air quality criteria. Section 109(d) of the CAA requires periodic review and, if appropriate, revision of existing air quality criteria. The revised air quality criteria reflect advances in scientific knowledge on the effects of the pollutant on public health or welfare. The EPA is also required to periodically review and revise the NAAQS, if appropriate, based on the revised criteria.

The EPA is currently conducting a joint review of the existing secondary (welfare-based) NAAQS for NO_X and SO_X. Because NO_X, SO_X, and their associated transformation products are linked from an atmospheric chemistry perspective as well as from an environmental effects perspective, and because of the National Research Council's 2004 recommendations to consider multiple pollutants in forming the scientific basis for the NAAQS, EPA has decided to jointly assess the science, risks, and policies relevant to protecting the public welfare associated with NO_X and SO_X. This is the first time since NAAQS were established in 1971 that a joint review of these two pollutants has been conducted. Since both the CASAC and EPA have recognized these interactions historically, and the science related to these interactions has continued to evolve and grow to the present day, there is a strong basis for considering them together.

As part of this review of the current secondary (welfare-based) NAAQS for NO_X and SO_X, EPA's OAQPS staff prepared a second draft Policy Assessment. The objective of this assessment is to evaluate the policy implications of the key scientific information contained in the document *Integrated Science Assessment for Oxides of Nitrogen and Sulfur-Ecological Criteria* (*http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=201485*), prepared by EPA's National Center for Environmental Assessment (NCEA) and the results from the analyses contained in the *Risk and Exposure Assessment for Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Oxides of Sulfur* (*http://www.epa.gov/ttn/naaqs/standards/no2so2sec/cr_rea.html*). The second draft Policy Assessment plus the supplementary materials are available online at: *http://www.epa.gov/ttn/naaqs/standards/no2so2sec/index.html.* This second draft Policy Assessment was reviewed by the CASAC during a public meeting which was held on October 6 and 7, 2010.

Dated: November 8, 2010.

Jennifer Noonan Edmonds,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2010–28969 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sunshine Act; Notice of Meeting

AGENCY HOLDING THE MEETING: Equal Employment Opportunity Commission. **Federal Register** Citation of Previous Announcement: 75 FR 68788, Tuesday, November 9, 2010.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: Wednesday, November 17, 2010, 10 a.m. Eastern Time.

CHANGE IN THE MEETING: The meeting time has been changed to 9:30 a.m. Eastern Time.

CONTACT PERSON FOR MORE INFORMATION: Stephen Llewellyn, Executive Officer, on (202) 663–4070.

Dated: November 15, 2010.

Stephen Llewellyn,

Executive Officer, Executive Secretariat.

This Notice Issued November 15, 2010.

[FR Doc. 2010–29129 Filed 11–15–10; 4:15 pm]

BILLING CODE 6570–01–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Special Meeting of the Sub-Saharan Africa Advisory Committee (SAAC) of the Export-Import Bank of the United States (Export-Import Bank).

SUMMARY: The Sub-Saharan Africa Advisory Committee was established by Public Law 105–121, November 26, 1997, to advise the Board of Directors on the development and implementation of policies and programs designed to support the expansion of the Bank's

financial commitments in Sub-Saharan Africa under the loan, guarantee, and insurance programs of the Bank. Further, the committee shall make recommendations on how the Bank can facilitate greater support by U.S. commercial banks for trade with Sub-Saharan Africa.

Time and Place: December 2, 2010, at 9:30 a.m. to 12:30 p.m. The meeting will be held at the Export-Import Bank in Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Agenda: Presentation on recent developments in Sub-Saharan Africa markets by Export Import Bank staff; an update on the Bank's on-going business development initiatives in the region; and Committee discussion of current challenges and opportunities for U.S. exporters.

Public Participation: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to December 2, 2010, Richard Thelen, 811 Vermont Avenue, NW., Washington, DC 20571, Voice: (202) 565–3515 or TDD (202) 565–3377.

FOR FURTHER INFORMATION CONTACT: For further information, contact Richard Thelen, 811 Vermont Avenue, NW., Washington, DC 20571, (202) 565–3515.

Jonathon Cordone,

General Counsel.

[FR Doc. 2010–28728 Filed 11–16–10; 8:45 am]

BILLING CODE 6690–01–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

November 9, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 18, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget via fax at 202–395–5167 or via e-mail to *Nicholas_A._Fraser@omb.eop.gov* and to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.* Include in the e-mail the OMB control number of the collection. If you are unable to submit your comments by e-mail contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Cathy Williams on (202) 418–2918.

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–0016.

Title: Application for Authority to Construct or Make Changes in a Low Power TV, TV Translator, or TV Booster Station, FCC Form 346.

Form Number: FCC Form 346.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities; Not-for-profit institutions; State, local or tribal government.

Number of Respondents and Responses: 3,500 respondents and 3,500 responses.

Estimated Time per Response: 7 hours.

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

Total Annual Burden: 24,500 hours.

Total Annual Costs: $15,043,000.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 154(i), 303, 307, 308 and 309 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: Confidentiality is not required for this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Licensees/permittees/applicants use FCC Form 346 to apply for authority to construct or make changes in a Low Power Television, TV Translator, or TV Booster broadcast station. On September 9, 2004, the Commission adopted a Report and Order, FCC 04–220, MB Docket Number 03–185, In the Matter of Parts 73 and 74 of the Commission's Rules to Established Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations. To implement the new rules, the Commission revised FCC Form 346 to allow licensees/permittees/applicants to use the revised FCC Form 346 to file for digital stations or for conversion of existing analog to digital.

Applicants are also subject to the third party disclosure requirements under 47 CFR 73.3580. Within 30 days of tendering the application, the applicant is required to publish a notice in a newspaper of general circulation when filing all applications for new or major changes in facilities—the notice is to appear at least twice a week for two consecutive weeks in a three-week period. A copy of this notice must be maintained with the application. FCC staff use the data to determine if the applicant is qualified, meets basic statutory and treaty requirements, and will not cause interference to other authorized broadcast services.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–29011 Filed 11–16–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

November 8, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden

invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. Comments are requested concerning:

(a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Persons wishing to comment on this information collection should submit their PRA comments January 18, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Submit all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167, or via the Internet at *Nicholas_A._Fraser@omb.eop.gov* and to *Judith-B.Herman@fcc.gov,* Federal Communications Commission (FCC). To submit your PRA comments by e-mail send them to: *PRA@fcc.gov.*

To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called "Currently Under Review", (3) click the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: For additional information, send an e-mail to *Judith- B.Herman@fcc.gov* or contact her at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1143.

Title: E–Rate Deployed Ubiquitously (EDU) 2011 Pilot Program.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and State, local or Tribal government.

Number of Respondents: 110 respondents; 110 responses.

Estimated Time per Response: 2 hours to 5 hours.

Frequency of Response: One time reporting requirement and third party disclosure requirement.

Obligation to Respond: Voluntary. Statutory authority for this information collection is contained in 47 U.S.C. sections 154–154, 201–205, 218–220, 254, 303(r), 403 and 405.

Total Annual Burden: 250 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting that the respondents submit confidential information to the Commission. If the Commission requests applicants to submit information that the respondents believe is confidential, respondents may request confidential treatment of such information under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the reporting and/or third party disclosure requirements) of this information collection. The Commission is reporting no change in their burden estimates.

On October 5, 2010 the Commission sought emergency processing from the Office of Management and Budget (OMB) of this new information collection. The Commission received OMB approval on October 21, 2010. Emergency OMB approvals are only granted for six months. In order to keep the OMB approval from lapsing, the Commission is now conducting the regular PRA processes to obtain the full three year clearance from them. The Commission will submit this extension to the OMB after this 60 day comment period.

On September 28, 2010, consistent with the vision outlined in the National Broadband Plan (NBP), the Federal Communications Commission (FCC) released a *Sixth Report and Order (Sixth R&O),* FCC 10–175, upgrading and modernizing the schools and libraries universal services support program (also known as the E-rate program) to bring fast, affordable Internet access to schools and libraries across the country, and eliminating rules that no longer serve the intended purpose. These changes will help ensure that America's students can learn and develop the high-tech skills necessary to compete in the 21st century economy.

As part of the *Sixth R&O,* the Commission launched a pilot program—EDU 2011 Pilot Program—that supports off-campus wireless Internet connectivity for mobile learning devices. Specifically, the Commission established this trial program to investigate the merits and challenges of wireless off-premises connectivity services, and to help the Commission determine whether and how those services should ultimately be eligible for E-rate support. The information may be used to offer E-rate support. The information requested may be used to offer E-rate support for the upcoming funding year (which starts July 1, 2011 and ends June 30, 2012) under this pilot program to fund wireless connections to a small number of selected applicants.

Specifically, to be considered for EDU 2011 Pilot Program funding, E-rate eligible applicants must have implemented or already be in the process of implementing a program to provide off-premises connectivity to students or library patrons through the use of portable wireless devices.

The application must contain the following information:

(1) A description of the current or planned program, how long it has been in operation, and a description of any improvements or other changes that would be made if E-rate funding were received for funding year 2011;

(2) Identification of the costs associated with implementing the program including, for example, costs for equipment such as e-readers or laptops, access and connection charges, teacher training, librarian training, or student/parent training;

(3) Relevant technology plans;

(4) A description of how the program complies with the Children's Internet Protection Program Act (CIPPA) and adequately protects against waste, fraud, and abuse;

(5) A copy of internal policies and enforcement procedures governing

acceptable use of the wireless device off the school's and library's premises;

(6) For schools, a description of the program's curriculum objectives, the grade levels included, and the number of students and teachers involved in the program; and

(7) For schools, any data collected on program outcomes.

Additionally, after the trial period, applicants will be required to submit a report to the Commission's Wireline Competition Bureau detailing any data collected as a result of the program and a narrative describing lessons learned from the program that would assist other schools and libraries desiring to adopt similar programs in the future.

Marlene H. Dortch,

Secretary, Federal Communications Commission.

[FR Doc. 2010–29013 Filed 11–16–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 13, 2010.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Bitterroot Holding Company, Lolo, Montana,* to retain shares of West One Bank, Kalispell, Montana.

Board of Governors of the Federal Reserve System, November 12, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–28953 Filed 11–16–10; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or To Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 3, 2010.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Family Bancorp, San Antonio, Texas,* to engage *de novo* in lending activities pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, November 12, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–28954 Filed 11–16–10; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Statement of Policy Regarding Communications in Connection With Collection of a Decedent's Debt

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Extension of the public comment period.

SUMMARY: The FTC has determined to extend until December 1, 2010, the time period for filing public comments in response to its proposed Statement of Policy Regarding Communications in Connection with Collection of a Decedent's Debt.

DATES: Written comments must be received on or before December 1, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form by following the instructions in the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted by using the following weblink: *https://ftcpublic.commentworks.com/ftc/deceaseddebtcollection* (and following the instructions on the web-based form). Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex W), 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2252.

FOR FURTHER INFORMATION CONTACT: Christopher Koegel or Quisaira Whitney, Attorneys, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3224.

SUPPLEMENTARY INFORMATION: On October 8, 2010, the Commission published (75 FR 62389) a notice of proposed statement of enforcement policy regarding communications in connection with collection of a decedent's debts ("proposed Statement") seeking comment on the overall costs, benefits, necessity, and regulatory and economic impact of the proposed Statement. Currently, the proposed Statement addresses three issues pertaining to debt collectors who attempt to collect on the debts of deceased debtors. First, the proposed Statement announces that the FTC will not bring enforcement actions for violations of Section 805(b) of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692c(b), against collectors who, in connection with the collection of a decedent's debt, communicate with a person who has authority to pay the decedent's debts from the assets of the decedent's estate. Second, the proposed Statement clarifies how a debt collector may locate the appropriate person with whom to discuss the decedent's debt. Third, the proposed Statement emphasizes to collectors that misleading consumers about their personal obligation to pay a decedent's debt is a violation of the FDCPA and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45. The notice designated

November 8, 2010, as the deadline for filing public comments.

Public comment on the Commission's proposed Statement is critical to developing policies that are fair and beneficial to consumers, creditors, and legitimate debt collectors. The Commission has been notified that several parties are interested in filing public comments on the proposed Statement, but would need additional time to comment. Because the proposed Statement implicates complicated issues involving not only FDCPA law, but also state probate law, the Commission is extending the deadline for public comment.

The short extension of the comment period will not substantially delay Commission action. The Commission is mindful of the need to deal with this matter expeditiously; however, it also recognizes that the proposed Statement involves complex issues and believes that extending the comment period to facilitate the creation of a more complete evaluation outweighs any harm that might result from any delay. Accordingly, the Commission has decided to extend the comment period until December 1, 2010, to allow for additional comment. Comments should refer to "Deceased Debt Collection Policy Statement" to facilitate the organization of comments. Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly accessible FTC Web site, at *http://www.ftc.gov/os/publiccomments.shtm.*

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form and clearly labeled "Confidential." [1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: *https://ftcpublic.commentworks.com/ftc/deceaseddebtcollection* (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink *https://ftcpublic.commentworks.com/ftc/deceaseddebtcollection.* If this Notice appears at *http://www.regulations.gov/search/index.jsp,* you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Web site at *http://www.ftc.gov* to read the Notice and the news release describing it.

A comment filed in paper form should include the "Deceased Debt Collection Policy Statement" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–113 (Annex W), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.shtm.*

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2010–28882 Filed 11–16–10; 8:45 am]

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[1] The comment must also be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0161; Docket 2010–0083; Sequence 25]

Federal Acquisition Regulation; Submission for OMB Review; Reporting Purchases From Sources Outside the United States

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning reporting purchases from sources outside the United States.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before December 17, 2010.

ADDRESSES: Submit comments identified by **Information Collection 9000–0161** by any of the following methods:

• *Regulations.gov: http://www.regulations.gov.* Submit comments

via the Federal eRulemaking portal by inputting "Information Collection 9000–0161" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "Information Collection 9000–0161". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000–0161" on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405. ATTN: Hada Flowers/IC 9000–0161.

Instructions: Please submit comments only and cite Information Collection 9000–0161, in all correspondence related to this collection. 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: Ms. Cecelia Davis, Procurement Analyst, Acquisition Policy Division, Contract Policy Branch, GSA (202) 219–0202 or email *Cecelia.davis@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

The information on place of manufacture will be used by each Federal agency to prepare the report required for submission to Congress.

B. Annual Reporting Burden

Respondents: 95,365.
Responses per Respondent: 40.
Total Responses: 3,814,600.
Hours per Response: .01.
Total Burden Hours: 38,146.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCA), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control Number 9000–0161,

Reporting Purchases from Sources Outside the United States, in all correspondence.

Dated: November 9, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

[FR Doc. 2010–28879 Filed 11–16–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier OS–0990–new]

60-day Notice

AGENCY: Office of the Secretary, HHS.

Agency Information Collection Request, 60-Day Public Comment Request. In compliance with the requirement of section 3506(2)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60-days.

Proposed Project: Public Input to Nominate Non-Federal Health and Health Care Data Sets and Applications for Listing on Healthdata.gov-OMB No. 0990–NEW—Immediate Office of the Secretary, Office of the Chief Technology Officer.

Abstract: The Department of Health and Human Services is promoting the use of health and health care datasets that are not specific to individual's personal health information to improve decision making by individuals, organizations, and governments through better understanding of the data. Federal agencies are making health indicator datasets (data that is not associated with any individuals) and tools available for use by the public through a web portal community known as healthdata.gov or *http://www.data.gov/health.* These datasets and tools are anticipated to benefit development of applications, web-based tools, and other electronic resources improve community action for health and health care. The development of tools, reference sets, dashboards, and electronic data visualization methods serve to provide context and understanding to complex health and health care data.

To broaden the type and amount of data available for these purposes, HHS is soliciting public input on nominations of non-federal health and health data indicator datasets and applications using them to improve health and health data. For example, health indicator datasets representing surveys conducted by state government or private organizations may be considered as high-value datasets among researchers, applications developers, and others.

ESTIMATED ANNUALIZED BURDEN TABLE

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Health and Healthcare Dataset Application.	Data specialist/technologist	40	1	15/60	10

Seleda Perryman,

Office of the Secretary, Paperwork Reduction Act Clearance Officer.

[FR Doc. 2010–28925 Filed 11–16–10; 8:45 am]

BILLING CODE 4150–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–11–11AC]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 or send comments to Carol E. Walker, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS D–74, 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

Using Traditional Foods and Sustainable Ecological Approaches for Health Promotion and Diabetes Prevention in American Indian/Alaska Native Communities—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Type 2 Diabetes was rare among American Indians until the 1950s. Since that time, diabetes has become one of the most common and serious illnesses among American Indians and Alaska Natives (AI/AN). From 1994 to 2004, the age-adjusted prevalence of diagnosed diabetes doubled (from 8.5 to 17.1 per 1,000 population) among AI/ANs less than 35 years of age who used Indian Health Service healthcare services. However, dietary management and physical activity can help to prevent or control Type 2 diabetes.

In 2008, the CDC's Native Diabetes Wellness Program (NDWP), in consultation with American Indian/Alaska Native Tribal elders, issued a cooperative agreement entitled, "Using Traditional Foods and Sustainable Ecological Approaches for Health Promotion and Diabetes Prevention in American Indian/Alaska Native Communities." The Traditional Foods program seeks to build on what is known about traditional ways in order to inform culturally relevant, contemporary approaches to diabetes prevention for AI/AN communities. The program supports activities that enhance or re-introduce indigenous foods and practices drawn from each grantee's landscape, history, and culture. Example activities include the cultivation of community gardens, organization of local farmers' markets, and the dissemination of culturally appropriate health messages through storytelling, audio and video recordings, and printed materials.

CDC requests OMB approval to collect standardized information, called Traditional Foods Shared Data Elements (SDE), from grantees over a three-year period. The SDE will be organized in three domains: Traditional Local Healthy Foods, Physical Activity, and Social Support for Healthy Lifestyle Change and Maintenance. Since each grantee currently maintains activity data for local program improvement, reporting summary information to CDC in SDE format is not expected to entail significant burden to respondents.

The SDE will allow CDC to compile a systematic, quantifiable inventory of activities, products, and outcomes associated with the Traditional Foods program. The SDE will also allow CDC to analyze aggregate data for improved technical assistance and overall program evaluation, reporting, and identification of outcomes; allow CDC and grantees to create a comprehensive inventory/resource library of diabetes primary prevention ideas and approaches for AI/AN communities and identify emerging best practices; and improve dissemination of success stories. The SDE will supplement the narrative progress report that grantees submit to CDC in conjunction with the annual continuation application for funding. Although these reports provide important contextual information and are useful for local program monitoring, they do not support the production of statistical reports that are needed to fully describe the Traditional Foods program and to respond to inquiries.

Respondents will be 17 Tribes and Tribal organizations that receive funding through the Traditional Foods program. The SDE will be routinely submitted to CDC semi-annually using Survey Monkey, an electronic Web-based interface. The estimated burden per response is two hours. Each grantee will receive a personalized advance notification letter, followed by an e-mail with a link to the Survey Monkey site. One of the two required SDE submissions will coincide approximately with submission of the continuation application for funding in the Spring. The second SDE submission will be scheduled annually in the Fall, at approximately the midpoint between the Spring submissions.

CDC anticipates that routine information collection will begin in April 2011 and will describe activities conducted during the period October 2010–March 2011. CDC also requests OMB approval to conduct one additional cycle of retrospective data collection during the first year of this three-year information collection request. The retrospective information collection will provide baseline SDE information about grantee activities conducted prior to October 2010, which is needed for comparison purposes and optimal overall program evaluation. Inclusion of the retrospective data will enable CDC and grantees to have a clearer, more quantifiable view of the growth of Traditional Foods activities over the five-year funding cycle for the cooperative agreement.

The total estimated burden for the one-time retrospective data collection is 34 hours (17 respondents × 2 hours/response). Annualizing this collection over three years results in an estimated annualized burden of 12 hours (6 respondents per year). The annualized figures slightly over-estimate the actual burden, due to rounding of the number of respondents for even allocation over the three-year clearance period. Second, some of the information could be collected through pre-testing the SDE collection system during Fall/Winter 2010.

There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	No. of respondents	No. of responses per respondent	Avg. burden per response (in hrs)	Total burden (in hrs)
AI/AN Tribal Grantees ...	Traditional Foods Shared Data Elements	17	2	2	68
	One-Time Retrospective Data Collection	6	1	2	12
Total	.....	.....	.....	.....	80

Dated: November 10, 2010.

Carol E. Walker,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–28930 Filed 11–16–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0532]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Experimental Study of Nutrition Facts Label Formats

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 (the PRA).

DATES: Fax written comments on the collection of information by December 17, 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 e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910—New and title "Experimental Study of Nutrition Facts Label Formats." 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.

I. Experimental Study of Nutrition Facts Label Format—(OMB Control No. 0910—New)

Nutrition information is required on most packaged foods and this information must be provided in a specific format as defined in 21 CFR 101.9. When FDA was determining which Nutrition Facts label format to require, the Agency undertook consumer research to evaluate alternatives (Refs. 1, 2, and 3). More recently, FDA conducted qualitative consumer research on the format of the Nutrition Facts label on behalf of the Agency's Obesity Working Group (OWG) (Ref. 4), which was formed in 2003 and tasked with outlining a plan to help confront the problem of obesity in the United States (Ref. 5). In addition to conducting consumer research, in response to the OWG plan FDA issued two advance notices of proposed rulemaking (ANPRM) requesting comments on format changes to the Nutrition Facts label. One ANPRM requested comments on whether and, if so, how to give greater emphasis to calories on the Nutrition Facts label (Ref. 6) and the other requested comments on whether and, if so, how to amend the Agency's serving size regulations (Ref. 7). In 2007, FDA issued an ANPRM requesting comments on whether the Agency should require that certain nutrients be added or removed from the Nutrition Facts label (Ref. 8).

FDA conducts consumer research under its broad statutory authority, set forth in section 903(b)(2)(A) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 393(b)(2)(A), to protect the public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled;", and in section 903(d)(2)(C) (21 U.S.C. 393(d)(2)(C)), to conduct research relating to foods, drugs, cosmetics and devices in carrying out the FD&C Act.

FDA is proposing to conduct an experimental study to quantitatively assess consumer reactions to potential options for modifying the Nutrition Facts label format. The purpose of the study is to help enhance FDA's understanding of consumer comprehension and acceptance of modifications to the Nutrition Facts label format. The study is part of the Agency's continuing effort to enable consumers to make informed dietary choices and construct healthful diets.

The proposed study will use a Web-based experiment to collect information from a sample of adult members in an online consumer panel established by a contractor. The study plans to randomly assign each of 10,000 participants to view Nutrition Facts labels from a set of Nutrition Facts labels that vary by the format, the type of food product, and the quality of nutritional attributes of the product. The study will focus on the following types of consumer reactions: (1) Judgments about a food product in terms of its nutritional attributes and overall healthfulness and (2) ability to use the Nutrition Facts label to, for example, calculate calories and estimate serving sizes needed to meet objectives. To help understand consumer reactions, the study will also collect information on participants' background, including but not limited to use of the Nutrition Facts label and health status.

The study results will be used to help the Agency to understand whether modifications to the Nutrition Facts label format could help consumers make informed food choices. The results of the experimental study will not be used to develop population estimates.

In the **Federal Register** of November 18, 2009 (74 FR 59553), FDA published a 60-day notice requesting public comment on the proposed collection of information. The Agency received 36 responses, some of them containing multiple comments. The comments, and the Agency's responses, are discussed in the following paragraphs. Some of the comments received were not responsive to the comment request on the four topics of the collection of information. These non-responsive comments are not addressed.

(Comment 1) Several comments cited the importance of studying ways to improve the Nutrition Facts label on

packaged foods and commended FDA for doing it.

(Response 1) FDA agrees that the study will help FDA learn how consumers react and respond to Nutrition Facts label modification options presented.

(Comment 2) One comment suggested adding questions about product purchase intent, amount the consumer would likely eat, and impression of the product's taste and safety.

(Response 2) FDA agrees that these questions are worthwhile and has included questions on product purchase intent. However, given the study designs focus solely on the nutrition label for use to choose healthier and lower calorie products and mode of data collection (Internet), questions on amount of product likely to be eaten and on taste are not meaningful to include.

(Comment 3) One comment suggested that the study include various formats with different methods of presenting nutrition information be tested so that the format can be found which helps consumers understand the total nutrition package without causing confusion regarding the other properties of the product.

(Response 3) FDA agrees that various formats should be tested that help consumers make more informed decisions about the healthfulness of the product. We will include questions about the product to test how consumers use the Nutrition Facts label for making those evaluations.

(Comment 4) One comment suggested the inclusion of real-time, one-on-one chats between live moderators and respondents during the fielding of the study to enhance the quality of the quantitative data collected.

(Response 4) FDA disagrees with this suggestion. FDA has already conducted a series of eight focus groups to learn how and why consumers react to the formats being tested. Also, prior to conducting the on-line experiment, FDA will conduct at least nine one-on-one interviews where we observe respondents taking the questionnaire, and get their feedback about what they were thinking as they answered each question. We believe that, taken together, the focus groups and the one-on-one interviews will give us a good feel as to why respondents answer the questions as they do.

(Comment 5) A number of comments asked the Agency to publish the revised instrument and mock stimuli for public comment prior to initiating the study. They had questions and recommendations about the design of the experiment, for example, whether there will be a control group and how many designs will be shown to the consumers and how many label formats will be tested and whether the subjects will be asked to rank the different formats in terms of preference.

(Response 5) We appreciate the suggestion for the Agency to publish the instrument and stimuli for public comment prior to initiating the study. Per the PRA, a copy of the revised instrument is attached to the supporting statement for public comment. We will also include examples of stimuli as an appendix of the supporting document. FDA will have a control group for this experiment. Ten different label formats will be tested. Each subject will only perform two tasks—an evaluation of a single label and a label comparison task.

(Comment 6) Several comments were about who should be included in the study. One comment said that FDA should give careful consideration to the gender and age distribution of the study subjects and that older subjects may have difficulty in using the Web. One comment said it was important to include people with special health concerns, those that do the majority of grocery shopping or food preparation for their households, and groups that may be underrepresented online.

(Response 6) FDA agrees that demographic factors such as age and gender, health concerns, grocery shopping, and food preparation experiences are important factors. FDA will collect the previously mentioned information and include them in the analyses. FDA will aim to have a sample resemble the American adult population. FDA will do pre-tests to make sure everyone can read and understand the survey.

(Comment 7) One comment suggested that FDA should consider as part of the proposed study how consumers interpret the Nutrition Facts label in the context of all the other information on the package, and raised the question of whether the information on the Nutrition Facts label would be lost, diluted, or confounded by all of the other information that appears on the package. The comment suggested that, as part of the study design, FDA could present the Nutrition Facts label by itself and also how it would appear alongside the other package information, to see if consumers view or interpret the Nutrition Facts label differently in light of the total package.

(Response 7) While FDA agrees that the Nutrition Facts label is perceived in the context of the entire package, the goal of this study is to test various modifications to the Nutrition Facts label that would be suitable for all food products regardless of the context of the package. The study design proposes to test different options of modified Nutrition Facts label without other aspects of the food package.

(Comment 8) One comment stated that, in selecting the final sample for the experimental study, FDA should consider whether a certain percentage of the subjects should be recruited based on their concerns about allergy information. The comment stated that although most of the information on the Nutrition Facts label has relevance to all consumers, label information about allergens may be of interest only to a relatively small number of subjects who have food allergies. The comment suggested that the responses from this group could be analyzed separately, in addition as part of the total sample.

(Response 8) It is estimated that the prevalence of food allergies ranges from approximately 1 to 10 percent of the population (Ref. 9). The study will use a convenience sample (not a representative sample) consisting of members of an online panel, 18 years of age or older. Therefore, the number of respondents who have food allergies or are caretakers of children who have food allergies would be too small for the purpose of statistically sound analysis.

(Comment 9) One comment asked that FDA consider ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques, when appropriate, and other forms of information technology.

(Response 9) FDA has taken steps to minimize the burden of data collection on respondents. Participants of the study will be members of the existing online panel and data will be collected through the Internet. Respondents will be sent e-mail invitations to participate in the study.

(Comment 10) One comment asked whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility.

(Response 10) FDA believes that collecting this information is necessary for FDA's regulatory oversight of the Nutrition Facts label. Because one of the purposes for initially developing and implementing the Nutrition Facts label was to help consumers make informed food choices, it is important for FDA to be able to evaluate whether consumers understand how to properly interpret the label, especially for health purposes.

(Comment 11) One comment requested that FDA consider using some or all of the label format changes suggested by the Center for Science in the Public Interest (CSPI) (Ref. 10).

(Response 11) CSPI suggested extensive changes to the Nutrition Facts label that affect many parts of the label. In this research, the Agency is focused on how consumers use labels for products that are customarily consumed at one eating occasion but may contain more than one serving per container as well as on how consumers react to different ways that calorie information is declared on the label. FDA believes these changes have the potential to be among the most useful changes to help consumers make informed choices. Therefore, FDA identified and chose the proposed formats, such as dual column formats and prominence of calorie formats, for this study. The variety of different experimental conditions for just these changes requires a very large number of respondents. It is not feasible to test the additional extensive changes such as those suggested by CSPI in this study because the number of respondents needed would become unmanageable.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Portion of study	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
Cognitive interview screener	96	1	96	0.083	8
Cognitive interview	12	1	12	1	12
Pretest invitation	1,000	1	1,000	0.033	33
Pretest	150	1	150	0.25	38
Experiment invitation	50,000	1	50,000	0.033	1,650
Experiment	10,000	1	10,000	0.25	2,500
Total					4,241

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

In the 60-day notice that published in the **Federal Register** of November 18, 2009, we estimated a total burden of 1,595 hours for the study. In this document, table 1 has been modified to reflect our re-evaluation of the original study design. The new total estimated burden is 4,241 hours.

To help design and refine the questionnaire to be used for the experimental study, we plan to conduct cognitive interviews by screening 96 adult consumers in order to obtain 12 participants in the interviews. Each screening is expected to take 5 minutes (0.083 hours) and each cognitive interview is expected to take 1 hour. The total for cognitive interview activities is 20 hours (8 hours + 12 hours). Subsequently, we plan to conduct pretests of the questionnaire before it is administered in the study. We expect that 1,000 invitations, each taking 2 minutes (0.033 hours), will need to be sent to adult members of an online consumer panel to have 150 of them complete a 15-minute (0.25 hours) pretest. The total for the pretest activities is 71 hours (33 hours + 38 hours). For the experiment, we estimate that 50,000 invitations, each taking 2 minutes (0.033 hours), will need to be sent to adult members of an online consumer panel to have 10,000 of them complete a 15-minute (0.25 hours) questionnaire. The total for the experiment activities is 4,150 hours (1,650 hours + 2,500 hours). Thus, the total estimated burden is 4,241 hours. FDA's burden estimate is based on prior experience with research that is similar to this proposed study.

II. References

1. Levy A., S. Fein, and R. Schucker, "Nutrition Labeling Formats: Performance and Preference," *Food Technology* 45: 116–121, 1991.
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Dated: November 10, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–28966 Filed 11–16–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; NIH NCI Central Institutional Review Board (CIRB) Initiative (NCI)

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Cancer Institute (NCI), the National Institutes of Health (NIH), has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on August 16, 2010 (75 FR 49938) and allowed 60-days for public comment. No public comments were received. The purpose of this notice is to allow 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it

displays a currently valid OMB control number.

Proposed Collection: Title: NIH NCI Central Institutional Review Board (CIRB). *Type of Information Collection Request:* Existing Collection in Use Without an OMB Number. *Need and Use of Information Collection:* The CIRB was created to reduce the administrative burden on local IRBs and investigators while protecting human research participants. To accomplish this, the CIRB uses several information collection tools to ensure that CIRB operations occur with high level of reviewer and board member satisfaction and is absent of conflicts of interest with the protocols under review. Tools utilized to accomplish this include the new member packets which are completed once a new member joins the CIRB to provide background information on workflow and processes of CIRB operations as well as a non-disclosure agreement. A conflict of interest form is completed occasionally or each time the reviewer is requested to serve as a reviewer for a study. CIRB helpdesk surveys measure satisfaction of helpdesk users and is conducted occasionally or each time the person contacts the helpdesk. *Frequency of Response:* Once, except for the SAE Reviewer Worksheet. *Affected Public:* Includes the Federal Government, business or other for-profits and not-for-profit institutions. *Type of Respondents:* Respondents include any customer who contacts the CIRB Helpdesk, institutional review board members and CIRB review participants. The annual reporting burden is estimated at 2209 hours (*see* Table 1 below for the estimated time burden). The total burden has decreased slightly as a result of corrected calculations from what was published in the 60-Day **Federal Register** Notice. The average annual cost to the government over a 12-month period is approximately $153,574 per year for a six year contract. This includes total annualized capital/start up costs of $25,108 and operating costs of $150,637.

TABLE 1—ESTIMATES OF ANNUAL BURDEN HOURS

Type of respondents	Survey instrument	Number of respondents	Frequency of response	Average time per response (min/hr)	Annual burden hours
Participants/Board Members.	CIRB Helpdesk Survey (Attachment 1)	1,500	1	10/60 (.17 hour)	250
Participants	NCI CIRB Institution Enrollment Worksheet (Attachment 2A).	30	1	3.5 hours	105
Participants	IRB Staff at Signatory Institution's IRB (Attachment 2B).	65	1	10/60 (.17 hour)	11
Participants	Investigator at Signatory Institution (Attachment 2C).	65	1	10/60 (.17 hour)	11
Participants	Research Staff at Signatory Institution (Attachment 2D).	65	1	10/60 (.17 hour)	11
Participants	Investigator at Affiliate Institution (Attachment 2E).	65	1	10/60 (.17 hour)	11
Participants	Research Staff at Affiliate Institution (Attachment 2F).	65	1	10/60 (.17 hour)	11
Participants	IRB at Signatory Institution (Attachment 2G)	65	1	10/60 (.17 hour)	11
Participants	Component Institution at Signatory Institution (Attachment 2H).	65	1	10/60 (.17 hour)	11
Participants	IRB at Affiliate Institution (Attachment 2I)	65	1	10/60 (.17 hour)	11
Participants	Institution Affiliate Institution without an IRB (Attachment 2J).	65	1	10/60 (.17 hour)	11
Participants	Request for 30–Day Access Form (Attachment 2K).	50	1	10/60 (.17 hour)	8
Participants	Facilitated Review (FR) Acceptance Form (Attachment 2L).	1,450	1	10/60 (.17 hour)	242
Participants	Study Review Responsibility Transfer Form (Attachment 2M).	120	1	10/60 (.17 hour)	20
Board Members	CIRB New Board Member Biographical Sketch Form (Attachment 3B).	16	1	30/60 (.5 hour)	8
Board Members	CIRB New Board Member Contact Information Form (Attachment 3C).	16	1	15/60 (.25 hour)	4
Board Members	CIRB New Board Member W–9 (Attachment 3D).	16	1	15/60 (.25 hour)	4
Board Members	CIRB New Board Member Non-Disclosure Agreement (NDA) (Attachment 3E).	16	1	15/60 (.25 hour)	4
Board Members	Direct Deposit Form (Attachment 4)	16	1	15/60 (.25 hour)	4
Participants	NCI Adult CIRB Application (Attachment 5A).	150	1	2 hours	300
Participants	NCI Pediatric CIRB Application (Attachment 5B).	62	1	2 hours	124
Participants	Adult/Pediatric CIRB Application—Ancillary Studies (Attachment 5C).	10	1	2 hours	20
Participants	Summary of CIRB Application Revisions (Attachment 5D).	20	1	30/60 (.5 hour)	10
Participants	Adult/Pediatric CIRB Application for Continuing Review (Attachment 5E).	230	1	1 hour	230
Board Members	Adult CIRB Reviewer Findings—Initial Review of Cooperative Group Protocol (Attachment 6A).	20	1	4 hours	80

TABLE 1—ESTIMATES OF ANNUAL BURDEN HOURS—Continued

Type of respondents	Survey instrument	Number of respondents	Frequency of response	Average time per response (min/hr)	Annual burden hours
Board Members	Pediatric CIRB Reviewer Findings—Initial Review of Cooperative Group Protocol (Attachment 6B).	12	1	4 hours	48
Board Members	Adult CIRB Reviewer Findings Cooperative Group Response to CIRB Review (Attachment 6C).	25	1	1 hour	25
Board Members	Pediatric CIRB Reviewer Findings Cooperative Group Response to CIRB Review (Attachment 6D).	70	1	1 hour	70
Board Members	Adult CIRB Reviewer Findings Amendment Cooperative Group Protocol (Attachment 6E).	130	1	1.5 hours	195
Board Members	Pediatric CIRB Reviewer Findings Amendment to Cooperative Group Protocol (Attachment 6F).	50	1	1.5 hours	75
Board Members	Adult CIRB Reviewer Findings Continuing Review of Cooperative Group Protocol (Attachment 6G).	150	1	.5 hour	75
Board Members	Pediatric CIRB Reviewer Findings Continuing Review of Cooperative Group Protocol (Attachment 6H).	110	1	.5 hour	55
Board Members	CIRB Reviewer Form (Attachment 6I)	20	1	2 hours	40
Board Members	CIRB Statistical Reviewer Form (Attachment 6J).	20	1	2 hours	40
Board Members	CIRB SAE Reviewer Worksheet (Attachment 6K).	10	15	30/60 (.5 hour)	75
Total		4,904			2,209

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Attention: NIH Desk Officer, Office of Management and Budget, at *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Jeanne Adler, Division of Cancer Treatment and Diagnosis or call non-toll-free number 301–594–0083 or e-mail your request, including your address to: *adlerj@mail.nih.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: November 10, 2010.

Vivian Horovitch-Kelley,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 2010–28883 Filed 11–16–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; Pretesting of NIAID's Biomedical HIV Prevention Research Communication Messages

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Institute of Allergy and Infectious Diseases (NIAID), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: Pretesting of NIAID's Biomedical HIV Prevention Research Communication Messages. *Type of Information Collection Request:* Revision of a previously approved collection. *Need and Use of Information Collection:* This is a request for clearance to pretest messages, materials and program activities about biomedical HIV prevention research. The primary objectives of the pretests are to (1) Assess audience knowledge, attitudes, behaviors and other characteristics for the planning/development of health messages, education products, communication strategies, and public information programs; and (2) pretest these health messages, products, strategies, and program components while they are in developmental form to assess audience comprehension, reactions, and perceptions. The information obtained from audience research and pretesting results in more effective messages, materials, and programmatic strategies. By maximizing the effectiveness of these messages and strategies for reaching targeted audiences, the frequency with which publications, products, and programs

need to be modified is reduced. *Frequency of Response:* On occasion. *Affected Public:* Individuals. *Type of Respondents:* Adults at risk for HIV/AIDS; representatives of organizations disseminating HIV-related messages or materials. The annual reporting burden is shown in the table below. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
General public	2,988	1	.40	1,195.2
Community-Based Organization Managers	749	1–3	.31	232.19
Healthcare Providers	107	1	.32	34.24
Total	3,844			1,461.63

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Katharine Kripke, Assistant Director, Vaccine Research Program, Division of AIDS, NIAID, NIH, 6700B Rockledge Dr., Bethesda, MD 20892–7628, or call non-toll-free number 301–402–0846, or E-mail your request, including your address to *kripkek@niaid.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: November 10, 2010.

John J. McGowan,

Deputy Director for Science Management NIAID.

[FR Doc. 2010–28980 Filed 11–16–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0515]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Non-Powered Suction Apparatus Device Intended for Negative Pressure Wound Therapy; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled "Class II Special Controls Guidance Document: Non-powered Suction Apparatus Device Intended for Negative Pressure Wound Therapy (NPWT)." This guidance document describes a means by which non-powered suction apparatus devices intended for NPWT may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule to classify non-powered suction apparatus devices intended for NPWT into class II (special controls). This guidance document is immediately in effect as the special control for non-powered suction apparatus devices intended for NPWT, but it remains subject to comment in accordance with the Agency's good guidance practices (GGPs).

DATES: Submit either electronic or written comments on the guidance at any time. General comments on Agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled "Class II Special Controls Guidance Document: Non-powered Suction Apparatus Device Intended for Negative Pressure Wound Therapy (NPWT)" to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4617, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. *See* the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the guidance 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. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jiyoung M. Dang, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3615, Silver Spring, MD 20993, 301–796–5650.

SUPPLEMENTARY INFORMATION:

I. Background

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule classifying non-powered suction apparatus devices intended for negative pressure wound therapy into class II (special controls) under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(2)). This guidance document will serve as the special control for non-powered suction apparatus devices intended for negative pressure wound therapy device. Section 513(f)(2) of the FD&C Act provides that any person who submits a premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k)) for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the FD&C Act, request that FDA classify the device under the criteria set forth in section

513(a)(1) of the FD&C Act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification. Because of the timeframes established by section 513(f)(2) of the FD&C Act, FDA has determined, under § 10.115(g)(2) (21 CFR 10.115(g)(2)), that it is not feasible to allow for public participation before issuing this guidance as a final guidance document. Therefore, FDA is issuing this guidance document as a level 1 guidance document that is immediately in effect. FDA will consider any comments that are received in response to this notice to determine whether to amend the guidance document.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (§ 10.115). The guidance represents the Agency's current thinking on non-powered suction apparatus devices intended for negative pressure wound therapy. 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 statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov.* To receive "Class II Special Controls Guidance Document: Non-powered Suction Apparatus Device Intended for Negative Pressure Wound Therapy (NPWT)," you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1701 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807, subpart E have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073; the collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; the collections of information in 21 CFR part 50 have been approved under OMB control number 0910–0586; the collections of information in 21 CFR 56 have been approved under OMB control number 0910–0130; and the collections of information in 21 CFR part 801 have been approved under OMB control number 0910–0485.

V. 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.

Dated: November 10, 2010.

Nancy K. Stade,

Deputy Director for Policy, Center for Devices and Radiological Health.

[FR Doc. 2010–28872 Filed 11–16–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Clinical Decision Making and Treatment.

Date: November 23, 2010.

Time: 10 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Anna L. Riley, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892, 301–435–2889, *rileyann@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Personality and Health.

Date: November 29, 2010.

Time: 11 a.m. to 12 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: Anna L. Riley, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892, 301–435–2889, *rileyann@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Memory, Stress, Pain, and Alcohol.

Date: December 1–2, 2010.

Time: 7 a.m. to 8 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michael Selmanoff, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3134, MSC 7844, Bethesda, MD 20892, 301–435–1119, *mselmanoff@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Molecular and Cellular HIV Biology.

Date: December 1, 2010.

Time: 11 a.m. to 1 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: Robert Freund, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3200,

MSC 7848, Bethesda, MD 20892, 301–435–1050, *freundr@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Business Applications Nephrology.

Date: December 13, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting).

Contact Person: Ryan G. Morris, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4205, MSC 7814, Bethesda, MD 20892, 301–435–1501, *morrisr@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR09–027: RM–RAID Review Meeting.

Date: December 15–16, 2010.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

Contact Person: Steven J. Zullo, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5146, MSC 7849, Bethesda, MD 20892, 301–435–2810, *zullost@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 9, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–28985 Filed 11–16–10; 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 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: Heart, Lung, and Blood Initial Review Group, NHLBI Institutional Training Mechanism Review Committee.

Date: December 10, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Charles Joyce, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892–7924. 301–435–0288. *cjoyce@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: November 10, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–28984 Filed 11–16–10; 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, The Antihypertensive and Lipid-Lowering to Prevent Heart Attack Trial.

Date: December 1, 2010.

Time: 1:30 p.m. to 4 p.m..

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Tony L. Creazzo, PhD, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7180, Bethesda, MD 20892–7924. 301–435–0725. *creazzotl@mail.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel Cardiovascular Management in Diabetics.

Date: December 2, 2010.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Charles Joyce, PhD, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892–7924. 301–435–0288. *cjoyce@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel Ancillary Studies in Clinical Trials.

Date: December 10, 2010.

Time: 8:a.m.to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Chang Sook Kim, PhD, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7179, Bethesda, MD 20892–7924. 301–435–0287. *carolko@mail.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel Research Demonstration and Dissemination Projects.

Date: December 14, 2010.

Time: 8 a.m. to 2 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: November 10, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–28981 Filed 11–16–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Statement of Organization, Functions, and Delegations of Authority

Part F of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), (last amended at 75 FR 14176–14178, dated March 24, 2010) is amended to reflect the establishment of a new Center for Medicare and Medicaid Innovation and to update the organization for CMS, as follows:

(1.) Under Part F, CMS, FC. 10 Organizations, insert the following new Center between the Center for Medicare (FCH) and the Center for Medicaid, CHIP and Survey & Certification (FCJ): "Center for Medicare and Medicaid Innovation (FCP)."

(2.) Under Part F, CMS, FC. 20 Functions, insert the following after the description of the Center for Medicare (FCH):

Center for Medicare and Medicaid Innovation (FCP)

- Identifies, validates and disseminates information about new care models and payment approaches to serve Medicare and Medicaid beneficiaries seeking to enhance the quality of health and health care and reducing cost through improvement.
- Consults with representatives of relevant Federal agencies, and clinical and analytical experts with expertise in medicine and health care management, including providers, payers, states, businesses, and community agencies, to develop new and effective models of care.
- Creates and tests new models in clinical care, integrated care and community health, and disseminates information on these models through CMS, HHS, states, local organizations, and industry channels.
- Performs rapid cycle evaluation of innovation and demonstration activities to determine effectiveness and feasibility for broader dissemination, scale, and sustainability.
- Works closely with other CMS components and regional offices to study health care industry trends and data for the purposes of designing, implementing, and evaluating innovative payment and service delivery models, and to disseminate information about effective models.
- Creates and tests innovative payment and service delivery models, building collaborative learning networks to facilitate the collection and analysis of innovation, as well as the implementation of effective practices, and developing necessary technology to support this activity.
- Creates and tests innovative payment and service delivery models, developing fellows with expertise in innovation, demonstration and diffusion to help support the introduction of effective practices across the nation.
- Carries out core business functions (*e.g.,* budget, facilities, HR, communications).

(Authority: 44 U.S.C. 3101)

Dated: November 12, 2010.

Kathleen Sebelius,

Secretary.

[FR Doc. 2010–28940 Filed 11–16–10; 8:45 am]

BILLING CODE 4120–01–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 62554–62559, dated October 12, 2010) is amended to reflect the reorganization of the National Institute for Occupational Safety and Health (CC), Centers for Disease Control and Prevention (C).

Section C–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the titles and functional statements for the Office of Mine Safety and Health Research (CCM) and insert the following:

Office of Mine Safety and Health Research (CCM). The Office of Mine Safety and Health Research (OMSHR): (1) Provides national and international leadership for the prevention of work-related illness, injury, and fatalities of mine workers through research and prevention activities at the Pittsburgh, Spokane, and Lake Lynn Laboratories; (2) conducts field studies to identify emerging hazards, to understand the underlying causes of mine safety and health problems, and to evaluate the effectiveness of interventions; (3) develops engineering and behavioral-based interventions, including training programs, to improve safety and health in the mines; trains mine safety and health trainers, and for evaluation purposes, conducts mine rescue and escape training for miners and mine rescue teams; (4) performs research, development, and testing of new technologies, equipment, and practices to enhance mine safety and health; (5) awards competitive grants and contracts to encourage the development, testing, demonstration, adoption, and manufacture of mine safety equipment and technologies; (6) develops best practices guidance for interventions; (7) transfers mining research and prevention products into practice; (8) coordinates NIOSH research and prevention activities for the mining sector; (9) provides policy guidance to the NIOSH Director on mining safety and health issues; and (10) provides for planning, oversight, and resource management of OMSHR's activities related to the conduct of programs, including: human capital and budget management, procurement, policy-setting and interpretation, and special initiatives.

Division of Mining Science and Technology (CCMD). The Division of Mining Science and Technology: (1) Studies global technology developments in areas of potential benefit to mining safety and health; (2) devises research or evaluation protocols to assess the efficacy of candidate technologies; (3) develops and implements work plans to adapt promising technologies for a mining application; (4) leads research-to-practice activities to facilitate adoption of key safety and health technologies; (5) utilizes contracts and grants to facilitate the goals of the MINER Act; (6) coordinates with the Division of Mining Research Operations for effective utilization of laboratory and human resources to accomplish the mission of the OMSHR; (7) provides vision and leadership, and coordinates the processes, to ensure an environment thriving with scientific excellence, integrity, and innovation; and (8) provides for the surveillance, health communications, and computational support needs of the OMSHR.

Health Communications, Surveillance and Research Support Branch (CCMDB). (1) Collects and analyzes health and safety data related to mining occupations in order to report on the overall incidence, prevalence and significance of occupational safety and health problems in mining; (2) describes trends in incidence of mining-related fatalities, morbidity, and traumatic injury; (3) conducts surveillance on the

use of new technology, the use of engineering controls, and the use of protective equipment in the mining sector; (4) coordinates surveillance activities with other NIOSH surveillance initiatives; (5) provides statistical support for surveillance and research activities of the laboratory; (6) analyzes and assists in the development of research protocols for developing studies; (7) coordinates planning, analysis, and evaluation of the OMSHR research program for achieving organizational goals; (8) collaborates with research staff to translate findings from laboratory research to produce compelling products that motivate the mining sector to engage in improved injury control and disease prevention activities; (9) coordinates with other health communication, health education, and information dissemination activities within NIOSH and CDC to ensure that mining research information is effectively integrated into the CDC dissemination and intervention strategies; and (10) supports mining research through the development and application of computational tools and techniques that advance the understanding and mitigation of mining health and safety problems.

Division of Mining Research Operations (CCME). The Division of Mining Research Operations: (1) Develops new knowledge, engineering and behavioral interventions, and new technologies to improve mining safety and health; (2) implements and manages the mining research portfolio to accomplish the functional goals of the OMSHR; (3) develops, manages, and operates the laboratory science programs at the Pittsburgh and Spokane facilities and the experimental programs at mines, including the experimental mines at Lake Lynn and Pittsburgh; (4) conducts research-to-practice activities; and (5) coordinates with the Division of Mining Science and Technology for effective utilization of laboratory and human resources to accomplish the mission of the OMSHR.

Ground Control Branch (CCMEB). (1) Conducts laboratory and field investigations of catastrophic events such as catastrophic structural or ground failures to better understand cause and effect relationships that initiate such events; (2) designs, evaluates, and implements appropriate intervention strategies and engineering controls to prevent ground failures; (3) develops, tests, and promotes the use of rock safety engineering prediction and risk evaluation systems for control or reduction of risk; (4) conducts laboratory and field investigations of surface mining operations to ensure appropriate engineering designs to prevent slope and highwall failures; (5) conducts research using a variety of techniques including numerical modeling and laboratory testing and experiments to ensure a full understanding of rock behavior and performance during rock excavation and mining operations; (6) develops, tests, and demonstrates sensors, predictive models, and engineering control technologies to reduce miners' risk for injury or death; and (7) conducts research investigations using a wide-variety of measurement and sensor technologies including in-mine and surface systems and technologies to ensure the structural stability of mining operations.

Dust, Ventilation and Toxic Substances Branch (CCMEC). (1) Develops, plans, and implements a program of research to develop or improve personal and area direct reading instruments for measuring mining contaminants including, but not limited to, respirable dust, silica, diesel particulates and exhaust and a variety of toxic and other potentially harmful exposures; (2) conducts field tests, experiments, and demonstrations of new technology for monitoring and assessing mine air quality; (3) designs, plans, and implements laboratory and field research to develop airborne hazard reduction control technologies; (4) carries out field surveys in mines to identify work organization strategies that could result in reduced dust exposures, diesel particulate exposures, toxic substance exposures and exposures to other potentially harmful exposures; (5) evaluates the performance, economics, and technical feasibility of engineering control strategies, novel approaches, and the application of new or emerging technologies for underground and surface mine dust and respiratory hazard control systems; (6) develops and evaluates implementation strategies for using newly developed monitors and control technology for exposure reduction or prevention; and (7) conducts field and laboratory experiments on mine ventilation systems to develop improved technologies and strategies for applications to dust control, gas control, diesel exhaust control to ensure safe and healthy conditions for underground miners.

Human Factors Branch (CCMED). (1) Conducts laboratory, field, and computer modeling research to focus on human physiological capabilities and limitations and their interactions with mining jobs, tasks, equipment, and the mine work environment; (2) designs and conducts epidemiological research studies to identify and classify risk factors that cause, or may cause, traumatic and cumulative/repetitive injuries to miners; (3) designs, builds, and tests proposed interventions, including demonstrations of proposed technologies using laboratory mock-ups, full-scale demonstrations at the laboratory's experimental mines, or through field evaluation in operating mines; (4) evaluates and recommends implementation strategies for injury prevention and control technologies developed by the laboratory; and (5) conducts human factors research and provides effective training and work organization techniques for mining.

Electrical and Mechanical Systems Safety Branch (CCMEE). (1) Conducts laboratory, field, and computer modeling research to assess the health and safety relevance of mining equipment design features; (2) using scientific and engineering techniques, analyzes case-studies of injuries and fatalities resulting from mining equipment and develops interventions and strategies for reducing or eliminating the hazards; (3) conducts laboratory and field research to assess the safety hazards of electrical systems used in mining operations and develops interventions and strategies to reduce or eliminate the hazards; (4) develops novel approaches for improving the operational safety of working around, and on, mining machinery; and (5) conducts laboratory and field research on communication systems, tracking systems and monitoring systems as needed to ensure their viability and safety during routine mining operations as well as post-disaster conditions.

Fires and Explosions Branch (CCMEG). (1) Conducts experiments and studies at the Lake Lynn Laboratory and the Bruceton Experimental Mine as well as field experiments at operating mines to prevent catastrophic events such as mine explosions, mine fires, and gas and water inundations to better understand cause and effect relationships which initiate such events; (2) develops new or improved strategies and technologies for mine fire prevention, detection, control, and suppression; (3) investigates and develops an understanding of the critical parameters and their interrelationships governing the mitigation and propagation of explosions, and develops and facilitates the implementation of interventions to prevent mine explosions; (4) develops new controls and strategies for eliminating explosions or fires or minimizing the impact of explosions on the safety of mine workers by improving

suppression systems, improving detection of sentinel events, and improving much needed escape and rescue approaches; (5) works with the mining industry and other government agencies to ensure research gaps and technology needs are met for mine rescue teams, and provides a test bed in the experimental mines to develop and evaluate rescue technologies and training methods; and (6) identifies and evaluates emerging health and safety issues as mining operations move into more challenging and dangerous geologic conditions.

Hearing Loss Prevention Branch (CCMEH). (1) Plans and conducts laboratory and field research on noise-induced hearing loss in miners; (2) conducts field dosimetric and audiometric surveys to assess the extent and severity of the problem, to identify those mining segments in greatest need of attention, and to objectively track progress in meeting hearing loss prevention goals; (3) conducts field and laboratory research to identify noise generation sources and to identify those areas most amenable to intervention activities; (4) develops, tests, and demonstrates new control technologies for noise reduction; (5) evaluates the technical and economic feasibility of controls; (6) develops, evaluates, recommends and empowers workers with implementation strategies to promote the adoption and use of noise reduction technology; and (7) improves the reliability of communication in noisy workplaces.

Dated: November 5, 2010.

William P. Nichols,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–28948 Filed 11–16–10; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

Statement of Organization, Functions, and Delegations of Authority

Part J (Agency for Toxic Substances and Disease Registry) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (50 FR 25129–25130, dated June 17, 1985, as amended most recently at 75 FR 62559–62560, dated October 12, 2010) is amended to reflect the reorganization of the Agency for Toxic Substances and Disease Registry.

Section J–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety item (10) of the functional statement for the Office of the Director (JAA), Agency for Toxic Substances and Disease Registry (J).

Dated: November 5, 2010.

William P. Nichols,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–28949 Filed 11–16–10; 8:45 am]

BILLING CODE 4160–70–M

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 62554–62559, dated October 12, 2010) is amended to reflect the reorganization of the National Center for Injury Prevention and Control, 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:

After the title and functional statement for the Office of Program Management and Operations (CUH13), Office of the Director (CUH1), National Center for Injury Prevention and Control (CU), insert the following:

Health Communication Science Office (CUH14). (1) Plans, develops, coordinates, and evaluates NCIPCs, publications, graphics, and technical information activities for intentional injury, unintentional injury, and acute care and rehabilitation; (2) disseminates injury control information to public and professional audiences; (3) in conjunction with the CDC Office of the Associate Director for Communication, interacts with the news media to ensure that injury topics are covered accurately and remain high on the public agenda; (4) provides expert consultation on the effective use and design of graphic materials for presentations, publications, and exhibits; (5) designs and produces professional quality graphic materials for use in NCIPC presentations and publications and designs and electronically typesets publications; (6) develops, maintains, and manages a graphics information retrieval system that allows ready access to slides and graphic presentations on injury topics; (7) provides expert consultation on the development and production of publications; (8) manages the clearance and production of NCIPC publications; (9) manages NCIPCs technical information resources, including developing and maintaining injury-related databases and a library of information on injury-related topics; (10) coordinates the centers information sharing activities, including involvement on Internet; (11) serves as NCIPC liaison with the CDC Office of the Associate Director for Communication, and other Centers, Institute, and Offices on matters related to graphics, publications, and technical information resources; and (12) in carrying out these functions, collaborates with other PHS agencies, Federal and state departments and agencies, and private organizations, as appropriate.

Delete in its entirety item (10) of the functional statement for the Office of the Director (CUH1).

Delete in its entirety the first sentence and item (9) of the functional statement for the Extramural Research Program Office (CUHI 6) and insert the following accordingly: The Extramural Research Program Office (ERPO) plans, develops, coordinates, and evaluates extramural research activities in cooperation with centers, divisions, and offices within the Office of Noncommunicable Diseases, Injury and Environmental Health. (9) assists the Office of the Associate Director for Science, CDC, in developing extramural research policies and oversees the implementation of those policies within the center.

Delete item (12) of the functional statement for the Program Implementation and Dissemination Branch (CUHCD) and insert the following: (12) works closely with relevant offices or groups, including the NCIPC Health Communication Science Office and the CDC Office of the Associate Director for Communication to secure appropriate clearance of materials;

Delete in its entirety item (10) of the functional statement for the Office of the Director (CUG1), National Center for Environment Health (CUG), Office of Noncommunicable Diseases, Injury and Environmental Health (CU).

Dated: November 5, 2010.

William P. Nichols,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–28951 Filed 11–16–10; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form N–336, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form N–336, Request for Hearing on a Decision in Naturalization Proceedings Under Section 336; OMB Control No. 1615–0050.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on August 18, 2010, at 75 FR 51095, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 17, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue, Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov*. When submitting comments by e-mail please make sure to add OMB Control Number 1615–0050 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Request for Hearing on a Decision in Naturalization Proceedings Under Section 336.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–336; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or Households.* Form N–336 provides a method for applicants, whose applications for naturalization are denied, to request a new hearing by an Immigration Officer of the same or higher rank as the denying officer, within 30 days of the original decision.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 4,145 responses at 2 hours and 45 minutes (2.75) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 11,398 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov*.

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020; Telephone 202–272–8377.

Dated: November 12, 2010.

Stephen Tarragon,

Deputy Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2010–29001 Filed 11–16–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form N–400, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form N–400, Application for Naturalization; OMB Control No. 1615–0052.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on August 18, 2010, at 75 FR 51096, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 17, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue, Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov*. When submitting comments by e-mail please make sure to add OMB Control Number 1615–0052 in the subject box. Written comments and suggestions from the public and affected agencies should

address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application for Naturalization.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–400; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or Households.* USCIS uses the information on Form N–400 to determine an applicant's eligibility for naturalization.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 693,890 responses at 6 hours and 8 minutes (6.13 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 4,253,545 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov*.

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020; Telephone 202–272–8377.

Dated: November 12, 2010.

Stephen Tarragon,

Deputy Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2010–29012 Filed 11–16–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form N–600, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form N–600, Application for Certificate of Citizenship; OMB Control No. 1615–0057.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on August 18, 2010, at 75 FR 51094, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 17, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue, Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0057 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application for Certificate of Citizenship.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–600; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or Households.* USCIS uses the information on Form N–600 to make a determination that the citizenship eligibility requirements and conditions are met by the applicant.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 44,441 responses at 1 hour and 35 minutes (1.583 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 70,350 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov*.

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020; Telephone 202–272–8377.

Dated: November 12, 2010.

Stephen Tarragon,

Deputy Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2010–29008 Filed 11–16–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–109]

Notice of Submission of Proposed Information Collection to OMB; Allocation of Operating Subsidies under the Operating Fund Formula: Data Collection

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 Housing Agencies (PHAs) use this information in budget submissions which are reviewed and approved by HUD field offices as the basis for obligating operating subsidies. This information is necessary to calculate the eligibility for operating subsidies under the Operating Fund Program regulation, as amended. The Operating Fund Program is designed to provide the amount of operating subsidy that would be needed for well-managed PHAs.

DATES: *Comments Due Date: December 17, 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 (2577–0029) 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 *Colette.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: Allocation of Operating Subsidies under the Operating Fund.

Formula: Data Collection.

OMB Approval Number: 2577–0029.

Form Numbers: HUD–53087, HUD–52722, HUD 52723.

Description of the Need for the Information and Its Proposed Use: Public Housing Agencies (PHAs) use this information in budget submissions which are reviewed and approved by HUD field offices as the basis for obligating operating subsidies. This information is necessary to calculate the eligibility for operating subsidies under the Operating Fund Program regulation, as amended. The Operating Fund Program is designed to provide the amount of operating subsidy that would be needed for well-managed PHAs.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	6,997	2		0.749		10,502

Total Estimated Burden Hours: 10,502.

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: November 9, 2010.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–28859 Filed 11–16–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of Natural Resources Revenue

[Docket No. BOEM–2010–0051]

Agency Information Collection Activities: Submitted for Office of Management and Budget Review; Comment Request

AGENCY: Office of Natural Resources Revenue (ONRR), Interior.

ACTION: Notice of an extension of a currently approved information collection (OMB Control Number 1010–0120).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to the Office of Management and Budget (OMB) an information collection request (ICR) to renew approval of the paperwork requirements in this ICR titled "30 CFR Parts 1202, 1206, 1210, 1212, 1217, and 1218, Solid Minerals and Geothermal Resources." This notice also provides the public a second opportunity to comment on the paperwork burden of these regulatory requirements.

DATES: Submit written comments on or before *December 17, 2010.*

ADDRESSES: Submit written comments by either FAX (202) 395–6566 or e-mail (*OIRA_Docket@omb.eop.gov*) directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of the Interior (OMB Control Number 1010–0120).

Please also submit a copy of your comments on this ICR to ONRR by any of the following methods. Please use

"ICR 1010–0120" as an identifier in your comment.

• Electronically go to *http://www.regulations.gov.* In the entry titled "Enter Keyword or ID," enter BOEM–2010–0051, and then click search. Follow the instructions to submit public comments. The ONRR will post all comments.

• Mail comments to Hyla Hurst, Regulatory Specialist, Office of Natural Resources Revenue, P.O. Box 25165, MS 61013B, Denver, Colorado 80225. Please reference ICR 1010–0120 in your comments.

• Hand-carry comments or use an overnight courier service. Our courier address is Building 85, Room A–614, Denver Federal Center, West 6th Ave. and Kipling St., Denver, Colorado 80225. Please reference ICR 1010–0120 in your comments.

FOR FURTHER INFORMATION CONTACT: Hyla Hurst, telephone (303) 231–3495, or e-mail *hyla.hurst@onrr.gov.* You may also contact Hyla Hurst to obtain copies, at no cost, of (1) the ICR, (2) any associated forms, and (3) the regulations that require the subject collection of information.

SUPPLEMENTARY INFORMATION:

Title: 30 CFR Parts 1202, 1206, 1210, 1212, 1217, and 1218, Solid Minerals and Geothermal Resources.

OMB Control Number: 1010–0120.

Bureau Form Number: MMS–4430, MMS–4292, and MMS–4293.

Abstract: The Secretary of the U.S. Department of the Interior is responsible for mineral resource development on Federal and Indian lands and the Outer Continental Shelf (OCS). The Secretary is required by various laws to manage mineral resource production from Federal and Indian lands and the OCS, collect the royalties and other mineral revenues due, and distribute the funds collected in accordance with applicable laws. Public laws pertaining to mineral leases on Federal and Indian lands are posted on our Web site at *http://www.onrr.gov/Laws_R_D/PublicLawsAMR.htm.* The Secretary also has a trust responsibility to manage Indian lands and seek advice and information from Indian beneficiaries. The Office of Natural Resources Revenue (ONRR) performs the minerals revenue management functions for the Secretary and assists the Secretary in carrying out the Department's trust responsibility for Indian lands.

I. General Information

When a company or an individual enters into a lease to explore, develop, produce, and dispose of minerals from Federal or Indian lands, that company or individual agrees to pay the lessor a share in an amount or value of production from the leased lands. The lessee is required to report various kinds of information to the lessor relative to the disposition of the leased minerals. Such information is generally available within the records of the lessee or others involved in developing, transporting, processing, purchasing, or selling of such minerals.

II. Information Collections

The ONRR, acting for the Secretary, uses the information collected to ensure that royalties are based on correct product valuation, reported in a timely manner, and paid appropriately. The ONRR and other Federal Government, state, and tribal entities use the information for audit purposes and for evaluating the reasonableness of product valuation or allowance claims submitted by lessees. Please refer to the burden hour table for all reporting requirements and associated burden hours. All data submitted is subject to subsequent audit and adjustment.

A. Solid Minerals

Producers of coal and other solid minerals from any Federal or Indian lease must submit Form MMS–4430, Solid Minerals Production and Royalty Report, and other associated data formats. Producers of coal from any Indian lease must also submit Form MMS–4292, Coal Washing Allowance Report, and Form MMS–4293, Coal Transportation Allowance Report, if they wish to claim allowances on Form MMS–4430. Companies report certain data on Form MMS–2014, Report of Sales and Royalty Remittance (OMB Control Number 1010–0139). The information requested is the minimum necessary to carry out our mission and places the least possible burden on respondents.

B. Geothermal Resources

This ICR also covers some of the information collections for geothermal resources, which are grouped by usage (electrical generation, direct use, and byproduct recovery), and by disposition of the resources (arm's-length (unaffiliated) contract sales, non-arm's-length contract sales, and no contract sales) within each use group. The ONRR relies primarily on data reported by payors on Form MMS–2014 for the majority of our business processes, including geothermal information. In addition to using the data to account for royalties reported by payors, ONRR uses the data for monthly distribution of mineral revenues and audit and compliance reviews.

III. OMB Approval

We are requesting OMB approval to continue to collect this information. Not collecting this information would limit the Secretary's ability to discharge fiduciary duties and may also result in the loss of royalty payments. Proprietary information submitted to ONRR under this collection is protected, and no items of a sensitive nature are included in this information collection.

Responses are mandatory for Form MMS–4430. A response is required to obtain benefits for Forms MMS–4292 and MMS–4293.

Frequency: Monthly, annually, and on occasion.

Estimated Number and Description of Respondents: 161 reporters.

Estimated Annual Reporting and Recordkeeping "Hour" Burden: 3,509 hours.

We have not included in our estimates certain requirements performed in the normal course of business and considered usual and customary. The following table shows the estimated burden hours by CFR section and paragraph:

RESPONDENTS' ESTIMATED ANNUAL BURDEN HOURS

Citation 30 CFR	Reporting and recordkeeping requirement	Hour burden	Average number annual responses	Annual burden hours
Part 1202—Royalties Subpart H—Geothermal Resources				
1202.351(b)(3)	Pay royalties on used, sold, or otherwise finally disposed of byproducts.	Hour burden covered under OMB Control Number 1010–0139.		

RESPONDENTS' ESTIMATED ANNUAL BURDEN HOURS—Continued

Citation 30 CFR	Reporting and recordkeeping requirement	Hour burden	Average number annual responses	Annual burden hours
1202.353(a), (b), (c), and (d)	Report on Form MMS–2014, royalties or direct use fee due for geothermal resources, byproduct quantity, and commercially demineralized water quantity.	Hour burden covered under OMB Control Number 1010–0139. *See* § 1210.52.		
1202.353(e)	Maintain quality measurements for audits	AUDIT PROCESS See Note.		
Part 1206—Product Valuation Subpart F—Federal Coal				
1206.253(c); 1206.254; and 1206.257(d)(1).	Maintain accurate records for Federal lease coal and all data relevant to the royalty value determination. Report the coal quantity information on appropriate forms under 30 CFR part 1210.	0.4166	816	340
1206.257(b)(1), (b)(3), (b)(4), and (d)(2).	Demonstrate and certify your arm's-length contract provisions including all consideration paid by buyer, directly or indirectly, for coal production. Provide written information of reported arm's-length coal sales value and quantity data.	AUDIT PROCESS See Note.		
1206.257(d)(3)	Submit a one-time notification when first reporting royalties on Form MMS–4430 and for a change in method.	2	1	2
1206.257(f)	Submit all available data relevant to the value determination proposal.	5	1	5
1206.257(i)	Write and sign contract revisions or amendments by all parties to an arm's-length contract, and retroactively apply revisions or amendments to royalty value for a period not to exceed two years.	2	1	2
1206.259(a)(1) and (a)(3)	Demonstrate that your contract is arm's-length. Provide written information justifying the lessee's washing costs.	AUDIT PROCESS *See* Note.		
1206.259(a)(1)	Report actual washing allowance on Form MMS–4430 for arm's-length sales.	0.34	12	4
1206.259(b)(1)	Report actual washing allowance on Form MMS–4430 for non-arm's-length or no contract sales.	0.75	48	36
1206.259(b)(2)(iv)	Report washing allowance on Form MMS–4430 after lessee elects either method for a wash plant.	1	1	1
1206.259(b)(2)(iv)(A)	Report washing allowance on Form MMS–4430 for depreciation—use either straight-line, or a unit of production method.	1	1	1
1206.259(c)(1)(ii) and (c)(2)(iii)	Submit arm's-length and non-arm's-length washing contracts and related documents to ONRR.	AUDIT PROCESS *See* Note.		
1206.262(a)(1)	Report transportation allowance on Form MMS–4430.	0.33	240	80
1206.262(a)(1) and (a)(3)	Demonstrate that your contract is arm's-length. Provide written information justifying your transportation costs when ONRR determines the costs are unreasonable.	AUDIT PROCESS *See* Note.		
1206.262(b)(1)	Report actual transportation allowance on Form MMS–4430 for non-arm's-length or no contract sales.	0.75	24	18
1206.262(b)(2)(iv)	Report transportation allowance on Form MMS–4430 after lessee elects either method for a transportation system.	1	1	1

RESPONDENTS' ESTIMATED ANNUAL BURDEN HOURS—Continued

Citation 30 CFR	Reporting and recordkeeping requirement	Hour burden	Average number annual responses	Annual burden hours
1206.262(b)(2)(iv)(A)	Report transportation allowance on Form MMS–4430 for depreciation—use either straight-line, or a unit of production method.	1	1	1
1206.262(b)(3)	Apply to ONRR for exception from the requirement of computing actual costs.	1	1	1
1206.262(c)(1)(ii) and (c)(2)(iii)	Submit all arm's-length transportation contracts, production agreements, operating agreements, and related documents to ONRR.	AUDIT PROCESS *See* Note.		
1206.264	Propose the value of coal for royalty purposes to ONRR for an ad valorem Federal coal lease.	1	1	1
1206.265	Notify ONRR if, prior to use, sale, or other disposition, you enhanced the value of coal.	1	1	1
Subpart H—Geothermal Resources				
1206.352(b)(1)(ii)	Determine the royalty on produced geothermal resources, used in your power plant for generation and sale of electricity, for Class I leases, as approved by ONRR.	Hour burden covered under OMB Control Number 1010–0139.		
1206.353(c)(2)(i)(A), (d)(9), and (e)(4)	Include a return on capital you invested when the purchase of real estate for transmission facilities is necessary. Allowable operating and maintenance expenses include other directly allocable and attributable operating and maintenance expenses that you can document.	AUDIT PROCESS *See* Note.		
1206.353(g)	Request change to other depreciation alternative method with ONRR approval.	1	1	1
1206.353(h)(1) and (m)(2)	Use a straight-line depreciation method, but not below salvage value, for equipment. Amend your prior estimated Form MMS–2014 reports to reflect actual transmission cost deductions, and pay any additional royalties due plus interest.	Hour burden covered under OMB Control Number 1010–0139.		
1206.353(n)	Submit all arm's-length transmission contracts, production and operating agreements and related documents, and other data for calculating the deduction.	AUDIT PROCESS *See* Note.		
1206.354(b)(1)(ii)	Redetermine your generating cost rate annually and request ONRR approval to use a different deduction period.	1	1	1
1206.354(c)(2)(i)(A), (d)(9), and (e)(4)	Include a return on capital you invested when the purchase of real estate for a power plant site is necessary. Allowable operating and maintenance expenses include other directly allocable and attributable operating and maintenance expenses that you can document.	AUDIT PROCESS *See* Note.		
1206.354(g)	Request change to other depreciation alternative method with ONRR approval.	1	1	1
1206.354(h) and (m)(2)	Use a straight-line depreciation method, but not below the salvage value, for equipment. Amend your prior estimated Form MMS–2014 reports to reflect actual generating cost deductions and pay any additional royalties due plus interest.	Hour burden covered under OMB Control Number 1010–0139.		

RESPONDENTS' ESTIMATED ANNUAL BURDEN HOURS—Continued

Citation 30 CFR	Reporting and recordkeeping requirement	Hour burden	Average number annual responses	Annual burden hours
1206.354(n)	Submit all arm's-length power plant contracts, production and operating agreements and related documents, and other data for calculating the deduction.	AUDIT PROCESS *See* Note.		
1206.356(a)(1) and (a)(2)	Determine the royalty on produced significant geothermal resource quantities, for Class I leases, with the weighted average of the arm's-length gross proceeds used to operate the same direct-use facility; For Class I leases, the efficiency factor of the alternative energy source will be 0.7 for coal and 0.8 for oil, natural gas, and other fuels derived from oil and natural gas, or an efficiency factor proposed by the lessee and approved by ONRR.	Hour burden covered under OMB Control Number 1010–0139.		
1206.356(a)(3)	For Class I leases, a royalty determined by any other reasonable method approved by ONRR.	1	1	1
1206.356(b)(3)	Provide ONRR data showing the geothermal production amount, in pounds or gallons of geothermal fluid, to input into the fee schedule for Class III leases.	Hour burden covered under OMB Control Number 1010–0139.		
1206.356(c)	The ONRR will determine fees on a case-by-case basis for geothermal resources other than hot water.	1	1	1
1206.357(b)(3); and 1206.358(d)	Determine the royalty due on byproducts by any other reasonable valuation method approved by ONRR. Use a discrete field on Form MMS–2014 to notify ONRR of a transportation allowance.	Hour burden covered under OMB Control Number 1010–0139.		
1206.358(d)(2) and (e); 1206.359(a)(1), (a)(2), (c)(2)(i)(A), (d)(9), and (e)(4).	Submit arm's-length transportation contracts for reviews and audits, if ONRR requires. Pay any additional royalties due plus interest, if you have improperly determined a byproduct transportation allowance. Provide written information justifying your transportation costs if ONRR requires you to determine the byproduct transportation allowance. Include a return on capital if the purchase was necessary. Allowable operating and maintenance expenses include any other directly allocable and attributable operating and maintenance expenses that you can document.	AUDIT PROCESS *See* Note.		
1206.359(g)	The lessee may not later elect to change to the other alternative without ONRR approval to compute costs associated with capital investment.	1	1	1
1206.359(h)(1) and (l)(2)	You must use a straight-line depreciation method based on the life of either equipment, or geothermal project. You must amend your prior Form MMS–2014 reports to reflect actual byproduct transportation cost deductions and pay any additional royalties due plus interest.	Hour burden covered under OMB Control Number 1010–0139.		
1206.360(a)(1), (a)(2), and (b); 1206.361(a)(1).	Retain all data relevant to the royalty value, or fee you paid. Show how you calculated then submit all data to ONRR upon request. The ONRR may review and audit your data and will direct you to use a different measure, if royalty value, gross proceeds, or fee is inconsistent with subpart.	AUDIT PROCESS *See* Note.		

RESPONDENTS' ESTIMATED ANNUAL BURDEN HOURS—Continued

Citation 30 CFR	Reporting and recordkeeping requirement	Hour burden	Average number annual responses	Annual burden hours
1206.361(a)(2)	Pay either royalties or fees due plus interest if ONRR directs you to use a different royalty value, measure of gross proceeds, or fee.	Hour burden covered under OMB Control Number 1010–0139.		
1206.361(b), (c), and (d)	The ONRR may require you to: increase the gross proceeds to reflect any additional consideration; use another valuation method; provide written information justifying your gross proceeds; demonstrate that your contract is arm's length; and certify that the provisions in your sales contract include all of the consideration the buyer paid you.	AUDIT PROCESS *See* Note.		
1206.361(f)(2)	Write and sign contract revisions or amendments by all parties to the contract.	1	1	1
1206.364(a)(1)	Request a value determination from ONRR in writing.	3	1	3
1206.364(c)(2)	Make any adjustments in royalty payments, if you owe additional royalties, and pay the royalties owed plus interest after the Assistant Secretary issues a determination.	Hour burden covered under OMB Control Number 1010–0139.		
1206.364(d)(2)	You may appeal an order requiring you to pay royalty under the determination.	Hour burden covered under OMB Control Number 1010–0122		
1206.366	State, tribal, or local government lessee must pay a nominal fee, if uses a geothermal resource.	Hour burden covered under OMB Control Number 1010–0139.		
Subpart J—Indian Coal				
1206.456(b)(1), (b)(3), and (b)(4)	Demonstrate that your contract is arm's-length. Provide written information justifying the reported coal value. And certify that your arm's-length contract provisions include all direct or indirect consideration paid by buyer for the coal production.	AUDIT PROCESS *See* Note.		
1206.456(d)(1); 1206.452(c); 1206.453	Retain all data relevant to the determination of royalty value to which individual Indian lease coal should be allocated. Report coal quantity information on Form MMS–4430, Solid Minerals Production and Royalty Report, as required under 30 CFR part 1210.	0.42	48	20
1206.456(d)(2)	An Indian lessee will make available arm's-length sales and sales quantity data for like-quality coal sold, purchased, or otherwise obtained from the area when requested by an authorized ONRR or Indian representative, or the Inspector General of the Department of the Interior or other persons authorized to receive such information.	AUDIT PROCESS *See* Note.		
1206.456(d)(3)	Notify ONRR by letter identifying the valuation method used and procedure followed. This is a one-time notification due no later than the month the lessee first report royalties on the Form MMS–4430.	1	1	1
1206.456(f)	Propose a value determination method to ONRR; submit all available data relevant to method; and use that method until ONRR decides.	1	1	1
1206.456(i)	Write and sign contract revisions or amendments by all parties to an arm's-length contract.	1	1	1

RESPONDENTS' ESTIMATED ANNUAL BURDEN HOURS—Continued

Citation 30 CFR	Reporting and recordkeeping requirement	Hour burden	Average number annual responses	Annual burden hours
1206.458(a)(1), (b)(1), (c)(1)(i), (c)(1)(iii), (c)(2)(i), and (c)(2)(iii).	Deduct the reasonable actual coal washing allowance costs incurred under an arm's-length contract, and allowance based upon their reasonable actual costs under a non-arm's-length or no contract, after submitting a completed page one of Form MMS–4292, Coal Washing Allowance Report, containing the actual costs for the previous reporting period, within 3 months after the end of the calendar year after the initial and for succeeding reporting periods, and report deduction on Form MMS–4430 for an arm's-length, or a non-arm's-length, or no contract.	2	1	2
1206.458(a)(3)	Provide written information justifying your washing costs when ONRR determines your washing value unreasonable.	AUDIT PROCESS *See* Note.		
1206.458(b)(2)(iv)	The lessee may not later elect to change to the other alternative without ONRR approval.	1	1	1
1206.458(b)(2)(iv)(A)	Elect either a straight-line depreciation method based on the life of equipment or reserves, or a unit of production method.	1	1	1
1206.458(c)(1)(iv) and (c)(2)(vi)	Submit arm's-length washing contracts and all related data used on Form MMS–4292.	AUDIT PROCESS *See* Note.		
1206.461(a)(1), (b)(1), (c)(1)(i), (c)(1)(iii), (c)(2)(i), and (c)(2)(iii).	Submit a completed page one of Form MMS–4293, Coal Transportation Allowance Report, of reasonable, actual transportation allowance costs incurred by the lessee for transporting the coal under an ARM'S-LENGTH CONTRACT, in which you may claim a transportation allowance retroactively for a period of not more than 3 months prior to the first day of the month that you filed the form with ONRR, unless ONRR approves a longer period upon a showing of good cause by the lessee. Submit also a completed Form MMS–4293 based upon the lessee's reasonable actual costs under a NON-ARM'S-LENGTH OR NO CONTRACT. (Emphasis added.).	2	1	2
1206.461(a)(3)	Provide written information justifying your transportation costs when ONRR determines your transportation value unreasonable.	AUDIT PROCESS *See* Note.		
1206.461(b)(2)(iv)	Submit completed Form MMS–4293 after a lessee has elected to use either method for a transportation system.	1	1	1
1206.461(b)(2)(iv)(A)	Submit completed Form MMS–4293 to compute depreciation for election to use either a straight-line depreciation, or unit-of-production method.	1	1	1
1206.461(b)(3)	Submit completed Form MMS–4293 for exception from the requirement of computing actual costs.	1	1	1
1206.461(c)(1)(iv) and (c)(2)(vi)	Submit arm's-length transportation contracts, production and operating agreements, and related documents used on Form MMS–4293.	AUDIT PROCESS *See* Note.		
1206.463	Propose the value of coal for royalty purposes to ONRR for an ad valorem Federal coal lease.	1	1	1
1206.464	Notify ONRR if, prior to use, sale, or other disposition, you enhance the value of coal.	1	1	1

RESPONDENTS' ESTIMATED ANNUAL BURDEN HOURS—Continued

Citation 30 CFR	Reporting and recordkeeping requirement	Hour burden	Average number annual responses	Annual burden hours
Part 1210—Forms and Reports Subpart E—Solid Minerals, General				
1210.201(a)(1); 1206.259 (c)(1)(i), (c)(2), (e)(2); 1206.262 (c)(1), (c)(2)(i), (e)(2); 1206.458 (c)(4), (e)(2); 1206.461 (c)(4), (e)(2).	Submit a completed Form MMS–4430. Report washing and transportation allowances as a separate line on Form MMS–4430 for arm's-length, non-arm's-length, or no contract sales, unless ONRR approves a different reporting procedure. Submit also a corrected Form MMS–4430 to reflect actual costs, together with any payment, in accordance with instructions provided by ONRR.	0.75	1,668	1,251
1210.202(a)(1) and (c)(1)	Submit sales summaries via electronic mail where possible for all coal and other solid minerals produced from Federal and Indian leases and for any remote storage site.	0.50	1,140	570
1210.203(a)	Submit sales contracts, agreements, and contract amendments for sale of all coal and other solid minerals produced from Federal and Indian leases with ad valorem royalty terms.	1	30	30
1210.204(a)(1)	Submit facility data if you operate a wash plant, refining, ore concentration, or other processing facility for any coal, sodium, potassium, metals, or other solid minerals produced from Federal or Indian leases with ad valorem royalty terms.	0.25	360	90
1210.205(a) and (b)	Submit detailed statements, documents, or other evidence necessary to verify compliance, as requested.	AUDIT PROCESS *See* Note.		
Subpart H—Geothermal Resources				
1210.351	Maintain geothermal records on microfilm, microfiche, or other recorded media.	Hour burden covered under OMB Control Number 1010–0139.		
1210.352	Submit additional geothermal information on special forms or reports.	1	1	1
1210.353	Submit completed Form MMS–2014 monthly once sales or utilization of geothermal production occur.	Hour burden covered under OMB Control Number 1010–0139.		
Part 1212—Records and Forms Maintenance Subpart E—Solid Minerals—General				
1212.200(a)	Maintain all records pertaining to Federal and Indian solid minerals leases for 6 years after records are generated unless the record holder is notified, in writing.	0.25	4,064	1,016
Subpart H—Geothermal Resources				
1212.351(a) and (b)	Retain accurate and complete records necessary to demonstrate that payments of royalties, rentals, and other amounts due under Federal geothermal leases are in compliance with laws, lease terms, regulations, and orders. Maintain all records pertaining to Federal geothermal leases for 6 years after the records are generated unless the recordholder is notified in writing.	Hour burden covered under OMB Control Numbers 1010–0139 (for Forms MMS–2014 and MMS–4054).		

RESPONDENTS' ESTIMATED ANNUAL BURDEN HOURS—Continued

Citation 30 CFR	Reporting and recordkeeping requirement	Hour burden	Average number annual responses	Annual burden hours
Part 1217—Audits and Inspections Subpart E—Coal				
1217.200	Furnish, free of charge, duplicate copies of audit reports that express opinions on such compliance with Federal lease terms relating to Federal royalties as directed by the Director for the Office of Natural Resources Revenue.	AUDIT PROCESS *See* Note.		
Subpart F—Other Solid Minerals				
1217.250	Furnish, free of charge, duplicate copies of annual or other audits of your books.	AUDIT PROCESS *See* Note.		
Subpart G—Geothermal Resources				
1217.300	The Secretary, or his/her authorized representative, will initiate and conduct audits or reviews that relate to compliance with applicable regulations.	AUDIT PROCESS *See* Note.		
PART 1218—COLLECTION OF MONIES AND PROVISION FOR GEOTHERMAL CREDITS AND INCENTIVES Subpart E—Solid Minerals—General				
1218.201(b); 1206.457(b); 1206.460(d)	You must tender all payments under § 1218.51 except for Form MMS–4430 payments, include both your customer identification and your customer document identification numbers on your payment document, and you shall be liable for any additional royalties, plus interest, if improperly determined a washing or transportation allowance.	0.0055	1,368	8
1218.203(a) and (b)	Recoup an overpayment on Indian mineral leases through a recoupment on Form MMS–4430 against the current month's royalties and submit the tribe's written permission to ONRR.	1	1	1
Subpart F—Geothermal Resources				
1218.300; 1218.301; 1218.304; 1218.305(a).	Submit all rental and deferred bonus payments when due and pay in value all royalties due determined by ONRR. The payor shall tender all payments. Pay the direct use fees in addition to the annual rental due. Pay advanced royalties, under 43 CFR 3212.15(a)(1) to retain your lease, that equal to the average monthly royalty you paid under 30 CFR part 1206, subpart H.	Hour burden covered under OMB Control Number 1010–0139.		
1218.306(a)(2)	You may receive a credit against royalties if ONRR approves in advance your contract.	4	1	4
1218.306(b)	Pay in money any royalty amount that is not offset by the credit allowed under this section.	Hour burden covered under OMB Control Number 1010–0139.		
Total Burden			**9,851**	**3,509**

Note: AUDIT PROCESS—The Office of Regulatory Affairs determined that the audit process is exempt from the Paperwork Reduction Act of 1995 because ONRR staff asks non-standard questions to resolve exceptions.

Estimated Annual Reporting and Recordkeeping "Non-hour" Cost Burden: We have identified no "non-hour" cost burden associated with the collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501 *et seq.*) provides that 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.

Comments: Section 3506(c)(2)(A) of the PRA requires each agency to "* * * provide 60-day notice in the **Federal Register** * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *." Agencies must specifically solicit comments to: (a) Evaluate whether the

proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

To comply with the public consultation process, we published a notice in the **Federal Register** on April 12, 2010 (75 FR 18536), announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day comment period. We received no comments in response to the notice.

If you wish to comment in response to this notice, you may send your comments to the offices listed under the **ADDRESSES** section of this notice. The OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days. Therefore, to ensure maximum consideration, OMB should receive public comments by December 17, 2010.

Public Comment Policy: We post all comments, including names and addresses of respondents, at *http://www.regulations.gov.* Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised 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 from public view your personal identifying information, we cannot guarantee that we will be able to do so.

Information Collection Clearance Officer: Arlene Bajusz 703–787–1025.

Dated: October 22, 2010.

Gregory J. Gould,

Director, Office of Natural Resources Revenue.

[FR Doc. 2010–28891 Filed 11–16–10; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029–0024

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request renewed approval for the collection of information for 30 CFR 732—Procedures and Criteria for Approval or Disapproval of State Program Submissions.

DATES: Comments on the proposed information collection must be received by January 18, 2011, to be assured of consideration.

ADDRESSES: Mail comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 210–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection requests contact John Trelease at (202) 208–2783, or via e-mail at *jtrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [*see* 5 CFR 1320.8(d)]. OSM will be requesting that the Office of Management and Budget extend its approval for the collection of information for 30 CFR 732.

OSM has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden or respondents. OSM will request a 3-year term of approval for these information collection activities.

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 number for Part 732 is 1029–0024, and may be found in OSM's regulations at 30 CFR 732.10.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submissions of the information collection requests to OMB.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

This notice provides the public with 60 days in which to comment on the following information collection activity:

Title: 30 CFR 732—Procedures and Criteria for Approval or Disapproval of State Program Submissions.

OMB Control Number: 1029–0024.

Summary: Part 732 establishes the procedures and criteria for approval and disapproval of State program submissions. The information submitted is used to evaluate whether State regulatory authorities are meeting the provisions of their approved programs.

Bureau Form Number: None.

Frequency of Collection: Once and annually.

Description of Respondents: 24 State and Tribal regulatory authorities.

Total Annual Responses: 24.

Total Annual Burden Hours: 1,610.

Dated: November 9, 2010.

Stephen M. Sheffield,

Acting Chief, Division of Regulatory Support.

[FR Doc. 2010–28801 Filed 11–16–10; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAD06000–L14300000–ET0000; CACA 43949]

Notice of Proposed Withdrawal, Transfer of Jurisdiction, and Notice of Public Meeting; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction.

SUMMARY: The Bureau of Land Management published in the **Federal Register** of December 31, 2003, a notice which contained an erroneous legal description.

DATES: Effective on November 17, 2010.

FOR FURTHER INFORMATION CONTACT: Liz Easley, 916–978–4673.

SUPPLEMENTARY INFORMATION: In notice document 03–32225, on page 75628 in

the issue of Wednesday, December 31, 2003, make the following correction:

On page 75628 in the second column, contained in the legal description for T. 17 S., R. 5 E., "Sec. 25, W½" is corrected to read "Sec. 25, E½".

Dated: November 10, 2010.

Karla D. Norris,

Associate Deputy State Director, Natural Resources (CA–930).

[FR Doc. 2010–28932 Filed 11–16–10; 8:45 am]

BILLING CODE 4310–40–P

INTERNATIONAL TRADE COMMISSION

Notice of Appointment of Individuals to Serve as Members of Performance Review Board

AGENCY: United States International Trade Commission.

ACTION: Appointment of individuals to serve as members of performance review board.

DATES: *Effective:* November 9, 2010.

FOR FURTHER INFORMATION CONTACT: Cynthia Roscoe, Director of Human Resources, U.S. International Trade Commission (202) 205–2651.

SUPPLEMENTARY INFORMATION: The Chairman of the U.S. International Trade Commission has appointed the following individuals to serve on the Commission's Performance Review Board (PRB):

Chair of the PRB: Vice Chairman Irving A. Williamson
Vice-Chair of the PRB: Commissioner Daniel R. Pearson
Member: David Beck
Member: Catherine DeFilippo
Member: Robert B. Koopman
Member: Karen Laney
Member: Lynn I. Levine
Member: James M. Lyons
Member: Stephen A. McLaughlin
Member: Lyn M. Schlitt
Member: Andrew Martin

This notice is published in the **Federal Register** pursuant to the requirement of 5 U.S.C. 4314(c)(4). Hearing-impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on (202) 205–1810.

By order of the Chairman.

Issued: November 10, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–28887 Filed 11–16–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–739]

In the Matter of Certain Ground Fault Circuit Interrupters and Products Containing Same; Notice of Commission Determination Not To Review an Initial Determination Granting a Motion To Amend the Complaint and Notice of 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 an initial determination ("ID") (Order No. 4) issued by the presiding administrative law judge ("ALJ") granting a motion filed by complainant Leviton Manufacturing Co. ("Leviton") for leave to amend its complaint and the notice of investigation.

FOR FURTHER INFORMATION CONTACT: Paul M. Bartkowski, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–5432. 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 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.* 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 September 9, 2010, based on a complaint filed by Leviton Manufacturing Co. ("Leviton") of Melville, NY. The complaint alleges 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, and the sale within the United States after importation of certain ground fault circuit interrupters and products containing the same. The Commission's notice of investigation named numerous respondents.

The presiding administrative law judge issued the subject ID on October 25, 2010, granting Leviton's motion to substitute Safety Plus, Inc. for respondent Safety Plus Products, Inc. No party filed a petition for review of the ID. 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 Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: November 12, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–28988 Filed 11–16–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–470–471 and 731–TA–1169–1170 (Final)]

Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses From China and Indonesia

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to sections 705(b) and 735(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) and (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is threatened with material injury [2] [3] by reason of imports of certain coated paper suitable for high-quality print graphics using sheet-fed presses ("certain coated paper") from China and Indonesia, provided for in subheadings 4810.14.11, 4810.14.19, 4810.14.20, 4810.14.50, 4810.14.60, 4810.14.70, 4810.19.11, 4810.19.19, 4810.19.20, 4810.22.10, 4810.22.50, 4810.22.60, 4810.22.70, 4810.29.10, 4810.29.50, 4810.29.60, 4810.29.70, 4810.32, 4810.39, and 4810.92, of the Harmonized Tariff Schedule of the United States, that the U.S. Department of Commerce has determined are

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Commissioner Charlotte R. Lane determines that the domestic certain coated paper industry is materially injured by reason of imports of the subject merchandise from China and Indonesia.

[3] Chairman Deanna Tanner Okun, Commissioner Daniel R. Pearson, Commissioner Shara L. Aranoff, Commissioner Irving A. Williamson, and Commissioner Dean A. Pinkert determine that they would not have found material injury but for the suspension of liquidation.

subsidized by the Governments of China and Indonesia and sold in the United States at less than fair value ("LTFV").

Background

The Commission instituted these investigations effective September 23, 2009, following receipt of a petition filed with the Commission and Commerce by Appleton Coated, LLC, Kimberly, WI; NewPage Corp., Miamisburg, OH; Sappi Fine Paper North America, Boston, MA; and the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW"). The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of certain coated paper from China and Indonesia were subsidized by the Governments of China and Indonesia within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and dumped within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on May 25, 2010 (75 FR 29364). The hearing was held in Washington, DC, on September 16, 2010, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on November 10, 2010. The views of the Commission are contained in USITC Publication 4192 (November 2010), entitled *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia: Investigation Nos. 701–TA–470–471 and 731–TA–1169–1170 (Final).*

By order of the Commission.

Issued: November 10, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–28863 Filed 11–16–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–720]

In the Matter of Certain Biometric Scanning Devices, Components Thereof, Associated Software, and Products Containing The Same; Notice of Commission Determination Not To Review an Initial Determination Granting Complainant's Motion To Amend the Complaint; Amendment of Notice of 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 an initial determination ("ID") (Order No. 12) of the presiding administrative law judge ("ALJ") granting complainant's motion to amend the complaint. The Commission has also amended the notice of investigation.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3152. Copies of the ID and all other nonconfidential 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. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. 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.*

SUPPLEMENTARY INFORMATION: On June 17, 2010, the Commission instituted an investigation under section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, based on a complaint filed by Cross Match Technologies, Inc. of Palm Beach Gardens, Florida ("Cross Match") alleging a violation of section 337 in the importation, sale for importation, and sale within the United States after importation of certain biometric scanning devices, components thereof, associated software, and products containing the same by reason of infringement of certain claims of U.S. Patent Nos. 5,900,993; 6,483,932; 7,203,344 ("the '344 patent"); and 7,277,562 ("the '562 patent"). 75 FR. 34482 (Jun. 17, 2010). Complainant Cross Match Technologies, Inc. of Palm Beach Gardens, Florida ("Cross Match") named Suprema, Inc. of Gyeonggi-Do, Korea and Mentalix, Inc. of Plano, Texas as respondents.

On September 27, 2010, complainant Cross Match moved to amend the complaint to add allegations of infringement by respondents of claims 5, 6, 12, and 30 of the '562 patent and claims 7, 15, 19, and 45 of the '344 patent.

On October 14, 2010, the ALJ issued Order No. 12 granting complainant's motion. No party petitioned for review of the subject ID. The Commission has determined not to review the ID. The Commission has similarly amended the notice of investigation.

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 section 210.42(h) of the Commission's Rules of Practice and Procedure (19 CFR 210.42(h)).

By order of the Commission.

Issued: November 10, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–28987 Filed 11–16–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

National Institute of Justice

[OMB Number 1121–0234]

Agency Information Collection Activities Proposed Collection; Comment Requested

ACTION: 60-Day Notice of Information Collection Under Review: Extension of a Currently Approved Collection Requirements Data Collection Application for the Juvenile Accountability Incentive Block Grants Program.

The Department of Justice, Office of Justice Programs 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. Comments are encouraged and will be accepted for "sixty days" until January 18, 2011. This

process is conducted in accordance with 5 CFR1320.10.

If you have 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 Tom Murphy, Office of Justice Programs, The Office of Juvenile Justice and Delinquency Prevention, (202) 353–8734.

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

Type of Information Collection:

(1) Extension of a Currently Approved Collection.

(2) *Title of the Forms/Collection:* Requirements Data Collection Application for the Juvenile Accountability Incentive Block Grants Program.

(3) The agency form number, if any, and the applicable component of the Department sponsoring the collection:

(4) Affected public who will be asked or required to respond are: Prosecutors, Law Enforcement Officials, and Forensic Laboratory personnel from agencies within the jurisdiction represented by the grantees.

The National Institute of Justice uses this information to assess the impacts and cost-effectiveness of the Forensic Casework DNA Backlog Programs over time and to diagnose performance problems in current casework programs. This evaluation will help decision makers be better informed to not only diagnose program performance problems, but also to better understand whether the benefits of DNA collection and testing is in fact an effective public safety and crime control practice.

(1) An estimate of the total number of respondents and the amount of time needed for an average respondent to respond is broken down as follows:

Law Enforcement—200 respondents, average burden time 120 minutes—400 hours total.

Prosecutors—200 respondents, average burden time 90 minutes—300 hours total.

Lab personnel—135 respondents, average burden time 120 minutes—270 hours total.

(2) An estimate of the total public burden (in hours) associated with the collection:

The estimated total public burden associated with this collection is 970 hours.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Planning and Policy Staff, Justice Management Division, 145 N Street, NE., Suite 2E–502, Washington, DC 20530.

Dated: November 10, 2010.

Lynn Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–28888 Filed 11–16–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[Docket No. ATF 42N]

Commerce in Explosives; List of Explosive Materials (2010R–27T)

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice.

ACTION: Notice of list of explosive materials.

SUMMARY: Pursuant to 18 U.S.C. 841(d) and 27 CFR 555.23, the Department must publish and revise at least annually in the **Federal Register** a list of explosives determined to be within the coverage of 18 U.S.C. 841 *et seq.* The list covers not only explosives, but also blasting agents and detonators, all of which are defined as explosive materials in 18 U.S.C. 841(c). This notice publishes the 2010 List of Explosive Materials.

DATES: The list becomes effective upon publication of this notice on November 17, 2010.

FOR FURTHER INFORMATION CONTACT: William J. Miller, Chief; Explosives Industry Programs Branch; Firearms and Explosives Industry Division; Bureau of Alcohol, Tobacco, Firearms and Explosives; United States Department of Justice; 99 New York Avenue, NE., Washington, DC 20226 (202–648–7120).

SUPPLEMENTARY INFORMATION: The list is intended to include any and all mixtures containing any of the materials on the list. Materials constituting blasting agents are marked by an asterisk. While the list is comprehensive, it is not all-inclusive. The fact that an explosive material is not on the list does not mean that it is not within the coverage of the law if it otherwise meets the statutory definitions in 18 U.S.C. 841. Explosive materials are listed alphabetically by their common names followed, where applicable, by chemical names and synonyms in brackets.

The Department has not added any new terms to the list of explosive materials or removed or revised any listing since its last publication.

This list supersedes the List of Explosive Materials dated January 8, 2010 (Docket No. ATF 34N, 75 FR 1085).

Notice of List of Explosive Materials

Pursuant to 18 U.S.C. 841(d) and 27 CFR 555.23, I hereby designate the following as explosive materials covered under 18 U.S.C. 841(c):

A

Acetylides of heavy metals.
Aluminum containing polymeric propellant.
Aluminum ophorite explosive.
Amatex.
Amatol.
Ammonal.
Ammonium nitrate explosive mixtures (cap sensitive).
* Ammonium nitrate explosive mixtures (non-cap sensitive).
Ammonium perchlorate having particle size less than 15 microns.
Ammonium perchlorate explosive mixtures (excluding ammonium perchlorate composite propellant (APCP)).
Ammonium picrate [picrate of ammonia, Explosive D].
Ammonium salt lattice with isomorphously substituted inorganic salts.
* ANFO [ammonium nitrate-fuel oil].
Aromatic nitro-compound explosive mixtures.
Azide explosives.

B

Baranol.

Baratol.
BEAF [1, 2-bis (2, 2-difluoro-2-nitroacetoxyethane)].
Black powder.
Black powder based explosive mixtures.
*Blasting agents, nitro-carbo-nitrates, including non-cap sensitive slurry and water gel explosives.
Blasting caps.
Blasting gelatin.
Blasting powder.
BTNEC [bis (trinitroethyl) carbonate].
BTNEN [bis (trinitroethyl) nitramine].
BTTN [1,2,4 butanetriol trinitrate].
Bulk salutes.
Butyl tetryl.

C

Calcium nitrate explosive mixture.
Cellulose hexanitrate explosive mixture.
Chlorate explosive mixtures.
Composition A and variations.
Composition B and variations.
Composition C and variations.
Copper acetylide.
Cyanuric triazide.
Cyclonite [RDX].
Cyclotetramethylenetetranitramine [HMX].
Cyclotol.
Cyclotrimethylenetrinitramine [RDX].

D

DATB [diaminotrinitrobenzene].
DDNP [diazodinitrophenol].
DEGDN [diethyleneglycol dinitrate].
Detonating cord.
Detonators.
Dimethylol dimethyl methane dinitrate composition.
Dinitroethyleneurea.
Dinitroglycerine [glycerol dinitrate].
Dinitrophenol.
Dinitrophenolates.
Dinitrophenyl hydrazine.
Dinitroresorcinol.
Dinitrotoluene-sodium nitrate explosive mixtures.
DIPAM [dipicramide; diaminohexanitrobiphenyl].
Dipicryl sulfone.
Dipicrylamine.
Display fireworks.
DNPA [2,2-dinitropropyl acrylate].
DNPD [dinitropentano nitrile].
Dynamite.

E

EDDN [ethylene diamine dinitrate].
EDNA [ethylenedinitramine].
Ednatol.
EDNP [ethyl 4,4-dinitropentanoate].
EGDN [ethylene glycol dinitrate].
Erythritol tetranitrate explosives.
Esters of nitro-substituted alcohols.
Ethyl-tetryl.
Explosive conitrates.
Explosive gelatins.
Explosive liquids.
Explosive mixtures containing oxygen-releasing inorganic salts and hydrocarbons.
Explosive mixtures containing oxygen-releasing inorganic salts and nitro bodies.
Explosive mixtures containing oxygen-releasing inorganic salts and water insoluble fuels.
Explosive mixtures containing oxygen-releasing inorganic salts and water soluble fuels.
Explosive mixtures containing sensitized nitromethane.
Explosive mixtures containing tetranitromethane (nitroform).
Explosive nitro compounds of aromatic hydrocarbons.
Explosive organic nitrate mixtures.
Explosive powders.

F

Flash powder.
Fulminate of mercury.
Fulminate of silver.
Fulminating gold.
Fulminating mercury.
Fulminating platinum.
Fulminating silver.

G

Gelatinized nitrocellulose.
Gem-dinitro aliphatic explosive mixtures.
Guanyl nitrosamino guanyl tetrazene.
Guanyl nitrosamino guanylidene hydrazine.
Guncotton.

H

Heavy metal azides.
Hexanite.
Hexanitrodiphenylamine.
Hexanitrostilbene.
Hexogen [RDX].
Hexogene or octogene and a nitrated N-methylaniline.
Hexolites.
HMTD [hexamethylenetriperoxidediamine].
HMX [cyclo-1,3,5,7-tetramethylene 2,4,6,8-tetranitramine; Octogen].
Hydrazinium nitrate/hydrazine/aluminum explosive system.
Hydrazoic acid.

I

Igniter cord.
Igniters.
Initiating tube systems.

K

KDNBF [potassium dinitrobenzo-furoxane].

L

Lead azide.
Lead mannite.
Lead mononitroresorcinate.
Lead picrate.
Lead salts, explosive.
Lead styphnate [styphnate of lead, lead trinitroresorcinate].
Liquid nitrated polyol and trimethylolethane.
Liquid oxygen explosives.

M

Magnesium ophorite explosives.
Mannitol hexanitrate.
MDNP [methyl 4,4-dinitropentanoate].
MEAN [monoethanolamine nitrate].
Mercuric fulminate.
Mercury oxalate.
Mercury tartrate.
Metriol trinitrate.
Minol-2 [40% TNT, 40% ammonium nitrate, 20% aluminum].
MMAN [monomethylamine nitrate]; methylamine nitrate.
Mononitrotoluene-nitroglycerin mixture.
Monopropellants.

N

NIBTN [nitroisobutametriol trinitrate].
Nitrate explosive mixtures.
Nitrate sensitized with gelled nitroparaffin.
Nitrated carbohydrate explosive.
Nitrated glucoside explosive.
Nitrated polyhydric alcohol explosives.
Nitric acid and a nitro aromatic compound explosive.
Nitric acid and carboxylic fuel explosive.
Nitric acid explosive mixtures.
Nitro aromatic explosive mixtures.
Nitro compounds of furane explosive mixtures.
Nitrocellulose explosive.
Nitroderivative of urea explosive mixture.
Nitrogelatin explosive.
Nitrogen trichloride.
Nitrogen tri-iodide.
Nitroglycerine [NG, RNG, nitro, glyceryl trinitrate, trinitroglycerine].
Nitroglycide.
Nitroglycol [ethylene glycol dinitrate, EGDN].
Nitroguanidine explosives.
Nitronium perchlorate propellant mixtures.
Nitroparaffins Explosive Grade and ammonium nitrate mixtures.
Nitrostarch.
Nitro-substituted carboxylic acids.
Nitrourea.

O

Octogen [HMX].
Octol [75 percent HMX, 25 percent TNT].
Organic amine nitrates.
Organic nitramines.

P

PBX [plastic bonded explosives].

Pellet powder.
Penthrinite composition.
Pentolite.
Perchlorate explosive mixtures.
Peroxide based explosive mixtures.
PETN [nitropentaerythrite, pentaerythrite tetranitrate, pentaerythritol tetranitrate].
Picramic acid and its salts.
Picramide.
Picrate explosives.
Picrate of potassium explosive mixtures.
Picratol.
Picric acid (manufactured as an explosive).
Picryl chloride.
Picryl fluoride.
PLX [95% nitromethane, 5% ethylenediamine].
Polynitro aliphatic compounds.
Polyolpolynitrate-nitrocellulose explosive gels.
Potassium chlorate and lead sulfocyanate explosive.
Potassium nitrate explosive mixtures.
Potassium nitroaminotetrazole.
Pyrotechnic compositions.
PYX [2,6-bis(picrylamino)] 3,5-dinitropyridine.

R

RDX [cyclonite, hexogen, T4, cyclo-1,3,5,-trimethylene-2,4,6,-trinitramine; hexahydro-1,3,5-trinitro-S-triazine].

S

Safety fuse.
Salts of organic amino sulfonic acid explosive mixture.
Salutes (bulk).
Silver acetylide.
Silver azide.
Silver fulminate.
Silver oxalate explosive mixtures.
Silver styphnate.
Silver tartrate explosive mixtures.
Silver tetrazene.
Slurried explosive mixtures of water, inorganic oxidizing salt, gelling agent, fuel, and sensitizer (cap sensitive).
Smokeless powder.
Sodatol.
Sodium amatol.
Sodium azide explosive mixture.
Sodium dinitro-ortho-cresolate.
Sodium nitrate explosive mixtures.
Sodium nitrate-potassium nitrate explosive mixture.
Sodium picramate.
Special fireworks.
Squibs.
Styphnic acid explosives.

T

Tacot [tetranitro-2,3,5,6-dibenzo-1,3a,4,6a tetrazapentalene].
TATB [triaminotrinitrobenzene].
TATP [triacetonetriperoxide].
TEGDN [triethylene glycol dinitrate].
Tetranitrocarbazole.
Tetrazene [tetracene, tetrazine, 1(5-tetrazolyl)-4-guanyl tetrazene hydrate].
Tetrazole explosives.
Tetryl [2,4,6 tetranitro-N-methylaniline].
Tetrytol.
Thickened inorganic oxidizer salt slurried explosive mixture.
TMETN [trimethylolethane trinitrate].
TNEF [trinitroethyl formal].
TNEOC [trinitroethylorthocarbonate].
TNEOF [trinitroethylorthoformate].
TNT [trinitrotoluene, trotyl, trilite, triton].
Torpex.
Tridite.
Trimethylol ethyl methane trinitrate composition.
Trimethylolthane trinitrate-nitrocellulose.
Trimonite.
Trinitroanisole.
Trinitrobenzene.
Trinitrobenzoic acid.
Trinitrocresol.
Trinitro-meta-cresol.
Trinitronaphthalene.
Trinitrophenetol.
Trinitrophloroglucinol.
Trinitroresorcinol.
Tritonal.

U

Urea nitrate.

W

Water-bearing explosives having salts of oxidizing acids and nitrogen bases, sulfates, or sulfamates (cap sensitive).
Water-in-oil emulsion explosive compositions.

X

Xanthamonas hydrophilic colloid explosive mixture.

Approved: November 5, 2010.

Kenneth E. Melson

Deputy Director.

[FR Doc. 2010–28874 Filed 11–16–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJJDP) Docket No. 1532]

Meeting of the Federal Advisory Committee on Juvenile Justice

AGENCY: Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, Justice.

ACTION: Notice of Meeting.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) announces the Fall meeting of the Federal Advisory Committee on Juvenile Justice (FACJJ), to be held in Washington, DC December 2 and 3, 2010.

DATES AND LOCATIONS: The meeting will take place in the 3rd floor main conference room of the Office of Justice Programs, 810 Seventh Street, NW., Washington, DC 20531. The meeting dates and times are as follows: Thursday, December 2, 2010 8 a.m. to 5:15 p.m. and Friday, December 3, 2010 8 a.m. to 9:30 a.m.

FOR FURTHER INFORMATION CONTACT: Robin Delany-Shabazz, Designated Federal Official, OJJDP, *Robin.Delany-Shabazz@usdoj.gov,* or 202–307–9963. [**Note:** This is not a toll-free number.]

SUPPLEMENTARY INFORMATION: The Federal Advisory Committee on Juvenile Justice (FACJJ), established pursuant to Section 3(2)A of the Federal Advisory Committee Act (5 U.S.C. App. 2), will meet to carry out its advisory functions under Section 223(f)(2)(C–E) of the Juvenile Justice and Delinquency Prevention Act of 2002. The FACJJ is composed of one representative from each state and territory. FACJJ duties include: reviewing Federal policies regarding juvenile justice and delinquency prevention; advising the OJJDP Administrator with respect to particular functions and aspects of OJJDP; and advising the President and Congress with regard to State perspectives on the operation of OJJDP and Federal legislation pertaining to juvenile justice and delinquency prevention. More information may be found at *http://www.facjj.org.*

Meeting Agenda

Thursday, December 2, 2010—8 a.m. to 5:15 p.m.

The agenda will include: (a) An update from the Administrator; (b) presentation from and discussion with staff of the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking on the guidelines to implement the Sexual Offender Registration and Notification Act as it pertains to youth sex offenders; (c) discussion of plans for a restructured FACJJ and options for selecting regional SAG representation; (d) discussion of compliance-related issues; (e) review of planned presentation to the Coordinating Council; and (f) roundtable discussions focused on sharing innovative practices and SAG-to-SAG consultation on local matters with fellow members.

Friday, December 3, 2010—8 a.m. to 9:30 a.m.

The agenda will include (a) a recap of the prior day's discussions; (b) any remaining business; (c) presentation of member certificates; and (d) adjournment of the meeting.

For security purposes, members of the FACJJ and of the public who wish to attend, must pre-register online at *http://www.facjj.org* by Monday, November 29, 2010. Should problems arise with web registration, call Daryel Dunston at 240–221–4343. [**Note:** These are not toll-free telephone numbers.] Photo identification will be required. Additional identification documents may be required. Space is limited.

Written Comments

Interested parties may submit written comments by Monday, November 29, 2010, to Robin Delany-Shabazz, Designated Federal Official for the Federal Advisory Committee on Juvenile Justice, OJJDP, at *Robin.Delany-Shabazz@usdoj.gov.* Alternatively, fax your comments to 202–307–2819 and call Joyce Mosso Stokes at 202–305–4445 to ensure its receipt. [**Note:** These are not toll-free numbers.] No oral presentations will be permitted. Written questions and comments from attendees may be invited.

Dated: November 10, 2010.

Marilyn Roberts,

Deputy Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 2010–28959 Filed 11–16–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of October 25, 2010 through October 29, 2010.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of

the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1- year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
73,272	Schott North America, Inc., Advanced Optics, Leased Workers Adecco USA, Manpower and ERG Staffing Service.	Duryea, PA	January 11, 2009.
73,574	Kohler Company, Generator, Brass, Engine, and Pottery Divisions; Leased Workers Manpower.	Kohler, WI	February 13, 2010.
73,574A	Sauk Technologies, Generator Division	Saukville, WI	February 13, 2010.
73,754	Andersen Distribution, Inc., Andersen Corp., Andersen Logistics, Leased Workers Ameritemps, Prologisticxs.	Birch Run, MI	March 19, 2009.
73,895	Idaho Timber of Kansas, LLC, Leucadia National Corporation Including Express Employment Professionals.	Halstead, KS	April 8, 2009.
74,111	Alstom Transportation, Inc., Transport, 1 Shamut Drive	Hornell, NY	May 14, 2009.
74,222	Midwest Stamping, LLC, Subdivision of The Brown Co. America, LLC, Leased Workers from Roper Staffing.	Sumter, SC	June 1, 2009.
74,328	Como Textile	Paterson, NJ	June 23, 2009.
74,637	Parker Hosiery Company, Inc	Old Fort, NC	September 12, 2010.
74,690	Mount Vernon Mills, Inc	Mauldin, SC	September 29, 2009.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
73,523	Vertis Communications, 34–Minneapolis Premedia	Minneapolis, MN	January 31, 2009.
73,797	Outotec (USA), Inc	Centennial, CO	March 26, 2009.
73,804	International Business Machines (IBM), Database Administrators, Working on the AT&T Contract.	San Ramon, CA	March 24, 2009.
73,911	Electronic Data Systems/HP Enterprise Services,, Working On-Site at Phoenix Life and Annuity Company.	Hartford, CT	April 14, 2009.
73,988	International Business Machines (IBM), Integrated Tech. Services, Info Mgt, Off-Site Teleworkers.	Armonk, NY	March 1, 2009.
74,240	Baker Hughes Oilfield Operations, Leased Workers from Kelly Services.	Broussard, LA	June 8, 2009.
74,316	International Business Machines (IBM), Global Tech Serv., Server Systems, IC1, Storage, Backup.	Lexington, KY	June 10, 2009.
74,316A	International Business Machines (IBM), Global Tech Serv., Server Systems, IC1, Storage, Backup.	Cambridge, MA	June 10, 2009.
74,316B	International Business Machines (IBM), Global Tech Serv., Server Systems, IC1, Storage, Backup.	Lansing and Midland, MI	June 10, 2009.
74,316C	International Business Machines (IBM), Global Tech Serv., Server Systems, IC1, Storage, Backup.	Hazelwood, MO	June 10, 2009.
74,316D	International Business Machines (IBM), Global Tech Serv., Server Systems, IC1, Storage, Backup.	Piscataway, NJ	June 10, 2009.
74,316E	International Business Machines (IBM), Global Tech Serv., Server Systems, IC1, Storage, Backup.	Research Triangle Park, NC	June 10, 2009.
74,316F	International Business Machines (IBM), Global Tech Serv., Server Systems, IC1, Storage, Backup.	Columbia, SC	June 10, 2009.
74,507	Hanesbrands, Inc., Weeks Operations Div., Leased Workers Security Forces, Debbie Staffing, etc.	Winston-Salem, NC	September 14, 2009.
74,613	Aastra USA, Inc., Aastra Technologeis Ltd., Leased Workers from John Galt Staffing.	Billerica, MA	September 3, 2009.
74,644	DORMA Door Controls, Inc., Dorma Vertrieb International GMBH	Reamstown, PA	September 16, 2009.
74,663	Stanley Black and Decker, Formerly Stanley Bostich, CDIY Division.	Jackson, TN	September 24, 2009.
74,686	Diebold Software Solutions, A Division of Diebold, Inc., Leased Workers from Technisource, Inc.	Raleigh, NC	September 24, 2009.
74,712	Xerox Corporation, Human Resource Services Center, On-Site Leased Workers from Manpower, etc.	Lewisville, TX	October 13, 2009.

TA–W No.	Subject firm	Location	Impact date
74,717	Borders, Inc., Customer Contact Center	LaVergne, TN	October 6, 2009.
74,726	Weldco-Beales Manufacturing	Tacoma, WA	October 12, 2009.
74,740	Bekaert Corporation, Bekaert Progressive Composites, Leased Wkrs Select Staffing and Caltek.	Vista, CA	October 14, 2009.
74,743	Sensata Technologies, Inc., Accounts Payable, Accounts Receivable, Leased Workers Olsten Staffing Services.	Attleboro, MA	October 15, 2009.
73,622	Kilburn's Plating Company, Inc., Leased Workers from Business Personnel Solutions.	Adamsville, TN	February 25, 2009.
74,111A	Alstom Transportation, Inc., Transport, 1 Transit Drive	Hornell, NY	May 14, 2009.

The following certifications have been issued. The requirements of Section 222(c) (downstream producer for a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criterion under paragraph (a)(1), or (b)(1), or (c)(1) (employment decline or threat of separation) of section 222 has not been met.

TA–W No.	Subject firm	Location	Impact date
74,245	Omya, Inc	Cincinnati, OH	
74,364	International Business Machines (IBM), Sales and Distribution Unit, Global Sales, Off-Site Teleworker.	Centerport, NY	
74,554	International Business Machines (IBM), Software Group Business Unit, Optim Data Studio.	San Francisco, CA	
74,758	IMI Cornelius, Inc., Beverage Dispense	Mason City, IA	

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
74,152	NSC Smelter, LLC, D/B/AColumbia Gorge Aluminum, Golden Northwest Aluminum Holding Co.	Goldendale, WA	
74,152A	Northwest Aluminum Company, Golden Northwest Aluminum Holding Co.	The Dalles, OR	

The investigation revealed that the criteria under paragraphs (a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
73,752	Industrial Metal Products Corporation	Lansing, MI	
73,876	Lorik Tool, Inc	Lawrenceburg, TN	
74,120	Graphics Microsystems, Inc	Rockwall, TX	
74,590	Quad/Graphics, Corinth Division, Leased Workers of Wise Staffing Services.	Corinth, MS	
74,660	Mid-Continent Distributors, Inc., Glazer's Wholesale Drug Company, Inc.	Springfield, MO	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
74,047	Stever-Locke Industries	Honeoye Falls, NY	
74,655	Temp Depot, Leased Worker for Fortune Fashion	Vernon, CA	

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W No.	Subject firm	Location	Impact date
73,902	Premier Manufacturing Support Services, Working On-Site at General Motors.	Lake Orion, MI	
74,667	International Business Machines Corporation (IBM), Global Technology Services Delivery Division; Off-Site Teleworkers.	Boulder, CO	

The following determinations terminating investigations were issued because the petitions are the subject of ongoing investigations under petitions filed earlier covering the same petitioners.

TA–W No.	Subject firm	Location	Impact date
74,508	Hanesbrands, Inc., Oak Summit Complex, Weeks Operations Division	Winston-Salem, NC	
74,512	Masco Retail Cabinet Group, LLC, Value Products Group Division	Seal Township, OH	
74,513	Masco Retail Cabinet Group, LLC, Value Products Group Division	Seaman, OH	

I hereby certify that the aforementioned determinations were issued during the period of October 25, 2010 through October 29, 2010. Copies of these determinations may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or *tofoiarequest@dol.gov.* These determinations also are available on the Department's Web site at *http://www.doleta.gov/tradeact* under the searchable listing of determinations.

Dated: November 5, 2010.

Michael W. Jaffe,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2010–28995 Filed 11–16–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than November 29, 2010.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than November 29, 2010.

Copies of these petitions may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail, to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or to *foiarequest@dol.gov.*

Signed at Washington, DC, this 4th of November 2010.

Michael Jaffe,

Certifying Officer, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 10/25/10 and 10/29/10]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
74770	21st Century Newspapers (Workers)	Pontiac, MI	10/25/10	10/20/10
74771	Psychonomic Society (Workers)	Austin, TX	10/25/10	10/21/10
74772	HEITEC Consulting (Workers)	Palm Desert, CA	10/25/10	10/11/10
74773	Welco LLC (Company)	Shelton, WA	10/25/10	10/12/10
74774	Charter Manufacturing Company, Inc. (State/One-Stop)	Milwaukee, WI	10/25/10	10/21/10
74775	Guardian Manufacturing, LLC (Union)	Willard, OH	10/25/10	10/21/10
74776	Wisconsin Drapery Supply, Inc. (Company)	Pewaukee, WI	10/25/10	10/22/10
74777	Fraser Timber Limited (Company)	Ashland, ME	10/25/10	10/22/10
74778	CEVA Logistics (Workers)	Houston, TX	10/25/10	10/21/10
74779	Exel-Owens Corning (Workers)	Heath, OH	10/27/10	10/12/10
74780	Harvard Folding Box Company (State/One-Stop)	Lynn, MA	10/27/10	10/20/10
74781	Ideal Box Company (State/One-Stop)	Lawrence, MA	10/27/10	10/20/10
74782	Assurant, Inc. (Workers)	Miami, FL	10/27/10	10/25/10
74783	Louisville Bedding Company (Workers)	Munfordville, KY	10/27/10	10/18/10
74784	Humana, Inc. (Workers)	Louisville, KY	10/27/10	10/22/10
74785	Southeast Missouri Hospital (Workers)	Cape Girardeau, MO	10/27/10	10/26/10

APPENDIX—Continued

[TAA petitions instituted between 10/25/10 and 10/29/10]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
74786	Alexvale Furniture Company (Company)	Hudson, NC	10/27/10	10/26/10
74787	Doner Advertising (State/One-Stop)	Southfield, MI	10/29/10	10/26/10
74788	JP Morgan Chase and Company (Workers)	Dallas, TX	10/29/10	10/21/10
74789	Convergys (Workers)	Orem, UT	10/29/10	08/27/10
74790	CTI and Associates, Inc. (Workers)	Wixom, MI	10/29/10	10/25/10
74791	Butternut One Limited (Company)	Beckley, WV	10/29/10	10/25/10
74792	Greenbrier Forest Products (Company)	Smoot, WV	10/29/10	10/25/10
74793	Apex Tool Group, LLC (Company)	Cullman, AL	10/29/10	10/27/10
74794	Xerox (Company)	Webster, NY	10/29/10	10/27/10
74795	Nevamar Company, LLC (State/One-Stop)	Tarboro, NC	10/29/10	10/27/10

[FR Doc. 2010–28994 Filed 11–16–10; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10–146)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, 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 proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358–1351, *Lori.Parker@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

To ensure accurate reporting of Government-owned, contractor-held property on the financial statements and to provide information necessary for effective property management, NASA obtains summary data annually from the official Government property records maintained by its contractors, on the NASA Form 1018, as of the end of the fiscal year.

II. Method of Collection

Contractors are only required to transcribe summary information from the records they maintain on the NASA Form 1018. Beginning with reporting for FY 1999, NASA implemented the NF 1018 Electronic Submission System (NESS), a Web-based system, for NF 1018 reporting.

III. Data

Title: NASA Property in the Custody of Contractors.

OMB Number: 2700–0017.

Type of Review: Revision of currently approved collection.

Affected Public: Business or other for-profit and not-for-profit institutions.

Estimated Number of Respondents: 1092.

Estimated Time per Response: Variable.

Estimated Total Annual Burden Hours: 9,805 hours.

Estimated Total Annual Cost: $0.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2010–28870 Filed 11–16–10; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10–147)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, 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 proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358–1351, *Lori.Parker@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The information submitted by recipients is to provide a tracking

mechanism for property on an annual basis, at the end of the grant, or on the occurrence of certain event. This information is used by NASA to effectively maintain an appropriate internal control system for equipment and property provided or acquired under grants and copperative agreements with institutions of higher education and other non-profit organizations, and to comply with statutory requirements.

II. Method of Collection

NASA is participating in Federal efforts to extend the use of information technology to more Government processes via Internet.

III. Data

Title: NASA Inventory Report: Property Management & Control, Grants.

OMB Number: 2700–0047.

Type of Review: Revision of currently approved collection.

Affected Public: Not-for-profit institutions and State, Local or Tribal Government.

Estimated Number of Respondents: 141.

Estimated Time per Response: 12.28 hours.

Estimated Total Annual Burden Hours: 1,732 hours.

Estimated Total Annual Cost: $0.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2010–28871 Filed 11–16–10; 8:45 am]

BILLING CODE P

NATIONAL LABOR RELATIONS BOARD

Appointments of Individuals To Serve as Members of Performance Review Boards

5 USC 4314(c)(4) requires that the appointments of individuals to serve as members of performance review boards be published in the **Federal Register**. Therefore, in compliance with this requirement, notice is hereby given that the individuals whose names and position titles appear below have been appointed to serve as members of performance review boards in the National Labor Relations Board for the rating year beginning October 1, 2009 and ending September 30, 2010.

Name and Title

William B. Cowen—Solicitor.
Kathleen A. Nixon—Deputy Chief Counsel to Board Member.
Gary W. Shinners—Deputy Executive Secretary.
Arlene Fine Klepper—Executive Assistant to the Chairman.
Barry J. Kearney—Associate General Counsel, Division of Advice.
Richard A. Siegel—Associate General Counsel, Division of Operations Management.
Gloria Joseph—Director of Administration, Division of Administration.
John H. Ferguson—Associate General Counsel, Division of Enforcement Litigation.

Washington, DC.

By Direction of the Board

Dated: November 12, 2010.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2010–28943 Filed 11–16–10; 8:45 am]

BILLING CODE P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request.

AGENCY: National Science Foundation.

ACTION: Submission for OMB Review; Comment Request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 75 FR 48369, and no significant comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.* Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725—17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

SUPPLEMENTARY INFORMATION: *Title of Collection:* A Social Network Analysis of the National Science Foundation's Research and Evaluation on Education in Science and Engineering (REESE) and Discovery Research K–12 (DR K–12) Programs.

OMB Approval Number: 3145–NEW.

Type of Request: Intent to seek approval to establish an information collection for three years.

Proposed Project: This study will assess the linkages, impacts, influences of NSF's REESE and DRK–12 programs. The primary objectives of the study are to conduct a social network analysis of the DR–K12 and REESE programs to understand the impact and influence of each program and whether there are links between the two programs and to other NSF programs. The findings will provide valuable information concerning the impacts and influences of the grant and grantees and whether the REESE and DRK–12 programs influence broader American society.

Frequency of Response: Once.

Affected Public: None.

Type of Respondents: REESE and DRK–12 grantees. There are no Capital Costs to report.

Estimated Number of Respondents: 1325

Estimated Number of Responses per Respondent: 1

Average Burden Hours per Response: .33

Estimated Total Annual Burden Hours Requested: 437.25 and the annualized cost to respondents is estimated at $14,534.19. Table l and Table 2, respectively, present data concerning the burden hours and cost burdens for this data collection.

TABLE 1—ANNUALIZED ESTIMATE OF HOUR BURDEN

Type of respondents	Number of respondents	Frequency of response	Average time for response (hr)	Total hour burden *
Grantees	1,325	1	.33	$437.25
Total	1,325	1	.33	437.25

** Total Burden = N Respondents * Response Frequency * (minutes to complete/60)*

TABLE 2—ANNUALIZED COST TO RESPONDENTS

Type of respondents	Number of respondents	Response frequency	Approx. hourly wage rate	Total respondent cost **
Grantee	1,325	1	$33.24	$14,534.19
Total	1,325	1	33.24	14,534.19

*** Total Respondent Cost = Total Hour Burden * Hourly Wage Rate.*

Dated: November 12, 2010.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2010–28958 Filed 11–16–10; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

National Science Board; Sunshine Act Meetings; Notice

The National Science Board's Ad Hoc Committee on Honorary Awards, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a teleconference for the transaction of National Science Board business and other matters specified, as follows:

DATE AND TIME: November 23, 2010, 3:30 p.m.–4:30 p.m.

SUBJECT MATTER: Review and discussion of selection criteria, discussion of candidates for the 2010 Vannevar Bush Award, and discussion of candidates for the 2010 National Science Board Public Service Awards.

STATUS: Closed.

LOCATION: This meeting will be held at National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230.

UPDATES & POINT OF CONTACT: Please refer to the National Science Board Web site *http://www.nsf.gov/nsb* for additional information and schedule updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/*. Point of contact for this meeting is Jennie L. Moehlmann, National Science Board Office, 4201Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7000.

Daniel A. Lauretano,

Counsel to the National Science Board.

[FR Doc. 2010–29092 Filed 11–15–10; 4:15 pm]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 70–7003, 70–7004; NRC–2010–0355]

USEC, Inc.; American Centrifuge Lead Cascade Facility; American Centrifuge Plant; Notice of Receipt of a License Transfer Application and Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Conforming Amendment and Opportunity To Provide Comments and Request a Hearing

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of request for written consent to transfer control of materials license and opportunity to request a hearing and provide written comments.

DATES: A request for a hearing must be filed by December 7, 2010.

ADDRESSES: You may submit comments by any one of the following methods. Please include Docket ID **NRC–2010–0355** in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site Regulations.gov. Because your comments will not be edited, to remove

any identifying or contact information the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID **NRC–2010–0355.** Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

Mail comments to: Cindy Bladey, Chief, Rules, Announcements and Directives Branch (RADB), Division of Administrative Services, Office of Administration, *Mail Stop:* TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax to RADB at 301–492–3446.

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine, and have copied for a fee, publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The USEC Inc.'s Request for Written NRC Consent to Transfer Control of Material Licenses SNM–7003 and SNM–2011, for the American Centrifuge Lead Cascade Facility and the American Centrifuge Plant, respectively, is available electronically under ADAMS Accession Numbers ML102650185 and ML102660382.

Federal Rulemaking Web site: Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: **NRC–2010–0355.**

FOR FURTHER INFORMATION CONTACT: Osiris Siurano, Project Manager, Uranium Enrichment Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, Nuclear Regulatory Commission, Washington, DC 20555. *Telephone:* 301–492–3117; *Fax number:* 301–492–3359; *e-mail: Osiris.Siurano-Perez@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (the Commission or NRC) is considering an application for approval of a transfer of control regarding Special Nuclear Material License Nos. SNM–7003 and SNM–2011. Material Licenses were issued on February 24, 2004, and April 13, 2007, respectively, to USEC Inc., (the Licensee), for its American Centrifuge Lead Cascade Facility (LCF) and American Centrifuge Plant (ACP), both located at the Portsmouth Gaseous Diffusion Plant site in Piketon, Ohio. The licenses authorize the Licensee to:

(1) Possess and use source and special nuclear material at the LCF; and
(2) Construct and operate a gas centrifuge uranium enrichment facility, the ACP.

The application now being considered is dated September 10, 2010. The Licensee proposes to modify its existing corporate structure and has established a subsidiary limited liability corporation, American Centrifuge Holdings, LLC. American Centrifuge Holdings, LLC consists of four additional subsidiaries: American Centrifuge Manufacturing, LLC, American Centrifuge Technology, LLC, American Centrifuge Operating, LLC (the proposed licensee), and American Centrifuge Enrichment, LLC. The Licensee requests NRC consent to transfer control of License Nos. SNM–7003 and SNM–2011 from USEC Inc. to the subsidiary limited liability company, American Centrifuge Operating, LLC. Upon NRC's approval of the transfer, USEC will make conforming changes to the License Applications, and Security Program documents to reflect American Centrifuge Operating, LLC as the licensee. No physical or operational changes to the LCF or the ACP are being proposed. An NRC administrative review, documented in an e-mail sent to the Licensee on October 5, 2010 (ADAMS accession number ML102861865), found the application acceptable to begin a more detailed technical review. If the application is granted, the license would be amended for administrative purposes to reflect the transfer, by replacing references in the license to USEC Inc. with references to American Centrifuge Operating, LLC.

Pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR), Section 2.1301, the Commission is noticing in the **Federal Register** the receipt of the application for approval of the transfer of SNM–7003 and SNM–2001 because they involve major fuel cycle facilities licensed under 10 CFR Part 70. The NRC is considering the issuance of an order in accordance with 10 CFR 70.36, authorizing the transfer of control from USEC Inc. to American Centrifuge Operating, LLC. Pursuant to 10 CFR 70.36, no license granted under 10 CFR Part 70, and no right thereunder to possess or utilize special nuclear material granted by any license issued pursuant to the regulations in this Part, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of Atomic Energy Act (AEA), and gives its consent in writing. The Commission will approve an application for the transfer of a license, if the Commission determines that the proposed restructuring and reorganization will not affect the qualifications of the Licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

If the September 10, 2010, request is granted, the licenses would be amended to reflect USEC Inc.'s reorganized ownership, and the new Licensee's name. Before such a license amendment is issued, the NRC will have made the findings required by the AEA and NRC's regulations. These findings will be documented in a Safety Evaluation Report. An Environmental Assessment (EA) will not be performed because, pursuant to 10 CFR 51.22(c)(21), approvals of direct or indirect transfers of any license issued by NRC and any associated amendments of license required to reflect the approval of a direct or indirect transfer of an NRC license are categorically excluded from the requirement to perform an EA.

II. Opportunity To Request a Hearing

Within 20 days from the date of publication of this notice, any person(s) whose interest may be affected, and who

desires to participate as a party, must file a request for a hearing.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at 866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention:* Rulemakings and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

The formal requirements for documents contained in 10 CFR 2.304(c)–(e) must be met. If the NRC grants an electronic document exemption in accordance with 10 CFR 2.302(g)(3), then the requirements for paper documents, set forth in 10 CFR 2.304(b) must be met. In accordance with 10 CFR 2.309(b), a request for a hearing must be filed by December 7, 2010.

In addition to meeting other applicable requirements of 10 CFR 2.309, a request for a hearing filed by a person other than an applicant must state:

1. The name, address, and telephone number of the requester;

2. The nature of the requester's right under the AEA to be made a party to the proceeding;

3. The nature and extent of the requester's property, financial or other interest in the proceeding;

4. The possible effect of any decision or order that may be issued in the proceeding on the requester's interest; and

5. The circumstances establishing that the request for a hearing is timely in accordance with 10 CFR 2.309(b).

In accordance with 10 CFR 2.309(f)(1), a request for hearing or petitions for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

1. Provide a specific statement of the issue of law or fact to be raised or controverted;

2. Provide a brief explanation of the basis for the contention;

3. Demonstrate that the issue raised in the contention is within the scope of the proceeding;

4. Demonstrate that the issue raised in the contention is material to the findings that the NRC must make to support the action that is involved in the proceeding;

5. Provide a concise statement of the alleged facts or expert opinions which support the requester's/petitioner's position on the issue and on which the requester/petitioner intends to rely to support its position on the issue; and

6. Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the requester/petitioner disputes and the supporting reasons for each dispute, or, if the requester/petitioner believes the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the requester's/petitioner's belief.

In addition, in accordance with 10 CFR 2.309(f)(2), contentions must be based on documents or other information filed by the applicant or otherwise available to the petitioner at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to the petitioner. On issues arising under the National Environmental Policy Act, the requester/petitioner shall file contentions based on the applicant's environmental report. The requester/petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft, or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer.

Each contention shall be given a separate numeric or alpha designation within one of the following groups:

1. Technical—primarily concerns issues relating to matters discussed or referenced in the Safety Evaluation Report for the proposed action.

2. Environmental—primarily concerns issues relating to matters discussed or referenced in the Environmental Report for the proposed action.

3. Emergency Planning—primarily concerns issues relating to matters discussed or referenced in the Emergency Plan as it relates to the proposed action.

4. Physical Security—primarily concerns issues relating to matters discussed or referenced in the Physical Security Plan as it relates to the proposed action.

5. Miscellaneous—does not fall into one of the categories outlined above.

If the requester/petitioner believes a contention raises issues that cannot be classified as primarily falling into one of these categories, the requester/petitioner must set forth the contention and supporting bases, in full, separately for each category into which the requester/petitioner asserts the contention belongs with a separate designation for that category.

Requesters/petitioners should, when possible, consult with each other in preparing contentions and combine similar subject matter concerns into a joint contention, for which one of the co-sponsoring requesters/petitioners is designated the lead representative. Further, in accordance with 10 CFR 2.309(f)(3), any requester/petitioner that wishes to adopt a contention proposed by another requester/petitioner must do so, in accordance with the E–Filing rule, within 10 days of the date the contention is filed, and designate a representative who shall have the authority to act for the requester/petitioner.

As indicated below, pursuant to 10 CFR 2.310(g), any hearing would be subject to the procedures set forth in 10 CFR Part 2, Subpart M.

III. Opportunity To Provide Written Comments

In accordance with 10 CFR 2.1305, as an alternative to requests for hearings and petitions to intervene, persons may submit written comments regarding this action. Written comments must be submitted no later than December 17, 2010. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted as described in the **ADDRESSES** section of this document. Comments received after 30 days will be considered if practicable to do so, but only those comments received on or before the due date can be assured consideration.

IV. Further Information

Documents related to this action, including the Application for the proposed license transfer (September 10, 2010) and supporting documentation, are available electronically through the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the publicly available documents related to this notice are:

The ADAMS accession numbers for the license transfer application are as follows: Incoming Request and Enclosure 1—ML102650185;

Enclosure 2—Security Related, Non-Publically Available;

Enclosure 3—ML102660382, and

Enclosure 4—Security Related, Non-Publically Available.

If you do not have access to ADAMS, or if there are problems accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, November 9, 2010.

For the Nuclear Regulatory Commission.

Brian W. Smith,

Chief, Uranium Enrichment Branch, Fuel Facility Licensing Directorate, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2010–28974 Filed 11–16–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards

In accordance with the purposes of Sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232b), the Advisory Committee on Reactor Safeguards (ACRS) will hold a meeting on December 2–4, 2010, 11545 Rockville Pike, Rockville, Maryland.

Thursday, December 2, 2010, Conference Room T2–B1, Two White Flint North, Rockville, Maryland

8:30 a.m.–8:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

8:35 a.m.–10 a.m.: Final Safety Evaluation Report Associated with the License Renewal Application for the Kewaunee Power Station (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff and Dominion Energy Kewaunee, Inc., regarding the final safety evaluation report associated with the License Renewal Application for the Kewaunee Power Station.

10:15 a.m.–12:15 p.m.: Draft Final Rule and Regulatory Guidance Regarding Enhancements to Emergency Preparedness Regulations (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding draft final rule, "Enhancements to Emergency Preparedness Regulations;" Regulatory Guide 1.219, "Guidance on Making Changes to Emergency Plans for Nuclear Power Reactors;" Interim Staff Guidance (ISG) NSIR/DPR–ISG–01,"Emergency Planning for Nuclear Power Plants;" and NUREG/CR–7002, "Criteria for Development of Evacuation Time Estimate Studies."

1:15 p.m.–4:15 p.m.: Final Safety Evaluation Report Associated with the Amendment to the AP1000 Design Control Document (Open/Closed)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff and Westinghouse regarding the final safety evaluation report associated with the amendment to the AP1000 Design Control Document. [**Note:** A portion of this session may be closed in order to discuss and protect information designated as proprietary by Westinghouse and its contractors pursuant to 5 U.S.C. 552b(c)(4).]

4:30 p.m.–7 p.m.: Preparation of ACRS Reports (Open)—The Committee will discuss proposed ACRS reports on matters discussed during this meeting.

Friday, December 3, 2010, Conference Room T2–B1, Two White Flint North, Rockville, Maryland

8:30 a.m.–8:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

8:35 a.m.–10 a.m.: Safety Culture Policy Statement (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding the draft final Commission's Safety Culture Policy Statement.

10:15 a.m.–12:15 p.m.: Staff Assessment of the RAMONA5–FA Code (Open/Closed)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff and AREVA, regarding the staff's assessment of the RAMONA5–FA code.

Note: A portion of this session may be closed in order to discuss and protect information designated as proprietary by AREVA pursuant to 5 U.S.C. 552b(c)(4)]

2 p.m.–3:30 p.m.: Future ACRS Activities/Report of the Planning and Procedures Subcommittee (Open/Closed)—The Committee will discuss the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the Full Committee during future ACRS Meetings, and matters related to the conduct of ACRS business, including anticipated workload and member assignments.

Note: A portion of this meeting may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

3:30 p.m.–3:45 p.m.: Reconciliation of ACRS Comments and Recommendations (Open)—The Committee will discuss the responses from the NRC Executive Director for Operations to comments and recommendations included in recent ACRS reports and letters.

4 p.m.–7 p.m.: Preparation of ACRS Reports (Open)—The Committee will continue its discussion of proposed ACRS reports.

Saturday, December 4, 2010, Conference Room T2–B1, Two White Flint North, Rockville, Maryland

8:30 a.m.–3 p.m.: Preparation of ACRS Reports (Open)—The Committee will continue its discussion of proposed ACRS reports.

3 p.m.–3:30 p.m.: Miscellaneous (Open)—The Committee will discuss matters related to the conduct of Committee activities and specific issues that were not completed during previous meetings.

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2010, (75 FR 65038–65039). In accordance with those procedures, oral or written views may be presented by members of the public, including representatives of the nuclear industry. Persons desiring to make oral statements should notify Ms. Ilka Berrios, Cognizant ACRS Staff (Telephone: 301–415–3179, E-mail: *Ilka.Berrios@nrc.gov*), five days before the meeting, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the Cognizant ACRS staff if such rescheduling would result in major inconvenience.

Thirty-five hard copies of each presentation or handout should be provided 30 minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the Cognizant ACRS Staff one day before meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the Cognizant ACRS Staff with a CD containing each presentation at least 30 minutes before the meeting.

In accordance with Subsection 10(d) Public Law 92–463, and 5 U.S.C. 552b(c), certain portions of this meeting may be closed, as specifically noted above. Use of still, motion picture, and television cameras during the meeting may be limited to selected portions of the meeting as determined by the Chairman. Electronic recordings will be permitted only during the open portions of the meeting.

ACRS meeting agenda, meeting transcripts, and letter reports are available through the NRC Public Document Room at

pdr.resource@nrc.gov, or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System (PARS) component of NRC's document system (ADAMS) which is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-ollections/ACRS/.*

Video teleconferencing service is available for observing open sessions of ACRS meetings. Those wishing to use this service for observing ACRS meetings should contact Mr. Theron Brown, ACRS Audio Visual Technician (301–415–8066), between 7:30 a.m. and 3:45 p.m. (ET), at least 10 days before the meeting to ensure the availability of this service.

Individuals or organizations requesting this service will be responsible for telephone line charges and for providing the equipment and facilities that they use to establish the video teleconferencing link. The availability of video teleconferencing services is not guaranteed.

Dated: November 10, 2010.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 2010–28961 Filed 11–16–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–266 and 50–301; NRC–2010–0350]

NextEra Energy Point Beach, LLC, Point Beach Nuclear Plant, Units 1 and 2; Notice of Consideration of Issuance of Amendment to Facility Operating License, and Opportunity for a Hearing and Order Imposing Procedures for Document Access to Sensitive Unclassified Non-Safeguards Information

AGENCY: Nuclear Regulatory Commission (NRC or the Commission).

ACTION: Notice of license amendment request, opportunity to request a hearing, and Commission order.

DATES: A request for a hearing must be filed by January 18, 2011. Any potential party as defined in Title 10 of the *Code of Federal Regulations* (CFR) 2.4 who believes access to Sensitive Unclassified Non-Safeguards Information and/or Safeguards Information is necessary to respond to this notice must request document access by November 29, 2010.

ADDRESSES: Please include Docket ID **NRC–2010–0350** in the subject line of your comments.

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine, and have copied for a fee, publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The application for amendment, dated April 7, 2009, contains proprietary information and, accordingly, those portions are being withheld from public disclosure. A redacted version of the application for amendment, dated April 7, 2009, is available electronically under ADAMS Accession No. ML091250564.

FOR FURTHER INFORMATION CONTACT: Terry A. Beltz, Senior Project Manager, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301–415–3049; fax number: 301–415–2102; e-mail: *Terry.Beltz@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering issuance of an amendment to Facility Operating License Nos. DPR–24 and DPR–27 issued to NextEra Energy Point Beach, LLC (the licensee) for operation of the Point Beach Nuclear Plant (PBNP), Units 1 and 2, located in Manitowac County, Wisconsin.

The proposed amendment would increase the licensed core power level for PBNP Units 1 and 2 from 1540 megawatts thermal (MWt) to 1800 MWt. The increase in core thermal power will be approximately 17 percent over the current licensed thermal power level and is categorized as an Extended Power Uprate (EPU). The proposed amendment would change the Renewed Facility Operating Licenses, the Technical Specifications (TSs) and licensing bases to support operation at the increased core thermal power level, including changes to the maximum licensed reactor core thermal power, reactor core safety limits, constant axial offset control operating strategy, reactor protection system and engineered safety feature actuation system, limited safety system setting values, and diesel generator (DG) start loss of voltage time delays. Additional TS changes include reactor coolant system flow rate, pressurizer operating level, pressurizer safety valve settings, accumulator and refueling water storage tank boron concentrations, main steam safety valve maximum allowable power level and lift settings, new main feedwater isolation valves, modifications to the auxiliary feedwater system, condensate storage tank level, and Core Operating Limits Report references.

A high energy line break (HELB) outside containment program has been reconstituted to ensure documentation demonstrates compliance with the plant's license basis. The review of the EPU license amendment request will include the HELB reconstitution to verify compliance with the licensing basis and acceptability for EPU conditions. The HELB evaluations have been re-evaluated at EPU conditions using the following: (1) Implementation of NRC Generic Letter 87–11, "Relaxation in Arbitrary Intermediate Pipe Rupture Requirements," dated June 19, 1987, and Branch Technical Position MEB 3–1, "Postulated Rupture Locations in Fluid System Piping Inside and Outside Containment," Revision 2, dated June 1987, (2) mass and energy released from a HELB, (3) compartment pressurization transient evaluation following a HELB event, (4) jet impingement from streams following a HELB event, and (5) operator response time evaluation.

II. Opportunity To Request a Hearing

Requirements for hearing requests and petitions for leave to intervene are found in 10 CFR 2.309, "Hearing requests, petitions to intervene, requirements for standing, and contentions." Interested persons should consult 10 CFR part 2, Section 2.309, which is available at the NRC's PDR located at O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852 (or call the PDR at 800–397–4209 or 301–415–4737). NRC regulations are also accessible electronically from the NRC's Electronic Reading Room on the NRC Web site at *http://www.nrc.gov.*

III. Petitions for Leave To Intervene

Any person whose interest may be affected by this proceeding and who wishes to participate as a party in the

proceeding must file a written petition for leave to intervene. As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the requestor/petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the requestor or petitioner and specifically explain the reasons why the intervention should be permitted with particular reference to the following factors: (1) The nature of the requestor's/petitioner's right under the Atomic Energy Act of 1954, as amended, to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the requestor/petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the requestor/petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings the NRC must make to support the granting of a license amendment in response to the application. The petition must include a concise statement of the alleged facts or expert opinions which support the position of the requestor/petitioner and on which the requestor/petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to specific portions of the application for amendment that the requestor/petitioner disputes and the supporting reasons for each dispute, or, if the requestor/petitioner believes that the application for amendment fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the requestor's/petitioner's belief. Each contention must be one which, if proven, would entitle the requestor/petitioner to relief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit a cross-examination plan for cross-examination of witnesses, consistent with NRC regulations, policies, and procedures. The Atomic Safety and Licensing Board (the Board) will set the time and place for any prehearing conferences and evidentiary hearings, and the appropriate notices will be provided.

Non-timely petitions for leave to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the Board or a presiding officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

A State, county, municipality, Federally-recognized Indian Tribe, or agencies thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(d)(2). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by January 18, 2011. The petition must be filed in accordance with the filing instructions in Section IV of this document, and should meet the requirements for petitions for leave to intervene set forth in this section, except that State and Federally-recognized Indian Tribes do not need to address the standing requirements in 10 CFR 2.309(d)(1) if the facility is located within its boundaries. The entities listed above could also seek to participate in a hearing as a nonparty pursuant to 10 CFR 2.315(c).

Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the Board. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission by January 18, 2011.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov*, or by telephone at 301–415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://*

www.nrc.gov/site-help/e-submittals/apply-certificates.html. System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by e-mail at *MSHD.Resource@nrc.gov*, or by a toll-free call at 866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from November 17, 2010. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Attorney for licensee: William Blair, Senior Attorney, NextEra Energy Point Beach, LLC, P.O. Box 14000, Juno Beach, FL 33408–0420.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request such access. A "potential party" is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov*, respectively.[1] The request must include the following information:

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's "E-Filing Rule," the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1);

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly-available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention;

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order [2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff either after a determination on standing and need for access, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

H. Review of Grants of Access. A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated at Rockville, Maryland, November 10, 2010.

For the Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

ATTACHMENT 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information in this Proceeding

Day	Event/Activity
0	Publication of **Federal Register** notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) All contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 requestor/petitioner reply).
20	Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows "need" for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of "need" for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

Day	Event/Activity
25	If NRC staff finds no "need" or no "likelihood" of standing, the deadline for requestor/petitioner to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and "need" for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2010–28963 Filed 11–16–10; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 15Ba2–6T; OMB Control No. 3235–0659; SEC File No. 270–618.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the existing collection of information provided for in the following rule: Rule 15Ba2–6T—Temporary Registration as a Municipal Advisor; Required Amendments; and Withdrawal from Temporary Registration (17 CFR 240.15Ba2–6T) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) ("Exchange Act"). The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Paragraph (a) of Rule 15Ba2–6T requires municipal advisors, as defined in Section 15B(e)(4) of the Exchange Act (15 U.S.C. 78*o*–4(e)(4)), to electronically file with the Commission on the Commission's Web site at the following link, *Municipal Advisor Registration*. The information set forth in Form MA–T (17 CFR 249.1300T) to temporarily register or withdraw from temporary registration.

Paragraph (b)(1) of Rule 15Ba2–6T requires municipal advisors to promptly amend their temporary registration whenever information concerning Items 1 (Identifying Information) or 3 (Disciplinary Information) of Form MA–T becomes inaccurate in anyway.

Paragraph (b)(2) of Rule 15Ba2–6T requires municipal advisors to promptly amend their temporary registration whenever they wish to withdraw from registration.

Paragraph (c) of Rule 15Ba2–6T provides that every initial registration, amendment to registration, or withdrawal from registration filed pursuant to this rule constitutes a "report" within the meaning of applicable provisions of the Exchange Act.

Paragraph (d) of Rule 15Ba2–6T provides that every Form MA–T, including every amendment to or withdrawal from registration, is considered filed with the Commission when the electronic form on the Commission's website is completed and the Commission has sent confirmation to the municipal advisor that the form was filed.

Paragraph (e) of Rule 15Ba2–6T provides that all temporary registrations of municipal advisors will expire on the earlier of: (1) The date that the registration is approved or disapproved by the Commission pursuant to a final rule adopted by the Commission establishing another manner of registration and prescribing a form for the registration; (2) the date on which the municipal advisor's temporary registration is rescinded by the Commission; or (3) December 31, 2011.

Paragraph (f) of Rule 15Ba2–6T provides that Rule 15Ba2–6T will expire on December 31, 2011.

The primary purpose of Rule 15Ba2–6T is to provide information about municipal advisors to investors and issuers, as well as the Commission pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Commission staff estimates that approximately 1,000 municipal advisors will file Form MA–T. Commission staff estimates that each of the approximately 1,000 municipal advisors will spend an average of 2.5 hours preparing each Form MA–T. Therefore, the estimated total reporting burden associated with completing Form MA–T is 2,500 hours. Additionally, Commission staff estimates that approximately 1,000 municipal advisors will amend their Form MA–T once during the period of September 1, 2010 through December 31, 2011 and that it will take approximately 30 minutes to amend their form, which means the total burden associated with amending Form MA–T is 500 hours. Therefore, the total annual burden associated with completing and amending Form MA–T is 3,000 hours.

The Commission believes that some municipal advisors will seek outside counsel to help them comply with the requirements of Rule 15Ba2–6T and Form MA–T, and assumes that each of the 1,000 municipal advisors will consult outside counsel for one hour for this purpose. The hourly rate for an attorney is $400, according to the Securities Industry and Financial Markets Association's publication titled

Management & Professional Earnings in the Securities Industry 2009, as modified by Commission staff to account for an 1,800 hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The Commission estimates the total cost for all 1,000 municipal advisors to hire outside counsel to review their compliance with the requirements of Rule 15Ba2–6T and Form MA–T to be approximately $400,000.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to: Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.*

November 12, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–28983 Filed 11–16–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act 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 an Open Meeting on November 19, 2010 at 10 a.m., in the Auditorium, Room L–002.

The subject matter of the Open Meeting will be:

1. The Commission will consider whether to propose new rules and rule amendments under the Investment Advisers Act of 1940 to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These rules and rule amendments are designed to give effect to provisions of Title IV of the Dodd-Frank Act that, among other things, increase the statutory threshold for registration by investment advisers with the Commission, require advisers to hedge funds and other private funds to register with the Commission, and address reporting by certain investment advisers that are exempt from registration.

2. The Commission will consider whether to propose rules that would implement new exemptions from the registration requirements of the Investment Advisers Act of 1940 for advisers to venture capital funds and advisers with less than $150 million in private fund assets under management in the United States. These exemptions were enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposed rules also would clarify the meaning of certain terms included in a new exemption for foreign private advisers.

3. The Commission will consider whether to propose new rules under Section 763(i) of the Dodd-Frank Wall Street Reform and Consumer Protection Act governing the security-based swap data repository registration process, the duties of such repositories, and the core principles applicable to such repositories.

4. The Commission will consider whether to propose Regulation SBSR under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act to provide for the reporting of security-based swap information to registered security-based swap data repositories or the Commission and the public dissemination of security-based swap transaction, volume, and pricing information.

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: November 12, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–29075 Filed 11–15–10; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63285; File No. SR–BX–2010–074]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Fees for the NASDAQ OMX BX Equities System

November 9, 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 October 27, 2010, NASDAQ OMX BX, Inc. ("BX") 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 BX. 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

BX proposes to modify pricing for BX members using the NASDAQ OMX BX Equities System. BX will implement the proposed change on November 1, 2010. The text of the proposed rule change is available at *http://nasdaqomxbx.cchwallstreet.com,* at BX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, BX 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. BX 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

BX is proposing to modify its fees for trades that execute at prices at or above $1.

BX has a pricing model under which members are charged for the execution

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

of quotes/orders posted on the BX book (*i.e.,* quotes/orders that provide liquidity), while providing a rebate to orders that access liquidity. Currently, the charge to provide liquidity is $0.0003 per share executed, while the rebate for accessing liquidity is $0.0001 per share executed. Effective November 1, 2010, BX will increase the rebate for accessing liquidity to $0.0002 per share executed. In addition, BX will introduce a tiered pricing structure for the fee to add liquidity, under which members adding a daily average of more than 50 million shares of liquidity during a month will be charged $0.00025 per share executed, while members adding a daily average of 50 million or fewer shares during the month will be charged $0.0004 per share executed. Thus, while the fee change will result in a small fee increase for members providing low volumes of liquidity on BX, it will reduce fees charged to members providing higher volumes of liquidity and members accessing liquidity. The fee changes are reflective of the ongoing intense level of competition for order flow in the cash equities markets.[3]

2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(4) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which BX operates or controls. The impact of the price changes upon the net fees paid by a particular market participant will depend upon a number of variables, including the relative availability of liquidity on BX and other venues, the prices of the market participant's quotes and orders relative to the national best bid and offer (*i.e.,* its propensity to add or remove liquidity), and the volume of liquidity provided by the member.

BX notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Accordingly, if particular market participants object to the proposed fee changes, they can avoid paying the fees by directing orders to other venues. BX believes that its fees continue to be reasonable and equitably allocated to members on the basis of whether they opt to direct orders to BX.

B. Self-Regulatory Organization's Statement on Burden on Competition

BX 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. Because the market for order execution and routing is extremely competitive, members may readily direct orders to BX's competitors if they object to the proposed rule change.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[6] 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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–2010–074 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2010–074. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2010–074 and should be submitted on or before December 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–28892 Filed 11–16–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63291; File No. SR–NYSEArca–2010–97]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Relating to Fees for NYSE Arca Depth-of-Book Data

November 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the

[3] *See, e.g.,* Securities Exchange Act Release No. 63053 (October 6, 2010), 75 FR 63237 (October 14, 2010) (SR–EDGA–2010–14); Securities Exchange Act Release No. 63054 (October 6, 2010), 75 FR 63227 (October 14, 2010) (SR–EDGX–2010–13); Securities Exchange Act Release No. 63149 (October 21, 2010), 75 FR 66180 (October 27, 2010) (SR–BYX–2010–004).

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(a)(ii).

[7] 17 CFR 200.30–3(a)(12).

"Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 1, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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, through its wholly owned subsidiary, NYSE Arca Equities, Inc. ("NYSE Arca Equities"), is filing a proposed rule change to authorize market data fees for the receipt and use of depth-of-book market data that the Exchange makes available. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and the Exchange's Web site at *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filings 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

[i.] The Services and Fees

A. Description

Through NYSE Arca Equities, the Exchange's equities trading facility, the Exchange makes ArcaBook SM, a compilation of all limit orders resident in the NYSE Arca limit order book, available on a real-time basis.[3] In addition, the Exchange makes available real-time information relating to transactions and limit orders in debt securities that are traded through the Exchange's facilities.

The Exchange makes ArcaBook and the bond trade and limit order information (collectively, "NYSE Arca Data") available to market data vendors, broker-dealers, private network providers and other entities by means of data feeds. By making the data it includes available, ArcaBook enhances market transparency, fosters competition among orders and markets, and enables buyers and sellers to obtain better prices.

B. Procedural Background

The fees for which the Exchange is filing this proposed rule change have a procedural history, including the following:

- On May 23, 2006, NYSE Arca submitted the 2006 Rule Change to establish fees for the receipt and use of ArcaBook data.
- On October 12, 2006, the Commission issued an order, by delegated authority, approving the 2006 Rule Change (the "Delegated Order").[4]
- On November 15, 2006, NetCoalition submitted a petition (the "Petition") requesting that the Commission review and set aside the Delegated Order.[5]
- On December 27, 2006, the Commission issued an order granting NetCoalition's request for the Commission to review the Delegated Order.[6]
- On June 4, 2008, the Commission published notice of a proposed order (the "Draft Order") approving the NYSE Arca proposed fees to give the public an additional opportunity to comment.[7]
- On December 8, 2008, the Commission set aside the Delegated Order and approved the 2006 Rule Change directly (the "Direct Order").[8]
- On or about January 1, 2009, the Exchange began charging the fees set forth in the 2006 Rule Change.
- On January 30, 2009, NetCoalition and SIFMA petitioned the United States Court of Appeals for the DC Circuit (the "DC Circuit") for review of the Direct Order.
- On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") was signed into law.
- On August 6, 2010, the DC Circuit issued a decision on the petitions for review (the "NetCoalition Decision").
- On September 17, 2010, the Exchange filed a petition for panel rehearing asking the DC Circuit to remand rather than vacate the Direct Order.
- On September 24, 2010, the DC Circuit ordered NetCoalition, SIFMA, and the Commission to respond to the Exchange's petition for panel rehearing.
- On October 12, 2010, NetCoalition, SIFMA, and the Commission filed responses to the Exchange's petition for panel rehearing.
- On October 25, 2010, the DC Circuit denied the petition for panel rehearing.

In this filing, the Exchange proposes to continue to assess the same fees that have been in effect since the Direct Order.

C. Fees

This filing will enable the Exchange to continue to assess the Market Data Fee Schedule set forth in Exhibit 5 hereto for the receipt and use of NYSE Arca Data. As the Market Data Fee Schedule details, this proposed rule change allows the Exchange to continue to assess access fees and professional and nonprofessional subscriber device fees. These are categories of fees that are consistent with the fees that the New York Stock Exchange ("NYSE") and the Nasdaq Stock Market ("Nasdaq"), and the Participants in the CTA, CQ, UTP and OPRA Plans, charge for the receipt and use of their market data. They are the same fees that NYSE Arca has charged since it received approval of those fees pursuant to the Direct Order.

1. Access Fees

The Exchange will continue to charge a monthly $750 fee for a data recipient to gain direct access to the datafeeds through which the Exchange makes NYSE Arca Data available. This fee entitles the datafeed recipient to gain access to NYSE Arca Data for a set of up to four "Logons." A "Logon" is activation of a means of direct access to any of the NYSE Arca datafeeds. For instance, if a datafeed recipient gains access to NYSE Arca Data one or more times during a month using an Exchange-provided and approved logon that provides access to the ArcaBook datafeed, that would constitute a "Logon." It would constitute a second "Logon" if, during that month, the datafeed recipient uses a different

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that it makes available to vendors the best bids and offers that are included in ArcaBook data no earlier than it makes those best bids and offers available to the processors under the CQ Plan and the "Reporting Plan for Nasdaq/National Market System Securities Traded on an Exchange on an Unlisted or Listed Basis" (the "UTP Plan").

[4] Securities Exchange Act Release No. 54597 (October 12, 2006) 71 FR 62029 (October 20, 2006).

[5] Petition for Commission Review submitted by Petitioner, dated November 14, 2006.

[6] Securities Exchange Act Release No. 55011 (December 27, 2006).

[7] Securities Exchange Act Release No. 57917 (June 4, 2008), 73 FR 32751 (June 10, 2008).

[8] Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9 2008).

logon name that allows access to the ArcaBook datafeed.

The Exchange will continue to charge a monthly $750 fee for a data recipient to gain indirect access to the datafeeds through which the Exchange makes NYSE Arca Data available for any number of Logons. "Indirect access" refers to access to a NYSE Arca datafeed indirectly through one or more intermediaries, rather than by means of a direct connection or linkage with the Exchange's facilities.

2. Device Fees

The Exchange will continue to charge device fees for professional and nonprofessional subscribers for the display of ArcaBook. In differentiating between professional and nonprofessional subscribers, the Exchange applies the same criteria for qualification as a nonprofessional subscriber as the CTA and CQ Plan Participants use, as more fully set forth in Exhibit 5.

a. For Professional Subscribers

For professional subscribers, the Exchange will continue to charge (i) a monthly fee of $15 per device for the receipt of ArcaBook data relating to Exchange-Traded Funds and those equity securities for which reporting is governed by the CTA Plan ("CTA Plan and ETF Securities") and (ii) a monthly fee of $15 per device for the receipt of ArcaBook data relating to those equity securities for which reporting is governed by the UTP Plan (excluding Exchange-Traded Funds; "UTP Plan Securities").

The combined monthly professional subscriber device fee of $30 (i.e., for receipt of NYSE ArcaBook data relating to CTA Plan and ETF Securities and to UTP Plan Securities) compares favorably with fees charged by other exchanges for similar products. For instance, for professional subscribers, Nasdaq charges $76 for its combined TotalView [9] and OpenView [10] products and NYSE charges $60 for NYSE OpenBook.[11]

b. For Nonprofessional Subscribers

For nonprofessional subscribers, the Exchange will continue to charge monthly fees of $5 per device for the receipt of ArcaBook data relating to CTA Plan and ETF Securities and $5 per device for the receipt of ArcaBook data relating to UTP Plan Securities (i.e., a combined fee of $10 for both CTA Plan and ETF Securities and UTP Plan Securities).

The Exchange will continue to limit for any one month the maximum amount of device fees payable by any broker-dealers in respect of nonprofessional subscribers that maintain brokerage accounts with the broker-dealer. Professional subscribers may be included in the calculation of the monthly maximum amount, so long as:

(i) Nonprofessional Subscribers comprise no less than 90 percent of the pool of subscribers that are included in the calculation;

(ii) Each professional subscriber that is included in the calculation is not affiliated with the broker-dealer or any of its affiliates (either as an officer, partner or employee or otherwise); and

(iii) Each such professional subscriber maintains a brokerage account directly with the broker-dealer (that is, with the broker-dealer rather than with a correspondent firm of the broker dealer).

When the Exchange first established the maximum amount in 2006, it set the maximum amount for any calendar month at $20,000. It provided that, for the months falling in a subsequent calendar year, the maximum monthly payment shall increase (but not decrease) by the percentage increase (if any) in the annual composite share volume [12] for the calendar year preceding that subsequent calendar year, subject to a maximum annual increase of five percent.[13] For example, if the annual composite share volume for a calendar year increases by three percent over the annual composite share volume for the prior calendar year, then the monthly "Maximum Amount" for months falling in the next subsequent calendar year would increase by three percent. Given that the ArcaBook fees did not become effective until 2009 and composite share volume did not rise in 2009, the Maximum Amount for 2010 remains at $20,000. The Exchange will continue to apply the annual adjustment described above.

The Maximum Amount compares favorably with monthly maximums payable to Nasdaq and to the CTA Plan Participants. Nasdaq set the maximum at $25,000 per month for nonprofessional subscribers' receipt of TotalView and OpenView. The CTA Plan Participants currently set the maximum at $660,000 per month for internal distribution within a broker-dealer's organization and for the broker-dealer's distribution to nonprofessional subscribers that maintain brokerage accounts (the "CTA Monthly Maximum").

D. Free Trial Period

As an incentive to prospective subscribers, the Exchange will continue to offer NYSE Arca Data free of charge for the duration of the billable month in which the subscriber first gains access to the data. For example, if a subscriber (whether professional or nonprofessional) is billed on a calendar-month basis and first gains access to NYSE Arca Data on October 10, the device fees set forth in this proposed rule change will not apply during that month of October. The Exchange has maintained this incentive since the Direct Order was issued.

ii. Justification of Fees

The market data fees that are the subject of this filing, in conjunction with fees for other services, provide for an equitable allocation of NYSE Arca's overall costs among users of its services. The market data fees are fair and reasonable because they compare favorably to fees that other markets charge for similar products and because competition provides an effective constraint on the market data fees that the Exchange has the ability and incentive to charge.

A. Other Markets' Fees

The combined monthly professional subscriber device fee of $30 (i.e., for receipt of NYSE Arca data relating to CTA Plan and ETF Securities and to UTP Plan Securities) compares favorably with the $76 that Nasdaq charges professional subscribers for its combined TotalView and OpenView products and the $60 that NYSE charges professional subscribers for NYSE OpenBook.

Nonprofessional subscriber monthly fees of $5 per device for the receipt of ArcaBook data relating to CTA Plan and ETF Securities and $5 per device for the receipt of ArcaBook data relating to UTP Plan Securities (a combined $10) compare favorably with the fees NYSE and Nasdaq charge for limit order data

[9] Through TotalView, Nasdaq provides information relating to the displayed quotes and orders of Nasdaq participants in UTP Plan Securities. TotalView displays quotes and orders at multiple prices and is similar to ArcaBook.

[10] Through OpenView, Nasdaq provides information relating to the displayed quotes and orders of Nasdaq participants in CTA Plan Securities. OpenView displays quotes and orders at multiple prices and is similar to ArcaBook.

[11] Through NYSE OpenBook, NYSE provides information relating to limit orders.

[12] "Composite share volume" for a calendar year refers to the aggregate number of shares in all securities that trade over NYSE Arca facilities for that calendar year.

[13] This is the same annual increase calculation that the Commission approved for the CTA Monthly Maximum (discussed below). *See* File No. SR–CTA/CQ–99–01, Release No. 34–41977, October 5, 1999.

services;[14] NYSE Arca proposes to continue to assess these fees. For nonprofessional subscribers, Nasdaq charges a device fee of $14 per month for its TotalView product and $1 per month for its OpenView product. NYSE charges nonprofessional subscribers a monthly device fee of $15, with a monthly maximum of $25,000.[15] NYSE Arca subjects its monthly maximum for nonprofessional subscribers to the same annual escalator as NYSE.

For direct access, NYSE Arca will continue to charge $750 per month for a set of up to four logons For indirect access, NYSE Arca will continue to charge $750 per month for any number of logons. In contrast, NYSE charges $5,000 per month for direct or indirect access to OpenBook and Nasdaq charges $2,500 per month for access to TotalView and another $2,500 per month for access to the OpenView datafeed.

B. Dodd-Frank Act

Some industry participants have expressed the view that the Dodd-Frank Act materially alters the scope of the Commission's review of fee filings for proprietary market data products.[16] In the Dodd-Frank Act, Congress allowed the Commission to rely upon the forces of competition to ensure that fees for market data are fair and reasonable. The Dodd-Frank Act creates a presumption that exchange fees, including market data fees imposed upon non-members, are to take effect immediately. It provides that the Commission should only take action to temporarily suspend a fee change (which suspension would then be followed by a proceeding to determine whether the fee change should be approved or disapproved) in certain specified situations.[17] There is no basis to suspend the immediate effectiveness of this filing.

C. Competition

ArcaBook fees are fair and reasonable because competition for order flow provides an effective constraint on the level of fees that the Exchange has the ability and incentive to charge for its market data products.

1. The Direct Order

In approving the fees in the Direct Order, the Commission adopted a "market-based approach" to assess whether non-core fees, such as the ArcaBook fees, satisfy the statutory requirements of fairness and reasonableness. Under this two-part approach, the Commission first determines "whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees."[18] If so, the Commission approves the proposal "unless it determines that there is a substantial countervailing basis to find that the terms" violate the Exchange Act or Commission rules.[19]

In the Direct Order, the Commission approved the ArcaBook fees after determining that the market-based approach provided alternative indicators of price fairness and reasonableness that made Commission consideration of costs unnecessary. It cited the availability to market participants of alternatives to purchasing ArcaBook data. The Direct Order also cited NYSE Arca's compelling need to attract order flow from market participants and the negative effect of higher market data fees on order flow. The Commission found no countervailing basis to find that the terms of the Exchange's proposal violated the Exchange Act or the Commission's rules.[20]

2. The NetCoalition Decision

The D.C. Circuit held that the Commission's market-based approach does not contravene the Exchange Act, rejecting the Petitioners' claims that Congress intended for the Commission to apply a cost-based approach in determining whether market data fees are fair and reasonable.[21] However, the Court found that the record did not provide adequate support for the Commission's determinations that (i) the availability of alternatives to ArcaBook data and (ii) the adverse effect of higher ArcaBook fees on order flow and trading revenues provide effective constraints on the market data fees that the Exchange has the ability and incentive to charge.[22]

3. The Competitive Market for Market Data Products

Several features of the market data business directly indicate that it is subject to competition. Investors can find suitable substitutes for most proprietary market data products. A market stands a high risk that investors may substitute another source of market information for its own because securities and investment methodologies are fungible.

A high correlation exists among the fee levels that NYSE, NYSE Arca, Nasdaq, and NASDAQ OMX BX charge and among the characteristics of their respective proprietary data products. That itself is consistent with the presence of competition in general, and of competition among those participants in particular. Similarly, the history and continued schedule of product innovation are consistent with the presence of competition. Examples include the advent of multicast feeds, format improvements, new execution messages, improvements in message efficiency, enterprise licensing, unified pricing for multiple categories of data, free trials, nonprofessional subscriber discounts, and new alternative methodologies for counting usage. These changes and innovations, and the fact that other markets adopted similar changes, provide strong evidence of competition in the market for depth-of-book data products among exchanges.

4. Availability of Alternatives to ArcaBook

One reason that ArcaBook fees are fair and reasonable is that market participants have alternatives to purchasing ArcaBook data. For example, market participants can use depth-of-book data from BATS, NYSE, and/or Nasdaq to gauge liquidity and place orders at NYSE Arca and/or at other markets. Indeed, NYSE Arca's data indicates that ten of the top 30 users of intermarket sweep orders ("ISOs")[23] on NYSE Arca do not subscribe to ArcaBook. They believe they have adequate sources of data to submit ISOs without purchasing ArcaBook data.

To illustrate how the availability of alternatives constrains fees for depth-of-book data, suppose there were a hypothetical increase in the fee for a

[14] The Exchange does not propose to impose device fees for the display of limit order, quotation and last sale price information relating to bonds that are traded through the Exchange's facilities.

[15] Securities Exchange Act Release No. 34–59544 (March 9, 2009), 74 FR 11162 (March 16, 2006).

[16] *See* Securities Exchange Act Release No. 34–62887 (September 10, 2010); 75 FR 57092 (September 17, 2010); Securities Exchange Act Release No. 34–62907 (September 14, 2010); 75 FR 57314 (September 20, 2010); and Securities Exchange Act Release No. 34–62908 (September 14, 2010); 75 FR 57321 (September 20, 2010).

[17] The NetCoalition Decision does not address the statutory amendments encompassed by the Dodd-Frank Act in any way. No questions relating to the operation or effect of those amendments were before the D.C. Circuit in connection with the petitions for review of the Direct Order. Nor did the D.C. Circuit have any occasion to discuss those amendments in connection with the NetCoalition Decision.

[18] Direct Order at 74,781.

[19] *Id.*

[20] *See infra* section 3(a)(ii)(C)(4)(c); Direct Order at 74,782–74,784.

[21] NetCoalition Decision at 14–15.

[22] *Id.* at 25–27.

[23] An intermarket sweep order is a limit order designated for automatic execution in a specific market center even when another market center is publishing a better quotation; they are typically used by institutional algorithmic investors, not retail investors.

market's depth-of-book data from $10 to $15, where $10 is the fair and reasonable level. Suppose that at $10 the depth-of-book data would have 1,000 subscribers, and thus total revenue of $10,000. Suppose that an increase in the fee to $15 would cause 400 users to cancel their subscriptions in favor of available alternatives (which might include not purchasing depth-of-book data at all), leaving 600 subscribers and total revenue of $9,000. Assuming there are no variable costs that depend on the number of subscribers, the hypothetical fee increase would reduce net revenue by $1,000, and hence the Exchange would not have an incentive to raise the price from $10 to $15.

NYSE Arca's experience also demonstrates that its proprietary market data customers are sensitive to the price charged for access to ArcaBook, and that the elasticity of demand for access to ArcaBook would deter the Exchange from requesting a fee unconstrained by competitive forces. The Commission issued the Direct Order in December 2008, and NYSE Arca started charging for ArcaBook soon after. As Table 8 [24] shows, there was an immediate and significant reduction in the number of accounts with at least one subscription for ArcaBook after the Exchange started charging for ArcaBook.[25] One can infer that any unreasonable increase in the fee would cause a loss in subscribers, and therefore a loss of the fee revenue that NYSE Arca would earn from these subscribers.

Another way to examine this issue is to examine the nature of the market for depth-of-book data. The D.C. Circuit noted that depth-of-book data might be of more use for certain types of market participants than others, and NYSE Arca agrees. One important category of users of depth-of-book data are those who use ISOs. The primary type of ISO on NYSE Arca is the "PNP ISO" order type. In July 2010, 30 firms generated approximately 99% of the PNP ISO orders on NYSE Arca (by both trade and order volume).[26] There are several important pieces of information that go with that statistic: First, ten of the firms (approximately 33.3% of the firms, representing approximately 7.4% of the PNP ISO orders) did not subscribe to ArcaBook in June 2010, indicating that they believed they had viable alternative sources of the data necessary to submit large ISOs on NYSE Arca).

Second, the top 20 firms that used ISOs on NYSE Arca and did subscribe to ArcaBook accounted for 54.72% of NYSE Arca's Tape A and Tape B volume for June 2010.[27]

This confirms that users of depth-of-book data account for significant trading volume, even though they only amount to a small percentage of all traders.[28]

In assessing the competitive landscape for depth-of-book data, one must determine whether the availability of alternative depth-of-book products would make this subset of market participants sensitive to one market's unreasonable depth-of-book product pricing. We believe that it is self-evident that it does. All of the investors within this subset make rapid decisions regarding what market data to purchase and where to direct their orders. They base those decisions on all their costs to trade (including the costs of market data they choose to purchase). They invest significant amounts of capital based on those decisions.

In contrast, the primary objectors to the 2006 Rule Change were data vendors (as opposed to market participants) whose business interests lie firmly rooted in reselling the exchanges' market data at significant mark-ups (or in attracting "eyeballs" to their sites to generate advertising revenue). For acting as middlemen in distributing the exchanges' market data to investors, traditional market data vendors, such as several that are SIFMA members, receive from investors a large multiple of the amounts that those vendors pay the exchanges for the right to distribute the data. No statutory standard constrains the amounts that those vendors may charge investors. Obviously, protesting the exchanges' fees is in their business interests because, if successful, it would increase their profit margins.

5. Competition for Orders and Trades

In addition, ArcaBook fees are fair and reasonable because competition for order flow and trade executions provides an effective constraint on the level of fees that the Exchange has the ability and incentive to charge for its market data products. NYSE Arca competes for orders, which represent liquidity, by offering liquidity rebates and by advertising those orders through dissemination of depth-of-book data. NYSE Arca competes for trades by offering liquidity, competitive trading fees, and high quality, efficient trading services.

a. Hypothetical

The hypothetical discussed above can be adapted to demonstrate how (i) the availability of alternatives to an exchange's depth-of-book data, combined with (ii) the adverse effect of a higher fee for depth-of-book data on net revenue from execution of trades, together constrain the fee for depth-of-book data to a fair and reasonable level. As before, suppose there were a hypothetical increase in the fee for depth-of-book data from $10 to $15, where $10 is the fair and reasonable level. Suppose that at $10, the depth-of-book data product would have 1,000 subscribers, and thus total revenue of $10,000. Suppose that an increase in the fee to $15 would cause 200 users (rather than 400, as in the preceding hypothetical) to cancel their subscriptions, leaving 800 subscribers and total revenue of $12,000. Assuming no variable costs that depend on number of subscribers, the hypothetical fee increase would increase net revenue by $2,000, and hence the exchange would have an incentive to raise the price from $10 to $15. However, suppose that the increase in the price of depth-of-book data caused a reduction in order flow and net trading revenue (above variable costs) from $25,000 to $21,000. In that case, the sum of net revenues from the depth-of-book data and execution of trades would decline from $35,000 to $33,000 as a result of the increase in the fee for depth of book data, and the exchange would not have an incentive to raise the fee. This hypothetical is consistent with the record evidence regarding the linkage between market data and order flow.

b. The Record Regarding Order Flow Competition

Considerable evidence exists to support the conclusion that competition for order flow and the availability of suitable alternatives constrain fees for non-core market data to levels that are fair and reasonable, both within the existing record and as supplemented herein.

[24] Copies of all charts and tables referenced herein are included in Exhibit 3 B.

[25] It should also be noted that before NYSE Arca began charging for ArcaBook, many users were not required to report their ArcaBook usage to the Exchange. Table 8's pre-2009 figures thus likely understate both the number of users before the Exchange began to charge and the magnitude of the decline in users after NYSE Arca began to charge.

[26] Together, these 30 firms accounted for approximately 56% of NYSE Arca's Tape A and Tape B volume for June 2010.

[27] These statistics likely understate the comparative contributions of sophisticated users of depth-of-book data. Because of the way market participants submit, execute, and report trades, the data the Exchange used to derive these statistics does not include all trades that are attributable to these firms. (For example, "Firm A" may purchases ArcaBook data under the name "Firm A" but submit trades under many different names. This data would not capture trades by entities other than "Firm A".)

[28] *See* NetCoalition Decision at 26 n.14.

i. Hendershott & Jones

Prior studies provide evidence that order flow on a market depends directly and substantially on the availability of depth-of-book data for that market. Of particular importance is an empirical study by Terrence Hendershott & Charles M. Jones, Island Goes Dark: Transparence, Fragmentation, and Regulation ("Hendershott & Jones").[29] Hendershott & Jones is an independent, exhaustive, refereed, published, and publicly available study, based on substantial empirical data and economic and statistical analysis, of the effects of one market's decision to stop displaying depth-of-book data entirely for certain products (because it did not wish to comply with the then-current version of Regulation ATS). The Commission previously relied on this study in concluding that order flow competition constrains market data fees [30] (although the NetCoalition Decision did not refer to it). Hendershott and Jones are well-respected academics.

Hendershott and Jones studied the impact of Island ECN ceasing to display its limit order book in the three most active ETFs for which it was the dominant venue; this occurred in late 2002. Hendershott and Jones found that Island's share of trading activity in each of these three ETFs fell when Island ceased displaying its limit order book for those ETFs. The following are among the elements of this empirical study that support the Commission's conclusion in the Direct Order that competition for order flow provides an effective constraint on the market data fees that the Exchange has the ability and incentive to charge:

- Hendershott & Jones examined "all trades and quotes" for the three ETFs. Their analysis of these data demonstrate the direct and substantial relationship between order flow and the availability of market data. Island's decision to cease displaying depth-of-book and other market data caused a 40% to 55% decline in trading in each of these ETFs on Island, and a comparable increase in trading in these ETFs at other venues, and those effects were immediate and statistically significant at a high level.[31] Hendershott & Jones make clear that they found "order flow migration" to other venues after Island ceased displaying depth-of-book and other market data.[32] Indeed, they concluded that the date Island went dark represented a "shift in regime" that not only caused order flow to migrate "substantially" from Island to other markets, but also from ETFs to E-mini futures (a different product entirely).[33] Hendershott & Jones also specifically addressed the point that even non-professional traders are likely to direct their order flow to venues in which more information about the likely terms of a trade is available.[34]
- Hendershott & Jones also analyzed what happened to order flow when Island eventually re-displayed depth-of-book and other market data. When Island did so, it regained some (but not all) of the order flow it had lost.[35]

Hendershott & Jones thus provides detailed and persuasive evidence that availability of depth-of-book and other data relating to one trading venue has a substantial effect on the level of order flow at that venue.[36]

Hendershott & Jones supports an inference that an increase in the price of depth-of-book data for a market will cause a reduction in order flow at that market. Therefore, it is clear that, if a market were to consider charging a higher price for its depth-of-book data, it would need to weigh the increased revenues it would receive from depth-of-book customers that continue to purchase the product against the reduced revenues from (a) subscription cancellations, and (b) fewer trade executions. Thus, the effect of availability of depth-of-book data on order flow constrains the ability and incentive of a market to charge a higher price for its depth-of-book data.

ii. Pricing of Depth-of-Book Data by Exchanges Other Than NYSE and Nasdaq

Observations of past and current behavior of markets support the conclusion that because of order flow competition markets do not have the ability or incentive to set supra-competitive prices for non-core market data. BATS (a recent entrant that has experienced significant market share growth) has publicly noted that part of its strategy to gain order flow is to provide its depth-of-book data for free, because BATS believes that the widest possible dissemination of these data is essential to attract order flow at the current stage of BATS's development. NYSE Arca notes that it used the same strategy initially to attract order flow. If the price charged for depth-of-book data did not have a significant effect on order flow and revenue from the execution of trades, it would not be rational for BATS to provide its depth-of-book data free of charge, and it would not have been rational for NYSE Arca to have done so initially.

iii. Effects of Competition on Shares of Trading

In the Direct Order, the Commission concluded that there is fierce competition for order flow. More recent data show that this conclusion was correct and that competition has intensified.

Table 1 shows the monthly trading volume of U.S. equities on NYSE Arca from 2001 through July 2010. After initially climbing, volume on NYSE Arca has been volatile, and, indeed, since October 2008 has fallen significantly. Table 2 shows NYSE Arca's percentage share of U.S. equities trading. Together, Tables 1 and 2 show that market participants are not wedded to NYSE Arca's platform and that NYSE Arca must continually compete to sell its trading services.[37]

The volatility and trends in the shares of total trading volume on each of the various markets demonstrate that competition among these markets in the sale of trading services is intense. Tables 3, 4, 5, and 6 provide graphical decompositions of shares from 2001 through July 2010 for NYSE Arca, NYSE, Nasdaq, the trade reporting facilities ("TRFs"), BATS, and other markets.[38] Table 3 shows shares for all U.S. equities trading. It demonstrates that NYSE, NYSE Arca, and Nasdaq's shares of trading have fallen, while the TRFs and BATS have taken a larger share of trading. This shows not only that the market for trading equities is competitive but also that entry has been easy.[39] Table 4 shows similar results for

[29] 18 Review of Financial Studies 743 (2005). A copy of Hendershott & Jones is attached hereto as Exhibit 3 A.

[30] Direct Order at 74,784 n. 218.

[31] *Id.* at 755–58.

[32] *Id.* at 764. *See also id.* at 765 ("Given that Island's going dark is a change in transparency that leads to order flow migration * * *.").

[33] *Id.* at 769.

[34] *Id.* at 779.

[35] *Id.* at 782–84.

[36] In addition, Hendershott & Jones noted that the introduction of NYSE's OpenBook real-time limit order book data feed was associated with increased order flow to NYSE. *Id.* at 747.

[37] This volatility evidences the speed and frequency with which market participants change their order routing determinations.

[38] The TRF data includes non-exchange trades through NYSE, Nasdaq, BSE, NSX, and FINRA.

[39] Ease of entry into this market is further evidenced by the recent entry of Direct Edge, which began operating two exchanges in July 2010. For the month of July 2010, the Direct Edge exchanges, EDGA and EDGX, accounted for 1.69% and 2.57%, respectively, of all tape-reported trade volume. For the month of August, those numbers increased to 3.79% and 4.75%. This rapid increase in trading volume evidences both the ease of entry into this market and the speed with which market participants change the venues to which they route orders. Direct Edge's rapid market share growth is not unique, NYSE Arca experienced a similarly rapid increase in market share when it commenced operations in 2004, and, as shown in Tables 4, 5, and 6, BATS's trading volume grew quickly, further evidencing ease of entry.

Tape A, and in particular shows that the TRFs have captured a significant share of trading from other markets. Table 5 shows shares for Tape B. Interestingly, Table 5 shows NYSE Arca coming into the market and quickly capturing a share of other exchanges' trading activity. It goes on to show the TRFs then coming in and doing the same (including capturing a share of NYSE Arca's trading activity), eventually achieving a share of nearly 30%. Table 6 shows a similar result for Tape C. Table 7 shows data on the same shares for the period January 2010–July 2010.

Moreover, this data provides additional support for the platform competition concept discussed below and further demonstrates that individual market depth-of-book products are substitutable to the extent market participants might not wish to purchase all such products. For example, large market participants place orders on many markets simultaneously, so they may not need all markets' depth-of-book products or may choose to purchase some but not others based on price and/or other features. Table 7 shows that Nasdaq had approximately the same share in Tape A and B securities that NYSE Arca did during the January–July 2010 period, meaning that a market participant placing orders in both markets could choose one depth-of-book product rather than the other based on price and/or other features.

iv. Effects of Competition on Trading Revenues

Since July 2007 NYSE Arca's per share net revenue capture has fallen and market share has declined, although its trading volume has increased somewhat due to growth in industry volumes. This is the result of fierce competition for order flow and is not consistent with NYSE Arca being able to set prices for its proprietary market data (such as ArcaBook) at its whim; it is also further support for the platform competition discussion below. As the Commission is aware, transaction fees have generally fallen across markets. The competition between those markets is passed through to traders in the form of lower net prices for trading services.

D. Pricing for Joint Products

Other market participants have noted that the liquidity provided by the order book, trade execution, core market data, and non-core market data are joint products of a joint platform and have common costs.[40] The Exchange agrees with and adopts those discussions and the arguments therein. The Exchange also notes that the economics literature confirms that there is no way to allocate common costs between joint products that would shed any light on competitive or efficient pricing.[41]

That large market participants, including internalizers handling retail order flow, use proprietary exchange feeds (rather than CTS and CQS feeds) to make trade and routing decisions further demonstrates the joint nature of market data and order flow.[42] So does the fact that some exchanges use certain market data quote revenue as a form of direct market maker liquidity provider rebate to drive more liquidity to their books in less active stocks. This highlights that market data and trade executions are joint products that are linked on a platform basis. Charts 3–7 provide additional support for the existence of this type of platform competition.

E. Pricing Non-Core Data Based on Cost Is Impractical

The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically.[43] The record relating to the 2006 Rule Change includes several documents attesting to the difficulty of cost-based pricing in this area. In addition to those, we respectfully direct the Commission's attention to two reports issued by PHB Hagler Bailly, Inc. ("PHB").[44] The New York Stock Exchange retained PHB to assist it in connection with its response to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues (the "2000 Concept Release"). The PHB reports conclude that cost-based pricing would inevitably stifle competition and innovation and entangle both the industry and the Commission in time-consuming, expensive, and ultimately fruitless proceedings and data analysis. Their conclusions include the following:

- *Enormous Administrative Burdens.* The administrative burdens that cost-based pricing would place on all parties, in particular the Commission, would be "enormous." The Commission would have to cost-regulate a large number of participants. Extraordinary amounts of information, accounts, and reports would have to be standardized and analyzed to make determinations that would stand the scrutiny and challenges to which rate-making decisions are often subject. This is the source of the Exchange's belief that cost-based rate regulation is infeasible.[45]
- *Joint Products.* It is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Market data and transaction execution are "joint products," linked in a way that pricing of one inevitably affects pricing of the other. If rate regulation were to reduce the revenues that could be realized from

[40] *See* Securities Exchange Act Release No. 34–62887 (September 10, 2010); 75 FR 57092 (September 17, 2010); Securities Exchange Act Release No. 34–62907 (September 14, 2010); 75 FR 57314 (September 20, 2010); and Securities Exchange Act Release No. 34–62908 (September 14, 2010); 75 FR 57321 (September 20, 2010); *see also* attachment to August 1, 2008 Comment Letter of Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc. (Statement of Janusz Ordover and Gustavo Bamberger) (a copy of which is attached hereto as Exhibit 3 C.).

[41] *See generally* Mark Hirschey, *Fundamentals of Managerial Economics* at 600 (2009) ("It is important to note, however, that although it is possible to determine the separate marginal costs of goods produced in variable proportions, it is impossible to determine their individual average costs. This is because common costs are expenses necessary for manufacture of a joint product. Common costs of production—raw material and equipment costs, management expenses, and other overhead—cannot be allocated to each individual by-product on any economically sound basis. * * * Any allocation of common costs is wrong and arbitrary."). This is not new economic theory. *See, e.g.,* F.W. Taussig, "A Contribution to the Theory of Railway Rates," *Quarterly Journal of Economics* V(4) 438, 465 (July 1891) ("Yet, surely, the division is purely arbitrary. These items of cost, in fact, are jointly incurred for both sorts of traffic; and I cannot share the hope entertained by the statistician of the Commission, Professor Henry C. Adams, that we shall ever reach a mode of apportionment that will lead to trustworthy results.").

[42] *See Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues—Findings Regarding the Market Events of May 6, 2010* at 76–79 (Sept. 30, 2010). That report again recognized that most retail order flow is handled by internalizers. *See id.* at 77.

[43] In addition, the evidence of competitive constraints on market data pricing (both directly and in the context of joint platforms) is so strong that it makes devoting the resources that would be necessary to try to incorporate a cost-based pricing model unnecessary. Because of the level of competition that already exists and the compelling need to devote regulatory resources to other issues, the Exchange does not believe there is any need for the Commission and markets to become embroiled in what would almost certainly become prolonged rate-making proceedings. Indeed, the amendment of Section 19 effected by the Dodd-Frank Act is further evidence that Congress intended market data fees to be governed by the development of competition in the markets rather than cost-based ratemaking.

[44] *See* "Issues Surrounding Cost-Based Regulation of Market Data Prices," which provides a view of cost-based pricing from a historical regulatory perspective, and "The Economic Perspective on Regulation of Market Data," which provides an economic assessment of cost-based pricing. The two reports constitute Appendix C to NYSE's comments to the 2000 Concept Release ("NYSE Comments") and can be found on the Commission's Web site at *http://www.sec.gov/rules/concept/s72899/buck1.htm.* They are attached hereto as Exhibits 2 D. and E. for the Commission's convenience.

[45] Footnote 11 to the NYSE Comments describes the significant nature of the burdens associated with cost-based pricing and the Exchange incorporates that discussion here by reference.

market data fees, then other fees—transaction fees or, in the case of the primary markets, listing fees—would have to be increased to maintain the total revenue infrastructure and the same level of services. However, because the three types of fees fall differently on broker-dealers following different business models and differently on broker-dealers, investors, and listed companies, the result would be a reallocation of market costs based not on competition and constituent governance but rather as a side-effect of governmental intervention.

• *Litigation.* Under cost-based rate regulation, litigation is inevitable, if only to delay rate decisions deemed unfavorable by one party or another.

• *Waste and Negative Incentives.* Consistently across industries where it has been used, cost-based regulation of pricing has been found to distort incentives, including incentives to minimize costs and to innovate, and to lead to considerable waste. Making arbitrary cost allocations provides disincentives for markets to invest in more resilient systems and to make their data services more widely available. It encourages padding and cross-subsidization of costs, yet provides no incentive to reduce costs through operating or administrative efficiencies. It would create incentives to use accounting practices to shift the recovery of costs to market data fees and away from transaction and listing fees.

• *Fee Increases.* In contrast to the dramatic decline in market data costs over the past quarter century, under cost-based regulation of prices, it is quite possible the industry would experience over time frequent rate increases based on escalating expense levels. Without the demonstration of a strong need to move to this form of regulation, such a result cannot be justified.

• *Rate of Return.* Rate regulation is never aimed solely at minimizing rates to consumers, since very low rates may affect the attractiveness of the business to competitors and potential competitors, or the level of service provided. The regulator must determine what rate of return is "fair" and provide a suitable incentive for service providers while protecting consumers as well. No one has demonstrated why the Commission needs to be the arbiter of this issue to enforce its responsibilities under Section 19 of the Exchange Act.

• *Market Forces.* Rate regulation implies a belief that an industry cannot rely upon market forces. We believe that constituent boards and customer control have in fact provided the pricing discipline that any government would expect and desire in the area of market data services and fees. Indeed, the discussion above demonstrates that the competitive constraints that apply to market data pricing are formidable.

• *Trends.* In contrast to cost-based pricing, the Commission's market-based approach to approving market data fees is currently the goal of many other regulatory bodies in other industries. Even in industries historically subject to utility regulation, cost-based rate making has been discredited and other regulated industries are moving away from cost-based rate-making. Proprietary market data dissemination is far from an ordinary utility function, and cost-based regulation is particularly inappropriate in the proprietary market data arena.

Such results would not be in the best interests of market participants and would be inconsistent with Congress's direction that the Commission use its authority to foster the development of the national market system.

F. Impact on Retail Investors

Pricing for non-core data products generally does not impact retail investors. As the Commission and the Commodities Futures Trading Commission recently noted, most retail equities transactions are internalized by a broker-dealer.[46]

That makes depth-of-book data of little relevance to retail investors. And retail broker-dealers are not required to purchase depth-of-book data to fulfill their duties of best execution.[47]

iii. Contracts

As before, the Exchange will require or continue to require each recipient of a datafeed containing NYSE Arca Data to enter into the form of "vendor" agreement into which the CTA and CQ Plans require recipients of the Network A datafeeds to enter. That agreement will authorize the datafeed recipient to provide NYSE Arca Data services to its customers or to distribute the data internally.

In addition, the Exchange will require or continue to require each professional end-user that receives NYSE Arca Data displays from a vendor or broker-dealer to enter into the form of professional subscriber agreement into which the CTA and CQ Plans require end users of Network A data to enter. It will also require or continue to require vendors and broker-dealers to subject nonprofessional subscribers to the same contract requirements as the CTA and CQ Plan Participants require of Network A nonprofessional subscribers.

The Network A Participants drafted the vendor and Network A professional subscriber agreements as one-size-fits-all forms to capture most categories of market data dissemination. They are sufficiently generic to accommodate or continue to accommodate NYSE Arca Data. The Participants in the CTA and CQ Plans have submitted the vendor form and the professional subscriber form to the Commission on Form 19b–4 on multiple occasions. (See Release Nos. 34–22851 (January 31, 1986), 34–28407 (September 10, 1990), and 34–49185 (February 4, 2004).

2. Statutory Basis

For the foregoing reasons, NYSE Arca believes that the proposed rule change is consistent with the provisions of Section 6 of the Act, in general, and with Section 6(b)(4)[48] of the Act, in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using the facilities of NYSE Arca. In this regard, the market data fees that are the subject of this filing, in conjunction with fees for other services, provide for an equitable allocation of NYSE Arca's overall costs among users of its services. The market data fees are fair and reasonable because they compare favorably to fees that other markets charge for similar products and because competition provides an effective constraint on the market data fees that the Exchange has the ability and incentive to charge.

B. Self-Regulatory Organization's Statement on Burden on Competition

For the reasons described above, the Exchange believes that the re-proposed fees will not impose any burden on competition that is not necessary or appropriate in the 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 not solicited, and does not intend to solicit, comments regarding the proposed rule change or re-authorization. Subsequent to the NetCoaliton Decision, the Exchange has not received any unsolicited written comments from Exchange participants or other interested parties.

[46] *See Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues—Findings Regarding the Market Events of May 6, 2010* at 77 (Sept. 30, 2010).

[47] *See* NetCoalition Decision at 6 n.6; Direct Order at 74,788 & nn. 259–266.

[48] 15 U.S.C. 78f(b)(4).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act [49] and subparagraph (f)(2) of Rule 19b–4 thereunder [50] because it establishes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–97 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–97. 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,[51] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–97 and should be submitted on or before December 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[52]

Florence E. Harmon,

Deputy Secretary.

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[49] 15 U.S.C. 78s(b)(3)(A)(ii).

[50] 17 CFR 240.19b–4(f)(2).

[51] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[52] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63292; File No. SR–NYSEArca-2010–98]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to the Listing and Trading of the WisdomTree Managed Futures Strategy Fund

November 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on November 1, 2010, NYSE Arca, Inc. ("Exchange" or "NYSE Arca" or "Corporation") 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 proposes to list and trade the shares of the following fund of the WisdomTree Trust ("Trust") under NYSE Arca Equities Rule 8.600: WisdomTree Managed Futures Strategy Fund ("Fund"). The shares of the Fund are collectively referred to herein as the "Shares." [3] The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares of the Fund under NYSE Arca Equities Rule 8.600,[4] which governs the listing and trading of "Managed Fund Shares" on the Exchange.[5]

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Form 19b–4 Information of the proposed rule change at 3.

[4] NYSE Arca Equities Rule 8.600(c)(1) provides that, among other criteria, a Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) ("1940 Act") organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[5] The Commission approved NYSE Arca Equities Rule 8.600 and the listing and trading of certain shares of the PowerShares Actively Managed Funds Trust on the Exchange pursuant to Rule 8.600 in Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR–NYSEArca–2008–25). The Commission also previously approved listing and trading on the Exchange of Managed Fund Shares under Rule 8.600. *See, e.g.,* Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 60981 (November 10, 2009), 74 FR 59594 (November 18, 2009) (SR–NYSEArca–2009–79) (order approving listing of five fixed income funds of the PIMCO ETF

Continued

The Fund will be an actively managed exchange-traded fund. WisdomTree Asset Management, Inc. ("WisdomTree Asset Management") is the investment adviser ("Adviser") to the Fund. WisdomTree Investments, Inc. ("WisdomTree Investments") is the parent company of WisdomTree Asset Management. Mellon Capital Management Corporation ("Mellon" or "Sub-Adviser") serves as the sub-adviser for the Fund. The Bank of New York Mellon is the administrator, custodian and transfer agent for the Fund. ALPS Distributors, Inc. serves as distributor for the Fund. The Shares will be offered by the Trust, which is registered with the Commission as an investment company.[6]

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the Investment Company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio. In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio.[7] Commentary .06 to Rule 8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. WisdomTree Asset Management is not affiliated with any broker-dealer. Mellon is affiliated with multiple broker-dealers and has implemented a "fire wall" with respect to such broker-dealers regarding access to information concerning the composition and/or changes to the Fund's portfolio.[8] In the event (a) the Adviser or the Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, they will be required to implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to a portfolio.

Description of the Shares, the Benchmark and the Fund:

According to the Registration Statement, the WisdomTree Managed Futures Strategy Fund seeks to provide investors with positive total returns in rising or falling markets that are not directly correlated to broad market equity or fixed income returns. The Fund is managed using a quantitative, rules-based strategy designed to provide returns that correspond to the performance of the Diversified Trends Indicator™ ("Benchmark"). The Benchmark is a widely used indicator designed to capture the economic benefit derived from rising or declining price trends in the commodity, currency and U.S. Treasury futures markets.

The Benchmark:

The Benchmark is a rules-based indicator designed to capture rising and falling price trends in the commodity, currency and U.S. Treasury markets through long and short positions on U.S. listed futures contracts. The Benchmark consists of U.S. listed futures contracts on 16 tangible commodities and 8 financial futures. The 16 commodity futures contracts are: light crude oil, natural gas, RBOB gas, heating oil, soybeans, corn, wheat, gold, silver, copper, live cattle, lean hogs, coffee, cocoa, cotton and sugar. The 8 financial futures contracts are: the Australian dollar, British pound, Canadian dollar, Euro, Japanese yen, Swiss franc, U.S. Treasury Notes and U.S. Treasury bonds. Each contract is sometimes referred to as a "Component" of the Benchmark.

Components that are similar in nature (such as gas and oil or gold and silver) are aggregated into "Sectors." There are nine commodity Sectors in the Benchmark: Energy, Grains, Precious Metals, Industrial Metals, Livestock, Coffee, Cocoa, Cotton, and Sugar. Each financial futures contract is considered to be its own Sector. As a result, there are eight financial Sectors in the Benchmark: The Australian dollar, British pound, Canadian dollar, Euro, Japanese yen, Swiss franc, U.S. Treasury Notes and U.S. Treasury bonds.

In order to capture both rising and falling price trends, at the end of each month each Sector in the Benchmark (other than the Energy Sector) is positioned as either "long" or "short" (at the end of each month, the Energy Sector is positioned as either "long" or "flat" (*i.e.,* no exposure)). This determination is made using an algorithm that compares the Sector's monthly return to the Sector's historic weighted moving average returns. If the Sector's returns are above its moving average returns the Sector is positioned as "long" throughout the following month. If the Sector's returns are below its moving average the Sector is positioned as "short" throughout the following month (with the sole exception of the Energy Sector, which would be positioned as "flat"). All Components within a Sector are held in the same direction. The value of a Sector and the value of the Benchmark should increase if a long position increases in value or if a short position decreases in value. For example, if a Sector is long in the Benchmark and the value of its Components goes up intra-month, the return of the Sector (and therefore the Benchmark) should

Trust); 61697 (March 12, 2010), 75 FR 13616 (March 22, 2010) (SR–NYSEArca 2010–04) (order approving listing and trading of WisdomTree Real Return Fund); and 62604 (June [sic] 30, 2010), 75 FR 47323 (August 5, 2010) (SR–NYSEArca–2010–49) (order approving listing and trading of the WisdomTree Emerging Markets Local Debt Fund).

[6] *See* Registration Statement on Form N–1A for the Trust filed with the Securities and Exchange Commission on July 22, 2010 (File Nos. 333–132380 and 811–21864) ("Registration Statement"). The Registration Statement became effective on September 20, 2010. The descriptions of the Fund and the Shares contained herein are based on information in the Registration Statement.

[7] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 ("Advisers Act"). As a result, the Adviser and Sub-Adviser are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act.

[8] The Exchange represents that the Adviser and the Sub-Adviser and their related personnel are subject to Investment Advisers Act Rule 204A–1. This Rule specifically requires the adoption of a code of ethics by an investment adviser to include, at a minimum: (i) Standards of business conduct that reflect the firm's/personnel fiduciary obligations; (ii) provisions requiring supervised persons to comply with applicable federal securities laws; (iii) provisions that require all access persons to report, and the firm to review, their personal securities transactions and holdings periodically as specifically set forth in Rule 204A–1; (iv) provisions requiring supervised persons to report any violations of the code of ethics promptly to the chief compliance officer ("CCO") or, provided the CCO also receives reports of all violations, to other persons designated in the code of ethics; and (v) provisions requiring the investment adviser to provide each of the supervised persons with a copy of the code of ethics with an acknowledgement by said supervised persons. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

increase. If a Sector is short in the Benchmark, and the value of its Components goes down intra-month, the return of the Sector (and therefore the Benchmark) should increase.

The Energy Sector and its Components may never be positioned short within the Benchmark. The Benchmark's methodology provides that, due to significant levels of continuous consumption, limited reserves and other factors, the Energy Sector can only be long or flat (*i.e.,* no exposure) within the Benchmark. If the Energy Sector is flat then the weighting of the other Sectors and Components within the Benchmark is increased on a pro-rata basis.[9] As a result, when the Energy Sector is flat, financial futures will represent approximately 61.5% of the weight of the Benchmark and commodities will represent approximately 38.5% of the weight of the Benchmark. When the Energy Sector is long, financial futures and commodity futures each represent 50% of the weight of the Benchmark.

At the beginning of each year and month, the Benchmark is weighted in one of two ways. If the Energy Sector is long, the Benchmark is weighted evenly (*i.e.,* 50/50) between commodity futures contracts and financial futures contracts. If the Energy Sector is flat, financial futures represent approximately 61.5% of the weight of the Benchmark and commodity futures represent approximately 38.5% of the Benchmark. At the beginning of 2010, the Benchmark was weighted evenly: A 50% weight to commodity futures and a 50% weight to financial futures. At the beginning of each year, each Component and Sector also has a "Base Weight," depending on whether the Energy Sector is long or flat. If the Energy Sector is flat, then the Base Weight of the other Sectors and Components within the Benchmark is increased on a pro-rata basis. Commodity Sector weights are based on, but not exactly proportional to, historical world production levels. Commodity Sectors that have higher historical production levels are weighted higher in the Benchmark. Weightings of the financial futures Sectors are based on, but not directly proportional to, historical gross domestic product ("GDP"). Larger economic regions (*i.e.,* Europe as measured by the Euro) should get a higher weighting than smaller regions (*i.e.,* Australia as measured by the Australian dollar).[10]

The weight of each Component and Sector in the Benchmark changes throughout each month based upon performance. At the end of each month, each Sector is reset back to its applicable Base Weight depending on whether the Energy Sector is long or flat. Within Sectors that have multiple Components, the weight of each Component relative to the others is allowed to fluctuate throughout the year and Component weights are reset back to their respective Base Weights only at year-end.

The Fund:

The Fund will invest substantially all of its assets in a combination of commodity- and currency-linked investments (including investments linked to U.S. Treasuries) designed to correspond to the performance of the Benchmark, and U.S. government securities (as defined in Section 3(a)(42) of the Exchange Act) ("Government Securities") that serve as collateral or otherwise back the commodity- and currency-linked investments. More specifically, the Fund will invest at least 70% of its assets in a combination of: (i) Listed commodity and financial futures contracts included in the Benchmark; and (ii) forward currency contracts based on currencies represented in the Benchmark,[11] in each case collateralized or otherwise backed by Government Securities. The Fund may invest up to 30% of its assets in a combination of swap transactions [12] and commodity-linked notes.[13] The Fund's

[9] To arrive at the Sector weightings when the Energy Sector is flat, divide the Sector Base Weight by one minus the Energy Sector Base Weight (*i.e.,* Sector Base Weight/1–0.1875)).

[10] The current Sector (and Component) Base Weights when the Energy Sector is long are as follows: Energy 18.75% (light crude 8.50%, natural gas 4.25%, RBOB 3.0%, heating oil 3.0%); Grains 11.50% (soybeans 5.0%, corn 4.0%, wheat 2.50%); Precious Metals 5.25% (Gold 3.50%, Silver 1.75%); Industrial Metals 5.0% (copper 5.0%); Livestock 5.0% (live cattle 3.0%, lean hogs 2.0%); Coffee 1.5%; Cocoa 1.0%; Cotton 1.0%; Sugar 1.0%; Euro 13.0%; Japanese Yen 12.0%; U.S. Treasury Note 7.50%; U.S. Treasury Bond 7.50%; British Pound 5.00%; Swiss Franc 2.0%; Australian Dollar 2.0%; and Canadian Dollar 1.00%.

The current Sector (and Component) Base Weights when the Energy Sector is flat are as follows: Energy 0% (light crude 0%, natural gas 0%, RBOB 0%, heating oil 0%); Grains 14.15% (soybeans 6.15%, corn 4.92%, wheat 3.08%); Precious Metals 6.46% (gold 4.31%, silver 2.15%); Industrial Metals 6.15% (copper 6.15%); Livestock 6.15% (live cattle 3.69%, lean hogs 2.46%); Coffee 1.85%; Cocoa 1.23%; Cotton 1.23%; Sugar 1.23%; Euro 16.0%; Japanese Yen 14.77%; U.S. Treasury Note 9.23%; U.S. Treasury Bond 9.23%; British Pound 6.15%; Swiss Franc 2.46%; Australian Dollar 2.46%; and Canadian Dollar 1.23%.

[11] The Fund's investments in commodity futures contracts will be limited by the application of position limits imposed by the CFTC and U.S. futures exchanges intended to prevent undue influence on prices by a single trader or group of affiliated traders. The Adviser has represented that the Fund's investment in futures contracts will be limited to investments in the U.S. listed futures contracts included in the Benchmark, except that the Fund may invest up to 10% of its assets in U.S. listed commodity and currency futures contracts not included in the Benchmark in a manner designed to achieve its investment objective.

The U.S. listed commodity futures contracts included in the Benchmark (and therefore included in the Fund) are heavily traded and are based on some of the world's most liquid and actively-traded commodities. As of August 31, 2010, the ten commodity futures contracts that are given the greatest weighting in the Benchmark, and their three-month Average Daily Dollar Volume ("ADDV"), were: high grade copper (6.15% weight; ADDV $528,158,471); soybeans (6.06% weight; ADDV $3,172,701,410); corn (4.67% weight; ADDV $2,528,323,106); gold (4.29% weight; ADDV $6,226,943,776); live cattle (3.75% weight; ADDV $566,731,652); wheat (3.42% weight; ADDV $1,385,115,481); lean hogs (2.40% weight; ADDV $339,611,918); silver (2.17% weight; ADDV $641,111,990); coffee (1.85% weight; ADDV $505,778,511); and cocoa (1.23% weight; ADDV $144,259,844).

The Fund will not invest in any currency that is not represented in the Benchmark. The listed financial futures contracts included in the Benchmark (and therefore included in the Fund) are heavily traded and represent six of the world's most liquid and actively-traded currencies (as well as the U.S. dollar through futures on Treasury bonds and 10 year notes) as measured by daily turnover. For example, according to Table B.5 of the 2007 Triennial Central Bank Survey of Foreign Exchange and Derivative Market Activity by the Bank for International Settlements ("BIS 2007 Survey"), the most actively traded currency pairs against the U.S. dollar (based on average daily turnover in U.S. dollars at current exchange rates in April 2007) were as follows: euro ($840 billion), yen ($397 billion), British pound ($361 billion), Australian dollar ($175 billion), Swiss franc ($143 billion), and Canadian dollar ($115 billion). According to Table E.2 of the BIS 2007 Survey, the daily turnover in April 2007 consisted of the following (in billions of U.S. dollars) (approximate):

Each of the currencies listed above is represented by U.S. listed financial futures contracts in the Benchmark.

As of August 31, 2010, the weighting of the financial futures contracts in the Benchmark, and their respective three month ADDV, was: euro (16.00% weight; ADDV $43,890,327,409); Japanese yen (14.77% weight; ADDV $16,832,896,412), U.S. Treasury 10 yr. note (9.23% weight, ADDV $15,149,128,260); U.S. Treasury Bond (9.23% weight; ADDV $5,233,746,635); British pound (6.15% weight; ADDV $9,822,322,233); Australian dollar (2.46% weight; ADDV U.S. $8,172,424,454); Swiss franc (2.46% weight; ADDV $4,342,434,023); and Canadian dollar (1.23% weight; ADDV U.S. $7,560,986,056). The Adviser represents that the returns of the forward currency contracts held by the Fund will be highly correlated to the returns of the listed futures contracts included in the Benchmark.

[12] The Fund will enter into over-the-counter swap transactions only with respect to transactions based on (i) the return of the Benchmark or any subset of the Benchmark, (ii) any Component in the Benchmark, or (iii) any commodity or currency represented in the Benchmark.

[13] The Fund may invest in commodity-linked notes. Commodity-linked notes are over-the-counter debt instruments, typically issued by a bank or broker-dealer, that are designed to provide cash flows linked to the value of a reference asset. They provide exposure, which may include long and/or short exposure, to the investment returns of the reference asset underlying the note. The performance of these notes is determined by the

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investments in listed futures contracts, forward currency contracts and swap transactions will be backed by investments in Government Securities in an amount equal to the exposure of such contracts.

	Total	Spot	Forward	Swap
Euro	840	265	90	485
Yen	397	140	42	215
British Pound	361	103	30	228
Australian Dollar	175	39	15	121
Swiss Franc	143	49	12	81
Canadian Dollar	115	33	12	69

The Fund will be managed so that the long and short exposure of the Fund's portfolio is economically similar to the long and short positions in the Benchmark. This does not, however, mean that the long and short exposures will be identical. The Fund's positions in such listed futures contracts may deviate from the Benchmark when the Adviser or the Sub-Adviser believes it is in the best interest of the Fund to do so.[14] For example, the Fund may deviate from the Benchmark in order to manage cash flows in and out of the Fund, such as in connection with the payment of dividends or expenses, to manage portfolio holdings around Benchmark changes, or to comply with the 1940 Act, the Commodity Exchange Act ("CEA"), the Internal Revenue Code of 1986 ("Code"), exchange position limits or other applicable laws, rules and regulations.

To the extent the Fund invests in futures contracts it will do so only in accordance with Rule 4.5 of the CEA. The Trust, on behalf of the Fund, has filed a notice of eligibility for exclusion from the definition of the term "commodity pool operator" in accordance with Rule 4.5 so that the Fund is not subject to registration or regulation as a commodity pool operator under the CEA. The Fund does not invest directly in physical commodities.

The Fund's investment in Government Securities shall be limited to investments: (i) To satisfy margin requirements, to provide collateral or to otherwise back investments in commodity- and currency-linked derivatives (such as futures contracts, forward contracts and swaps); (ii) to help manage cash flows in and out of the Fund, such as in connection with the payment of dividends or expenses; or (iii) as a substitute for investment in the listed U.S. Treasury futures contracts included in the Benchmark. In addition, the Fund may invest in money market instruments with remaining maturities of one year or less, as well as cash and cash equivalents, in order to collateralize or otherwise back its positions in listed futures contracts, forward currency contracts or swaps or for cash management purposes. All money market securities acquired by the Fund will be rated investment grade. The Fund generally expects to maintain an average portfolio maturity of 90 days or less on its investments in money market securities.

Neither the Fund nor the Benchmark is leveraged. The Fund will be a "non-diversified" fund. This means that a relatively high percentage of its assets may be invested in a limited number of securities and instruments. The Fund intends to maintain the level of diversification necessary to qualify as a regulated investment company ("RIC") under Subchapter M of the Code.

The Fund will seek to gain exposure to the commodity and currency markets, in whole or in part, through investments in a subsidiary organized in the Cayman Islands ("Subsidiary"). The Subsidiary is wholly-owned and controlled by the Fund, and its investments will be consolidated into the Fund's financial statements. The Fund's and the Subsidiary's holdings will be disclosed on the Fund's website on a daily basis. The Fund's investment in the Subsidiary may not exceed 25% of the Fund's total assets at the end of each fiscal quarter. The Subsidiary's shares will be offered only to the Fund and the Fund will not sell shares of the Subsidiary to other investors.

The Fund's use of the Subsidiary is designed to help the Fund achieve exposure to commodity and currency returns in a manner consistent with the federal tax requirements applicable to the Fund and other regulated investment companies. The Subsidiary will comply with the 1940 Act except that, unlike the Fund, the Subsidiary may invest without limitation in commodity- and currency-linked investments based on commodities and currencies included within the Benchmark. The Subsidiary will otherwise operate in the same manner as the Fund with regard to applicable compliance policies and procedures. The Fund's Registration Statement states that since the Subsidiary's investments are consolidated into the Fund's, the Fund's combined holdings (including the investments of the Subsidiary) must comply with the 1940 Act.

The Fund will not invest in non-U.S. equity securities (other than shares of the Subsidiary).

The Shares:

According to the Registration Statement, the Fund issues and redeems Shares on a continuous basis at net asset value ("NAV")[15] only in large blocks of Shares, typically 50,000 Shares or more ("Creation Unit Aggregations"), in transactions with Authorized Participants. Only institutional investors who have entered into an Authorized Participant agreement may purchase or redeem Creation Unit Aggregations. Orders to create or redeem Creation Unit Aggregations of the Fund must be delivered through an Authorized Participant prior to the

price movement of the reference asset underlying the note. The Fund's investment in commodity-linked notes will be limited to notes providing exposure to (i) the Benchmark or any subset of the Benchmark, (ii) any Component of the Benchmark or (iii) any commodity or currency represented in the Benchmark. As noted, the Benchmark consists of heavily traded U.S. listed futures contracts based on liquid and actively-traded commodities and currencies and there is also an active market for forward currency contracts and other derivatives based on the commodities and currencies represented in the Benchmark. In addition, the Benchmark is widely-followed and currently serves as the basis for a range of investment products, including funds, swap contracts and other derivatives. The Fund's overall investment in swaps and commodity-linked notes will not exceed 30% of the Fund's assets.

[14] The Sub-Adviser is responsible for day-to-day management of the Fund and, as such, typically makes all decisions with respect to portfolio holdings. The Adviser has ongoing oversight responsibility.

[15] The NAV of the Fund's Shares generally is calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange, generally 4 p.m. Eastern time ("NAV Calculation Time"). NAV per Share is calculated by dividing the Fund's net assets by the number of Fund Shares outstanding. For more information regarding the valuation of Fund investments in calculating the Fund's NAV, see the Registration Statement.

Fund's NAV calculation time. The consideration for purchase of Creation Unit Aggregations of the Fund will consist of the in-kind deposit of a designated portfolio of Government Securities and/or listed futures contracts included in the Benchmark ("Deposit Securities") and an amount of cash ("Cash Component"). Together, the Deposit Securities and the Cash Component constitute the "Fund Deposit," which represents the minimum initial and subsequent investment amount for a Creation Unit Aggregation of the Fund. The Fund Deposit may consist entirely of cash.

The process to redeem Creation Unit Aggregations works much like the process to purchase Creation Unit Aggregations, but in reverse.

Each business day prior to the opening of trading the Fund will publish the specific securities and designated amount of cash included in that day's basket for the Fund through the National Securities Clearing Corporation or other method of public dissemination. The Fund reserves the right to accept or pay out a basket of securities or cash that differs from the published basket. The prices at which creations and redemptions occur are based on the next calculation of NAV after an order is received in proper form.

Additional information regarding the Fund and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings, disclosure policies, distributions and taxes is included in the Registration Statement. All terms relating to the Fund that are referred to, but not defined in, this proposed rule change are defined in the Registration Statement.

Availability of Information:

The Fund's website (*http://www.wisdomtree.com*), which will be publicly available prior to the public offering of Shares, will include a form of the Prospectus for the Fund that may be downloaded. The website will include additional quantitative information updated on a daily basis, including, for the Fund: (1) The prior business day's reported NAV, mid-point of the bid/ask spread at the time of calculation of such NAV ("Bid/Ask Price"),[16] and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

On each business day, before commencement of trading in Shares in the Core Trading Session[17] on the Exchange, the Trust will disclose on its website the identities and quantities of the portfolio of securities and other assets ("Disclosed Portfolio")[18] held by the Fund and the Subsidiary that will form the basis for the Fund's calculation of NAV at the end of the business day.[19] On a daily basis, the Adviser (using an automated process currently used by existing WisdomTree Funds) will disclose for each portfolio security or other investment of the Fund the following information: ticker symbol (if applicable), name or description of security or investment, number of shares or dollar value of investments held in the portfolio, and percentage weighting of the security or investment in the portfolio. The website information will be publicly available at no charge.

In addition, for the Fund, an estimated value, defined in NYSE Arca Equities Rule 8.600 as the "Portfolio Indicative Value," that reflects an estimated intra-day value of the Fund's portfolio, will be disseminated. The Portfolio Indicative Value will be based upon the current value for the components of the Disclosed Portfolio and will be updated and disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session on the Exchange. The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

Intra-day and end-of-day prices are readily available through Bloomberg, other major market data providers and broker-dealers for the Benchmark, the listed futures contracts included in the Benchmark, the commodities and currencies represented in the Benchmark, and the forward currency contracts, swaps, notes and other derivatives based on the Benchmark. As a result, information necessary to evaluate the value of any swap or commodity-linked note purchased by the Fund will be readily available to market participants. Intra-day prices for the Benchmark are updated and disseminated at least every 15 seconds during the Core Trading Session on the Exchange.

Investors can also obtain the Trust's Statement of Additional Information ("SAI"), the Fund's Shareholder Reports, and its Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's website at *http://www.sec.gov.* Information regarding market price and trading volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line.

Initial and Continued Listing:

The Shares will be subject to NYSE Arca Equities Rule 8.600(d), which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and/or continued listing, the Shares must be in compliance with Rule 10A–3 under the Exchange Act,[20] as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share for the Fund will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Trading Halts:

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Shares of the Fund will be

[16] The Bid/Ask Price of the Fund is determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and/or its service providers.

[17] The Core Trading Session is 9:30 a.m. to 4 p.m. Eastern time.

[18] The Exchange notes that NYSE Arca Equities Rule 8.600(d)(2)(B)(ii) provides that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.

[19] Under accounting procedures followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any business day may be booked and reflected in NAV on such business day. Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[20] *See* 17 CFR 240.10A–3.

halted if the "circuit breaker" parameters in NYSE Arca Equities Rule 7.12 are reached. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. Such rule provides that, if the Portfolio Indicative Value (as defined in Rule 8.600(c)(3)) of a series of Managed Fund Shares is not being disseminated as required, the Corporation may halt trading during the day in which the interruption to the dissemination of the Portfolio Indicative Value occurs. If the interruption to the dissemination of the Portfolio Indicative Value persists past the trading day in which it occurred, the Corporation will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV or the Disclosed Portfolio with respect to a series of Managed Fund Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV or the Disclosed Portfolio is available to all market participants.

Trading Rules:

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

Surveillance:

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which includes Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from NYMEX, ICE Futures and other exchanges that are members of ISG.[21]

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin:

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit Aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4 p.m. Eastern time each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)[22] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the listing and trading criteria set forth in NYSE Arca Equities Rule 8.600 are intended to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 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.

[21] For a list of the current members of ISG, see *http://www.isgportal.org.* The Exchange notes that not all of the components of the Disclosed Portfolio for the Fund may trade on exchanges that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[22] 15 U.S.C. 78f(b)(5).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2010–98 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–98. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549–1090 on official business days between 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–98 and should be submitted on or before December 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–28894 Filed 11–16–10; 8:45 am]

BILLING CODE 8011–01–P

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63299; File No. SR–BYX–2010–005]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Y-Exchange, Inc.

November 10, 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 October 29, 2010, BATS Y-Exchange, Inc. ("Exchange", "BYX Exchange" or "BYX") 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. BYX has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to modify its fee schedule applicable to Members[5] of the Exchange pursuant to BYX Rules 15.1(a) and (c). While changes to the fee schedule pursuant to this proposal will be effective upon filing, the changes will become operative on November 1, 2010.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com*, at the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov*, 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

The Exchange is proposing to modify its fee schedule to revise pricing for routed orders that are sent to and executed by the Exchange's affiliate, BATS Exchange, Inc. ("BZX Exchange"). Effective November 1, 2010, BZX Exchange is increasing its standard fee to remove liquidity to $0.0028 per share.[6] The Exchange has various routing strategies and order types that route to BZX Exchange and charge the current remove rate charged by BZX Exchange. These strategies include BYX + BZX Exchange Destination Specific Orders orders[7] (referred to by the Exchange as "B2B" orders), the TRIM routing strategy[8] and the SLIM routing strategy.[9] The Exchange proposes to increase the fee for executions at BZX Exchange through B2B, TRIM and SLIM to $0.0028 per share, consistent with the BZX Exchange fee increase.

In addition to the changes described above, the Exchange proposes to use the name "BYX Exchange" and "BYX" throughout the fee schedule. Similarly, the Exchange proposes defining its affiliate, as it has done above, as "BZX Exchange." Also, the Exchange proposes to make stylistic changes, including referring to its book of orders as its "order book," rather than just its "book."

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[6] *See* "BATS October U.S. Markets Update and Pricing November 1, 2010" (October 25, 2010), *available at: http://batstrading.com/resources/fee_schedule/2010/BATS-October-US-Markets-Update-and-Pricing-November-1-2010.pdf.*

[7] As defined in BYX Rule 11.9(c)(12), a "Destination Specific Order" is "[a] market or limit order that instructs the System to route the order to a specified away trading center or centers, after exposing the order to the BATS Book."

[8] As defined in BYX Rule 11.13(a)(3)(G), "TRIM is a routing option under which an order checks the System for available shares and then is sent to destinations on the System routing table."

[9] As defined in BYX Rule 11.13(a)(3)(H), "SLIM is a routing option under which an order checks the System for available shares and then is sent to destinations on the System routing table."

requirements of Section 6 of the Act. Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Also, although routing services offered by the Exchange are available to all Members, Members are not required to use the Exchange's routing services, but instead, the Exchange's routing services are completely optional. Members can manage their own routing practices or can utilize a myriad of other routing solutions that are available to market participants. Finally, the change to the fee will allow the Exchange to continue to charge its Members the same fee for orders routed to and executed by its affiliate, BZX Exchange, as BZX Exchange would charge directly if such Members routed to BZX Exchange directly.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments Regarding 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

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act [10] and Rule 19b–4(f)(2) thereunder,[11] because it establishes or changes a due, fee or other charge imposed on members by the Exchange. Accordingly, the proposal is effective upon filing with the Commission.

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–BYX–2010–005 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–BYX–2010–005. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–BYX–2010–005 and should be submitted on or before December 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–28895 Filed 11–16–10; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63300; File No. SR–BATS–2010–031]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

November 10, 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 October 29, 2010, BATS Exchange, Inc. (the "Exchange," "BZX Exchange" or "BZX") 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 Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to modify its fee schedule applicable to Members [5] of the Exchange pursuant to BZX Rules 15.1(a) and (c). While changes to the fee schedule pursuant to this proposal will be effective upon filing, the changes will become operative on November 1, 2010.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com*, at the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov*, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the "Equities Pricing" section of its fee schedule to increase its standard fee for removing liquidity from the Exchange to $0.0028 per share and to increase its standard rebate for adding displayed liquidity to the Exchange to $0.0027 per share. The Exchange does not propose to charge different fees or grant different rebates depending on the amount of orders submitted to, and/or trades executed on or through, the Exchange. Accordingly, all fees and rebates described below are applicable to all Members, regardless of the overall volume of their trading activities on the Exchange.

Consistent with the current fee to remove liquidity, the charge per share for executions that remove liquidity from the Exchange will not apply [sic] executions that remove liquidity in securities priced under $1.00 per share. The fee for such executions will remain at 0.10% of the total dollar value of the execution. Similarly, as is currently the case for the rebate for adding liquidity to the Exchange, there will be no liquidity rebate for adding liquidity in securities priced under $1.00 per share. Finally, the rebate paid by the Exchange for adding non-displayed liquidity will remain at $0.0020 per share. As defined on the Exchange's current fee schedule, "non-displayed liquidity" includes liquidity resulting from all forms of Pegged Orders,[6] Mid-Point Peg Orders,[7] and Non-Displayed Orders,[8] but does not include liquidity resulting from Reserve Orders [9] or Discretionary Orders.[10]

In addition to the changes described above, and to differentiate itself from its affiliate, BATS Y-Exchange, Inc. ("BYX Exchange"), which recently commenced operations, the Exchange proposes to use the name "BZX Exchange" and "BZX" throughout the fee schedule, other than when referring to its equity options platform, which it will refer to as "BATS Options." Similarly, the Exchange proposes defining its affiliate, as it has done above, as "BYX Exchange." Also, the Exchange proposes to make stylistic changes, including referring to its book of orders as its "order book," rather than just its "book." Finally, the Exchange proposes to remove one heading from its fee schedule, "Options Pricing (Continued)," which is no longer necessary for the printed version of its fee schedule.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[11] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[12] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls.

The impact of the proposed price changes upon the net fees paid by a particular market participant will depend upon a number of variables, including the prices of the market participant's quotes and orders relative to the national best bid and offer (*i.e.,* its propensity to add or remove liquidity), the types of securities that it trades and its usage of non-displayed quotes/orders. While Members that generally remove liquidity from the Exchange will be paying a higher fee, the Exchange believes that such Members will benefit to the extent the higher rebate paid by the Exchange for adding liquidity attracts additional liquidity and thus improves the depth of liquidity available on the Exchange.

The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that its fees and credits are competitive with those charged by other venues. Finally, the Exchange believes that the proposed rates are equitable in that they apply uniformly to all Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments Regarding 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

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act [13] and Rule 19b–4(f)(2) thereunder,[14] because it establishes or changes a due, fee or other charge imposed on members by the Exchange. Accordingly, the proposal is effective upon filing with the Commission.

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–BATS–2010–031 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[6] As defined in BZX Rule 11.9(c)(8).
[7] As defined in BZX Rule 11.9(c)(9).
[8] As defined in BZX Rule 11.9(c)(11).
[9] As defined in BZX Rule 11.9(c)(1).
[10] As defined in BZX Rule 11.9(c)(10).
[11] 15 U.S.C. 78f.
[12] 15 U.S.C. 78f(b)(4).
[13] 15 U.S.C. 78s(b)(3)(A)(ii).
[14] 17 CFR 240.19b–4(f)(2).

100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2010–031. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–BATS–2010–031 and should be submitted on or before December 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–28896 Filed 11–16–10; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63301; File No. SR–FICC–2010–08]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change To Eliminate Certain Cash Adjustments Currently Processed by the MBSD

November 10, 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 October 28, 2010, the Fixed Income Clearing Corporation ("FICC") 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 primarily by FICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to eliminate cash adjustments that are currently processed by the Mortgage-Backed Securities Division ("MBSD").

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FICC 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. FICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[3]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

FICC is proposing to eliminate the cash adjustments that are currently processed by the MBSD.[4] FICC is proposing to eliminate the cash adjustments because they have low monetary impact and were originally designed to address a clearance event ("significant variance") that no longer applies. Variance was originally established when mortgage-backed securities were physically settled, and it was difficult to organize physical pools into $1 million par amounts for delivery.

As a result of the netting of To Be Announced ("TBA") transactions, a participant may have a settlement obligation to another participant with which it did not trade ("SBON Obligations"). SBON Obligations are created in multiples of $1 million par amounts and are assigned a uniform delivery price. Since the delivery price will differ from the participant's original trade price, an adjustment is calculated for the difference between the delivery price and the trade price. This adjustment is referred to as the Settlement Balance Order Market Differential ("SBOMD").

Participants notify the MBSD when they have settled their SBON Obligations with their assigned counterparties through the Notification of Settlement ("NOS") process. From the information supplied by both the delivering and receiving participants in their respective NOS, the MBSD determines whether the securities delivered were in $1 million par amounts or in a par amount within acceptable variance (plus or minus $100 per million). In instances where the delivery was completed in $1 million par amounts, the MBSD takes no additional steps.

If the delivery was cleared for a par amount within acceptable variance, the MBSD will calculate a cash adjustment to reconcile the difference between the original SBOMD (based on a $1 million par amount) and what the SBOMD should have been (based on the par amount delivered). As mortgage-backed securities migrated from physical to electronic settlement, acceptable variance has been reduced from an initial $50,000 per million to the current amount of $100 per million.

FICC believes the proposed rule change is consistent with the requirements of Section 17A of the Act [5] and the rules and regulations thereunder applicable to FICC because it is a deletion of a rule that covers a process that is no longer needed and as such it provides certainty and clarity of the clearance process at MBSD to members.

(B) Self-Regulatory Organization's Statement on Burden on Competition

FICC does not believe that the proposed rule change will have any impact or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. FICC will notify the Commission of any written comments received by FICC.

[3] The Commission has modified the text of the summaries prepared by FICC.

[4] The specific language of the proposed provision can be found at *http://www.dtcc.com/downloads/legal/rule_filings/2010/ficc/2010-08.pdf.*

[5] 15 U.S.C. 78q–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 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 Commissions 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–FICC–2010–08 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–FICC–2010–08. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings will also be available for inspection and copying at the principal office of FICC and on FICC's Web site at *http://dtcc.com/downloads/legal/rule_filings/2010/ficc/2010-08.pdf.* 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–FICC–2010–08 and should be submitted on or before December 8, 2010.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–28897 Filed 11–16–10; 8:45 am]

BILLING CODE 8011–01–P

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63072A; File No. SR–NYSEAmex–2010–97]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC Amending the Exchange Price List; Correction

October 8, 2010.

AGENCY: Securities and Exchange Commission.

ACTION: Notice; correction.

SUMMARY: The Securities and Exchange Commission published a document in the **Federal Register** of October 19, 2010 concerning a Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC Amending the Exchange Price List. The document was dated incorrectly.

FOR FURTHER INFORMATION CONTACT: Yue Ding, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549, (202) 551–5842.

Correction

In the **Federal Register** of October 19, 2010, in FR Doc. 2010–26109, on page 64368, in the 23rd line of the second column, the date is corrected to read as noted above.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–28864 Filed 11–16–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63307; File No. SR–MSRB–2010–13]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing and Immediate Effectiveness of Amendments to Rule A–7, on Assessments, and Rule A–8, on Rulemaking Procedures

November 12, 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 November 1, 2010, the Municipal Securities Rulemaking Board ("Board" or "MSRB"), filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the MSRB. The MSRB has designated the proposed rule change as concerned solely with the administration of the Board pursuant to Section 19(b)(3)(A)(iii) of the Act, and Rule 19b–4(f)(3) thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB is filing a proposed rule change consisting of amendments to Rule A–7, on assessments, and Rule A–8, on rulemaking procedures, to apply existing MSRB mechanisms and procedures for establishing assessments and undertaking rulemaking in connection with municipal advisors. The proposed rule change would apply to municipal advisors effective immediately. The text of the proposed rule change is available on the MSRB's Web site at *http://www.msrb.org/Rules-and-Interpretations/SEC-Filings/2010-Filings.aspx*, at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

may be examined at the places specified in Item IV below. The MSRB 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 purposes of the proposed rule change are: (i) To provide that the same procedures that the MSRB uses to engage in rulemaking for brokers, dealers, and municipal securities dealers will also apply to rulemaking concerning the activities of municipal advisors described in Section 15B(e)(4)(i) and (ii) of the Act and (ii) to provide a mechanism for the assessment of reasonable fees to defray a portion of the increased costs and expenses associated with the operation and administration of the Board attributable to the Board's regulation of municipal advisors, just as such a mechanism currently exists for assessments on brokers, dealers, and municipal securities dealers. Although the proposed rule change establishes procedures and mechanisms relating to rulemaking and assessments, it does not itself actually prescribe any rules for, or impose fees or charges on, municipal advisors. Such rules or assessments would be adopted through separate rulemaking proposals by the Board pursuant to such procedures and mechanisms.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Act, which provides that:

> The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(J) of the Act provides that the rules of the MSRB shall:

> Provide that each municipal securities broker, municipal securities dealer, and municipal advisor shall pay to the Board such reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the Board.

The proposed rule change is consistent with Section 15B(b)(2) of the Act, because it provides for the procedures that the MSRB shall use to engage in rulemaking provided for in Section 15B(b)(2) of the Act and a mechanism for the assessment of reasonable fees to defray a portion of the increased costs and expenses associated with the operation and administration of the Board attributable to the Board's regulation of municipal advisors.

> Section 15B(b)(2)(L) of the Act requires that rules adopted by the Board not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

As noted above, the proposed rule change only authorizes the MSRB to engage in rulemaking concerning municipal advisors and to impose fees and charges on municipal advisors, in both cases as contemplated by the Act. The proposed rule change does not actually prescribe rules for, or impose fees or charges on, municipal advisors. Accordingly, the proposed rule change imposes no regulatory burden on small advisors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB 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, since it would apply equally to all municipal advisors.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The MSRB represented that the proposed rule change qualifies for immediate effectiveness pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(3) [4] thereunder, in that those proposed amendments are concerned solely with the administration of the Board. 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.[5]

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–MSRB–2010–13 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE,, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MSRB–2010–13. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a,m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. 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

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(3).

[5] *See* Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

Number SR–MSRB–2010–13 and should be submitted on or before December 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–28982 Filed 11–16–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63305; File No. SR–Phlx–2010–153]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change To Update and Streamline the Process for Specialist Evaluations and Clarify the Time Within Which SQTs and RSQTs Begin To Electronically Quote After Assignment

November 10, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 5, 2010, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 proposal to amend Phlx By-Law Article XI (Appeals) Section 11–1; Phlx Rules 507 (Application for Approval as an SQT or RSQT and Assignment in Options), 508 (Allocation Application), 510 (SQT and RSQT Performance Evaluation), 511 (Specialist Performance Evaluation), and 515 (Specialist Evaluations); and Phlx Options Floor Procedure Advice ("OFPA") C–8 (Options Specialist Evaluations) to update the specialist evaluation process; ensure timely electronic quotations by Streaming Quote Traders and Remote Streaming Quote Traders; ensure the ability of the Exchange to control allocation transfers; and consolidate and delete unnecessary and obsolete rules and processes.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of 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 purpose of the proposed rule change is to amend By-Law Article XI Section 11–1; Phlx Rules 507, 508, 510, 511, and 515; and OFPA C–8 to enhance the ability to gauge specialist performance in an ever-increasingly competitive electronic trading environment; ensure timely electronic quotations by Streaming Quote Traders and Remote Streaming Quote Traders; ensure the ability of the Exchange to control allocation transfers; and consolidate and delete unnecessary and obsolete rules and processes.

Background

After the merger of The NASDAQ OMX Group, Inc. ("NASDAQ OMX") and the Philadelphia Stock Exchange, Inc. (now NASDAQ OMX PHLX LLC),[3] the Commission in May 2009 approved a Phlx filing that, among other things, transferred all relevant duties from the Options Allocation, Evaluation and Securities Committee ("Allocation Committee") to the Exchange staff and established that the Exchange administers Exchange Rules 500 through 599 (the "Allocation and Assignment Rules").[4]

The Allocation and Assignment Rules generally describe the process for: Application for becoming and appointment of specialists; allocation of classes of options to specialist units and individual specialists; [5] application for becoming and approval of Streaming Quote Traders ("SQTs") [6] and Remote Streaming Quote Traders ("RQTs") [7] (together the "Streaming Quote Traders") [8] and assignment of options to them; and performance evaluations for specialist units and Streaming Quote Traders. The Allocation and Assignment Rules also indicate, among other things, under what circumstances new specialist allocations and Streaming Quote Trader assignments may not be made.[9]

Specialist Evaluations

Rule 511 and Rule 515 deal with specialist evaluations and certain allocation procedures. Currently, Rule 511 indicates, among other things, that specialist performance evaluations standards and procedures may be used in respect of Exchange decisions regarding allocating new options classes; reallocating options classes for substandard performance; determining whether a specialist that has been transferred an options class is performing adequately; and determining whether a staff reorganization or material change with respect to a specialist unit has affected the ability of the unit to continue to perform

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR–Phlx–2008–31); and 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (SR–NASDAQ–2008–035). *See also* Securities Exchange Act Release No. 62783 (August 27, 2010), 75 FR 54204 (September 3, 2010) (SR–Phlx–2010–104).

[4] *See* Securities Exchange Act Release No. 59924 (May 14, 2009), 74 FR 23759 (May 20, 2009) (SR–Phlx–2009–23) (approval order.) *See also* Rule 500.

[5] A specialist unit may have one or more individual specialists. *See* proposed Supplementary Material .05 to Rule 511.

[6] An SQT is a Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the floor of the Exchange. *See* Rule 1014(b)(ii)(A).

[7] An RSQT is an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. *See* Rule 1014(b)(ii)(B).

[8] Streaming Quote Traders also include Directed SQTs ("DSQTs") and Directed RSQTs ("DRSQTs"), which are SQTs and RSQTs that receive a Directed Order. Exchange Rule 1080(l)(i)(A) defines Directed Order.

[9] *See, for example,* Supplementary Material .01 to Rule 506 (specialist may not apply for a new allocation for a period of six months after an option allocation was taken away from the specialist in a disciplinary proceeding or an involuntary reallocation proceeding). *See also* Commentary .02 to Rule 507 (establishing the Maximum Number of Quoters in assigned equity options).

adequately in order to retain allocated securities. Rule 511 also discusses the process and timing for doing routine and special (cause) evaluations and reviews. Currently, Rule 515 similarly discusses specialist performance evaluations for options specialists and indicates, among other things, the timing and frequency of evaluations. The criterion to evaluate specialists may include, but is not limited to, quality of markets, observance of ethical standards, administrative responsibilities, and trade correction and exemptive relief data. Rule 515, like OFPA C–8, also discusses the use of floor broker questionnaires in the specialist evaluation process.

The Exchange proposes to eliminate the floor broker questionnaire ("questionnaire"), which asks floor brokers their opinions of specialist performance and presumes that a specialist unit performed below minimum standards if the specialist unit was rated in the bottom 10% of all units in the aggregate results for all questionnaires. The Exchange has found that such questionnaires, being wholly subjective in nature and not based on any hard data, would generally provide limited, if any, substantial value in the current fast-paced, competitive trading environment that includes numerous market participants and liquidity providers. The Exchange believes that the various types of specialist performance evaluations that are discussed in this filing enhance the evaluation process and make it increasingly data-based, and make questionnaires unnecessary. As such, the Exchange is deleting OFPA C–8 and all references to floor broker questionnaires in its Allocation and Assignment Rules and OFPAs.

The Exchange proposes to consolidate Rules 511 and 515 into Rule 511 and to adopt for specialist units [10] an objective review process that is similar to the process currently in use for Streaming Quote Traders per Rule 510, particularly in respect of minimum performance standards. The Exchange also proposes to relocate portions of the existing evaluation process from Rule 515 into Rule 511. As such, there would be two types of specialist evaluations or reviews per Rule 511: a) routine Specialist Performance Evaluations, which would be conducted on at least an annual basis,[11] and would include monthly Minimum Performance Reviews; [12] and b) Special Circumstance Evaluations, which may be conducted if a specialist unit's performance was so egregiously deficient as to call into question the Exchange's integrity or impair the Exchange's reputation for maintaining efficient, fair and orderly markets; and within six months after a new allocation and within four months after transfer of one or more options.[13]

The Exchange proposes changes to Rule 511 so that specialist suspension, termination, or restriction of allocations in one or more options may occur after two or more consecutive sub-standard Minimum Performance Reviews or after Special Circumstance Evaluations and after written notice. As discussed below, following substandard minimum performance, a specialist unit may have an opportunity for an informal meeting with Exchange staff; and following a Special Circumstance Evaluation may be afforded thirty days to improve performance. Moroever, after a Minimum Performance Review or a Special Circumstance Evaluation, a specialist or specialist unit [14] may appeal from a decision of the Exchange in accordance with Exchange By-Law Article XI, Section 11–1, after filing a written notice of appeal with the Exchange.[15] The Exchange believes that this appeal process for specialists or specialist units per Rule 511, which is similar to the process afforded to Streaming Quote Traders per Rules 507 and 510, is fair and equitable and promotes uniformity for the various market participant members of the Exchange.[16] The Exchange is, for similar reasons of uniformity, establishing new minimum performance standards for specialist units.

The minimum performance standards for specialist units in proposed Rule 511(d), which are part of the Specialist Performance Evaluation process, are similar to the minimum performance standards for Streaming Quote Traders in Rule 510 Commentary .01.[17] This is done to promote a minimum performance floor across the Exchange for specialist units and Streaming Quote Traders.[18] Thus, proposed Rule 511(d) suggests the minimum acceptable performance for specialist units using the following criteria: (a) The percentage of time that the specialist unit represents or exceeds the Phlx Best Bid or Offer ("PBBO") in the options allocated to the unit; [19] and (b) quoting requirements of specialist units pursuant to Rule 1014.[20] Specifically, if the percentage of the total time that the options allocated to a specialist unit represent or exceed the PBBO is in the lowest quartile of all specialist units for two or more consecutive months, this may be considered sub-standard performance, that is, performance that does not attain minimum performance standards; and if a specialist unit fails

[10] Proposed Supplementary Material .05 to Rule 511 states that reference to specialist unit within Rule 511 means the unit as a whole or any subpart of its operation that is acting in a specialist capacity on the Exchange and is subject to evaluation; and that a specialist unit may have one or more individual specialists. As such, individual specialist actions may be attributable to relevant specialist units in respect of matters discussed in this proposal such as evaluations. The proposed language in Rule 511 was moved from Rule 515 and updated to reflect current usage.

[11] *See* proposed Rule 511(c).

[12] *See* proposed Rule 511(d).

[13] *See* proposed Rule 511(e).

[14] In proposed Rule 511(d) and Rule 511(e), a specialist has the right to request an appeal on behalf of his specialist unit.

[15] By-Law Article XI Section 11–1(c) states that an appeal: shall be heard by a special committee of the Board of Governors composed of three (3) Governors, of whom at least one (1) shall be an Independent Governor. The person requesting review may appeal by filing a written notice thereof with the Secretary of the Exchange within ten (10) days after a decision. The person requesting review shall be permitted to submit a written statement to and/or appear before this special committee. The Secretary of the Exchange shall certify the record of the proceeding, if any and the written decision and shall submit these documents to the special committee. The special committee's review of the action shall be based solely on the record, the written decision and any statement submitted by the person requesting the review. The special committee shall prepare and deliver to such person a written decision and reasons therefor. If the special committee affirms the action, the action shall become effective ten (10) days from the date of the special committee's decision. There shall be no appeal to the Board of Governors from any decision of the special committee.

The Exchange is correcting a reference in By-Law Article XI Section 11–1(c) from Rule 511(e) to Rule 511(d) or (e), in light of the internal numbering changes proposed in Rule 511; and cross-referencing Rule 507, which notes the availability of the appeal process.

[16] For consistency, the Exchange proposes appeal language in Rules 510 and 511 that is similar, in relevant part, to that of Rule 507: An appeal to the Board of Governors from a decision of the Exchange * * * may be requested * * * by filing with the Secretary of the Exchange written notice of appeal within ten (10) days after the decision has been rendered, in accordance with Exchange By-Law Article XI, Section 11–1.

[17] *See* Securities Exchange Act Release No. 55080 (January 10, 2007), 72 FR 2324 (January 18, 2007) (SR–Phlx–2006–51) (order approving performance standards for Streaming Quote Traders and Remote Streaming Traders).

[18] Recognizing that among market participants on the Exchange specialists have diverse and at times greater market making responsibilities, which are not diminished by this filing, Specialist Performance Evaluations are available to the Exchange to review specialist performance and behavior (as discussed in more detail below).

[19] In that the Exchange is specifically establishing a measure of specialist performance on Phlx, the Exchange is changing the requirement to PBBO from NBBO (National Best Bid or Offer). A reference in Commentary .01 of Rule 510 is similarly changed to PBBO for the sake of conformity.

[20] This rule change proposal makes no changes to current quoting requirements for specialists delineated in Rule 1014. Rule 1014 is written in terms of specialists; as noted in proposed Supplementary Material .05 to Rule 511, a specialist unit may have one or more specialists. *See* supra note 10.

to meet the quoting requirements as prescribed by Rule 1014, this may be considered sub-standard performance. The Exchange proposes a process that would allow specialist to meet with Exchange staff regarding their sub-standard performance.

The Exchange proposes in Rule 511(d)(ii) that if the Exchange finds that a specialist unit failed to meet Minimum Performance Standards, it will provide written notice to the unit. The Exchange proposes in Rule 511(d)(iii) that the specialist unit may request and the Exchange may hold an informal meeting with the head specialist and any other appropriate specialist of the specialist unit to discuss the failure to meet minimum standards and to explore possible remedies. The Exchange will give notice of the meeting and no verbatim record will be kept. If, after receiving such notice for the Exchange, the specialist unit refuses or otherwise fails without reasonable justification to meet with the Exchange, the Exchange may refer the matter to the Business Conduct Committee (a standing committee of the Exchange) for the commencement of formal disciplinary proceedings. If the Exchange believes there are no mitigating circumstances that would demonstrate substantial improvement of or reasonable justification for the failure to meet minimum standards, the Exchange may take remedial action pursuant to subparagraph (d)(ii).

The Exchange proposes in Rule 511(d)(ii) that if it finds sub-standard minimum performance by a specialist unit, the Exchange may take the following remedial actions: a) restriction of allocations in additional options (subsection (d)(ii)(A)); b) suspension, termination, or restriction of allocations in one or more options (subsection (d)(ii)(B)); or c) suspension, termination, or restriction of the specialist or specialist unit's registration in general (subsection (d)(ii)(C)). Specialist units or specialists therein may appeal to the Board of Governors from a decision of the Exchange pursuant to subsection (d)(ii)(B) or subsection (d)(ii)(C) by filing the requisite notice of appeal.[21] Minimum Performance Reviews will be conducted at least annually but may be conducted at monthly intervals.

Routine Specialist Performance Evaluations pursuant to proposed Rule 511(c) are conducted at annual (or shorter) intervals to determine whether specialists have fulfilled performance standards that may include, but are not limited to, trade correction data, exemptive relief data, quality of markets data, proper execution of duties as a specialist unit, competition among market makers and in representing the Exchange as specialist unit, observance of ethical standards, and administrative factors. The Exchange may also consider, when doing these routine evaluations, any other relevant information including, but not limited to, trading data, regulatory history, the number of requests for quote spread parameter relief, how a specialist unit optimizes the submission of quotes through the Specialized Quote Feed as defined in Rule 1080 by evaluating the number of individual quotes per quote block received by the Exchange, and such other factors and data as may be pertinent in the circumstances.

The Exchange may also, but is not required to, conduct Special Circumstance Evaluations pursuant to proposed Rule 511(e) whenever the Exchange feels that circumstances warrant such reviews. These include, but are not limited to, where the Exchange believes that a specialist unit's performance in a particular market situation was so egregiously deficient as to call into question the Exchange's integrity or impair the Exchange's reputation for maintaining efficient, fair and orderly markets. Special Circumstance Evaluations may incorporate the same review methodology and procedures as established for routine Specialist Performance Evaluations or Minimum Performance Reviews. However, Special Circumstance Evaluations may instead or in addition examine such other matters related to a specialist unit's performance as the Exchange deems necessary and appropriate. Special Circumstance Evaluations may be done within six months of new allocations[22] and within four months of transfers of allocations to specialist units.[23]

The Exchange may determine, pursuant to a Rule 511 Special Circumstance Evaluation, that a specialist unit that received a new allocation has not complied with any of the commitments that it made when applying for the options class, including but not limited to commitments regarding capital, personnel and order flow (subsection (e)(i)(A)); or that the performance of a specialist unit was inadequate after the transfer of one or more options classes or when there has been a material change in the specialist unit (subsection (e)(i)(B)). After the Exchange indicates to the applicable specialist unit why its performance is inadequate, the specialist unit will be afforded thirty days in which to improve its performance. If the specialist unit does not improve its performance, the Exchange may, after written notice, remove and reallocate one or more securities that were allocated to such unit. Specialists units and specialists therein may appeal to the Board of Governors from a decision of the Exchange pursuant to proposed subsection (e)(ii) by filing the requisite notice of appeal.[24]

Additionally, the rules establish limits on the allocation of options to specialist units that fail to perform adequately. By virtue of proposed Rule 511(e)(iii), if a specialist allocation in an option is terminated as a result of a Special Circumstance Evaluation, the specialist unit may not receive an allocation (or re-allocation) in the terminated option or options for a period not to exceed six months. Similarly, by virtue of proposed Rule 511(d)(v), if an allocation is terminated because a specialist exhibits sub-standard performance in terms of best bid and offer or in terms of quoting requirements, such specialist may not receive an allocation (or re-allocation) in the terminated option or options for a period not to exceed six months; and if an allocation is terminated because a specialist unit exhibits sub-standard performance in terms of minimum quoting requirements per Rule 1014, such specialist unit may not receive an allocation (or re-allocation) in the terminated option or options for a period not to exceed twelve months.

As discussed, all specialists and specialist units have the right to appeal from an Exchange decision that was taken pursuant to a Specialist Evaluation or a Special Circumstance Evaluation. Moreover, the rules indicate that the Exchange must provide written notice regarding the lack of adequate performance; and give specialist units an opportunity to discuss performance or improve performance before the Exchange takes remedial action. The Exchange feels that these procedures are fair, reasonable, and uniform for all specialists on the Exchange.[25]

[21] *See* supra note 15. The Minimum Performance Standards; remedial action by the Exchange if there is a failure to attain such performance standards; and appeal rights therefrom are substantially similar for specialist units and SQTs/RSQTs per Rules 511 and 510, respectively.

[22] For purposes of conformity with the proposed six month period, 90 days is changed to 180 days (six months) in Rule 511(b).

[23] While Special Circumstance Evaluations are optional during the noted four month and six month periods, the Exchange may also conduct independent Minimum Performance Reviews on a monthly basis.

[24] *See* supra note 15.

[25] In an effort to streamline the specialist evaluation process, and in light of the noted

Continued

In Rule 510 (regarding SQTs and RSQTs) and Rule 511 (regarding specialists), the Exchange proposes to eliminate the right to appeal from an Exchange's determination to restrict additional options allocations based on failure to meet minimum performance requirements. The Exchange believes that an appeals process for restriction of allocations or assignments in additional (not currently allocated or assigned) options, which would require a 10 day notice period followed by a potentially lengthy appeals proceeding, is not necessary and indeed may be counterproductive in light of the need to efficiently and timely allocate or assign additional options.

Assignment in Options

Rule 507 deals with the process of applying for approval as an SQT or RSQT on the Exchange and assignment of options to SQTs and RSQTs. These are Registered Options Traders that, similarly to other market makers on the Exchange such as specialists, provide depth and liquidity through two-sided quotes in the options in which they are assigned. Rule 1014 discusses, among other things, the quote obligations of market makers and participants on the Exchange.[26] Rule 507 defines the Maximum Number of Quoters ("MNQ") in equity options, which establishes the greatest number of SQT and RSQT assignments that the Exchange may make in a particular class of option. MNQ in equity options is currently set in Commentary .02 to Rule 507 at no more than: Twenty-four market participants (SQTs and RSQTs) for equity options in the top 5% most actively traded options; nineteen market participants for the next 10% most actively traded options; and seventeen market participants for all other options.[27]

Because the number of assignments that may be made by the Exchange are limited by MNQ, thereby resulting in situations where SQTs and RSQTs may not be able to get assignments that they applied (and may be eligible) for, the Exchange is striving to ensure that option assignments are used to provide liquidity within a reasonable time after assignment. It is for this reason that the Exchange proposes to add new Commentary .01 to Rule 507 to state that within not more than thirty business days after assignment of an option pursuant to this rule, an assigned SQTs or RSQTs shall begin to generate and submit electronic quotations for such option through the Exchange's electronic quotation, execution, and trading system. Quoting requirements are, as previously noted, set forth in Rule 1014.[28] Should an assigned SQT or RSQT not generate electronic quotes within the requisite time frame, the Exchange shall have the ability to terminate the assignment in question after providing written notice to the assigned SQT or RSQT, and make a re-assignment, unless there are exigent circumstances that the Exchange believes may not have allowed timely generation and submission of electronic quotes.[29]

Transfer of Allocated Option Classes

Rule 508 deals with agreements between specialist units to transfer one or more options classes that are already allocated by the Exchange to one of such units. This type of process tends to happen most often, and in fact is instrumental to facilitating the orderly transfer and continuation of markets in classes of allocated options, when a specialist unit significantly changes the scale or breadth of its specialist operation on the Exchange or withdraws from the Exchange.

Currently, Rule 508 states that failure to provide the Exchange with prior notice of an arranged (agreed-upon) transfer of one or more already allocated options classes in accordance with this rule permits the Exchange to reallocate such options classes. The proposed change to Rule 508 states that failure to provide the Exchange prior notice of a transfer in accordance with this Rule, or failure to obtain Exchange approval of a transfer, permits the Exchange to recover the allocated securities and reallocate them. The Exchange believes that this is appropriate given that the Exchange initially makes the allocation of the option class after evaluating the relevant factors, and should continue to have a similar ability to evaluate the propriety of subsequent transfer of the same option class.

Commentary .01 to Rule 508 also currently indicates that no member may effect a change in the floor trading location of any equity option or index option class until forty-five calendar days after final approval of the change by the Exchange has been disseminated to the option floor. The Exchange proposes to delete this provision. The Exchange believes that the forty-five day delay to affect a change is functionally obsolete and no longer necessary, particularly in the current fast-paced trading environment.[30]

Finally, the Exchange is proposing technical, housekeeping rule changes in respect of ensuring conformity of rule language and deleting references that are obsolete or no longer in use. For example, the reference to Registrant is changed to specialist or specialist unit in Rules 508 and 511, and the reference to grant is changed to allocate in Rule 511 for purposes of conformity.[31] The Exchange is proposing to clean up the language of Commentary .02 of Rule 510 by removing reference to initial implementation of the existing rule. The Exchange is also proposing to conform Rule 511 language in light of the consolidation with Rule 515. Thus, reference to Specialist Performance Evaluations and Special Circumstance Evaluations, and reference to factors that may be considered by the Exchange (e.g., evaluations, trade correction data, exemptive relief data) are added to Rule

safeguards built into the Exchange's rules and By-Laws, the Exchange is deleting the formal hearing process that is currently in Rule 511(e) and proposes an informal hearing process in Rule 510 (regarding SQTs and RSQTs) and Rule 511 (regarding specialists).

[26] Rule 1014(b)(ii)(D) states that in addition to the other requirements for ROTs set forth in this Rule 1014, except as provided in sub-paragraph (4) below, an SQT and an RSQT shall be responsible to quote two-sided markets in not less than 60% of the series in which such SQT or RSQT is assigned, provided that, on any given day, a Directed SQT ("DSQT") or a Directed RSQT ("DRSQT") (as defined in Rule 1080(l)(i)(C)) shall be responsible to quote two-sided markets in the lesser of 99% of the series listed on the Exchange or 100% of the series listed on the Exchange minus one call-put pair, in each case in at least 60% of the options in which such DSQT or DRSQT is assigned. Whenever a DSQT or DRSQT enters a quotation in an option in which such DSQT or DRSQT is assigned, such DSQT or DRSQT must maintain until the close of that trading day quotations for the lesser of 99% of the series of the option listed on the Exchange or 100% of the series of the option listed on the Exchange minus one call-put pair.

[27] Regarding MNQ procedures in general, *see* Commentaries .01 to .05 to Rule 507. *See also* Securities Exchange Act Release No. 60688 (September 18, 2009), 74 FR 49058 (September 25, 2009) (SR–Phlx–2009–82) (order approving modest increase in MNQ levels).

[28] Rule 1014 also sets forth circumstances in which market participants do not have quoting responsibilities. As an example, subsection (b)(ii)(D)(4) states that SQTs, DSQTs, RSQTs and DRSQTs are deemed not to be assigned, and therefore do not have quoting responsibilities, respecting Quarterly Option Series, adjusted option series, and series with an expiration of nine months or greater. Adjusted option series are defined as option series wherein one option contract in the series represents the delivery of other than 100 shares of underlying stock or Exchange-Traded Fund Shares. *See* Securities Exchange Act Release No. 61095 (December 2, 2009), 74 FR 64786 (December 8, 2009) (SR–Phlx–2009–99) (notice of filing and immediate effectiveness).

[29] The Exchange has proposed other amendments to Rule 507 at SR–Phlx–2010–145 that should not impact this filing. Should it become necessary, however, the Exchange will propose additional rule text amendments.

[30] The Exchange will notify relevant specialist units, specialists, or members regarding transfer applications pursuant to Rule 508.

[31] This change in terminology conforms it to current usage.

511(b); and reference to Rule 515 is deleted.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [32] in general, and furthers the objectives of Section 6(b)(5) of the Act [33] in particular, in that it is 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, by updating and making more uniform the evaluation process for specialist units, ensuring timely electronic quotations by SQTs and RSQTs, and consolidating and deleting unnecessary and obsolete rules and processes. The Exchange believes that its rule change proposal does not engender unfair discrimination among specialists, specialist units, SQTs and RSQTs in that it proposes to amend rules and procedures that are equally applicable to all members and member organizations at the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 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 No. SR–Phlx-2010–153 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–153. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–153 and should be submitted on or before December 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–28900 Filed 11–16–10; 8:45 am]

BILLING CODE 8011–01–P

[32] 15 U.S.C. 78f(b).

[33] 15 U.S.C. 78f(b)(5).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63308; File No. SR–MSRB–2010–15]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing and Immediate Effectiveness of Rule D–13, on a Definition of "Municipal Advisory Activities", Rule D–14, on a Definition of "Appropriate Regulatory Agency", and Amendments to Rule D–11 ("Associated Persons"), Rule G–40 on Electronic Mail Contacts, and Form G–40, on Electronic Mail Contacts

November 12, 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 November 10, 2010, the Municipal Securities Rulemaking Board ("Board" or "MSRB") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the MSRB. The Board has designated the proposed rule change as concerned solely with the administration of the Board or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of Section 19(b)(2) of the Act. 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 MSRB is filing a proposed rule change relating to municipal advisors, consisting of: (i) Amendments to Rule D–11 (definition of "associated persons"); (ii) new Rule D–13 (definition of "municipal advisory activities"); (iii) new Rule D–14 (definition of "appropriate regulatory agency"); (iv) amendments to Rule G–40, on electronic mail contacts, by municipal advisors; and (v) amendments to Form G–40, on electronic mail contacts. The proposed rule change is effective immediately upon filing.

The text of the proposed rule change is available on the MSRB's Web site at *http://www.msrb.org/Rules-and-Interpretations/SEC-Filings/2010-Filings.aspx,* at the MSRB's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB 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 Board 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 purposes of the proposed rule change are: (i) To complete the rulemaking that is necessary for the registration of municipal advisors with the MSRB (amended Rule G–40 and amended Form G–40) and (ii) to define certain terms that are necessary to the MSRB rules governing rulemaking concerning municipal advisors and the process of registering municipal advisors with the MSRB. Specifically, the proposed rule change consists of: (i) An amendment to Rule D–11 to provide that the term "municipal advisor" in MSRB rules shall include the associated persons of such municipal advisor unless otherwise specified, (ii) a new Rule D–13 that defines "municipal advisory activities" with respect to the activities of municipal advisors described in Section 15B(e)(4)(A)(i) and (ii) of the Act, (iii) a new Rule D–14 that defines "appropriate regulatory agency" to have the meaning set forth in Section 3(a)(34) of the Act with respect to a broker, dealer, or municipal securities dealer and to mean the Commission with respect to a municipal advisor; (iv) amendments to Rule G–40 concerning the provision of electronic mail contacts by municipal advisors, and (v) amended Form G–40 concerning the provision of electronic mail contacts by municipal advisors.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Act, which provides that:

> The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

The proposed rule change is consistent with Section 15B(b)(2) of the Act, because it: (i) Is essential to the registration with the MSRB of the municipal advisors described in Section 15B(b)(2) of the Act and (ii) defines certain terms that are necessary to the MSRB rules governing such municipal advisors and the process of registering such advisors with the MSRB.

Section 15B(2)(L) of the Act requires that rules adopted by the Board

> not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

The proposed rule change does not impose a regulatory burden on small advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons and for the robust protection of investors against fraud. Rule G–40, as amended by the proposed rule change, only requires municipal advisors to submit basic contact information and to select the categories of municipal advisors that best describe them. The MSRB expects that municipal advisors will need no more than 15 minutes to complete electronic Form G–40, but the MSRB will have staff ready to assist them should they have any questions. Any burden on municipal advisors is *de minimis.* The portion of the proposed rule change that consists of definitions will impose no burden on any municipal advisor. While the proposed rule change, at best, imposes only a *de minimis* burden on municipal advisors, the proposed rule change is necessary for the MSRB to have a record of the municipal advisors it regulates, so that it may keep them abreast of regulatory developments, better target its rulemaking and professional qualifications examinations to different types of municipal advisors, and identify to the Commission those municipal advisors who have reportedly violated MSRB rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB 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, since it would apply equally to all municipal advisors.

C. Self-Regulatory Organization's Statement on Comments Received on the Proposed Rule Change by Members, Participants, or Others

Written comments were neither solicited nor received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The MSRB represented that the proposed rule change qualifies for immediate effectiveness pursuant to Section 19(b)(3)(A)(iii) of the Act [3] thereunder, because it: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after filing or such shorter time as the Commission may designate consistent with the protection of investors and the public interest.[4]

The MSRB provided the required written notice of its intention to file the proposed rule change to the Commission on October 22, 2010.

The MSRB has requested that the Commission designate a shorter time period for the proposed rule change to become operative, that is, on November 15, 2010, and has represented that the proposed rule change is not controversial, that it is integrally related to SR–MSRB–2010–14, which became effective November 9, 2010, and that it is necessary for the completion of rulemaking related to the registration of municipal advisors with the MSRB. The MSRB has stated that an earlier operative date of November 15, 2010 will permit the MSRB to begin to register municipal advisors and will provide municipal advisors with additional time to complete their registration process with the MSRB by no later than January 1, 2011. The Commission hereby grants the MSRB's request and believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[5] The earlier operative date will allow municipal advisors

[3] 15 U.S.C. 78s(b)(3)(A).

[4] In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[5] For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

additional time to register with the MSRB.

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.[6]

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–MSRB–2010–15 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–MSRB–2010–15. 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 Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the MSRB's offices. 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–MSRB–2010–15 and should be submitted on or before December 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–28986 Filed 11–16–10; 8:45 am]

BILLING CODE 8011–01–P

[6] *See* Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63304; File No. SR–ISE–2010–108]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Expand the $0.50 Strike Program

November 10, 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 November 10, 2010, the International Securities Exchange, LLC ("ISE" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by 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 its rules to: (i) Expand the $0.50 Strike Program for strike prices below $1.00; (ii) extend the $0.50 Strike Program to strike prices that are $5.50 or less; (iii) extend the prices of the underlying security to at or below $5.00; and (iv) extend the number of options classes overlying 20 individual stocks. The text of the proposed rule change is available on the Exchange's Web site *http://www.ise.com,* at the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 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 modify the Exchange's rules to expand the $0.50 Strike Program in order to provide investors with opportunities and strategies to minimize losses associated with owning a stock declining in price.

The Exchange is proposing to establish strike price intervals of $0.50, beginning at $0.50 for certain options classes where the strike price is $5.50 or less and whose underlying security closed at or below $5.00 in its primary market on the previous trading day and which have national average daily volume that equals or exceeds 1000 contracts per day as determined by The Options Clearing Corporation ("OCC") during the preceding three calendar months. The Exchange also proposes to limit the listing of $0.50 strike prices to options classes overlying no more than 20 individual stocks as specifically designated by the Exchange.

Currently, Supplementary Material .05 to ISE Rule 504 permits strike price intervals of $0.50 or greater beginning at $1.00 where the strike price is $3.50 or less, but only for option classes whose underlying security closed at or below $3.00 in its primary market on the previous trading day and which have national average daily volume that equals or exceeds 1000 contracts per day as determined by OCC during the preceding three calendar months. Further, the listing of $0.50 strike prices is limited to options classes overlying no more than 5 individual stocks as specifically designated by the Exchange. The Exchange is currently restricted from listing series with $1 intervals within $0.50 of an existing strike price in the same series, except that strike prices of $2, $3, and $4 shall be permitted within $0.50 of an existing

strike price for classes also selected to participate in the $0.50 Strike Program.[3]

The number of $0.50 strike options traded on the Exchange has continued to increase since the inception of the $0.50 Strike Program. There are now approximately 19 of the $0.50 strike price option classes listed, and traded, across all options exchanges including ISE; 3 of which are classes chosen by ISE for the $0.50 Strike Program. The current proposal would expand $0.50 strike offerings to market participants, such as traders and retail investors, and thereby enhance their ability to tailor investing and hedging strategies and opportunities in a volatile market place.

By way of example, if an investor wants to invest in 5,000 shares of Sirius Satellite ("SIRI") at $0.9678,[4] the only choice the investor would have today would be to buy out-of-the-money calls, at the $1.00 strike, or to invest in the underlying stock with a total outlay of $0.96 per share or $4,800. However, if a $0.50 strike series were available, an investor may be able to invest in 5,000 shares by purchasing an exercisable in-the-money $0.50 strike call option. It is reasonable to assume that with SIRI trading at $0.96, the $0.50 strike call option would trade at an estimated price of $0.46 to $0.48 under normal circumstances. This would allow the investor to manage 5,000 shares with the same upside potential return for a cost of only $2,350 (assuming $.47 as a call price).

Similarly, if an investor wanted to spend $4,800 for 5,000 shares of SIRI, a $0.50 put option that would trade for $0.01 to $0.05 would provide protection against a declining stock price in the event that SIRI dropped below $0.50 per share. In a down market, where high volume widely held shares drop below $1.00, investors deserve the opportunity to hedge downside risk in the same manner as investors have with stocks greater than $1.00.

Increasing the threshold from $3.00 to $5.00 and expanding the number of $0.50 strikes available for stocks under $5.00 further aids investors by offering opportunities to manage risk and execute a variety of option strategies to improve returns. For example, today an investor can enhance their yield by selling an out-of-the-money call. Using an example of an investor who wants to hedge Citigroup ("C") which is trading at $4.24,[5] that investor would be able to choose the $4.50 strike which is 6% out-of-the-money or they would be able to choose the $5.00 strike which is 17.92% out-of-the-money, under this proposal. Today, this investor only has the latter choice. Beyond that, this investor today may choose the $6.00 strike which is 41% out-of-the-money and offers significantly less premium. Pursuant to this proposal if this investor had a choice to hedge with a $5.50 strike option, the investor would have the opportunity to sell the option at only 29% out-of-the-money and would improve their return by gaining more premium, while also benefitting from 29% of upside return in the underlying equity.

By increasing the number of securities from 5 individual stocks to 20 individual stocks would allow the Exchange to offer investors additional opportunities to use the $0.50 Strike Program. The Exchange notes that $0.50 strikes have had no impact on capacity. Further, the Exchange has observed the popularity of $0.50 strikes.

The open interest in the $2.50 August strike series for Synovus Financial Corp. ("SNV"), which closed at $2.71 on July 13, 2010, was 12,743 options; whereas open interest in the $2 and $3 August strike series was a combined 318 options. The open interest in the August $1.50 strike series for Ambac Financial Group, Inc. ("ABK"), which closed at $0.7490 on July 13, 2010, was 15,879 options compared to 8,174 options for the $2 strike series. The August $2.50 strike series had open interest of 22,280 options, also more than the traditional $2 strike series.

By expanding the $0.50 Strike Program investors would be able to better enhance returns and manage risk by providing investors with significantly greater flexibility in the trading of equity options that overlie lower price stocks by allowing investors to establish equity options positions that are better tailored to meet their investment, trading and risk.

The Exchange also proposes making a corresponding amendment to Supplementary Material .01 to ISE Rule 504 to add $5 and $6 to $1 Strike Program language that addresses listing series with $1 intervals within $0.50 of an existing strike price in the same series. Currently, and to account for the overlap with the $0.50 Strike Program, the following series are excluded from this prohibition: Strike prices of $2, $3, and $4. The Exchange proposes to add $5 and $6 to that list to account for the proposal to expand the $0.50 Strike Program to a strike price of $5.50.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934[6] (the "Act") in general, and furthers the objectives of Section 6(b)(5) of the Act[7] in particular, in that it is 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 Exchange believes that amending the current $0.50 Strike Program would result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment decisions in a greater number of securities. With the increase in active, low-price securities, the Exchange believes that amending the $0.50 Strike Program to allow a $0.50 strike interval below $1 for strike prices of $5.50 or less is necessary to provide investors with additional opportunity to minimize and manage risk.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

[3] *See* Supplementary Material .01 to ISE Rule 504 referring to the $1 Strike Program.

[4] SIRI was trading at $0.9678 on July 13, 2010.

[5] C was trading at $4.24 on July 14, 2010.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to that of another exchange that has been approved by the Commission.[10] Therefore, the Commission designates the proposal operative upon filing.[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–ISE–2010–108 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2010–108. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2010–108 and should be submitted on or before December 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon.

Deputy Secretary.

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BILLING CODE 8011–01–P

has waived the five-day prefiling requirement in this case.

[10] *See* Securities Exchange Act Release No. 63132 (October 19, 2010) (SR–Phlx–2010–118) (order approving expansion of $0.50 Strike Price Program).

[11] 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).

[12] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of Reporting Requirements Submitted for OMB Review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Submit comments on or before December 17, 2010. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

Copies: Request for clearance (OMB 83–1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

ADDRESSES: Address all comments concerning this notice to: *Agency Clearance Officer,* Jacqueline White, Small Business Administration, 409 3rd Street, SW., 5th Floor, Washington, DC 20416; and *OMB Reviewer,* Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Jacqueline White, Agency Clearance Officer, (202) 205–7044.

SUPPLEMENTARY INFORMATION:

Title: Stockholders Confirmation (Corporation Ownership Confirmation (Partnership).

Frequency: On Occasion.

SBA Form Number's: 1405, 1405A.

Description of Respondents: Newly Licensed SBIC'S.

Responses: 600.

Annual Burden: 600.

Title: Microloan Program Electronic Reporting System (MPERS) (MPERsystem).

Frequency: On Occasion.

SBA Form Number: N/A.

Description of Respondents: Microloan Program Intermediary Lenders.

Responses: 2,500.

Annual Burden: 625.

Title: Loan Program business, Small Business Reporting and Recordkeeping and recordkeeping requirements.

Frequency: On Occasion.

SBA Form Number's: 2276A, B, C, 2281.

Description of Respondents: Application for an SBA Loan.

Responses: 180.

Annual Burden: 180.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 2010–28875 Filed 11–16–10; 8:45 am]

BILLING CODE P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: 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.*

SSA 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 December 17, 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 e-mail address.

1. *Private Printing and Modification of Prescribed Application and Other Forms—20 CFR 422.527—0960–0663. 20 CFR 422.527 of the Code of Federal Regulations* requires a person, institution, or organization (third-party entities) to obtain approval from SSA prior to reproducing, duplicating, or privately printing any application or other form the agency owns. SSA collects the information to ensure requests comply with the law and regulations. SSA uses the information to process requests from third-party entities who want to reproduce, duplicate, or privately print any SSA application or other SSA form. To obtain SSA's approval, entities must make their requests in writing, using their company letterhead, providing the required information set forth in the regulation. SSA employees review the requests and provide approval via e-mail or mail to the third-party entities. The respondents are third-party entities who submit requests to SSA to reproduce, duplicate, or privately print an SSA-owned form.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 10.

Frequency of Response: 15.

Number of Responses: 150.

Average Burden Per Response: 8 minutes.

Estimated Annual Burden: 20 hours.

2. *Request for Waiver of Special Veterans Benefits (SVB) Overpayment Recovery or Change in Repayment Rate—20 CFR 408.900–408.950, 408.923(b), 408.931(b), 408.932(c), (d) and (e), 408.941(b) and 408.942—0960–0698. Title VIII of the Social Security Act* allows SSA to pay a monthly benefit to a qualified World War II veteran who resides outside the United States. When an overpayment in SVB occurs, the beneficiary can request a waiver of recovery of the overpayment or a change in the repayment rate. SSA uses the SSA–2032–BK to obtain the information necessary to establish whether the claimant met the waiver of recovery provisions of the overpayment, and to determine the repayment rate if we do not waive repayment. Respondents are beneficiaries who have overpayments on their *Title VIII* record and wish to file a claim for waiver of recovery or change in repayment rate.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 450.

Frequency of Response: 1.

Average Burden per Response: 120 minutes.

Estimated Annual Burden: 900 hours.

3. *Consent Based Social Security Number Verification Process—20 CFR 400.100—0960–0760.* The Consent Based Social Security Number (SSN) Verification (CBSV) process is a fee-based, automated SSN verification service available to private businesses and other requesting parties. To use the system, private businesses and requesting parties must register with SSA and obtain valid consent from SSN number holders prior to verification. We collect the information to verify if the submitted name and SSN match the information in SSA records. After completing a registration process and paying the fee, the requesting party can use the CBSV Internet application to submit a file containing names of number holders who have given valid consent, along with each number holder's accompanying SSN and date of birth (if available). They also have the option to obtain real-time results using a web service application or SSA's Business Services Online application.

SSA matches the information against the SSA master file of SSNs, using SSN, name, date of birth, and gender code (if available). The requesting party retrieves the results file from SSA, which indicates only a match or no match for each SSN submitted.

Under the CBSV process, the requesting party does not submit the consent forms of the number holders to SSA. SSA requires each requesting party to retain a valid consent form for each SSN verification request. The requesting party retains the consent forms in either electronic or paper format.

To ensure the integrity of the CBSV process, SSA added a strong audit component that requires audits (called "compliance reviews") at the discretion of the agency with all audit costs paid by the requesting party. Independent certified public accountants (CPA) conduct these reviews to ensure compliance with all the terms and conditions of the party's agreement with SSA, including a review of the consent forms. CPAs conduct the review at the requesting party's place of business to ensure the integrity of the process. In addition, SSA reserves the right to perform unannounced onsite inspections of the entire process, including review of the technical systems that maintain the data and transaction records. The respondents to the CBSV collection are the participating companies, members of the public who consent to the SSN verification, and CPAs who provide compliance review services.

Type of Request: Revision of an OMB-approved information collection.

Note: When SSA published the 60-day **Federal Register** notice for this collection on August 2, 2010 at 75 FR 45190, the burden figures we reported were correct at that time. We have updated the burden data that we are reporting in the burden chart below.

Time Burden

Participating Companies:

Requirement	Number of respondents	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated annual burden (hours)
Registration Process (new participating companies or requesting parties)	10 *	1	10	120	20
Creation of file with SSN holder identification data; maintaining required documentation, forms	115	251 **	28,865	60	28,865

Requirement	Number of respondents	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated annual burden (hours)
Using the system to upload request file, check status, and download results file	115	251	28,865	5	2,405
Storing Consent Forms	115	251	28,865	60	28,865
Activities related to compliance review	115	251	28,865	60	28,865
Total			115,470		89,020

* One-time registration; approximately 10 new participating companies per year.
** Please note: There are 251 Federal business days per year on which a requesting party could submit a file.

People whose SSNs SSA Will Verify:

Requirement	Number of respondents	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated annual burden (hours)
Reading and signing authorization for SSA to release SSN verification	986,585	1	986,585	3	49,329
Responding to CPA re-contact	5,750	1	5,750	5	479
Total	992,335				49,808

CPAs (conducting compliance reviews and preparing written report of findings):

Number of Respondents: 115.

Frequency of Response: 1.

Average Burden Per Response: 4,800.

Estimated Annual Burden: 9,200 hours.

Total Collective Burden: 148,028.

Cost Burden

The public burden cost is dependent upon the number of companies and transactions. SSA based the cost estimates below upon 115 participating companies submitting 986,585 transactions. The total cost for developing the system was $5.6 million. SSA has already expended $3.0 million we will recoup over the depreciable life of the system based on the fee per-transaction model.

One-Time Per Company Registration Fee—$5,000.

Estimated Per SSN Transaction Fee—$5.00.[i]

Estimated Per Company Cost to Build Optional Web Service—$200,000.[ii]

Estimated Per Company Cost to Store Consent Forms—$300.

Estimated Per Company Cost To Contract with CPA for Audit—$8,000.

Dated: November 10, 2010.

Liz Davidson,

Center Director, Social Security Administration.

[FR Doc. 2010–28926 Filed 11–16–10; 8:45 am]

BILLING CODE 4191–02–P

[i] The annual costs associated with the transaction to each company are dependent upon the number of SSN transactions submitted to SSA by the company on a yearly basis. For example, if a company anticipates submitting 1 million requests to SSA for the year, its total transaction cost for the year would be $5 × 1,000,000 or $5,000,000. Periodically, SSA will calculate its costs to provide CBSV services and adjust the fee charged as needed. SSA will notify companies in writing of any change and companies will have the opportunity to cancel the agreement or continue service using the new transaction fee.

[ii] A company may choose to submit batch files via the SSA web site or submit real-time individual requests via the SSA Web site. There is no public burden cost with either of these methods using the CBSV system. Companies are not required to purchase SSA's Web design service. To date, no participating companies have opted for this service.

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Emergency Clearance Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L.) 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes a revision to an existing OMB-approved collection.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, e-mail, or fax your comments and recommendations on the information collection to the OMB Desk Officer and SSA Reports Clearance Officer to the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov*.

SSA submitted the information collection below to OMB for Emergency Clearance. SSA is requesting Emergency Clearance from OMB no later than November 22, 2010. Individuals can obtain copies of the collection instrument by calling the SSA Reports Clearance Officer at 410–965–8783 or by writing to the above e-mail address.

Medicare Income-Related Monthly Adjustment Amount—Life-Changing Event Form—0960–NEW. Per the Medicare Modernization Act of 2003, selected Medicare insurance recipients pay an income-related monthly adjustment amount (IRMAA). The Internal Revenue Service (IRS) transmits income tax return data to SSA for SSA to determine the IRMAA. SSA will use the new Form SSA–44 to determine if a recipient qualifies for a reduction in IRMAA. If affected Medicare recipients believe SSA should use more recent tax data because a life-changing event occurred that significantly reduces their income, they can report these changes to

SSA and ask for a new initial determination of their IRMAA.

We are seeking OMB clearance for a new SSA–44 to fulfill the provisions of the Patient Protection and Affordable Care Act (Pub. L. 111–148), which mandates reductions in the Federal Medicare Part D prescription drug coverage subsidies, resulting in higher premiums for those with income above a specific threshold who have this coverage. Since the provisions of the law become effective January 1, 2011, we are seeking emergency clearance for this form. The respondents are Medicare Part B and prescription drug coverage recipients and enrollees with modified adjusted gross income over a high-income threshold who experience one of the eight significant life-changing events.

Type of Request: Request for a new information collection.

Method of information collection	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
Personal Interview (SSA field office)	147,000	1	30	73,500
Paper Form (mailed)	39,000	1	45	29,250
Totals	186,000			102,750

Liz Davidson,

Center Director, Center for Reports Clearance, Social Security Administration.

[FR Doc. 2010–28992 Filed 11–16–10; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 7228]

Privacy Act; System of Records: Equal Employment Opportunity Records

SUMMARY: Notice is hereby given that the Department of State proposes to amend an existing system of records, Equal Employment Opportunity Records, State–09, pursuant to the provisions of the Privacy Act of 1974, as amended (5 U.S.C. 552a) and Office of Management and Budget Circular No. A–130, Appendix I. The Department's report was filed with the Office of Management and Budget on October 20, 2010.

It is proposed that the current system will retain the name "Equal Employment Opportunity Records." It is also proposed that the amended system description will include revisions/additions to the following sections: Categories of records, Purpose, Routine uses, Storage, as well as other administrative updates. The following section has been added to the system of records, Equal Employment Opportunity Records, State–09, to ensure Privacy Act of 1974 compliance: Purpose. Any persons interested in commenting on the amended system of records may do so by submitting comments in writing to Director, Office of Information Programs and Services, A/GIS/IPS, Department of State, SA–2, 515 22nd Street, Washington, DC 20522–8001. This system of records will be effective 40 days from the date of publication, unless we receive comments that will result in a contrary determination.

The amended system description, "Equal Employment Opportunity Records, State–09," will read as set forth below.

Dated: October 20, 2010.

Steven J. Rodriguez,

Deputy Assistant Secretary of Operations, Bureau of Administration, U.S. Department of State.

State–09

SYSTEM NAME:

Equal Employment Opportunity Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Department of State, 2201 C Street, NW., Washington, DC 20520.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Employees and applicants for employment who have filed formal or informal complaints which allege discrimination.

CATEGORIES OF RECORDS IN THE SYSTEM:

Investigative reports; employment applications; biographic information to include race, color, national origin, sex, sexual orientation, religion, age, disability, genetic information; and employment histories.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2000e; Executive Order 11478, as amended.

PURPOSE(S):

For the investigation, processing and resolution of formal and informal complaints of discrimination filed against the Department of State in accordance with 29 CFR 1614 and the Department's internal procedures for addressing Equal Employment Opportunity (EEO) complaints.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Records from this system will be disclosed to other federal agencies for purposes of investigating, processing, adjudicating, resolving and litigating EEO complaints involving more than one agency, or in situations where the Department of State has requested that another federal agency provide investigative support for an EEO complaint.

The Department of State periodically publishes in the **Federal Register** its standard routine uses that apply to all of its Privacy Act systems of records. These notices appear in the form of a Prefatory Statement. These standard routine uses apply to the Equal Employment Opportunity Records, State–09.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Hard copy and electronic.

RETRIEVABILITY:

By individual name.

SAFEGUARDS:

All users are given cyber security awareness training which covers the procedures for handling Sensitive but Unclassified information, including personally identifiable information. Annual refresher training is mandatory. Before being granted access to Equal Employment Opportunity Records, a user must first be granted access to the Department of State computer system.

Remote access to the Department of State network from non-Department owned systems is authorized only through a Department-approved access program. Remote access to the network is configured with the Office of Management and Budget Memorandum M–07–16 security requirements, which include but are not limited to two-factor authentication and time out function.

All Department of State employees and contractors with authorized access have undergone a thorough background security investigation. Access to the Department of State, its annexes and posts abroad is controlled by security guards and admission is limited to those individuals possessing a valid identification card or individuals under proper escort. All paper records containing personal information are maintained in secured file cabinets in restricted areas, access to which is limited to authorized personnel only. Access to computerized files is password-protected and under the direct supervision of the system manager. The system manager has the capability of printing audit trails of access from the computer media, thereby permitting regular and ad hoc monitoring of computer usage.

When it is determined that a user no longer needs access, the user account is disabled.

RETENTION AND DISPOSAL:

Records are retired or destroyed in accordance with published records disposition schedules of the Department of State and as approved by the National Archives and Records Administration (NARA). More specific information may be obtained by writing the Director, Office of Information Programs and Services, Department of State, SA–2, 515 22nd Street, NW., Washington, DC 20522–8001.

SYSTEM MANAGER AND ADDRESS:

Director, Office of Civil Rights, Room 7428, Department of State, 2201 C Street, NW., Washington, DC 20520.

NOTIFICATION PROCEDURES:

Individuals who have cause to believe that the Office of Civil Rights might have records pertaining to them should write to the Director, Office of Information Programs and Services, Department of State, SA–2, 515 22nd Street, NW., Washington, DC 20522–8001. The individual must specify that he/she wishes the records of the Office of Civil Rights to be checked. At a minimum, the individual must include: Name; date and place of birth; current mailing address and zip code; signature; the approximate date upon which the individual filed a formal or informal complaint alleging discrimination or requested other services from the Office of Civil Rights.

RECORD ACCESS AND AMENDMENT PROCEDURES:

Individuals who wish to gain access to or amend records pertaining to themselves should write to the Director, Office of Information Programs and Services (address above).

CONTESTING RECORD PROCEDURES:

(*See* above).

RECORD SOURCE CATEGORIES:

The individual; supervisors of the individual; EEO counselors; EEO personnel; and other employees or individuals having knowledge of the facts involved in the complaint.

SYSTEM EXEMPTED FROM CERTAIN PROVISION OF THE ACT:

Certain records contained within this system of records are exempted from 5 U.S.C. 552a(k)(5). *See* 22 CFR 171.36.

[FR Doc. 2010–28989 Filed 11–16–10; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF STATE

[Public Notice: 7229]

Privacy Act; System of Records: Records of the Bureau of Public Affairs

SUMMARY: Notice is hereby given that the Department of State proposes to amend an existing system of records, Records of the Bureau of Public Affairs, State–22, pursuant to the provisions of the Privacy Act of 1974, as amended (5 U.S.C. 552a) and Office of Management and Budget Circular No. A–130, Appendix I. The Department's report was filed with the Office of Management and Budget on October 20, 2010.

It is proposed that the current system will retain the name "Records of the Bureau of Public Affairs." It is also proposed that the amended system description will include revisions/additions to the following sections: System location; Categories of records; Routine uses; and Storage, Safeguards and Retrievability as well as other administrative updates. The following sections have been added to the system of records, Records of the Bureau of Public Affairs, State–22, to ensure Privacy Act of 1974 compliance: Purpose and Disclosure to Consumer Reporting Agencies.

Any persons interested in commenting on the amended system of records may do so by submitting comments in writing to the Director, Office of Information Programs and Services, A/GIS/IPS, Department of State, SA–2, 515 22nd Street, Washington, DC 20522–8001. This system of records will be effective 40 days from the date of publication, unless we receive comments that will result in a contrary determination.

The amended system description, "Records of the Bureau of Public Affairs, State–22," will read as set forth below.

Dated: October 20, 2010.

Steven J. Rodriguez,

Deputy Assistant Secretary of Operations, Bureau of Administration, U.S. Department of State.

State–22

SYSTEM NAME:

Records of the Bureau of Public Affairs.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Department of State, 2201 C Street, NW., Rm 2214 Washington, DC 20520.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Media representatives who request interviews with the Secretary of State and/or Department principals; individuals who apply to accompany the Secretary of State on official travel; individuals who request building passes for access to the Department; individuals who request information from a press officer concerning an issue(s) or information about the Department and its policies; individuals who are on the mailing list for the Secretary's speeches; individuals who invite the Secretary or Department principals to accept a speaking engagement or attend a function; representatives of nongovernmental organizations throughout the United States; state and local government officials; and Department employees who have asked the Bureau of Public Affairs to place articles about their achievements in their hometown newspapers.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains contact information for individuals who are involved in the operations of the Bureau of Public Affairs; travel records, assignments, biographies, speaking engagements, interviews and communications of Department Secretaries, principals and members of the media; records relating to requests for access to Department facilities; press releases; names of local media organizations; information on Department employees who asked the

Bureau of Public Affairs to publish information/articles about them; and invitations sent to the Secretary and Department principals to include the name/organization of the requester, internal control number, assigned action office and status.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301 (Management of Executive agencies); 22 U.S.C. 2651a (Organization of the Department of State); and 22 U.S.C. 3921 (Management of the Service/Secretary of State).

PURPOSE(S):

The purpose of soliciting this information is to enable the Bureau of Public Affairs to establish and maintain contact with the media, members of civil society organizations and the general public and circulate information to specific individuals or groups based on self-identified regional and policy interests.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The records in this system may be disclosed to contact members of the media to inform them of events, travel opportunities, and status of building access requests; respond to media representatives' and general public inquiries on various topics; and prepare briefing materials for interviewees.

The information may be made available as a routine use to other U.S. Government agencies and the White House for purposes of planning and coordinating public engagement activities.

The Department of State periodically publishes in the **Federal Register** its standard routine uses that apply to all of its Privacy Act systems of records. These notices appear in the form of a Prefatory Statement. These standard routine uses apply to Records of the Bureau of Public Affairs, State–22.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic, hardcopy.

RETRIEVABILITY:

By individual name.

SAFEGUARDS:

All users are given cyber security awareness training, including the procedures for handling Sensitive but Unclassified information including personally identifiable information. Annual refresher training is mandatory. Before being granted access to Records of the Bureau of Public Affairs, a user must first be granted access to the Department of State computer system.

Remote access to the Department of State network from non-Department owned systems is authorized only through a Department approved access program. Remote access to the network is configured with the Office of Management and Budget Memorandum M–07–16 security requirements, which include but are not limited to two-factor authentication and time out function.

All Department of State employees and contractors with authorized access have undergone a thorough background security investigation. Access to the Department of State, its annexes and posts abroad is controlled by security guards and admission is limited to those individuals possessing a valid identification card or individuals under proper escort. All paper records containing personal information are maintained in secured file cabinets in restricted areas, access to which is limited to authorized personnel only. Access to computerized files is password-protected and under the direct supervision of the system manager. The system manager has the capability of printing audit trails of access from the computer media, thereby permitting regular and ad hoc monitoring of computer usage.

When it is determined that a user no longer needs access, the user account is disabled.

RETENTION AND DISPOSAL:

Records are retired in accordance with published Department of State Records Disposition Schedules as approved by the National Archives and Records Administration (NARA). More specific information may be obtained by writing the Director, Office of Information Programs and Services, Department of State, SA–2, 515 22nd Street, NW., Washington, DC 20522–8001.

SYSTEM MANAGER AND ADDRESS:

Deputy Assistant Secretary, Bureau of Public Affairs, Room 6800, Department of State, 2201 C Street NW., Washington, DC 20520.

NOTIFICATION PROCEDURES:

Individuals who have reason to believe that the Bureau of Public Affairs has records pertaining to them should write to the Director, Office of Information Programs and Services, Department of State, SA–2, 515 22nd Street, NW., Washington, DC 20522–8001.

RECORD ACCESS AND AMENDMENT PROCEDURES:

Individuals who wish to gain access to or amend records pertaining to them should write to the Director, Office of Information Programs and Services (address above).

CONTESTING RECORD PROCEDURES:

See above.

RECORD SOURCE CATEGORIES:

These records contain information obtained directly from the individual who is the subject of these records, the agency or organization that the individual represents, published directories and/or other bureaus in the Department.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 2010–28990 Filed 11–16–10; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF STATE

[Public Notice: 7227]

Bureau of Political-Military Affairs: Directorate of Defense Trade Controls; Notifications to the Congress of Proposed Commercial Export Licenses

SUMMARY: Notice is hereby given that the Department of State has forwarded the attached Notifications of Proposed Export Licenses to the Congress on the dates indicated on the attachments pursuant to sections 36(c) and 36(d) and in compliance with section 36(f) of the Arms Export Control Act (22 U.S.C. 2776).

DATES: *Effective Date:* As shown on each of the 15 letters.

FOR FURTHER INFORMATION CONTACT: Mr. Robert S. Kovac, Managing Director, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State (202) 663–2861.

SUPPLEMENTARY INFORMATION: Section 36(f) of the Arms Export Control Act mandates that notifications to the Congress pursuant to sections 36(c) and 36(d) must be published in the **Federal Register** when they are transmitted to Congress or as soon thereafter as practicable.

October 6, 2010 (Transmittal No. DDTC 09–103.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a manufacturing license agreement for the export of defense articles, including technical data, and

defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, including technical data, and defense services to support the Jordanian M113A2Mk1 Armored Personnel Carrier and Co-production Program. The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs.

October 6, 2010 (Transmittal No. DDTC 10–036.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement to include the export of defense articles, including technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to the United Kingdom and Germany for the manufacture of the main engine fuel pump for the EJ200 engine for the Eurofighter Typhoon Aircraft for use by the governments of Austria, Germany, Italy, the Kingdom of Saudi Arabia, Spain, and the United Kingdom. No significant military equipment (SME) is authorized for export or for manufacturing under this authorization.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs.

October 4, 2010 (Transmittal No. DDTC 10–048.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification for the export of defense articles, to include technical data, and defense services in the amount of $98,984,112.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to the United Arab Emirates, relating to the sale of ten (10) AT–802 aircraft, for use by the UAE Armed Forces. The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs.

October 4, 2010 (Transmittal No. DDTC 10–058.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement for the export of defense articles, to include technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, to include technical data, and defense services to the United Kingdom and United Arab Emirates related to the DB–110 Reconnaissance System, Integrated Logistics Support and Training in support of the F–16 Block 60 for the United Arab Emirates.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs.

October 6, 2010 (Transmittal No. DDTC 10–074.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Sections 36(c) and 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a manufacturing license agreement for the manufacture of significant military equipment abroad and the export of defense articles or defense services abroad in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, technical data, and defense services to Russia for the RD–180 Liquid Propellant Rocket Engine Program.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs.

October 4, 2010 (Transmittal No. DDTC 10–076.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed Technical Assistance Agreement for the export of defense articles, to include technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services for the Systeme d' Information et de Comandement des Forces Terrestres (SIC FT System) [translation: "Information and Command System of the Land Forces"] for the Algerian Ministry of Defense.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs.

October 6, 2010 (Transmittal No. DDTC 10–081.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to Mexico for the manufacture of various high and low pressure, non-cooled, turbine blades for end-use by the United States.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the

applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs.

October 8, 2010 (Transmittal No. DDTC 10–084.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement for the export of defense articles, to include technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, to include technical data, and defense services to the United Kingdom, Italy, and Saudi Arabia related to the integration of and support for Paveway Weapons Systems for the Royal Saudi Air Force.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs.

October 13, 2010 (Transmittal No. DDTC 10–085.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement for the export of defense articles, to include technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, to include technical data, and defense services to Chile and Canada to support flight training, maintenance and support related to the Bell 412 Helicopter and Huey II Flight Training Device for the Chilean Air Force.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs.

October 6, 2010 (Transmittal No. DDTC 10–091.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles sold commercially under contract in the amount of $1,000,000 or more.

The transaction contained in the attached certification involves the permanent export of defense articles, including technical data, and defense services related to sale of Sig Sauer Pistols and components for end-use by Bucello y Asociados S.R.L. for commercial resale in Argentina.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs.

October 6, 2010 (Transmittal No. DDTC 10–093.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) and Section 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services for the manufacture of Enhanced Position Location Reporting System (EPLRS) Communications Products for end use by the Indian Ministry of Defense (MOD) and its subordinate military commands.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs.

October 12, 2010 (Transmittal No. DDTC 10–099.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement for the export of defense articles, including technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, to include technical data, and defense services to support the sale of twelve (12) 27 MHz S–Band Transponders on-orbit in the SES–7 commercial communications satellite.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Matthew M. Rooney
Principal Deputy Assistant Secretary, Legislative Affairs.

October 6, 2010 (Transmittal No. DDTC 10–100.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a manufacturing license agreement for the export of defense articles, to include technical data, and defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services for the manufacturing and post-production support of various legacy naval equipment supplies by Nippon Avionics Co Ltd (Japan) to the Government of Japan to support the Japan Ministry of Defense.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs.

October 6, 2010 (Transmittal No. DDTC 10–102.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement to

include the export of defense articles, to include technical data, and defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, to include technical data, and defense services to the United Kingdom and Canada to support the sale of Tactical Support Vehicles and related components and accessories for end use by the United Kingdom Ministry of Defense.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs.

October 6, 2010 (Transmittal No. DDTC 10–111.)

Hon. Nancy Pelosi, Speaker of the House of Representatives.

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement to include the export of defense articles, to include technical data, and defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to Japan for the manufacture, repair, and overhaul of F–15 Environmental Control System components, and the upgrade of the F–15 High Pressure Water System, Airframe Mounted Accessory Drive System and Center Gear Box for the Japanese Ministry of Defense.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs.

Dated: October 14, 2010.

Robert S. Kovac,

Managing Director, Directorate of Defense Trade Controls, Department of State.

[FR Doc. 2010–28991 Filed 11–16–10; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2010 0098]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel FOREVER.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2010–0098 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before December 17, 2010.

ADDRESSES: Comments should refer to docket number MARAD–2010–0098. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov* or *http://smses.dot.gov/submit/*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel FOREVER is:

Intended Commercial Use of Vessel: "Recreation personal charter up to 12 persons in U.S. and foreign waters."

Geographic Region: "ME, MA, NH, RI, CT, NY, NJ, DE, MD, VA, NC, SC, GA, FL."

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

Dated: November 4, 2010.

By order of the Maritime Administrator.

Murray Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. 2010–28886 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Advisory Committee; Renewal

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Renewal.

SUMMARY: Pursuant to Section 14(a)(2)(A) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 2), and 5 USC552b (c), and in accordance with § 102–3.65, Title 41 of the Code of Federal Regulations, notice is hereby given that the Commercial Space Transportation Advisory Committee (COMSTAC) has been renewed for a 2-year period beginning November 17, 2010. The primary purpose of the Committee is to provide information, advice, and recommendations to the U.S. Department of Transportation (DOT) on matters concerning the U.S. commercial space transportation industry. The

primary goals of the Committee are to evaluate economic, technological, and institutional developments relating to the industry; to provide a forum for the discussion of problems involving the relationship between industry activities and government requirements; and to make recommendations to DOT on issues and approaches for Federal policies and programs regarding the industry. The Committee will operate in accordance with the rules of the Federal Advisory Committee Act and the Department of Transportation, FAA Committee Management Order (1110.30C).

FOR FURTHER INFORMATION, CONTACT: Susan Lender (AST–100), COMSTAC Executive Director, Office of Commercial Space Transportation, 800 Independence Avenue SW., Room 325, Washington, DC 20591, telephone: (202) 267–8029; e-mail: *susan.lender@faa.gov.*

Issued in Washington, DC, November 10, 2010.

George C. Nield,

Associate Administrator for Commercial Space Transportation.

[FR Doc. 2010–28885 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Availability of the Draft Environmental Impact Statement for a Proposed Project in Mariposa County, CA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of availability of the Draft Environmental Impact Statement.

SUMMARY: The FHWA, on behalf of the California Department of Transportation (Caltrans), announces the availability of the Draft Environmental Impact Statement (DEIS) for a proposed Ferguson Slide Permanent Restoration Project in Mariposa County, California.

DATES: Public circulation of this document will begin on November 15, 2010 and will end on January 13, 2011. An open forum public hearing will be held for this project on Wednesday, December 8, 2010 between 4 p.m. and 7 p.m. in Mariposa. The location is Mariposa County Government Center, 5100 Bullion Street, Mariposa, CA 95338 in the Board of Supervisors Chambers. An additional open forum public hearing will be held for this project on Thursday, December 9, 2010 between 4 p.m. and 7 p.m. in El Portal. The location is the El Portal Community Center, El Portal, CA 95318.

ADDRESSES: This document will be available at the Caltrans District 10 office, 1976 Dr Martin Luther King Jr. Blvd, Stockton, CA 95205 on weekdays from 8 a.m. to 5 p.m. Copies of the document can also be read at the Mariposa County Library at 4978 10th Street, Mariposa, CA 95338 and at the El Portal Post Office at 5508 Foresta Road, El Portal, CA 95318. The Draft EIS is also available at *http://www.dot.ca.gov/dist10/environmental/projects/fergusonslide/index.htm.*

FOR FURTHER INFORMATION CONTACT: Kirsten Helton, 2015 East Shields Ave., Suite 100, Fresno, CA 93726. Phone 559–243–8224 or *Kirsten_Helton@dot.ca.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the FHWA assigned, and Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Caltrans as the assigned National Environmental Policy Act (NEPA) agency, has prepared a DEIS that evaluates 6 build alternatives to permanently restore and reopen the section of State Route 140 that was damaged by the Ferguson rockslide. Motorists are currently using a temporary bypass route to travel to this section of State Route 140. Caltrans approved the DEIS on November 5, 2010. Caltrans proposes to restore full highway access between Mariposa and El Portal via State Route 140 in Mariposa County, California by repairing or permanently bypassing the portion of State Route 140 that was blocked and damaged by the Ferguson rockslide. The total length of the project is 0.7 mile. The following build alternatives are being proposed:

Alternative C (Open-cut Realignment)

This alternative would realign the highway to the northeast of its current alignment, spanning the Merced River and bypassing the rockslide. State Route 140 would cut through the mountain across the Merced River from the rockslide and then span back across the river where it would meet the existing alignment. Two bridges would be built across the river.

Alternative T (Tunnel Realignment)

This alternative would realign the highway to the northeast of its current alignment, spanning the Merced River and bypassing the rockslide. State Route 140 would tunnel 700 feet through the mountain across the Merced River from the rockslide and then span back across the river where it would meet the existing alignment. Two bridges would be built across the river.

Alternative T–3 (Tunnel under Slide Realignment)

This alternative would realign the highway by constructing a 2,200-foot-long tunnel under the area of the slide.

Alternative S (Viaduct Realignment)

This alternative would realign the highway to the northeast of its current alignment, spanning the Merced River with two bridges and bypassing the rockslide with a hillside viaduct and retaining wall.

Alternative S–2 (Modified Viaduct Realignment)

This alternative is similar to Alternative S and would realign the highway to the northeast of its current alignment, spanning the Merced River with two bridges and bypassing the rockslide with a hillside viaduct and retaining wall. This alternative differs from Alternative S in that it proposes two bridge type variations along with their own specific roadway alignments. The first (S2–V1) would construct two tied-arch bridges, which use an arch structure with cables above the bridge deck for support. The second (S2–V2) would construct two slant-leg bridges, which use "V"-shaped columns to support the bridge deck.

Alternative R (Rockshed/Tunnel)

This alternative would construct a rockshed (cut-and-cover tunnel) through the talus (foundation layer) of the slide along the existing State Route 140 alignment.

The No-build Alternative would leave State Route 140 damaged and blocked by the Ferguson rockslide. As a result of the No-build Alternative, the temporary detour would continue to function as State Route 140. Either general wear or damage from flooding in a high water year will eventually require the removal of the bridges, supporting structures, and the detour pavement, leading to the permanent closure of State Route 140 at the section damaged by the rockslide.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: November 10, 2010.

Cindy Vigue,

Director, State Programs, Federal Highway Administration, Sacramento, California.

[FR Doc. 2010–28933 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highways in Alaska

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by FHWA.

SUMMARY: This notice announces actions taken by the FHWA that are final within the meaning of 23 U.S.C. 139(l)(1). The action relates to a proposed highway project on the Parks Highway from Lucus Road to Big Lake Road, in the Matanuska-Susitna Borough, State of Alaska. Those actions grant approval for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the listed highway project will be barred unless the claim is filed on or before May 16, 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. Alex Viteri, Central Region Area Engineer, FHWA Alaska Division, P.O. Box 21648, Juneau, Alaska 99802–1648; office hours 8 a.m. to 4:30 p.m. (AST), phone (907) 586–7544; e-mail *Alex.Viteri@dot.gov.* You may also contact Brian Elliott, DOT&PF Central Region, Regional Environmental Manager, Alaska Department of Transportation and Public Facilities, 4111 Aviation Drive, P.O. Box 196900, Anchorage, Alaska 99519–6900; office hours 7:30 a.m. to 4 p.m. (AST), phone (907) 269–0539, e-mail *brian.elliott@alaska.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA has taken final agency actions subject to 23 U.S.C. 139(I)(1) by issuing approvals for the following highway project in the State of Alaska: Project No. IM–0A4–1(23)/57178; Project Location: Project begins within the City of Wasilla, extends through Meadow Lakes and ends within the City of Houston, Matanuska-Susitna Borough, Alaska. Project type: Road improvements between Lucus Road and Big Lake Road, a distance of approximately eight miles. The five-lane section east of the project would be extended one mile west from Lucus Road to Church Road and the existing two-lane section west of Church Road would be upgraded to a four-lane divided highway with a depressed grass median from Church Road west to Big Lake Road. Existing frontage roads would be improved, and the existing 10-foot wide pedestrian pathway would be reconstructed and/or relocated as necessary. The project also includes construction of two bridges, drainage improvements, and continuous illumination.

The actions by the Federal agency on the project, and the laws under which such actions were taken, are described in the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) issued for the project, approved on September 12, 2010 and in other documents in the FHWA project files or the State of Alaska Department of Transportation & Public Facilities. The EA, FONSI, and other documents from the FHWA project records files are available by contacting the FHWA or the State of Alaska Department of Transportation & Public Facilities at the addresses provided above. The EA and FONSI documents can be viewed and downloaded from the project Web site at *http://www.parkshighway44-52.info/* or viewed at 4111 Aviation Avenue, Anchorage, Alaska 99519.

This notice applies to all FHWA decisions and approvals on the project as of the issuance date of this notice and all laws and Executive Orders 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 and 23 U.S.C. 128].

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 of 1973 [16 U.S.C. 1531–1544 and Section 1536]; 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 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)–470(II)]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act (Section 404, Section 401, Section 319 [33 U.S.C. 1251–1377]; Coastal Zone Management Act [16 U.S.C. 1451–1465]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; Wetlands Mitigation [23 U.S.C. 103(b)(6)(M) and 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *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. 13186 Migratory Birds; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway 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(l)(1)

Issued on: November 2, 2010.

David C. Miller,

Division Administrator, Juneau, Alaska.

[FR Doc. 2010–28942 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35441]

Blackwell Northern Gateway Railroad Company–Lease Renewal Exemption–Oklahoma Department of Transportation and Blackwell Industrial Authority

Blackwell Northern Gateway Railroad Company (BNGR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to renew and supplement its lease of approximately 37.26 miles of rail line, owned by the Oklahoma Department of Transportation (ODOT) and Blackwell Industrial Authority (BIA), referred to as the Blackwell Line. The Blackwell Line extends from approximately milepost 0.09 at Wellington, Kan., to approximately milepost 35.35 at Blackwell, Okla., and from approximately milepost 127.0 to approximately milepost 125.0, in Blackwell, a total distance of

approximately 37.26 miles.[1] ODOT owns the portions of the Blackwell Line extending from milepost 18.32, near Hunnewell, Kan., on the Oklahoma/Kansas border, to milepost 35.35 at Blackwell, and from milepost 127.0 to milepost 126.45 in Blackwell. BIA owns the portions of the Blackwell Line extending from milepost 0.09 at Wellington, to milepost 18.32 at the Kansas/Oklahoma border, and from milepost 126.45 to milepost 125.0 in Blackwell.

BNGR currently operates the Blackwell Lines pursuant to a lease agreement with ODOT and BIA. BNGR, ODOT, and BIA have agreed to execute a First Renewal Track Lease and Operating Agreement that will extend the terms of the lease for 5 years, through November 30, 2015, and will also include other changes beyond the extension of the lease term.

BNGR certifies that its projected revenues as a result of this transaction will not result in the creation of a Class II or Class I carrier and will not exceed $5 million.

The transaction is scheduled to be consummated on December 1, 2010, the effective date of the exemption (30 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to Docket No. FD 35441, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on, Thomas J. Litwiler, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2832.

Board decisions and notices are available on our Web site at "*http://www.stb.dot.gov.*"

Decided: November 10, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–28975 Filed 11–16–10; 8:45 am]

BILLING CODE 4915–01–P

[1] BNGR states that the mileposts are slightly corrected from the earlier proceedings involving this line. *See Blackwell N. Gateway R.R.—Change in Operators Exemption—Okla. Dep't of Transp. and Blackwell Indus. Auth.,* FD 34777 (STB served Nov. 30, 2005) and *State of Okla. by and through the Okla. Dep't of Transp. and Blackwell Indus. Auth.—Acquis. Exemption—Cent. Kan. Ry.,* FD 33492 (STB served Oct. 31, 1997).

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[USCG–2010–0993]

Liberty Natural Gas LLC, Liberty Liquefied Natural Gas (LNG) Deepwater Port License Application

AGENCY: Maritime Administration, DOT.

ACTION: Notice of Application.

SUMMARY: The Maritime Administration and the U.S. Coast Guard announce they have received an application for the licensing of a natural gas deepwater port and the application contains the required information. This notice summarizes the applicant's plans and procedures that will be followed in considering the application.

DATES: The Deepwater Port Act of 1974, as amended, requires a public hearing on this application within 240 days of the publication of this notice, and a decision on the application not later than 90 days after the final public hearing.

ADDRESSES: The public docket for USCG–2010–0993 is maintained by the: Department of Transportation, Docket Management Facility, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

The Federal Docket Management Facility accepts hand-delivered submissions, and makes docket contents available for public inspection and copying at this address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Facility telephone number is 202–366–9329, the fax number is 202–493–2251, and the Web site for electronic submissions or for electronic access to docket contents is *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Ray Martin, U.S. Coast Guard, telephone: 202–372–1449, e-mail: *Raymond.W.Martin@uscg.mil* or Ms. Yvette Fields, Maritime Administration, telephone: 202–366–0926, e-mail: *Yvette.Fields@dot.gov.* If you have questions on viewing the Docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone: 202–493–0402.

SUPPLEMENTARY INFORMATION:

Receipt of Application

On September 28, 2010, the Maritime Administration and U.S. Coast Guard received an application from Liberty Natural Gas LLC for all Federal authorizations required for a license to own, construct, and operate a deepwater port authorized under the Deepwater Port Act of 1974, as amended, 33 U.S.C. 1501 *et seq.* (the Act). On November 1, 2010, we determined the application contained all information required by the Act to initiate processing.

Background

According to the Act, a deepwater port is a fixed or floating manmade structure other than a vessel, or a group of structures, located beyond state seaward boundaries and used or intended for use as a port or terminal for the transportation, storage, and further handling of oil or natural gas for transportation to any state.

The Maritime Administrator possesses the authority to license a deepwater port (by delegation from the Secretary of Transportation, published on June 18, 2003 (68 FR 36496)). Statutory and regulatory requirements for licensing appear in 33 U.S.C. 1501 *et seq.* and in 33 CFR Part 148. Under delegations from, and agreements between, the Secretary of Transportation and the Secretary of Homeland Security, applications are jointly processed by the Maritime Administration and U.S. Coast Guard. Each application is considered on its own merits.

The Act imposes a strict timeline for processing an application. Once we determine that an application contains the required information, we must hold public hearings on the application within 240 days, and the Maritime Administrator must render a decision on the application within 330 days. We will publish additional **Federal Register** notices to inform you of these public hearings and other procedural milestones, including the environmental review. The Maritime Administrator's decision, and other key documents, will be filed in the public docket.

At least one public hearing must take place in each adjacent coastal state. Pursuant to the criteria provided in the Act, New Jersey and New York are adjacent coastal states for this application. Other states may apply for adjacent coastal state status in accordance with 33 U.S.C. 1508(a)(2).

Summary of the Application

Liberty Natural Gas, LLC, proposes to own, construct, and operate a natural gas deepwater port, known as Liberty Deepwater Port. It would be located approximately 16 miles off the coast of New Jersey to the east of Asbury Park in a water depth of approximately 100 to 120 feet. It will connect via offshore pipeline to a 9.2 mile onshore pipeline that will traverse through Perth Amboy, Woodbridge and Carteret in Middlesex County, New Jersey and terminate in Linden, Union County, New Jersey.

Liberty Deepwater Port would receive and transfer natural gas from purpose-build LNG regasification vessels (LNGRVs) with a total cargo tank capacity of approximately 145,000 m^3. The vessels would be equipped to vaporize LNG cargo to natural gas through onboard closed loop vaporization systems and to odorize and meter gas for send-out by means of a Submerged Turret Loading™ (STL) buoy system. When the vessels are not present, the buoy would be submerged on a special landing pad on the seafloor, 100–120 feet below the sea surface. The top of the buoy would be approximately 50–70 feet below the surface of the water.

Liberty Deepwater Port would consist of up to four STL Buoy systems. Each buoy system would connect to an 18-inch diameter pipeline, called a Lateral, at a pipeline end manifold (PLEM) installed on the seafloor. The Laterals would be approximately 0.6 miles to 1 mile in length. Natural gas would flow through each Lateral to the 36-inch diameter, 44.37 mile long Offshore Pipeline. The Offshore Pipeline would connect to a 36-inch diameter, 9.2 mile long Onshore Pipeline that would traverse through Perth Amboy, Woodbridge and Carteret in Middlesex County, New Jersey and terminate in Linden, Union County, New Jersey. The Onshore Pipeline would connect to Transco and TETCO pipeline systems.

The Liberty Deepwater Port would be installed in two phases, with the first two STL Buoy systems and accompanying onshore and offshore pipeline infrastructure proposed to be installed and operational by the end of 2013. The second phase, consisting of an additional pair of STL Buoy systems and associated Laterals, would be constructed at a later date.

The Offshore Pipeline ultimately used by four STL Buoy systems will have a delivery capacity of approximately 2.4 billion cubic feet per day (bcf/d) of natural gas. Each LNGRV will have an average natural gas delivery capacity of 600 million cubic feet per day (MMcf/d) with a maximum capacity of 750 MMcf/d.

Liberty Natural Gas LLC is currently seeking Federal Energy Regulatory Commission (FERC) approval for the onshore pipelines. As required by FERC regulations, FERC will also maintain a docket for the FERC portion of the project. The docket number is CP11–10. The filing may also be viewed on the Web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call (866) 208–3767 or TYY, (202) 502–8659.

In addition, the deepwater port pipelines and structures, such as the STL moorings, may require permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, which are administered by the U.S. Army Corps of Engineers (USACE).

Liberty Deepwater Port may also require permits from the Environmental Protection Agency (EPA) pursuant to the provisions of the Clean Air Act, as amended, and the Clean Water Act, as amended.

The offshore and onshore pipelines will be included in the National Environmental Policy Act (NEPA) review as part of the deepwater port application process. FERC, EPA, and the USACE, among others, are cooperating agencies and will assist in the NEPA process as described in 40 CFR 1501.6; will be participating in the scoping meetings; and will incorporate the EIS into their permitting processes. Comments sent to the FERC docket, or to the EPA or USACE, will be incorporated into the DOT docket and considered as the EIS is developed to ensure consistency with the NEPA Process.

Should a license be issued, construction of the deepwater port would be expected to take approximately 18 months over a two-year period with startup of commercial operations following construction. The deepwater port would be designed, constructed and operated in accordance with applicable codes and standards.

Privacy Act

The electronic form of all comments received into the Federal Docket Management System can be searched by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). The DOT Privacy Act Statement can be viewed in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, pages 19477–78) or you may visit *http://www.regulations.gov.* Authority 49 CFR 1.66.

Dated: November 9, 2010.

By Order of the Maritime Administrator.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–28881 Filed 11–16–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Termination of Environmental Review Process Cities of Chesapeake and Virginia Beach, VA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Termination of environmental review process for Southeastern Parkway and Greenbelt.

SUMMARY: The FHWA is issuing this notice to advise the public that the environmental review process for proposed Southeastern Parkway and Greenbelt in the Cities of Chesapeake and Virginia Beach, Virginia, is terminated.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Sundra, Planning and Environment Team Leader, FHWA Virginia Division Office, (804) 775–3320, *Edward.Sundra@dot.gov*, 400 North 8th Street, Suite 750, Richmond, VA 23219–4825. Sharon Vaughn-Fair, Assistant Chief Counsel, FHWA Eastern Legal Services Division, (410) 962–2544, *Sharon.Vaughn-Fair@dot.gov*, 10 S. Howard Street, Suite 4000, Baltimore, MD 21201. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Electronic Access:

An electronic copy of this notice may be downloaded from the Office of the Federal Register's home page at *http://www.archives.gov* and the Government Printing Office's Web site at *http://www.access.gpo.gov*.

Background:

The FHWA is terminating the environmental review process for the proposed Southeastern Parkway and Greenbelt. This notice terminates the environmental process that began when the notice of intent was published in the **Federal Register** on Wednesday December 24, 2003, at 68 FR 74698. A Draft Environmental Impact Statement (EIS) was prepared for this project and a Notice of Availability was published in the **Federal Register** on June 10, 2005, at 70 FR 33901.

The identified preferred alternative for the proposed project would result in a net wetland loss of over 170 acres. There is significant resource agency opposition to the proposed project. The United States Army Corps of Engineers have expressed serious concern in their July 22, 2005, comment letter on the Draft EIS and in subsequent coordination meetings. An Environmentally Unsatisfactory rating was issued by the United States

Environmental Protection Agency (EPA) on July 29, 2005. In a February 11, 2009, letter to FHWA, EPA stated that "even the best mitigation may not be able to adequately compensate for the environmental harm expected."

Following further coordination with the appropriate resource agencies, FHWA has concluded that, pursuant to 23 CFR 771.133, it has no reasonable assurance that the requirements of Section 404 of the Clean Water Act can be met for the project as proposed. Therefore a determination has been made thereby to terminate the environmental review process.

Authority: 23 CFR 771.133.

Issued on: November 10, 2010.

Victor M. Mendez,

Administrator.

[FR Doc. 2010–28880 Filed 11–16–10; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 10, 2010.

The Department of the Treasury will submit the following public information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. A copy of the submission may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding these information collections should be addressed to the OMB reviewer listed and to the Treasury PRA Clearance Officer, Department of the Treasury, 1750 Pennsylvania Avenue, NW., Suite 11010, Washington, DC 20220.

DATES: Written comments should be received on or before December 17, 2010 to be assured of consideration.

Financial Management Service (FMS)

OMB Number: 1510–0059.

Type of Review: Extension without change to a currently approved collection.

Title: Authorization Agreement for Preauthorized Payment.

Form: SF–5510.

Abstract: Preauthorized payment is used by remitters (individuals and corporations) to authorize electronic funds transfers from the bank accounts maintained at financial institutions for government agencies to collect monies.

Respondents: Individuals and households.

Estimated Total Burden Hours: 25,000 hours.

Bureau Clearance Officer: Wesley Powe, Financial Management Service, 3700 East West Highway, Room 144, Hyattsville, MD 20782; (202) 874–8936.

OMB Reviewer: Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2010–28970 Filed 11–16–10; 8:45 am]

BILLING CODE 4810–35–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of Entities Pursuant to Executive Order 13382

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is publishing the names of 37 newly-designated entities and 5 newly-designated individuals whose property and interests in property are blocked pursuant to Executive Order 13382 of June 28, 2005, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters."

DATES: The designation by the Director of OFAC of the 37 entities and 5 individuals identified in this notice pursuant to Executive Order 13382 is effective on October 27, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.:* 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/offices/enforcement/ofac*) or via facsimile through a 24-hour fax-on demand service, *tel.:* (202) 622–0077.

Background

On June 28, 2005, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) ("IEEPA"), issued Executive Order 13382 (70 FR 38567, July 1, 2005) (the "Order"), effective at 12:01 a.m. eastern daylight time on June 29, 2005. In the Order, the President took additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in the Annex to the Order; (2) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern; (3) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in clause (2) above or any person whose property and interests in property are blocked pursuant to the Order; and (4) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Order.

On October 27, 2010, the Director of OFAC, in consultation with the Departments of State, Justice, and other relevant agencies, designated 37 entities and 5 individuals whose property and interests in property are blocked pursuant to Executive Order 13382.

The list of additional designees is as follows:

Entities

1. DARYA CAPITAL ADMINISTRATION GMBH, Schottweg 6, Hamburg 22087, Germany; Business Registration Document #HRB94311 (Germany) issued 21 Jul 2005 [NPWMD]
2. EIGHTH OCEAN ADMINISTRATION GMBH,

Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRB94633 (Germany) issued 24 Aug 2005 [NPWMD]

3. EIGHTH OCEAN GMBH & CO. KG, c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRA102533 (Germany) issued 1 Sep 2005; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
4. ELEVENTH OCEAN ADMINISTRATION GMBH, Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRB94632 (Germany) issued 24 Aug 2005 [NPWMD]
5. ELEVENTH OCEAN GMBH & CO. KG, c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRA102544 (Germany) issued 9 Sep 2005; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 004940302930; Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
6. FIFTEENTH OCEAN GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Business Registration Document #HRA104175 (Germany) issued 12 Jul 2006; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
7. FIFTH OCEAN ADMINISTRATION GMBH, Schottweg 5, 22087, Hamburg, Germany; Business Registration Document #HRB94315 (Germany) issued 21 Jul 2005 [NPWMD]
8. FIFTH OCEAN GMBH & CO. KG, c/o Hafiz Darya Shipping Co, No 60, Ehteshamiyeh Square, 7th Neyestan Street, Pasdaran Avenue, Tehran, Iran; Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRA102599 (Germany) issued 19 Sep 2005; E-mail Address *info@hdslines.com;* Web site *http://www.hdslines.com;* Telephone: 00494070383392; Telephone: 00982126100733; Fax: 00982120100734 [NPWMD]
9. FIRST OCEAN ADMINISTRATION GMBH, Schottweg 5, 22087, Hamburg, Germany; Business Registration Document #HRB94311 (Germany) issued 21 Jul 2005 [NPWMD]
10. FIRST OCEAN GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Business Registration Document #HRA102601 (Germany) issued 19 Sep 2005; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
11. FOURTEENTH OCEAN GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Business Registration Document #HRA104174 (Germany) issued 12 Jul 2006; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
12. FOURTH OCEAN ADMINISTRATION GMBH, Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRB94314 (Germany) issued 21 Jul 2005 [NPWMD]
13. FOURTH OCEAN GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Business Registration Document #HRA102600 (Germany) issued 19 Sep 2005; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 00494070383392; Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
14. HTTS HANSEATIC TRADE TRUST AND SHIPPING, GMBH, Schottweg 7, Hamburg 22087, Germany; Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRB109492 (Germany); Web site *http://www.httsgmbh.com;* alt. Web site *http://www.irisl-europe.de;* Telephone: 004940278740; Telephone: 004940600383200; Telephone: 0049406003830; Telephone: 00494027874112; Fax: 00494027874200 [NPWMD]
15. KERMAN SHIPPING CO LTD, 143/1 Tower Road, SLM1604, Sliema, Malta; c/o Hafiz Darya Shipping Co, No 60, Ehteshamiyeh Square, 7th Neyestan Street, Pasdaran, Tehran, Iran; Business Registration Document #C37423 (Malta) issued 2005; E-mail Address *info@hdslines.com;* Web site *http://www.hdslines.com;* Telephone: 0035621317171; Telephone: 00982126100733; Fax: 0035621317172; Fax: 00982120100734 [NPWMD]
16. LANCELIN SHIPPING COMPANY LIMITED, Fortuna Court, Block B, 284 Archiepiskopou Makariou C' Avenue, 2nd Floor, 3105, Limassol, Cyprus; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley, Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #C133993 (Cyprus) issued 2002; E-mail Address info@demetriades.com; alt. E-mail Address info@ssa-smc.net; Web site *http://www.irisl.net;* alt. Web site *http://www.ssa-smc.net;* Telephone: 0035725800000; Telephone: 00982126100191; Fax: 0035725588055; Fax: 0035725587191; Fax: 00982126100192 [NPWMD]
17. NARI SHIPPING AND CHARTERING GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRA102485 (Germany) issued 19 Aug 2005; Telephone: 004940278740 [NPWMD]
18. NINTH OCEAN ADMINISTRATION GMBH, Schottweg 5, 22087, Hamburg, Germany; Business Registration Document #HRB94698 (Germany) issued 9 Sep 2005 [NPWMD]
19. NINTH OCEAN GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Business Registration Document #HRA102565 (Germany) issued 15 Sep 2005; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
20. OCEAN CAPITAL ADMINISTRATION GMBH, Schottweg 5, Hamburg 22087, Germany; Business Registration

Document #HRB92501 (Germany) issued 4 Jan 2005; Telephone: 004940278740 [NPWMD]

21. SECOND OCEAN ADMINISTRATION GMBH, Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRB94312 (Germany) issued 21 Jul 2005 [NPWMD]
22. SECOND OCEAN GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; c/o Hafiz Darya Shipping Co, No 60, Ehteshamiyeh Square, 7th Neyestan Street, Pasdaran Avenue, Tehran, Iran; Business Registration Document #HRA102502 (Germany) issued 24 Aug 2005; E-mail Address *info@hdslines.com;* Web site *http://www.hdslines.com;* Telephone: 00982126100733; Fax: 00982120100734 [NPWMD]
23. SEVENTH OCEAN ADMINISTRATION GMBH, Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRB94829 (Germany) issued 19 Sep 2005 [NPWMD]
24. SEVENTH OCEAN GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Business Registration Document #HRA102655 (Germany) issued 26 Sep 2005; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
25. SHERE SHIPPING COMPANY LIMITED, 143/1 Tower Road, SLM1604, Sliema, Malta; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley, Golriz St, Vafa Alley, Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #C39928 (Malta) issued 2006; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 0035621317171; Telephone: 00982126100191; Fax: 0035621317172; Fax: 00982126100192 [NPWMD]
26. SIXTH OCEAN ADMINISTRATION GMBH, Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRB94316 (Germany) issued 21 Jul 2005 [NPWMD]
27. SIXTH OCEAN GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; c/o Hafiz Darya Shipping Co, No 60, Ehteshamiyeh Square, 7th Neyestan Street, Pasdaran Avenue, Tehran, Iran; Business Registration Document #HRA102501 (Germany) issued 24 Aug 2005; E-mail Address *info@hdslines.com;* Web site *http://www.hdslines.com;* Telephone: 00982126100733; Fax: 00982120100734 [NPWMD]
28. TENTH OCEAN GMBH & CO. KG, c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRA102679 (Germany) issued 27 Sep 2005; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
29. THIRD OCEAN ADMINISTRATION GMBH, Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRB94313 (Germany) issued 21 Jul 2005 [NPWMD]
30. THIRD OCEAN GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Business Registration Document #HRA102520 (Germany) issued 29 Aug 2005; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
31. THIRTEENTH OCEAN GMBH & CO. KG, Schottweg 5, Hamburg 22087, Germany; c/o Islamic Republic of Iran Shipping Lines (IRISL), No. 37, Aseman Tower, Sayyade Shirazee Square, Pasdaran Ave., P.O. Box 19395–1311, Tehran, Iran; Business Registration Document #HRA104149 (Germany) issued 10 Jul 2006; E-mail Address *smd@irisl.net;* Web site *http://www.irisl.net;* Telephone: 00982120100488; Fax: 00982120100486 [NPWMD]
32. TONGHAM SHIPPING CO LTD, 143/1 Tower Road, SLM1604, Sliema, Malta; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #C39931 (Malta) issued 2006; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 0035621317171; Telephone: 00982126100191; Fax: 0035621317172; Fax: 00982126100192 [NPWMD]
33. TWELFTH OCEAN ADMINISTRATION GMBH, Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRB94573 (Germany) issued 18 Aug 2005 [NPWMD]
34. TWELFTH OCEAN GMBH & CO. KG, c/o Hafiz Darya Shipping Co, No 60, Ehteshamiyeh Square, 7th Neyestan Street, Pasdaran Avenue, Tehran, Iran; Schottweg 5, Hamburg 22087, Germany; Business Registration Document #HRA102506 (Germany) issued 25 Aug 2005; E-mail Address *info@hdslines.com;* Web site *http://www.hdslines.com;* Telephone: 00982126100733; Fax: 00982120100734 [NPWMD]
35. UPPERCOURT SHIPPING COMPANY LIMITED, 143/1 Tower Road, SLM1604, Sliema, Malta; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #C39926 (Malta) issued 2006; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 0035621317171; Telephone: 00982126100191; Fax: 0035621317172; Fax: 00982126100192 [NPWMD]
36. VOBSTER SHIPPING COMPANY LTD, 143/1 Tower Road, SLM1604, Sliema, Malta; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #C39927 (Malta) issued 2006; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 0035621317171; Telephone: 00982126100191; Fax: 0035621317172; Fax: 00982126100192 [NPWMD]
37. WOKING SHIPPING INVESTMENTS LIMITED, 143/1 Tower Road, SLM1604, Sliema, Malta; Business Registration Document #C39912 issued 2006; Telephone: 0035621317171; Fax: 0035621317172 [NPWMD]

Individuals

1. BATENI, Naser, Hamburg, Germany; DOB 16 Dec 1962; nationality Iran (individual) [NPWMD]
2. ESLAMI, Mansour; DOB 31 Jan 1965; nationality Iran (individual) [NPWMD]

3. NABIPOUR, Ghasem (a.k.a. POUR, Ghasem Nabi), 143 Shahid Lavasani Avenue, Farmanieh, Tehran, Iran; Suite B 12/F, Two Chinachem Plaza, 135 Des Voeux Road, Central, Hong Kong; DOB 16 Jan 1956; nationality Iran; Passport L11758148 (individual) [NPWMD]
4. SARKANDI, Ahmad (a.k.a. SARKANDI, Ahmed; a.k.a. SARKANDI, Akhmed), 2 Abbey Road, Barking Essex 1G11 7AX, London, United Kingdom; No 143 Shahid Lavasani Avenue, Farmanieh, Tehran, Iran; Suite B 12/F, Two Chinachem Plaza, 135 Des Voeux Road, Central, Hong Kong; 15 Rodney Court, Maida Vale, W9 1TQ, London, United Kingdom; DOB 30 Sep 1953; nationality Iran (individual) [NPWMD]
5. TALAI, Mohamad, Hamburg, Germany; DOB 4 Jun 1953; nationality Iran (individual) [NPWMD]

Dated: November 8, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010–28967 Filed 11–16–10; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request —Thrift Financial Report: Schedules SC, SO, VA, PD, LD, CC, CF, DI, SI, FS, CCR, and VIE

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Amended notice and request for comment.

SUMMARY: On October 5, 2010 (75 FR 61563) the OTS inadvertently cited on page 61565 the last six bullets as additional requirements for the Thrift Financial Report. This notice is issued to correct that error. The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. Today, the Office of Thrift Supervision within the Department of the Treasury solicits comments on proposed changes to the Thrift Financial Report (TFR), Schedule SC—Consolidated Statement of Condition, Schedule SO—Consolidated Statement of Operations, Schedule VA—Consolidated Valuation Allowances and Related Data, Schedule PD—Consolidated Past Due and Nonaccrual, Schedule LD—Loan Data, Schedule CC—Consolidated Commitments and Contingencies, Schedule CF—Consolidated Cash Flow Information, Schedule DI—Consolidated Deposit Information, Schedule SI—Consolidated Supplemental Information, Schedule FS—Fiduciary and Related Services, and Schedule CCR—Consolidated Capital Requirement, and on a proposed new Schedule VIE—Variable Interest Entities. The changes are proposed to become effective in March 2011.

At the end of the comment period, OTS will analyze the comments and recommendations received to determine if it should modify the proposed revisions prior to giving its final approval. OTS will then submit the revisions to the Office of Management and Budget (OMB) for review and approval.

DATES: Submit written comments on or before December 6, 2010.

ADDRESSES: Send comments to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send facsimile transmissions to FAX number (202) 906–6518; send e-mails to *infocollection.comments@ots.treas.gov;* or hand deliver comments to the Guard's Desk, east lobby entrance, 1700 G Street, NW., on business days between 9 a.m. and 4 p.m. All comments should refer to "TFR Revisions—2011, OMB No. 1550–0023." OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can access sample copies of the proposed 2011 TFR forms on OTS's Web site at *http://www.ots.treas.gov* or you may request them by electronic mail from *tfr.instructions@ots.treas.gov.* You can request additional information about this proposed information collection from James Caton, Managing Director, Economic and Industry Analysis Division, (202) 906–5680, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

Title: Thrift Financial Report.
OMB Number: 1550–0023.
Form Number: OTS 1313.
Abstract: OTS is proposing to revise and extend for three years the TFR, which is currently an approved collection of information.

All OTS-regulated savings associations must comply with the information collections described in this notice. OTS collects this information each calendar quarter or less frequently if so stated. OTS uses this information to monitor the condition, performance, and risk profile of individual institutions and systemic risk among groups of institutions and the industry as a whole. Except for selected items, these information collections are not given confidential treatment.

Current Actions:

I. Overview

OTS last revised the form and content of the TFR in a manner that significantly affected a substantial percentage of institutions in March 2010. Since the beginning of 2010 OTS has evaluated its ongoing information needs. OTS recognizes that the TFR imposes reporting requirements, which are a component of the regulatory burden facing institutions. Another contributor to this regulatory burden is the examination process, particularly on-site examinations during which institution staff spends time and effort responding to inquiries and requests for information designed to assist examiners in evaluating the condition and risk profile of the institution. The amount of attention that examiners direct to risk areas of the institution under examination is, in large part, determined from TFR data. These data, and analytical reports, including the Uniform Thrift Performance Report, assist examiners in scoping and making their preliminary assessments of risks during the planning phase of the examination.

A risk-focused review of the information from an institution's TFR allows examiners to make preliminary risk assessments prior to onsite work. The degree of perceived risk determines the extent of the examination procedures that examiners initially plan for each risk area. If the outcome of these procedures reveals a different level of risk in a particular area, the examiner adjusts the examination scope and procedures accordingly.

TFR data are also a vital source of information for the monitoring and regulatory activities of OTS. Among their benefits, these activities aid in determining whether the frequency of an institution's examination cycle

should remain at maximum allowed time intervals, thereby lessening overall regulatory burden. More risk-focused TFR data enhance the ability of OTS to assess whether an institution is experiencing changes in its risk profile that warrant immediate follow-up, which may include accelerating the timing of an on-site examination.

In developing this proposal, OTS considered a range of potential information needs, particularly in the areas of credit risk, liquidity, and liabilities, and identified those additions to the TFR that are most critical and relevant to OTS in fulfilling its supervisory responsibilities. OTS recognizes that increased reporting burden will result from the addition to the TFR of the new items discussed in this proposal. Nevertheless, when viewing these proposed revisions to the TFR within a larger context, they help to enhance the on- and off-site supervision capabilities of OTS, which assist with controlling the overall regulatory burden on institutions.

OTS also considered the potential impacts from the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act") that the President signed into law on July 21. The Dodd-Frank Act provides for the combination of the OTS into the Office of the Comptroller of the Currency 12 to 18 months after the enactment date. Employees of the OTS on the transfer date will transfer to the OCC, the FDIC, or a new Consumer Financial Protection Bureau. At this point, no decision about a possible conversion, if any, from the TFR to the Call Report has been made. Nevertheless, effort was made to avoid increasing differences between the two reports. For this reason, the majority of the proposed changes mirror changes proposed for the Call Report. However, proposed are some changes that will further and enhance off-site monitoring and on-site examination efficiency.

Thus, OTS is requesting comment on the following proposed revisions to the TFR that would take effect as of March 31, 2011, unless otherwise noted. These revisions would change the reporting frequency for the number and market value of collective investment funds and common trust funds data reported in Memorandum Item 3 of Schedule FS from annually to quarterly, revise several existing lines, add new lines to the TFR, and add a new Schedule VIE, Variable Interest Entities.

For each of the proposed revisions or new items, OTS is particularly interested in comments from institutions on whether the information proposed to be collected is readily available from existing institution records. OTS also invites comment on whether there are particular proposed revisions for which the new data would be of limited relevance for purposes of assessing risks in a specific segment of the savings association industry. In such cases, OTS requests comments on what criteria, e.g., an asset size threshold or some other measure, we should establish for identifying the specific segment of the savings association industry that we should require to report the proposed information. Finally, OTS seeks comment on whether, for a particular proposed revision, there is an alternative information set that could satisfy OTS data needs and be less burdensome for institutions to report than the new or revised items that OTS has proposed. OTS will consider all of the comments it receives as it formulates a final set of revisions to the TFR for implementation in 2011. The proposed revisions include:

- A breakdown by loan category of the existing troubled debt restructurings for amounts added in the current quarter and amounts included in Schedule SC in compliance with modified terms in Schedule VA, and for troubled debt restructurings that are past due 30 to 89 days, 90 days or more, or in nonaccrual status in Schedule PD;
- Additional data for automobile loans, including securities backed by automobile loans in Schedule SC, interest income from automobile loans in Schedule SO, automobile loans closed, purchased, or sold during the quarter in Schedule CF, and the average daily balance for automobile loans during the quarter in Schedule SI;
- A breakdown in Schedule SC of the existing items for mortgage-backed securities between residential and commercial securities issued or guaranteed by U.S. Government agencies and sponsored enterprises and those that are not;
- New items for the amount and average daily deposits of nonbrokered deposits obtained through the use of deposit listing service companies in Schedule DI;
- A breakdown of the existing items for deposits of individuals, partnerships, and corporations between deposits of individuals and deposits of partnerships and corporations in Schedule DI;
- A new Schedule VIE, Variable Interest Entities, for reporting the categories of assets of consolidated variable interest entities (VIEs) that can be used only to settle the VIEs' obligations, the categories of liabilities of consolidated VIEs without recourse to the savings association's general credit, and the total assets and total liabilities of other consolidated VIEs included in the savings association's total assets and total liabilities, with these data reported separately for securitization trusts, asset-backed commercial paper conduits, and other VIEs;
- Breakdowns of loans and repossessed assets covered by FDIC loss-sharing agreements by loan and repossessed asset category in Schedule SI, new line in Schedule SI for income received from or accrued on assets covered by the FDIC under loss-sharing agreements, and a breakdown in Schedule PD of loans past due 30 to 89 days, 90 days or more, or in nonaccrual status covered by FDIC loss-sharing agreements;
- A breakdown of the existing items for key person life insurance in Schedule SC into items for general account and separate account life insurance assets;
- New items for the total assets of captive insurance and reinsurance subsidiaries in Schedule SI;
- A change in reporting frequency from annual to quarterly for the data reported in Schedule FS on collective investment funds and common trust funds for those savings associations that currently report fiduciary assets and income annually, i.e., banks with fiduciary assets greater than $250 million or gross fiduciary income greater than 10 percent of bank revenue;
- A new item in Schedule SO for service charges on deposit accounts;
- A new item in Schedule CCR for qualifying noncontrolling (minority) interests in consolidated subsidiaries;
- Two new items in Schedule SC for trust preferred securities;
- A more detailed breakdown by loan type in Schedule VA of general, specific, and total valuation allowances;
- A breakdown by loan type in Schedule VA of classified assets;

The specific wording of the captions for the new or revised TFR data items discussed in this proposal and the numbering of these data items should be regarded as preliminary.

I. Discussion of Revisions Proposed for March 2011

A. Troubled Debt Restructurings

OTS is proposing that savings associations report additional detail on loans that have undergone troubled debt restructurings in TFR Schedules VA and PD. More specifically, new items are proposed for Schedule VA under two columns for the amount of troubled debt restructured during the current quarter (odd-numbered lines) and the amount of

troubled debt restructured that is included in Schedule SC in compliance with the modified terms (even-numbered lines):

VA211, VA212 Construction Loans (Total of VA213–VA218):
- VA213, VA214 1–4 Dwelling Units
- VA215, VA216 Multifamily (5 or more) Dwelling Units
- VA217, VA218 Nonresidential Property

Permanent Loans, Secured By:
- VA221, VA222 1–4 Dwelling Units
- VA223, VA224 Multifamily (5 or more) Dwelling Units
- VA 225, VA226 Nonresidential Property (Except Land)
- VA227, VA228 Owner-Occupied Nonresidential Property
- VA231, VA232 Other Nonresidential Property
- VA233, VA234 Land

VA241, VA242 Nonmortgage Loans—Total
- V243, VA244 Commercial Loans—Total
- VA245, VA246 Secured
- VA247, VA248 Unsecured
- VA251, VA252 Credit Card Loans Outstanding—Business
- VA253, VA254 Consumer Loans—Total

New items are proposed in Schedule PD to add detail to troubled debt restructuring amounts past due and still accruing, 30–89 days (500-series lines), past due and still accruing, 90 days or more (600-series lines), and nonaccrual (700-series lines):

Construction Loans:
- PD516, PD616, PD716 1–4 Dwelling Units
- PD517, PD617, PD717 Multifamily (5 or more) Dwelling Units
- PD518, PD618, PD718 Nonresidential Property

Permanent Loans, Secured By:
- PD519, PD619, PD719 1–4 Dwelling Units
- PD525, PD625, PD725 Multifamily (5 or more) Dwelling Units
- PD535, PD635, PD735 Nonresidential Property (Except Land)
- PD536, PD636, PD736 Owner-Occupied Nonresidential Property
- PD537, PD637, PD737 Other Nonresidential Property
- PD538, PD638, PD738 Land

PD539, PD639, PD739 Nonmortgage Loans—Total
- PD540, PD640, PD740 Commercial Loans—Total
- PD541, PD641, PD741 Secured
- PD542, PD642, PD742 Unsecured
- PD545, PD645, PD745 Credit Card Loans Outstanding—Business
- PD560, PD660, PD760 Consumer Loans—Total

In the aggregate, troubled debt restructurings for all insured institutions have grown from $6.9 billion at year-end 2007, to $24.0 billion at year-end 2008, to $58.1 billion at year-end 2009, with a further increase to $64.0 billion as of March 31, 2010. The proposed additional detail on troubled debt restructurings in Schedules VA and PD would enable OTS to better understand the level of restructuring activity at savings associations, the categories of loans involved in this activity, and, therefore, whether savings associations are working with their borrowers to modify and restructure loans. In particular, to encourage banks and savings associations to work constructively with their commercial borrowers, the federal banking agencies recently issued guidance on commercial real estate loan workouts and small business lending. While this guidance has explained the agencies' expectations for prudent workouts, the agencies do not have adequate and reliable data outside of the examination process to assess restructuring activity for commercial real estate loans and commercial and industrial loans. Further, it is important to separately identify commercial real estate loan restructurings from commercial and industrial loan restructurings given that the value of the real estate collateral is a consideration in an institution's decision to modify the terms of a commercial real estate loan in a troubled debt restructuring, but such collateral protection would normally be absent from commercial and industrial loans for which a loan modification is being explored because of borrowers' financial difficulties.

It is also anticipated that other loan categories will experience continued workout activity in the coming months given that every asset class has been impacted by the recent recession (as evidenced by the increase in past due and nonaccrual assets across all asset classes). In addition, because credit availability has substantially decreased, borrowers experiencing financial difficulties are left with few alternatives for funding and their creditor institutions will need to evaluate whether to work with them by granting a concession when modifying the terms of their existing loans.

The new data would provide the OTS with the level of information necessary to assess savings associations' troubled debt restructurings to the same extent that other loan quality and performance indicators can be assessed. However, the OTS notes that, under generally accepted accounting principles, troubled debt restructurings do not include changes in lease agreements [1] and we therefore propose to exclude leases from the new items proposed.

B. Auto Loans

OTS is proposing to collect additional information on automobile loans. More specifically, the following new lines are proposed:

SC183 Securities Backed by Auto Loans
SO173 Auto Loans—Interest Income
CF401 Auto Loans Closed or Purchased During Quarter
CF402 Auto Loans Sold During Quarter
SI886 Auto Loans—Average Daily Balance During Quarter

Automobile loans are a significant consumer business for many large savings associations. The proposed additional lines will enhance supervisory evaluation and oversight of automobile lending performance and risks.

C. Commercial Mortgage-Backed Securities Issued or Guaranteed by U.S. Government Agencies and Sponsored Agencies

OTS is proposing to split the existing items on mortgage-backed securities (MBS) in Schedule SC to distinguish between residential and commercial MBS issued or guaranteed by U.S. Government agencies and sponsored agencies (collectively, U.S. Government agencies) and residential and commercial MBS issued by others. OTS proposes to revise the following existing lines to report data for residential MBS:

Residential Pass-Through:
- SC210 Insured or Guaranteed by an Agency or Sponsored Enterprise of the U.S.
- SC215 Other Pass-Through

Other Residential Mortgage-Backed Securities (Excluding Bonds):
- SC217 Issued or Guaranteed by FNMA, FHLMC, or GNMA
- SC219 Collateralized by Mortgage-Backed Securities Issued or Guaranteed by FNMA, FHLMC, or GNMA
- SC222 Other

OTS proposes the following new lines to report data for commercial MBS:

Commercial Pass-Through:
- SC211 Insured or Guaranteed by an Agency or Sponsored Enterprise of the U.S.
- SC213 Other Pass-Through

Other Commercial Mortgage-Backed Securities (Excluding Bonds):
- SC223 Issued or Guaranteed by FNMA, FHLMC, or GNMA
- SC224 Collateralized by Mortgage-

[1] Accounting Standards Codification paragraph 470–60–15–11.

Backed Securities Issued or Guaranteed by FNMA, FHLMC, or GNMA

SC225 Other

D. Nonbrokered Deposits Obtained Through the Use of Deposit Listing Service Companies

Savings associations currently report information on their funding in the form of brokered deposits in Schedule DI. These data are an integral component of the regulatory analysis of individual institutions' liquidity and funding, including their reliance on non-core sources to fund their activities.

Deposit brokers have traditionally provided intermediary services for financial institutions and investors. However, the Internet, deposit listing services, and other automated services now enable investors who focus on yield to easily identify high-yielding deposit sources. Such customers are highly rate sensitive and can be a less stable source of funding than typical relationship deposit customers. Because they often have no other relationship with the financial institution, these customers may rapidly transfer funds to other institutions if more attractive returns become available.

OTS expects each institution to establish and adhere to a sound liquidity and funds management policy. The institution's board of directors, or a committee of the board, should also ensure that senior management takes the necessary steps to monitor and control liquidity risk. This process includes establishing procedures, guidelines, internal controls, and limits for managing and monitoring liquidity and reviewing the institution's liquidity position, including its deposit structure, on a regular basis. A necessary prerequisite to sound liquidity and funds management decisions is a sound management information system, which provides certain basic information including data on non-relationship funding programs, such as brokered deposits, deposits obtained through the Internet or other types of advertising, and other similar rate sensitive deposits. Thus, an institution's management should be aware of the number and magnitude of such deposits.

To improve its ability to monitor potentially volatile funding sources, OTS is proposing two lines to Schedule DI in which savings associations would report the amount of deposits and average daily deposits obtained through the use of deposit listing services that are not brokered deposits:

DI117 Total Amount of Deposits Obtained Through Deposit Listing Services That Are Not Brokered Deposits.

DI547 Average Daily Deposits Totals: Deposits Obtained Through Deposit Listing Services That Are Not Brokered Deposits.

A deposit listing service is a company that compiles information about the interest rates offered on deposits, such as certificates of deposit, by insured depository institutions. A particular company could be a deposit listing service (compiling information about certificates of deposits) as well as a deposit broker (facilitating the placement of certificates of deposit). A deposit listing service is not a deposit broker if all of the following four criteria are met:

(1) The person or entity providing the listing service is compensated solely by means of subscription fees (*i.e.,* the fees paid by subscribers as payment for their opportunity to see the rates gathered by the listing service) and/or listing fees (*i.e.,* the fees paid by depository institutions as payment for their opportunity to list or "post" their rates). The listing service does not require a depository institution to pay for other services offered by the listing service or its affiliates as a condition precedent to being listed.

(2) The fees paid by depository institutions are flat fees: they are not calculated on the basis of the number or dollar amount of deposits accepted by the depository institution as a result of the listing or "posting" of the depository institution's rates.

(3) In exchange for these fees, the listing service performs no services except (A) the gathering and transmission of information concerning the availability of deposits; and/or (B) the transmission of messages between depositors and depository institutions (including purchase orders and trade confirmations). In publishing or displaying information about depository institutions, the listing service must not attempt to steer funds toward particular institutions (except that the listing service may rank institutions according to interest rates and also may exclude institutions that do not pay the listing fee). Similarly, in any communications with depositors or potential depositors, the listing service must not attempt to steer funds toward particular institutions.

(4) The listing service is not involved in placing deposits. Any funds to be invested in deposit accounts are remitted directly by the depositor to the insured depository institution and not, directly or indirectly, by or through the listing service.

E. Deposits of Individuals, Partnerships, and Corporations

Savings associations currently do not report separate breakdowns of their deposit accounts in the TFR by category of depositor. The recent crisis has demonstrated that business depositors' behavioral characteristics are significantly different than the behavioral characteristics of individuals. Thus, separate reporting of deposits of individuals versus deposits of partnerships and corporations would enable the federal banking agencies to better assess the liquidity risk profile of institutions given differences in the relative stability of deposits from these two sources.

OTS is proposing that the following two lines be added to Schedule DI:

DI196 Deposits of Individuals.

DI197 Deposits of Partnerships and Corporations.

Under this proposal, accounts for which the depositor's taxpayer identification number, as maintained on the account in the savings association's records, is a Social Security Number (or an Individual Taxpayer Identification Number [2]) should be treated as deposits of individuals. In general, all other accounts should be treated as deposits of partnerships and corporations. However, line SC710 currently includes all certified and official checks. To limit the reporting burden of this proposed change, official checks in the form of money orders and travelers checks would be reported as deposits of individuals. Certified checks and all other official checks would be reported as deposits of partnerships and corporations. OTS is requesting comment on this approach to reporting certified and official checks.

F. Variable Interest Entities

In June 2009, the Financial Accounting Standards Board (FASB) issued accounting standards that have changed the way entities account for securitizations and special purpose entities. ASU No. 2009–16 (formerly FAS 166) revised ASC Topic 860, Transfers and Servicing, by eliminating the concept of a "qualifying special-purpose entity" (QSPE) and changing the requirements for derecognizing financial assets. ASU No. 2009–17 (formerly FAS 167) revised ASC Topic 810, Consolidations, by changing how a financial institution or other company

[2] An Individual Taxpayer Identification Number is a tax processing number only available for certain nonresident and resident aliens, their spouses, and dependents who cannot get a Social Security Number. It is a 9-digit number, beginning with the number "9," formatted like a Social Security Number.

determines when an entity that is insufficiently capitalized or is not controlled through voting or similar rights, *i.e.,* a "variable interest entity" (VIE), should be consolidated. For most financial institutions, ASU Nos. 2009–16 and 2009–17 took effect January 1, 2010.

Under ASC Topic 810, as amended, determining whether a financial institution is required to consolidate a VIE depends on a qualitative analysis of whether that institution has a "controlling financial interest" in the VIE and is therefore the primary beneficiary of the VIE. The analysis focuses on the institution's power over and interest in the VIE. With the removal of the QSPE concept from generally accepted accounting principles that was brought about in amended ASC Topic 860, a institution that transferred financial assets to an SPE that met the definition of a QSPE before the effective date of these amended accounting standards was required to evaluate whether, pursuant to amended ASC Topic 810, it must begin to consolidate the assets, liabilities, and equity of the SPE as of that effective date. Thus, when implementing amended ASC Topics 860 and 810 at the beginning of 2010, financial institutions began to consolidate certain previously off-balance securitization vehicles, asset-backed commercial paper conduits, and other structures. Going forward, financial institutions with variable interests in new VIEs must evaluate whether they have a controlling financial interest in these entities and, if so, consolidate them. In addition, institutions must continually reassess whether they are the primary beneficiary of VIEs in which they have variable interests.

For those VIEs that savings associations must consolidate, guidance advises institutions to report the assets and liabilities of these VIEs on Schedule SC in the balance sheet category appropriate to the asset or liability. However, ASC paragraph 810–10–45–25 [3] requires a reporting entity to present "separately on the face of the statement of financial position:

a. Assets of a consolidated variable interest entity (VIE) that can be used only to settle obligations of the consolidated VIE [and] b. Liabilities of a consolidated VIE for which creditors (or beneficial interest holders) do not have recourse to the general credit of the primary beneficiary." This requirement has been interpreted to mean that "each line item of the consolidated balance sheet should differentiate which portion of those amounts meet the separate presentation conditions." [4] In requiring separate presentation for these assets and liabilities, the FASB agreed with commenters on its proposed accounting standard on consolidation that "separate presentation . . . would provide transparent and useful information about an enterprise's involvement and associated risks in a variable interest entity." [5] The federal banking agencies concur that separate presentation would provide similar benefits to them and other Call Report and TFR users.

Consistent with the presentation requirements discussed above, the banking agencies are proposing to add a new Schedule RC–V, Variable Interest Entities, to the Call Report, and OTS is proposing to add a new Schedule VIE, Variable Interest Entities, to the TFR. Financial institutions would use the proposed new schedules to report a breakdown of the assets of consolidated VIEs that can be used only to settle obligations of the consolidated VIEs and liabilities of consolidated VIEs for which creditors do not have recourse to the general credit of the financial institution. The following proposed categories of assets and liabilities would include some of the same categories presented on the Call Report and TFR balance sheet schedules: Cash and balances due from depository institutions, Held-to-maturity securities; Available-for-sale securities; Securities purchased under agreements to resell, Loans and leases held for sale; Loans and leases, net of unearned income; Allowance for loan and lease losses; Trading assets (other than derivatives); Derivative trading assets; Other real estate owned; Other assets; Securities sold under agreements to repurchase; Derivative trading liabilities; Other borrowed money (other than commercial paper); Commercial paper; and Other liabilities. These assets and liabilities would be presented separately for securitization trusts, asset-backed commercial paper conduits, and other VIEs.

In addition, the federal banking agencies propose to include separate items in the new schedules in which financial institutions would report the total assets and the total liabilities of consolidated VIEs (for which the breakdown of assets and liabilities described above is not reported) to help the agencies understand the magnitude of any VIE assets that are not dedicated solely to settling obligations of the VIE and any VIE liabilities for which creditors may have recourse to the general credit of the bank. These consolidated VIEs' total assets and total liabilities, which would be reported after eliminating intercompany transactions, would also be reported separately for securitization trusts, asset-backed commercial paper conduits, and other VIEs.

G. Assets Covered by FDIC Loss-Sharing Agreements

In March 2010, the federal banking agencies added a four-way breakdown of assets covered by loss-sharing agreements with the FDIC to the Call Report and the TFR. In a January 22, 2010, comment letter to the banking agencies on the agencies' submission for OMB review of proposed Call Report revisions for implementation in 2010, the American Bankers Association (ABA) stated that while the addition of the covered asset items to Schedule RC–M was

> "a step in the right direction, ABA believes it would be beneficial to regulators, reporting banks, investors, and the public to have additional, more granular information about the various categories of assets subject to the FDIC loss-sharing agreements. While we recognize that this would result in additional reporting burden on banks, on balance our members feel strongly that the benefit of additional disclosure of loss-sharing data would outweigh the burden of providing these detailed data. Thus, we urge the Agencies and the FFIEC to further revise the collection of data from banks on assets covered by FDIC loss-sharing agreements on the Call Report to include the several changes suggested below * * *. We believe these changes would provide a more precise and accurate picture of a bank's asset quality."

OTS is proposing to revise the TFR along the lines suggested by the ABA by adding the following new lines:

Breakdown of line SI770, Loans and Leases:
- SI771 Construction Loans—Total
- SI773 Residential—Total
- SI717 1–4 Dwelling Units
- SI718 Multifamily (5 or More) Dwelling Units
- SI775 Nonresidential Property
- SI777 Permanent Loans—Total
- SI778 Residential—Total
- SI779 1–4 Dwelling Units—Total
- SI780 Revolving Open-End Loans
- SI781 All Other—First Liens
- SI782 All Other—Junior Liens
- SI783 Multifamily (5 or More) Dwelling Units
- SI784 Nonresidential Property—Total

[3] Formerly paragraph 22A of FIN 46(R), as amended by FAS 167.

[4] Deloitte & Touche LLP, "Back on-balance sheet: Observations from the adoption of FAS 167," May 2010, page 4 (*http://www.deloitte.com/view/en_US/us/Services/audit-enterprise-risk-services/Financial-Accounting-Reporting/f3a70ca28d9f8210VgnVCM200000bb42f00aRCRD.htm*).

[5] *See* paragraphs A80 and A81 of FAS 167.

SI785 Owner-Occupied Nonfarm Nonresidential Property
SI786 Other Nonfarm Nonresidential Property
SI787 Land
SI788 Commercial Loans—Total
SI789 Secured
SI790 Unsecured
SI791 Credit Card Loans Outstanding—Business
SI792 Lease Receivables
SI793 Consumer Loans—Total
SI794 Loans on Deposits
SI795 Home Improvement Loans (Not Secured by Real Estate)
SI796 Education Loans
SI797 Auto Loans
SI798 Mobile Home Loans
SI799 Credit Cards
SI800 Other, Including Lease Receivables
SI801 Repossessed Assets—Total
SI802 Real Estate—Total
SI803 Construction
SI804 Residential—Total
SI805 1–4 Dwelling Units
SI806 Multifamily (5 or More) Dwelling Units
SI807 Nonresidential (Except Land)
SI808 Land
SI809 Other Repossessed Assets
SI810 Guaranteed amount of total amount of covered real estate owned
SI811 Total Income Included on Schedule SO Received From or Accrued on Assets Covered by the FDIC Under Loss-Sharing Agreements

Breakdown of Covered Past Due and Nonaccrual Loans and Leases (3 amounts for each line—30–89 days past due and still accruing, 90 days or more past due and still accruing, and nonaccrual):

PD515, PD615, PD715 Construction Loans—Total
PD SUBxxx, PD SUBxxx, PD SUBxxx Residential—Total
PD516, PD616, PD716 1–4 Dwelling Units
PD517, PD617, PD717 Multifamily (5 or More) Dwelling Units
PD518, PD618, PD718 Nonresidential Property
PD SUBxxx, PD SUBxxx, PD SUBxxx Permanent Loans—Total
PD SUBxxx, PD SUBxxx, PD SUBxxx Residential—Total
PD SUBxxx, PD SUBxxx, PD SUBxxx 1–4 Dwelling Units—Total
PD521, PD621, PD721 Revolving Open-End Loans
PD523, PD623, PD723 All Other—First Liens
PD524, PD624, PD724 All Other—Junior Liens
PD525, PD625, PD725 Multifamily (5 or More) Dwelling Units
PD535, PD635, PD735 Nonresidential Property—Total
PD536, PD636, PD736 Owner-Occupied Nonresidential Property
PD537, PD637, PD737 Other Nonresidential Property
PD538, PD638, PD738 Land
PD540, PD640, PD740 Commercial Loans—Total
PD541, PD641, PD741 Secured
PD542, PD642, PD742 Unsecured
PD540, PD643, PD743 Credit Card Loans Outstanding—Business
PD545, PD645, PD745 Lease Receivables
PD SUBxxx, PD SUBxxx, PD SUBxxx Consumer Loans—Total
PD561, PD661, PD761 Loans on Deposits
PD563, PD663, PD763 Home Improvement Loans (Not Secured by Real Estate)
PD565, PD665, PD765 Education Loans
PD567, PD667, PD767 Auto Loans
PD569, PD669, PD769 Mobile Home Loans
PD571, PD671, PD771 Credit Cards
PD580, PD680, PD780 Other, Including Lease Receivables
PD596, PD696, PD796 Guaranteed amount of total amount of covered past due and nonaccrual loans and leases

H. Life Insurance Assets

Financial institutions purchase and hold bank-owned life insurance (BOLI) policies as assets, the premiums for which may be used to acquire general account or separate account life insurance policies. Savings associations currently report the aggregate amount of their life insurance assets in Schedule SC without regard to whether their holdings are general account or separate account policies.

Many financial institutions have BOLI assets, and the distinction between those life insurance policies that represent general account products and those that represent separate account products has meaning with respect to the degree of credit risk involved as well as performance measures for the life insurance assets in a volatile market environment. In a general account policy, the general assets of the insurance company issuing the policy support the policy's cash surrender value. In a separate account policy, the policyholder's cash surrender value is supported by assets segregated from the general assets of the insurance carrier. Under such an arrangement, the policyholder neither owns the underlying separate account created by the insurance carrier on its behalf nor controls investment decisions in the account. Nevertheless, the policyholder assumes all investment and price risk.

A number of financial institutions holding separate account life insurance policies have recorded significant losses in recent years due to the volatility in the markets and the vulnerability to market fluctuations of the instruments that are investment options in separate account life insurance policies. Information distinguishing between the cash surrender values of general account and separate account life insurance policies would allow the OTS to track savings associations' holdings of both types of life insurance policies with their differing risk characteristics and changes in their carrying amounts resulting from their performance over time. Accordingly, the OTS is proposing to add the following new items:

Key Person Life Insurance:
SC617 General Account Life Insurance Assets
SC619 Separate Account Life Insurance Assets

Other BOLI Not Considered Key Person Life Insurance:
SC627 General Account Life Insurance Assets
SC629 Separate Account Life Insurance Assets

I. Captive Insurance and Reinsurance Subsidiaries

Captive insurance companies are utilized by banking organizations to "self insure" or reinsure their own risks pursuant to incidental activities authority. A captive insurance company is a limited purpose insurer that may be licensed as a direct writer of insurance or as a reinsurer. Insurance premiums paid by an institution to its captive insurer, and claims paid back to the institution by the captive, are transacted on an intercompany basis, so there is no evidence of this type of self-insurance activity when an institution prepares consolidated financial statements, including its TFR. The cash flows for a captive reinsurer's transactions also are not transparent in an institution's consolidated financial statements.

A number of financial institutions own captive insurers or reinsurers, several of which were authorized to operate more than ten years ago. Some of the most common lines of business underwritten by financial institution captive insurers are credit life, accident, and health; disability insurance; and employee benefits coverage. Additionally, financial institution captive reinsurance subsidiaries may underwrite private mortgage guaranty reinsurance and terrorism risk reinsurance.

As part of their supervisory processes, the federal banking agencies have been following the proliferation of financial institution captive insurers and reinsurers and the performance trends of these captives for the past several years. Collection of financial information regarding the total assets of captive insurance and reinsurance subsidiaries would assist the agencies in monitoring the insurance activities of banking organizations as well as any safety and soundness risks posed to the parent institution from the activities of these subsidiaries.

OTS is proposing to collect two new items in Schedule SI:

SI762 Total assets of captive insurance subsidiaries

SI763 Total assets of captive reinsurance subsidiaries

These new items are not expected to be applicable to the vast majority of savings associations. When reporting the total assets of these captive subsidiaries in the proposed new items, savings associations should measure the subsidiaries' total assets before eliminating intercompany transactions between the consolidated subsidiary and other offices or subsidiaries of the consolidated institution.

J. Quarterly Reporting for Collective Investment Funds

For financial institutions that provide fiduciary and related services, the volume of assets under management is an important metric for understanding risk at these institutions and in the banking system. A savings association's assets under management may include such pooled investment vehicles as collective investment funds and common trust funds (hereafter, collectively, CIFs) that it offers to investors. When considering how and where to place funds in pooled investment vehicles, which also include registered investment funds (mutual funds), investors' decisions are highly influenced by risk and return factors. While registered investment funds regularly disclose an array of fund-related data to the U.S. Securities and Exchange Commission and the investing public, the OTS's collection and public disclosure of summary data on CIFs is limited to annual data reported in lines FS610 through FS675 of TFR Schedule FS, Fiduciary and Related Services, as of each December 31.

Like other investment vehicles, CIFs were affected by market disruptions during the recent financial crisis. To detect changes in investor behavior and bank investment management strategies at an early stage in this $2.5 trillion line of business, the banking agencies believe it would be beneficial to change the reporting frequency for the Schedule FS data on collective investment funds and common trust funds from annually to quarterly for those institutions that currently report their fiduciary assets and fiduciary income quarterly. Quarterly filing of these Schedule FS data is required of institutions with total fiduciary assets greater than $250 million (as of the preceding December 31) or with gross fiduciary and related income greater than 10 percent of revenue for the preceding calendar year.

K. Service Charges on Deposit Accounts

Savings associations currently do not report separate detail on service charges on deposit accounts. There has been growing interest in the amount of deposit account service fees charged by financial institutions. Banks currently report this data as a separate component of noninterest income in Call Report Schedule RI. In reporting this item, banks include amounts charged depositors (in domestic offices):

(1) For the maintenance of their deposit accounts with the bank, so-called "maintenance charges,"

(2) For their failure to maintain specified minimum deposit balances,

(3) Based on the number of checks drawn on and deposits made in their deposit accounts,

(4) For checks drawn on so-called "no minimum balance" deposit accounts,

(5) For withdrawals from nontransaction deposit accounts,

(6) For the closing of savings accounts before a specified minimum period of time has elapsed,

(7) For accounts which have remained inactive for extended periods of time or which have become dormant,

(8) For deposits to or withdrawals from deposit accounts through the use of automated teller machines or remote service units,

(9) For the processing of checks drawn against insufficient funds, so-called "NSF check charges," that the bank assesses regardless of whether it decides to pay, return, or hold the check. Exclude subsequent charges levied against overdrawn accounts based on the length of time the account has been overdrawn, the magnitude of the overdrawn balance, or which are otherwise equivalent to interest (report in the appropriate subitem of Schedule RI, item 1.a, "Interest and fee income on loans (in domestic offices)"),

(10) For issuing stop payment orders,

(11) For certifying checks, and

(12) For the accumulation or disbursement of funds deposited to Individual Retirement Accounts (IRAs) or Keogh Plan accounts when not handled by the bank's trust department. Report such commissions and fees received for accounts handled by the bank's trust department in Schedule RI, item 5.a, "Income from fiduciary activities." Exclude penalties paid by depositors for the early withdrawal of time deposits (report as "Other noninterest income" in Schedule RI, item 5.l, or deduct from the interest expense of the related category of time deposits, as appropriate).

OTS is proposing to add the following line to Schedule SO as a detail item of other fees and charges within the noninterest income section:

SO422 Service Charges on Deposit Accounts

L. Qualifying Noncontrolling (Minority) Interests in Consolidated Subsidiaries

Only qualifying noncontrolling (minority) interests in consolidated subsidiaries are allowable in Tier 1 capital. Those that are non-qualifying are not. The existing Schedule CCR computes Tier 1 Capital using Total Equity Capital (Line SC 84), which includes all noncontrolling (minority) interests from Line SC 800. This can be interpreted as permitting all noncontrolling (minority) interests (Line SC 800), whether qualifying or not, to be included in the calculation of Tier 1 Capital. Therefore to clarify the treatment of noncontrolling (minority) interests, OTS is proposing to use Total Savings Association Equity Capital (Line SC 80), which is net of noncontrolling (minority) interests, as the starting point for computation of Tier 1 capital for Schedule CCR. Non-controlling (minority) interests are then added to Tier 1, per the new line CCR187 described below, only to the extent they are qualifying noncontrolling (minority) interests. This approach is consistent with the approach used on the Call Report. Thus, OTS is proposing to revise one line and add a new line on Schedule CCR to address the treatment of noncontrolling (minority) interests in Tier 1 Capital:

Revise line CCR100 Total Equity Capital (SC84) to CCR100 Total Savings Association Equity Capital (SC80)

Add new line CCR187 Qualifying Noncontrolling (Minority) Interests in Consolidated Subsidiaries.

M. Trust Preferred Securities

As financial institution investments, trust preferred securities are hybrid instruments possessing characteristics typically associated with debt obligations. Although each issue of these securities may involve minor

differences in terms, under the basic structure of trust preferred securities a corporate issuer, such as a financial institution holding company, first organizes a business trust or other special purpose entity. This trust issues two classes of securities: common securities, all of which are purchased and held by the corporate issuer, and trust preferred securities, which are sold to investors. The business trust's only assets are deeply subordinated debentures of the corporate issuer, which the trust purchases with the proceeds from the sale of its common and preferred securities. The corporate issuer makes periodic interest payments on the subordinated debentures to the business trust, which uses these payments to pay periodic dividends on the trust preferred securities to the investors. The subordinated debentures have a stated maturity and may also be redeemed under other circumstances. Most trust preferred securities are subject to mandatory redemption upon the repayment of the debentures.

Trust preferred securities meet the definition of a security in FASB Statement No. 115, "Accounting for Certain Investments in Debt and Equity Securities." Because of the mandatory redemption provision in the typical trust preferred security, investments in trust preferred securities would normally be considered debt securities for financial accounting purposes. Accordingly, regardless of the authority under which a financial institution is permitted to invest in trust preferred securities, savings associations should report these investments as debt securities for purposes of these reports (unless, based on the specific facts and circumstances of a particular issue of trust preferred securities, the securities would be considered equity rather than debt securities under Statement No. 115. To better gauge the level of investment in trust preferred securities by savings associations, the OTS is proposing to add the following two lines as detail to other investment securities reported in Schedule SC:

SC187 Trust Preferred Securities Issues By FDIC–Insured Depository Institutions or Their Holding Companies

SC188 Other Trust Preferred Securities

N. General, Specific, and Total Valuation Allowances by Major Loan Type

OTS is proposing that savings associations report additional detail on loans for general and specific valuation allowances. The proposed additional detail on valuation allowances in Schedules VA would enable OTS to better understand reserves activity within loan categories at savings associations.

More specifically, new items are proposed for Schedule VA under three columns for the amount of general valuation allowances at the end of the current quarter (1100 series of lines), the amount of specific valuation allowances at the end of the current quarter (1200 series of lines), and the total of valuation allowances at the end of the current quarter (1300 series of lines):

VA1115, VA1215, VA1315 Construction Loans—Total

VA SUBxxx, VA SUBxxx,VA SUBxxx Residential—Total

VA1120, VA1220, VA1320 1–4 Dwelling Units

VA1122, VA1222, VA1322 Multifamily (5 or More) Dwelling Units

VA1130, VA1230, VA1330 Nonresidential Property

VA SUBxxx, VA SUBxxx,VA SUBxxx Permanent Loans—Total

VA SUBxxx, VA SUBxxx,VA SUBxxx Residential—Total

VA SUBxxx, VA SUBxxx,VA SUBxxx 1–4 Dwelling Units—Total

VA1140, VA1240, VA1340 Revolving Open-End Loans

VA1145, VA1245, VA1345 All Other—First Liens

VA1147, VA1247, VA1347 All Other—Junior Liens

VA1150, VA1250, VA1350 Multifamily (5 or More) Dwelling Units

VA1160, VA1260, VA1360 Nonresidential Property—Total

VA1162, VA1262, VA1362 Owner-Occupied Nonresidential Property

VA1163, VA1263, VA1363 Other Nonresidential Property

VA1165, VA1265, VA1365 Land

VA1170, VA1270, VA1370 Commercial Loans—Total

VA1172, VA1272, VA1372 Secured

VA1173, VA1273, VA1373 Unsecured

VA1176, VA1276, VA1376 Lease Receivables

VA SUBxxx, VA SUBxxx,VA SUBxxx Consumer Loans—Total

VA1182, VA1282, VA1382 Loans on Deposits

VA1183, VA1283, VA1383 Home Improvement Loans (Not Secured by Real Estate)

VA1184, VA1284, VA1384 Education Loans

VA1185, VA1285, VA1385 Auto Loans

VA1186, VA1286, VA1386 Mobile Home Loans

VA1187, VA1287, VA1387 Credit Cards

VA1188, VA1288, VA1388 Other, Including Lease Receivables

O. Classified Assets by Major Loan Type

OTS is proposing that savings associations report additional detail on classified assets by major loan type. The proposed additional detail on classified assets in Schedules VA would enable OTS to better understand asset quality within loan categories at savings associations.

More specifically, new items are proposed for Schedule VA under four columns for the amount of special mention assets at the end of the current quarter (1400 series of lines), the amount of substandard assets at the end of the current quarter (1500 series of lines), the amount of doubtful assets at the end of the current quarter (1600 series of lines), and the amount of loss assets at the end of the current quarter (1700 series of lines):

VA1415, VA1515, VA1615, VA1715 Construction Loans—Total

VA SUBxxx, VA SUBxxx, VA SUBxxx, VA SUBxxx Residential—Total

VA1420, VA1520, VA1620, VA1720 1–4 Dwelling Units

VA1422, VA1522, VA1622, VA1722 Multifamily (5 or More) Dwelling Units

VA1430, VA1530, VA1630, VA1730 Nonresidential Property

VA SUBxxx, VA SUBxxx, VA SUBxxx, VA SUBxxx Permanent Loans—Total

VA SUBxxx, VA SUBxxx, VA SUBxxx, VA SUBxxx Residential—Total

VA SUBxxx, VA SUBxxx, VA SUBxxx, VA SUBxxx 1–4 Dwelling Units—Total

VA1440, VA1540, VA1640, VA1740 Revolving Open-End Loans

VA1445, VA1545, VA1645, VA1745 All Other—First Liens

VA1447, VA1547, VA1647, VA1747 All Other—Junior Liens

VA1450, VA1550, VA1650, VA1750 Multifamily (5 or More) Dwelling Units

VA1460, VA1560, VA1660, VA1760 Nonresidential Property—Total

VA1462, VA1562, VA1662, VA1762 Owner-Occupied Nonresidential Property

VA1463, VA1563, VA1663, VA1763 Other Nonresidential Property

VA1465, VA1565, VA1665, VA1765 Land

VA1470, VA1570, VA1670, VA1770 Commercial Loans—Total

VA1472, VA152, VA1672, VA1772 Secured

VA1473, VA1573, VA1673, VA1773 Unsecured

VA1475, VA1575, VA1675, VA1775 Credit Card Loans Outstanding—Business

VA1476, VA1576, VA1676, VA1776 Lease Receivables

VASUBxxx, VASUBxxx, VASUBxxx, VASUBxxx Consumer Loans—Total

VA1482, VA1582, VA1682, VA1782 Loans on Deposits

VA1483, VA1583, VA1683, VA1783 Home Improvement Loans (Not Secured by Real Estate)
VA1484, VA1584, VA1684, VA1784 Education Loans
VA1485, VA1585, VA1685, VA1785 Auto Loans
VA1486, VA1586, VA1686, VA1786 Mobile Home Loans
VA1487, VA1587, VA1687, VA1787 Credit Cards
VA1488, VA1588, VA1688, VA1788 Other, Including Lease Receivables

Request for Comments: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number.

In this notice, OTS is soliciting comments concerning the following information collection.

Statutory Requirement: 12 U.S.C. 1464(v) imposes reporting requirements for savings associations.

OMB Control Number: 1550–0023.

Form Number: 1313.

Type of Review: Revision of currently approved collections.

Frequency of Response: Quarterly; annually.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 753 savings associations.

Estimated Burden Hours per Respondent: 60.0 hours average for quarterly schedules and 2.0 hours average for schedules required only annually plus recordkeeping of an average of one hour per quarter.

Estimated Total Annual Burden: 188,712 burden hours.

OTS is proposing to revise the TFR, which is currently an approved collection of information, in March 2011. The effect on reporting burden of the proposed revisions to the TFR requirements will vary from institution to institution depending on the institution's asset size and its involvement with the types of activities or transactions to which the proposed changes apply.

The proposed TFR changes that would take effect as of March 31, 2011 would change the reporting frequency for the number and market value of collective investment funds and common trust funds data reported in Memorandum Item 3 of Schedule FS, revise several existing lines, add new lines to the TFR, and add a new Schedule VIE, Variable Interest Entities.

OTS estimates that the implementation of these reporting revisions will result in an increase in the current reporting burden imposed by the TFR on all savings associations.

As part of the approval process, we invite comments addressing one or more of the following points:

a. Whether the proposed revisions to the TFR collections of information are necessary for the proper performance of the agency's functions, including whether the information has practical utility;

b. The accuracy of the agency's estimate of the burden of the collection of information;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques, the Internet, or other forms of information technology; and

e. Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

OTS will summarize the comments received and include them in the request for OMB approval. All comments will become a matter of public record.

Dated: November 10, 2010.

Ira L. Mills,

Paperwork Clearance Officer, Office Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2010–29004 Filed 11–16–10; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–54: OTS No. H–4752]

Alliance Bancorp, Inc. of Pennsylvania, Broomall, PA; Approval of Conversion Application

Notice is hereby given that on November 10, 2010, the Office of Thrift Supervision approved the application of Alliance Mutual Holding Company and Greater Delaware Valley Savings Bank, dba Alliance Bank, Broomall, Pennsylvania, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (phone number: 202–906–5922 or e-mail *Public.Info@OTS.Treas.gov*) at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552, and the OTS Northeast Regional Office, Harborside Financial Center Plaza Five, Suite 1600, Jersey City, New Jersey 07311.

Dated: November 10, 2010.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. 2010–28952 Filed 11–16–10; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–53: OTS No. H–4756]

Minden Bancorp, Inc., Minden, LA; Approval of Conversion Application

Notice is hereby given that on November 9, 2010, the Office of Thrift Supervision approved the application of Minden Mutual Holding Company and MBL Bank, Minden, Louisiana, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (phone number: 202–906–5922 or e-mail *Public.Info@OTS.Treas.gov*) at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552, and the OTS Western Regional Office, 122 W. John Carpenter Freeway, Suite 600, Irving, Texas 75261–9027.

Dated: November 10, 2010.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. 2010–28800 Filed 11–16–10; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF THE TREASURY

United States Mint

Citizens Coinage Advisory Committee; Meeting

ACTION: Notification of Citizens Coinage Advisory Committee November 19, 2010 Public Meeting.

SUMMARY: Pursuant to United States Code, Title 31, section 5135(b)(8)(C), the United States Mint announces the Citizens Coinage Advisory Committee (CCAC) public meeting scheduled for November 19, 2010.

Date: November 19, 2010.

Time: 8 a.m. to 12 p.m.

Location: 8th Floor Board Room, United States Mint, 801 9th Street, NW., Washington, DC 20220.

Subject: Review and discuss reverse candidate designs for the 2011 American Eagle Platinum Coin program, reverse candidate designs for the 2011 First Spouse Coins and Medals honoring Eliza Johnson and Lucy Hayes, and the proposed theme for the 2012 Native American $1 Coin Reverse.

Interested persons should call 202–354–7502 for the latest update on meeting time and room location.

In accordance with 31 U.S.C. 5135, the CCAC:

■ Advises the Secretary of the Treasury on any theme or design proposals relating to circulating coinage, bullion coinage, Congressional Gold Medals, and national and other medals.

■ Advises the Secretary of the Treasury with regard to the events, persons, or places to be commemorated by the issuance of commemorative coins in each of the five calendar years succeeding the year in which a commemorative coin designation is made.

■ Makes recommendations with respect to the mintage level for any commemorative coin recommended.

FOR FURTHER INFORMATION CONTACT: Cliff Northup, United States Mint Liaison to the CCAC; 801 9th Street, NW., Washington, DC 20220; or call 202–354–7200.

Any member of the public interested in submitting matters for the CCAC's consideration is invited to submit them by fax to the following number: 202–756–6830.

Authority: 31 U.S.C. 5135(b)(8)(C).

Dated: November 10, 2010.

Edmund C. Moy,

Director, United States Mint.

[FR Doc. 2010–28862 Filed 11–16–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0252]

Agency Information Collection (Application for Authority to Close Loans on an Automatic Basis—Nonsupervised Lenders) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 17, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0252" in any correspondence

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0252."

SUPPLEMENTARY INFORMATION:

Title: Application for Authority to Close Loans on an Automatic Basis—Nonsupervised Lenders, VA Form 26–8736.

OMB Control Number: 2900–0252.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–8736 is used by nonsupervised lenders requesting approval to close loans on an automatic basis. Automatic lending privileges eliminate the requirement for submission of loans to VA for prior approval. Lending institutions with automatic loan privileges may process and disburse such loans and subsequently report the loan to VA for issuance of guaranty. The form requests information considered crucial for VA to make acceptability determinations as to lenders who shall be approved for this privilege.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 16, 2010, at pages 56662–56663.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 50 hours.

Estimated Average Burden per Respondent: 25 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 120.

Dated: November 12, 2010.

By direction of the Secretary:

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–28977 Filed 11–16–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0111]

Agency Information Collection (Statement of Purchaser or Owner Assuming Seller's Loans) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATE: Comments must be submitted on or before December 17, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–0111" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0111."

SUPPLEMENTARY INFORMATION: *Title:* Statement of Purchaser or Owner Assuming Seller's Loans, VA Form 26–6382.

OMB Control Number: 2900–0111.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–6382 is completed by purchasers who are assuming veterans' guaranteed, insured, and direct home loans. The information collected is essential in the determinations for release of liability as well as for credit underwriting determinations for substitution of entitlement. If a veteran chooses to sell his or her VA guaranteed home, VA will allow a qualified purchaser to assume the veteran's loan and all the responsibility under the guaranty or insurance. In regard to substitution of entitlement cases, eligible veteran

purchasers must meet all requirements of liability in addition to having available loan guaranty entitlement.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 9, 2010, at pages 54965.

Affected Public: Individuals or households.

Estimated Annual Burden: 250 hour.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 1,000.

Dated: November 12, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–28979 Filed 11–16–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (10–0488)]

Agency Information Collection (Follow-Up Study of a National Cohort of Gulf War and Gulf Era Veterans) Activity Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 17, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–New (10–0488)" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0966 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–New (10–0488)."

SUPPLEMENTARY INFORMATION: *Titles:* Follow-Up Study of a National Cohort of Gulf War and Gulf Era Veterans, VA Form 10–0488 and Consent Form for Release of Medical Records, VA Form 10–0488a.

OMB Control Number: 2900–New (10–0488).

Type of Review: New collection.

Abstracts:

a. The data collected on VA Form 10–0488, will help VA to assess the health of Gulf War veterans who were exposed to a variety of environmental factors potentially linked to chronic condition including Chronic Fatigue Syndrome and unexplained multi-system illnesses. VA will use the data to better understand the long-term consequences of military deployment and to provide better health care for Gulf War veterans.

b. VA Form 10–0488a is completed by claimants to request release of medical records from their health care provider.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 9, 2010, at pages 54965–54966.

Affected Public: Individuals or households.

Estimated Annual Burden:

a. Follow-Up Study of a National Cohort of Gulf War and Gulf Era Veterans, VA Form 10–0488—9,000.

b. Consent Form for Release of Medical Records, VA Form 10–0488a—117.

Frequency of Response: Annually.

Estimated Average Burden per Respondents:

a. Follow-Up Study of a National Cohort of Gulf War and Gulf Era Veterans, VA Form 10–0488—30 minutes.

b. Consent Form for Release of Medical Records, VA Form 10–0488a—10 minutes.

Estimated Annual Responses:

a. Follow-Up Study of a National Cohort of Gulf War and Gulf Era Veterans, VA Form 10–0488—18,000.

b. Consent Form for Release of Medical Records, VA Form 10–0488a—700.

Dated: November 12, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–28978 Filed 11–16–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act Of 1974; System of Records

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice of Amendment to System of Records.

SUMMARY: As required by the Privacy Act of 1974, 5 U.S.C. 552a(e), notice is hereby given that the Department of Veterans Affairs (VA) is amending the system of records currently entitled "My Health*e*Vet Administrative Records—VA" 130VA19 as set forth in the **Federal Register** 193 FR 59991. VA is amending the system by revising the Routine Uses of Records Maintained in the System and the Categories of Records in the System, Location, and Purpose. VA is republishing the system notice in its entirety.

DATES: Comments on the amendment of this system of records must be received no later than December 17, 2010. If no public comment is received, the amended system will become effective December 17, 2010.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 (this is not a toll-free number) for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Veterans Health Administration (VHA) Privacy Officer, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; telephone (704) 245–2492.

SUPPLEMENTARY INFORMATION:

Background: My Health*e*Vet (MHV) is a web-based personal health record

system that provides Veterans with information and tools that they can use to increase their knowledge about health conditions, increase communication with their care providers and improve their own health. Level one Veterans (who have a MHV account hosted behind the VA firewall which follows VA approved guidelines for user name and strong password) are able to access health education tools and resources, create and maintain a secure comprehensive personal health record, and request VA prescription refills online. Authenticated level two Veterans are able to receive electronic copies of their health information, view VA wellness reminders, communicate with their providers through secure messaging, and access a number of other functions and options related to their health maintenance and health information. VA also provides, through a web-based environment, a secure and private health space where Veterans can enter their own personal and medical information in a "self-entered" health information section.

Electronic copies of health information are not considered VA authoritative records, nor are they considered part of the VA system of records once they are downloaded into the Veteran's secure and private health space. The Veteran's self-entered health information is also owned and maintained by the Veteran in the My Health***e***Vet secure and private health space and is not by itself a part of the VA's system of records. This self-entered health information may be included in the Veteran's official VA electronic health record upon the Veteran's request and/or upon VA's determination that it is appropriate to include it in the official medical record.

Certain applications of My Health***e***Vet may generate or result in data and information that is included in another VA system of records, such as secure messages which are generated from the My Health***e***Vet application but are included in 24VA19 system of records due to the potential for clinically relevant information to be contained within a secure message. Administrative data associated with such applications will be included in the My Health***e***Vet Administrative Records—VA system of records.

Certain applications of My Health***e***Vet may interface with other VA maintained programs or applications to allow communication from the Veteran to the specific application or program, such as eBenefits applications, a VA/DoD joint portal. Certain administrative data may be maintained by My Health***e***Vet as a result of these applications or exchanges; however, the VA maintained program or application receiving the information will maintain the authoritative information of record.

My Health***e***Vet may also be used, upon permission from the Veteran, as a Health Information Exchange point, between a VA approved agency or organization and the Veteran's personal health record.

VA does not provide access to the Veteran's personal health information maintained in My Health***e***Vet in any situation, including medical emergency situations. If a non-VA health care provider requires information from VA medical records to treat a Veteran patient, the non-VA health care provider must obtain the Veteran's consent to release information and contact the VA facility where the Veteran patient was last treated to obtain information.

Delegation of My Health***e***Vet will allow Veterans to share all or part of the information in their account with other individuals that they designate, such as family members, and VA and non-VA health care providers.

In order to administer the My Health***e***Vet program and support the provision of the above benefits to Veterans, VHA retains administrative information, including personally identifiable information on users of My Health***e***Vet. In addition, VHA houses the patient's self-entered information in a separate database, but the administrative and patient data files can be linked. This administrative information is stored in the My Health***e***Vet Administrative Records System, and constitutes a separate system of records.

I. Description of Proposed System of Records

The My Health***e***Vet Administrative Records System contains administrative information created or collected during the course of operating My Health***e***Vet, and is provided by Veterans and other qualified individuals, their delegates and grantees, Veterans Health Information Systems and Technology Architecture (VistA) IT systems, VA employees, contractors, and subcontractors. At this time, the My Health***e***Vet program is planning to maintain minimal administrative records at each local facility, while maintaining more comprehensive administrative records at a central location, VA National Data Center or VA Health Data Warehouse Repository. The records kept locally support the local VA My Health***e***Vet training programs and applications, and VA's annual reporting requirements under the Freedom of Information Act (FOIA) for those Veterans who request electronic access to copies of key portions of their health records.

The more comprehensive repository of administrative information is maintained at a central location. This information is used to support My Health***e***Vet electronic services, such as requests for prescription refill, co-payment and appointment information, entry of personal health metrics, and Veteran requests for electronic copies of their health information. This information may also be used for business administrative reports for system operators and VA managers to ensure that the My Health***e***Vet system is meeting performance expectations and being used within legal boundaries.

The information needed to support My Health***e***Vet program activities and electronic services includes such information as: the person's full name; My Health***e***Vet User ID; date of birth; e-mail address; telephone number; social security number; mother's maiden name; zip code; place and date of registration for My Health***e***Vet electronic record access; delegate and grantee user IDs associated with My Health***e***Vet users; level of access to My Health***e***Vet electronic services; date and type of transaction; patient integration control number (ICN); and other administrative data needed for My Health***e***Vet roles and services.

II. Proposed Routine Use Disclosures of Data in the System

We are proposing to establish the following Routine Use disclosures of information maintained in the system:

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

This routine use permits disclosures by the Department to report a suspected incident of identity theft and provide information or documentation related to or in support of the reported incident.

7. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the

Department or another agency or disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

8. Disclosure of administrative data including information about My Health*e*Vet use and user transactions accomplished via the Web site may be provided to approved VA research investigators with VA Institutional Review Board (IRB) approval. Disclosure of this information to research investigators will allow VA to evaluate the value of the My Health*e*Vet for purposes of system modification and improvement, and for purposes of promoting patient self-management of health and improved health outcomes.

III. Compatibility of the Proposed Routine Uses

The Privacy Act permits VA to disclose information about individuals without their consent for a routine use when the information, in this case administrative information, will be used for a purpose that is compatible with the purpose for which VA collected it. In all of the routine use disclosures described above, either the recipient of the administrative information will use the information in connection with the My Health*e*Vet program, a matter relating to one of VA's programs to provide a benefit to VA, or to meet legal requirements for disclosure.

The Report of Intent to Amend a System on Records Notice and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of the Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: November 1, 2010.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

130VA19

SYSTEM NAME:

"My Health*e*Vet Administrative Records—VA"

SYSTEM LOCATION:

Veterans Health Administration (VHA) local facilities, VA National Data Centers, and VA Health Data Repository (HDR) located at the VA National Data Centers. Address locations for VA facilities are listed in VA Appendix 1 of the biennial publications of the VA systems of records.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered encompass: (1) All individuals who successfully register for a My Health*e*Vet account and whose identity has been verified; (2) Representatives of the above individuals who have been provided grantee or delegate access to My Health*e*Vet including, but not limited to, family members, friends, or VA and non-VA health care providers; (3) VA health care providers and certain administrative staff; (4) VHA Information Technology (IT) staff and/or their approved contractors who may need to enter identifying, administrative information into the system to initiate, support and maintain electronic services for My Health*e*Vet participants; and (5) VA researchers fulfilling VA required authorization procedures.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records include personally identifiable information, such as an individual's full name; My Health*e*Vet User Identifier (ID); date of birth; social security number; e-mail address; telephone number; mother's maiden name; ZIP code; place and date of registration for My Health*e*Vet; delegate and grantee user IDs associated with My Health*e*Vet accounts; level of access to My Health*e*Vet electronic services; date and type of transaction; web analytics for the purpose of monitoring site usage, patient internal control number (ICN); and other administrative data needed for My Health*e*Vet roles and services.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title 38, United States Code, § 501.

PURPOSE(S):

The information in the My Health*e*Vet Administrative Records is needed to operate the My Health*e*Vet program, including but not limited to registration and verification of the Veteran's identity or to register and authenticate those who have legal authority to participate in lieu of the Veteran, to assign and verify administrators of the My Health*e*Vet portal, to retrieve the Veteran's information to perform specific functions, allow access to specific information and provide other associated My Health*e*Vet electronic services in current and future applications of the My Health*e*Vet program. The administrative information may also be used to create administrative business reports for system operators and VA managers who are responsible for ensuring that the My Health*e*Vet system is meeting performance expectations, and is in compliance with applicable Federal laws and regulations. Administrative information may also be used for evaluation to support program improvement, including VA approved research studies.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To the extent that records contained in the system include information protected by 45 CFR Parts 160 and 164, i.e., individually identifiable health information, and 38 U.S.C. 7332, i.e., medical treatment information related to drug abuse, alcoholism or alcohol abuse, sickle cell anemia or infection with the human immunodeficiency virus, that information cannot be disclosed under a routine use unless there is also specific statutory authority in 38 U.S.C. 7332 and regulatory authority in 45 CFR Parts 160 and 164 permitting disclosure.

1. Disclosure of information in this system of records may be made to private or public sector organizations, individuals, agencies, etc., with whom VA has a contract or agreement, including subcontractors, in order to administer the My Health*e*Vet program, or perform other such services as VA deems appropriate and practical for the purposes of administering VA laws.

2. VA may disclose on its own initiative any information in the system, except the names and home addresses of Veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of the law whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule, or order issued pursuant thereto, to a Federal, state, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule, or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal, or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, or order issued pursuant thereto.

3. Disclosure may be made to National Archives and Records Administration (NARA) and the General Services Administration (GSA) to support its records management inspections responsibilities and its role as Archivist of the United States under authority of title 44 United States Code (U.S.C).

4. Any information in this system of records may be disclosed to the United States Department of Justice or United States Attorneys in order to prosecute or defend litigation involving or pertaining to the United States, or in which the United States has an interest.

5. Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

7. Disclosure of information may be made when (1) it is suspected or confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of embarrassment or harm to the reputations of the record subjects, 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 another agency or entity) that rely upon the compromised information; and (3) the disclosure is to agencies, entities, and persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosure by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

8. Disclosure of information may be made to VA to approved researchers to enhance, advance and promote both the function and the content of the My Health***e***Vet application.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

These administrative records are maintained on paper and electronic media, including hard drive disks, which are backed up to tape at regular intervals.

RETRIEVABILITY:

Records may be retrieved by an individual's name, user ID, date of registration for My Health***e***Vet electronic services, zip code, the VA assigned ICN, date of birth and/or social security number, if provided.

SAFEGUARDS:

1. Access to and use of the My Health***e***Vet Administrative Records are limited to those persons whose official duties require such access; VA has established security procedures to ensure that access is appropriately limited. Information security officers and system data stewards review and authorize data access requests. VA regulates data access with security software that authenticates My Health***e***Vet administrative users and requires individually unique codes and passwords. VA provides information security training to all staff and instructs staff on the responsibility each person has for safeguarding data confidentiality. VA regularly updates security standards and procedures that are applied to systems and individuals supporting this program.

2. Physical access to computer rooms housing the My Health***e***Vet Administrative Records is restricted to authorized staff and protected by a variety of security devices. Unauthorized employees, contractors, and other staff are not allowed in computer rooms. The Federal Protective Service or other security personnel provide physical security for the buildings housing computer systems and data centers.

3. Data transmissions between operational systems and My Health***e***Vet Administrative Records maintained by this system of records are protected by telecommunications software and hardware as prescribed by VA standards and practices. This includes firewalls, encryption, and other security measures necessary to safeguard data as it travels across the VA-Wide Area Network.

4. Copies of back-up computer files are maintained at secure off-site locations.

RETENTION AND DISPOSAL:

Records are maintained and disposed of in accordance with the records disposition authority approved by the Archivist of the United States. Records from this system that are needed for audit purposes will be disposed of 6 years after a user's account becomes inactive. Routine records will be disposed of when the agency determines they are no longer needed for administrative, legal, audit, or other operational purposes. These retention and disposal statements are pursuant to NARA General Records Schedules GRS 20, item 1c and GRS 24, item 6a.

SYSTEM MANAGER(S) AND ADDRESS:

Official responsible for policies and procedures: Deputy Chief Information Officer for Health (19), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Officials maintaining this system of records: The local VA facility (Address locations for VA facilities are listed in VA Appendix 1 of the biennial publications of the VA systems of records) and the Chief, Technical Infrastructure Division (31), Austin Automation Center, 1615 Woodward Street, Austin, Texas 78772.

NOTIFICATION PROCEDURE:

Individuals who wish to determine whether a record is being maintained under their name in this system or wish to determine the contents of such records have two options:

1. Submit a written request or apply in person to the VA facility where the records are located. VA facility location information can be found in the Facilities Locator section of VA's Web site at *http://www.va.gov;* or

2. Submit a written request or apply in person to the Chief of the Technical Infrastructure Division (31), Austin Automation Center, 1615 Woodward Street, Austin, Texas 78772.

Inquiries should include the person's full name, user ID, date of birth and return address.

RECORD ACCESS PROCEDURE:

Individuals seeking information regarding access to and contesting of records in this system may write or call their local VA facility and/or the Chief of the Technical Infrastructure Division (31), Austin Automation Center, 1615 Woodward Street, Austin, Texas 78772, or call (512) 326–6780 to reach the VA Austin Automation Center Help Desk speak with the Chief of the Technical Infrastructure Division.

CONTESTING RECORD PROCEDURES:

(*See* Record Access Procedures above).

RECORD SOURCE CATEGORIES:

The sources of information for this system of records include the

individuals covered by this notice and an additional contributor, as listed below:

(1) All individuals who successfully register for a My Health*e*Vet account;

(2) Representatives of the above individuals who have been provided access to the private health space by the Veteran user, including but not limited to, family members, friends, or VA and non-VA health care providers;

(3) VA health care providers;

(4) VHA IT staff and/or their contractors and subcontractors who may need to enter information into the system to initiate, support and maintain My Health*e*Vet electronic services for My Health*e*Vet users;

(5) VistA systems and

(6) VA researchers fulfilling VA required authorization procedures (*see* VHA Handbook 1200.01 *http://www1.va.gov/vhapublications/ViewPublication.asp?pub_ID=2038*).

[FR Doc. 2010–28950 Filed 11–16–10; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
November 17, 2010

Part II

Department of Health and Human Services

Center for Medicare & Medicaid Services

42 CFR Parts 409, 418, 424 et al.

Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 409, 418, 424, 484, and 489

[CMS–1510–F]

RIN 0938–AP88

Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule sets forth an update to the Home Health Prospective Payment System (HH PPS) rates, including: the national standardized 60-day episode rates, the national per-visit rates, the nonroutine medical supply (NRS) conversion factors, and the low utilization payment amount (LUPA) add-on payment amounts, under the Medicare prospective payment system for HHAs effective January 1, 2011. This rule also updates the wage index used under the HH PPS and, in accordance with the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act), updates the HH PPS outlier policy. In addition, this rule revises the home health agency (HHA) capitalization requirements. This rule further adds clarifying language to the "skilled services" section. The rule finalizes a 3.79 percent reduction to rates for CY 2011 to account for changes in case-mix, which are unrelated to real changes in patient acuity. Finally, this rule incorporates new legislative requirements regarding face-to-face encounters with providers related to home health and hospice care.

DATES: *Effective Date:* These regulations are effective on January 1, 2011.

FOR FURTHER INFORMATION CONTACT:

Frank Whelan, (410) 786–1302, for information related to payment safeguards.

Elizabeth Goldstein, (410) 786–6665, for CAHPS issues.

Mary Pratt, (410) 786–6867, for quality issues.

Randy Throndset, (410) 786–0131, for overall HH PPS issues.

Kathleen Walch, (410) 786–7970, for skilled services requirements and clinical issues.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Background

The Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33, enacted on August 5, 1997) significantly changed the way Medicare pays for Medicare home health (HH) services. Section 4603 of the BBA mandated the development of the home health prospective payment system (HH PPS). Until the implementation of an HH PPS on October 1, 2000, home health agencies (HHAs) received payment under a retrospective reimbursement system.

Section 4603(a) of the BBA mandated the development of an HH PPS for all Medicare-covered HH services provided under a plan of care (POC) that were paid on a reasonable cost basis by adding section 1895 of the Social Security Act (the Act), entitled "Prospective Payment For Home Health Services". Section 1895(b)(1) of the Act requires the Secretary to establish an HH PPS for all costs of HH services paid under Medicare.

Section 1895(b)(3)(A) of the Act requires the following: (1) The computation of a standard prospective payment amount includes all costs for HH services covered and paid for on a reasonable cost basis and that such amounts be initially based on the most recent audited cost report data available to the Secretary; and (2) the standardized prospective payment amount be adjusted to account for the effects of case-mix and wage level differences among HHAs.

Section 1895(b)(3)(B) of the Act addresses the annual update to the standard prospective payment amounts by the HH applicable percentage increase. Section 1895(b)(4) of the Act governs the payment computation. Sections 1895(b)(4)(A)(i) and (b)(4)(A)(ii) of the Act require the standard prospective payment amount to be adjusted for case-mix and geographic differences in wage levels. Section 1895(b)(4)(B) of the Act requires the establishment of an appropriate case-mix change adjustment factor for significant variation in costs among different units of services.

Similarly, section 1895(b)(4)(C) of the Act requires the establishment of wage adjustment factors that reflect the relative level of wages, and wage-related costs applicable to HH services furnished in a geographic area compared to the applicable national average level. Under section 1895(b)(4)(C) of the Act, the wage-adjustment factors used by the Secretary may be the factors used under section 1886(d)(3)(E) of the Act.

Section 1895(b)(5) of the Act, as amended by section 3131 of the Patient Protection and Affordable Care Act of 2010 (The Affordable Care Act) (Pub. L. 111–148, enacted on March 23, 2010) gives the Secretary the option to make additions or adjustments to the payment amount otherwise paid in the case of outliers because of unusual variations in the type or amount of medically necessary care. Section 3131(b) of the Affordable Care Act revised section 1895(b)(5) of the Act so that the standard payment amount is reduced by 5 percent and the total outlier payments in a given fiscal year (FY) or year may not exceed 2.5 percent of total payments projected or estimated. The provision also makes permanent a 10 percent agency level outlier payment cap.

In accordance with the statute, as amended by the BBA, we published a final rule in the July 3, 2000 **Federal Register** (65 FR 41128) to implement the

1997 HH PPS legislation. The July 2000 final rule established requirements for the new HH PPS for HH services as required by section 4603 of the BBA, as subsequently amended by section 5101 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act (OCESAA) for Fiscal Year 1999, (Pub. L. 105–277, enacted on October 21, 1998); and by sections 302, 305, and 306 of the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act (BBRA) of 1999, (Pub. L. 106–113, enacted on November 29, 1999). The requirements include the implementation of an HH PPS for HH services, consolidated billing requirements, and a number of other related changes. The HH PPS described in that rule replaced the retrospective reasonable cost-based system that was used by Medicare for the payment of HH services under Part A and Part B. For a complete and full description of the HH PPS as required by the BBA, see the July 2000 HH PPS final rule (65 FR 41128 through 41214).

Section 5201(c) of the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171, enacted February 8, 2006) added new section 1895(b)(3)(B)(v) to the Act, requiring HHAs to submit data for purposes of measuring health care quality, and links the quality data submission to the annual applicable percentage increase. This data submission requirement is applicable for CY 2007 and each subsequent year. If an HHA does not submit quality data, the HH market basket percentage increase is reduced 2 percentage points. In the November 9, 2006 **Federal Register** (71 FR 65884, 65935), we published a final rule to implement the pay-for-reporting requirement of the DRA, which was codified at § 484.225(h) and (i) in accordance with the statute.

The Affordable Care Act made additional changes to the HH PPS. One of the changes in section 3131 of the Affordable Care Act is the amendment to section 421(a) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173, enacted on December 8, 2003) as amended by section 5201(b) of the DRA. The amended section 421(a) of the MMA now requires, for HH services furnished in a rural area (as defined in section 1886(d)(2)(D) of the Act) with respect to episodes and visits ending on or after April 1, 2010, and before January 1, 2016, that the Secretary increase by 3 percent the payment amount otherwise made under section 1895 of the Act.

B. System for Payment of Home Health Services

Generally, Medicare makes payment under the HH PPS based on a national standardized 60-day episode payment rate that is adjusted for the applicable case-mix and wage index. The national standardized 60-day episode rate includes the six HH disciplines (skilled nursing, HH aide, physical therapy, speech-language pathology, occupational therapy, and medical social services). Payment for nonroutine medical supplies (NRS) is no longer part of the national standardized 60-day episode rate and is computed by multiplying the relative weight for a particular NRS severity level by the NRS conversion factor (See section III.C.4.e. of this final rule). Payment for durable medical equipment covered under the HH benefit is made outside the HH PPS payment. To adjust for case-mix, the HH PPS uses a 153-category case-mix classification to assign patients to a home health resource group (HHRG). Clinical needs, functional status, and service utilization are computed from responses to selected data elements in the OASIS assessment instrument.

For episodes with four or fewer visits, Medicare pays based on a national per-visit rate by discipline; an episode consisting of four or fewer visits within a 60-day period receives what is referred to as a low utilization payment adjustment (LUPA). Medicare also adjusts the national standardized 60-day episode payment rate for certain intervening events that are subject to a partial episode payment adjustment (PEP adjustment). For certain cases that exceed a specific cost threshold, an outlier adjustment may also be available.

C. Updates to the HH PPS

As required by section 1895(b)(3)(B) of the Act, we have historically updated the HH PPS rates annually in the **Federal Register**. The August 29, 2007 final rule with comment period set forth an update to the 60-day national episode rates and the national per-visit rates under the Medicare prospective payment system for HHAs for CY 2008.

That rule included an analysis performed on CY 2005 HH claims data, which indicated a 12.78 percent increase in the observed case-mix since 2000. The case-mix represented the variations in conditions of the patient population served by the HHAs. Subsequently, a more detailed analysis was performed on the 12.78 percent increase in case-mix to evaluate if any portion of the increase was associated with a change in the actual clinical condition of HH patients. We examined data on demographics, family severity, and non-HH Part A Medicare expenditure data to predict the average case-mix weight for 2005. As a result of the subsequent detailed analysis, we recognized that an 11.75 percent increase in case-mix was due to changes in coding practices and documentation, and not to treatment of more resource-intensive patients.

To account for the changes in case-mix that were not related to an underlying change in patient health status, CMS implemented a reduction over 4 years in the national standardized 60-day episode payment rates and the NRS conversion factor. That reduction was to be 2.75 percent per year for 3 years beginning in CY 2008 and 2.71 percent for the fourth year in CY 2011. We indicated that we would continue to monitor for any further increase in case-mix that was not related to a change in patient status, and would adjust the percentage reductions and/or implement further case-mix change adjustments in the future.

For CY 2010, we published a final rule in the November 10, 2009 **Federal Register** (74 FR 58077) (hereinafter referred to as the CY 2010 HH PPS final rule) that sets forth the update to the 60-day national episode rates and the national per-visit rates under the Medicare prospective payment system for HH services.

D. Comments Received

In response to the publication of the CY 2011 HH PPS proposed rule, we received approximately 500 items of correspondence from the public. We received numerous comments from various trade associations and major health-related organizations. Comments also originated from HHAs, hospitals, other providers, suppliers, practitioners, advocacy groups, consulting firms, and private citizens. The following discussion, arranged by subject area, includes our responses to the comments, and where appropriate, a brief summary as to whether or not we are implementing the proposed provision or some variation thereof.

General (Miscellaneous)

Comment: A commenter stated that multiple policy changes and payment reductions have led to the industry's inability to apply "cause-and-effect" analysis when HH care access becomes critical. The commenter recommends applying changes one at a time and phasing them in to allow time to determine the impact of those individual changes. Another commenter stated that as an HHA owner, she is

willing to accept cuts to the Medicare HH benefit but that the cuts need to be incremental so agencies have the time and the resources to implement adjustments in response to payment changes. In addition, there is the growing concern of the "unknown" costs associated with implementation of the Affordable Care Act. Another commenter stated that the health insurance costs for their employees have skyrocketed over the past 3 years, and that in conjunction with these cuts, it hinders their ability to hire staff.

Response: We have, in fact, been phasing in the reductions to the HH PPS rates for the increase in nominal case-mix. As a result of the CY 2008 final rule, we have reduced HH PPS rates by 2.75 percent for 2008, 2009, and 2010 to account for the increase in nominal case-mix, that is an increase in case-mix not due to actual changes in patient characteristics. However, there still exists significant nominal case-mix increase in the payment system that has not yet been addressed. Consequently, we believe that the case-mix adjustments continue to be necessary in order to address the residual increase in the nominal change in case-mix that has not yet been accounted for in the payment system. As such, we are moving forward with phasing in our case-mix reductions and will be applying a 3.79 percent reduction to the HH PPS rates in CY 2011 (as discussed in the July 23, 2010 proposed rule). In response to comments that we received on our case-mix model and its measurement of real case-mix, we will further study the concerns raised and are not finalizing the proposed 3.79 percent reduction to the HH PPS rates for CY 2012 at this time. Therefore, in addition to our continuous monitoring of nominal case-mix increase, we plan to perform a review of our case-mix and NRS models, and address any reductions to the CY 2012 HH PPS payments in next year's rulemaking. The other policy changes and reductions addressed in this rule (that is, outlier provisions and reductions to the market basket update) were mandated by the Affordable Care Act. We are uncertain of the meaning of "unknown" costs as referenced by the commenter and therefore are unable to address the particular concern.

Comment: A commenter stated that he receives calls from providers who are confused with the language that is used by CMS in determining billing requirements. He believes the proposed changes are a step in the right direction.

Response: We appreciate the comment and will continue to work towards providing the industry/public with clear policies, instructions, and guidance as they relate to our payment policies.

Comment: With the increased use of technology and telehealth, funds should be made available to HHAs to include such monitoring to allow patients and their families to be more proactive in the management of their illnesses and to reduce ER visits, primary care physician appointments and hospital stays. Home Health is the area to fund, not to cut, and that medical spending in other areas should be reduced.

Response: We are not opposed to improvements in technology, or the use of telehealth in the HH setting and certainly do not discourage the use of these advances in medicine. However, under section 1895(e) of the Act, telehealth services cannot substitute for in-person HH services ordered as part of a plan of care. However, telehealth can be used to supplement traditional HH services.

Section 1895(b)(3)(B) of the Act dictates how HH PPS rates are to be updated annually, and section 3131(a) of the Affordable Care Act, amending this provision, requires the Secretary to rebase HH payments beginning in 2014. At that time, more up-to-date costs will be used to rebase payments to HHAs.

Comment: A commenter stated that the impact analysis in the proposed rule is useless in that the analysis simply quantifies the percentage cut in rates on a geographic basis. Further, the impact analysis offers little substantive understanding of the individual cost impact of such proposed provisions as the physician face-to-face encounter requirement, the revisions to therapy assessment, coverage and documentation standards, coding change proposals, and CAHPS compliance. The estimated costs are vastly understated because they do not include the sizeable administrative expenses that HHAs will incur to implement any of the changes beyond the cost of some of the form revisions.

A valid and useful impact analysis starts with an understanding of the results of the combination of rate cuts and cost increases that the proposed policies will bring to HHAs. The commenter further asserts that once these results are fairly and accurately determined, the impact analysis must begin with the highest of priority concerns—impact on access to care—as that is the central purpose of Medicare. Second, the commenter believes that the impact analysis should continue with an evaluation of the effect of the proposed policies on total spending for the Medicare program, not just the effect on HH services spending.

The commenter provided the example that if the analysis of the proposed policies' impact on access to care shows that thousands of Medicare beneficiaries would no longer have HH care available or that provision of HH services would be significantly delayed, Medicare spending would rise as a result of a shift to higher cost care such as skilled nursing facility services or extended inpatient stays.

The commenter also proposed that the impact analysis should evaluate the impact of the proposed policies on another stakeholder—HHAs as businesses. Such evaluation should start with the ongoing viability of the individual businesses and the industry as a whole. Among the many elements that should be reviewed is whether the business will be paid less than the cost of the delivery of care. Another element is the workforce impact—will health care workers take their talents to other care sectors because of reductions in compensation and benefits. Access to capital is also an important factor to evaluate. If the proposed rule changes restrict access to capital, there may be reduced use of efficiency-related technologies or business expansions to achieve economies of scale. Lack of access to capital could also mean an inability to meet ongoing payroll obligations because of cash flow problems.

The commenter also claimed there is another flaw in the CMS impact analysis, which is its limited review to a single year. This is particularly concerning to the commenter because the proposed rule extends rate cuts into a second year. An impact analysis that does not evaluate the impact of cuts in payment rates for both of the years as proposed is invalid and in violation of CMS obligations under the Regulatory Flexibility Act.

The commenter strongly recommends that CMS conduct a thorough and valid impact analysis, consistent with the concerns referenced above. Another commenter states that in the proposed rule CMS concluded that the proposed rule would not have a significant impact on a substantial number of small entities. Section 605 of the Regulatory Flexibility Act (RFA) requires that if the regulatory agency certifies that the rule will not have a significant impact on a substantial number of small businesses, it must include a statement providing the factual basis supporting the certification. The commenter suggests that CMS failed to provide an adequate factual basis for its certification that there would be no significant impact. In fact, there is no language in the RFA section of the proposed rule that

discloses the reasons why CMS concluded that there would be no substantial impact on small HHAs. CMS should at a minimum have provided the public with information on the number of HHAs and other health care entities likely to be affected by the rule. Further, CMS has guidelines (usually based on small business revenues) in place that the agency uses to determine whether a rule will have a significant impact on a substantial number of small entities. CMS failed to discuss how the impacts of this rule fall within those guidelines. Such a discussion is vital for the purposes of transparency, as affected small entities can use this information to provide CMS with economic impact information on the rule's projected impact on their business. Based on the public input, the commenter asserts that CMS could determine the validity of their decision to certify the rule in the publication of the final regulation.

The commenter is concerned that while CMS has certified that the rule will not have a significant impact, the affected HHAs still believe that the regulation will result in a significant burden on their businesses. The commenter believes that there is merit in bringing these small business concerns to the attention of CMS in the hope that they will add to the transparency of the RFA contained in the final rule.

Response: The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities for that year. As such, there is no requirement under the RFA to provide impacts for any year(s) beyond that which the rule is updating the rates. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7 million to $34.5 million in any 1 year. For purposes of the RFA, approximately 95 percent of HHAs are considered small businesses according to the Small Business Administration's size standards, with total revenues of $13.5 million or less in any one year. Individuals and States are not included in the definition of a small entity. As such, this rule is estimated to have an overall negative effect upon small entities (see section IV.B. of this final rule, "Anticipated Effects", for supporting analysis).

The last section of Table 19 shows the percentage change in payments by agency size, as determined by the number of first episodes. The agency size categories, for this rule, are based on the number of first episodes in a random 20 percent beneficiary sample of CY 2008 claims data. Initial episodes, under the HH PPS, are defined as the first episode in a series of adjacent episodes (contiguous episodes that are separated by no more than a 60-day period between episodes) for a given beneficiary. Initial, or first, episodes are a good estimate of agency size, because this method approximates the number of admissions experienced by the agency based on approximately one-fifth of the total annual data. The size categories were set to have roughly equal numbers of agencies, except that the highest category has somewhat more agencies because added detail amongst the large size category was not needed.

Because our model does not have the data to account for the "total" revenue of an HHA, in the proposed rule, and again in this final rule, we have used the number of first episodes as a proxy for agency size. As such, using the facility size categories (based on the number of first episodes), the impact table shows that the difference in impact between smaller and larger HHAs is small and within a 0.05 percentage point range. In fact, smaller agencies have a smaller reduction and fare slightly better than larger agencies represented by the "200 or more first episodes" category.

In an effort to better demonstrate the impact on small HHAs, as it relates to total revenue, we supplemented our impact analysis by linking to Medicare cost report data, which has total revenues for HHAs. Using total revenues and the $13.5 million threshold of the RFA, we categorized an HHA as being either small or large. To perform this analysis, we were able to match approximately 72 percent of the cost report data to our model. For the remainder of the agencies in the model, we proxy for large agencies as those agencies with at least 750 first episodes. This results in approximately 95 percent of agencies being classified as small and 5 percent of agencies being large, which is reflective of what our cost report files show us. This analysis provides similar results to the one using first episodes as a measure of an agency's size in that small HHAs fare slightly better, −4.84 percent impact, than do large HHAs, which are estimated to experience a −5.01 percent (see section IV.B. of this final rule, "Anticipated Effects", for supporting analysis).

In a separate, supplemental analysis, as merely an indicator of possible access to care issues, we looked at estimated margins of HHAs, by county, and the estimated effect that the provisions of this rule might have on HHAs. In particular, we look to identify counties that might not be served by at least one HHA with a positive margin as a result of the finalized policies of this rule. The analysis demonstrate that occurrence of such counties is very infrequent; thus, we do not believe that access to care is an issue (see section IV.B. of this final rule, "Anticipated Effects", for supporting analysis). Given the profit margins of HHAs that we and MedPAC are seeing in our analyses, we believe that the reductions of this final rule can be absorbed by the majority of HHAs, and that access to care will not be compromised. However, we will continue to monitor the situation to identify any unintended consequences of our policies in this final rule.

Comments Regarding Access to Care

Comment: A commenter stated that additional regulatory responsibilities of oversight, documentation, education, choosing survey vendors, etc., would result in increased costs to HHAs. There is an inherent risk for decreased quality of care and volume of services provided by HHAs. It is possible that HHAs may become more selective in their acceptance of medically difficult patients who are likely to utilize more services.

Response: We assume that the commenter is referring to the therapy provisions of this rule. We believe that our clarifications to our therapy coverage requirements do not constitute additional responsibilities, but rather clarify the existing responsibilities of the qualified therapist and the HHA. Similarly, we are clarifying the existing supervision/oversight requirements of qualified therapists in the HH setting. We are also clarifying our coverage requirements for education of the patient and/or family members, and our documentation requirements. We do not consider any of these clarifications to be beyond the current responsibilities of an HHA.

We are, as part of this final rule, requiring qualified therapists to perform the needed therapy service, assess patients and measure and document therapy effectiveness at what we consider key points of the episode. We believe that all HH patients who need therapy services would benefit from those services being delivered by a qualified therapist, instead of an assistant, at key points in the course of treatment. We will continue to monitor for unintended consequences of the provisions of this final rule.

Comment: Several commenters stated that the payment reductions would result in decreased access to care and force HHAs out of business. The

commenters assert that patients who are moved from acute care facilities to their homes and have major medical problems would not be able to get HH services for their illnesses. These proposed changes would not only endanger access to care but also impede efforts to transition patients to the home and cripple essential community HHAs. Several commenters stated that HH patients would be forced into costly institutional care and increase Medicare spending. Another commenter stated that if these proposed cuts were implemented, many senior citizens who have paid taxes in to the Medicare system for years would be forced to go into assisted living facilities and nursing homes or simply not receive the healthcare they deserve. In addition, their quality of life would be compromised.

Response: As discussed in a previous response to a comment, in a separate analysis in the regulatory impact section of this rule, we looked at margins of HHAs, by county, and the estimated effect that the provisions of this rule would have on HHAs. In particular, we studied the number of counties that would not be served by at least one HHA with a positive margin. Our analysis concluded that there were few counties in which no HHAs had positive margins; therefore, we do not believe that access to care will be adversely affected by these case-mix adjustments. Given the data on profit margins that we and MedPAC saw in our analyses, we believe that the reimbursement rate reductions set forth in this final rule can be absorbed by the majority of HHAs, and that access to care will not be compromised.

II. Provisions of the Proposed Rule and Response to Comments

A. Case-Mix Measurement

As stated in the proposed rule published on July 23, 2010, analysis of HH PPS claims shows total average case-mix grew at a rate of about 1 percent each year from 2000 to 2007, with 4 percent growth in 2008. Based on our analysis of the proportion of total case-mix change due to changes in real case-mix severity of the HH user population, the total amount of case-mix growth unrelated to real changes in patient severity (nominal case-mix) is 17.45 percent between 2000 and 2008. In each of the years 2008, 2009, and 2010, we reduced payment rates by 2.75 percent as recoupment for nominal case-mix change. A payment-rate reduction of 7.43 percent would be needed to account for the outstanding amount of nominal case-mix change we intend to recoup based on the real case-mix change analysis updated through 2008. In the proposed rule, we proposed to increase the planned 2.71 percent reduction in CY 2011 to 3.79 percent, and to make another 3.79 percent reduction in CY 2012. Doing so would enable us to account for the 7.43 percent nominal case-mix residual, while minimizing access to care risks. Iteratively implementing the case-mix reduction over two years gives HH providers more time to adjust to the intended reduction of 7.43 percent than would be the case were we to account for the residual in a single year.

For a complete description of the proposed case-mix refinements model and the underlying research, we refer readers to the CY 2011 HH PPS proposed rule (75 FR 43238 through 43244) published in the July 23, 2010, **Federal Register**.

Comment: Commenters stated that we should suspend or drop case-mix reductions because the proposal is based on the assumption that agencies intentionally gamed the system.

Response: As we have stated in previous regulations, changes and improvements in coding are important in bringing about nominal coding change. We believe nominal coding change results mostly from changed coding practices, including improved understanding of the ICD–9 coding system, more comprehensive coding, changes in the interpretation of various items on the OASIS and in formal OASIS definitions, and other evolving measurement issues. Our view of the causes of nominal coding change does not emphasize the idea that HHAs in general gamed the system. However, since our goal is to pay increased costs associated with changes in patient severity, and nominal coding change does not necessarily demonstrate that underlying changes in patient severity occurred, we believe it is necessary to recoup overpayments due to nominal coding change.

Comment: Commenters stated that all of the HHAs are being penalized for the corrupt actions of a few HHAs. Many commenters indicated that their agency had case-mix weights below the national average. Commenters stated that nominal case-mix change reductions should be limited to certain types of agencies (for example, those with high average case-mix index (CMI) or large weight increases or for-profit providers) or that CMS should implement different payment reductions by state or by geographical region, suggesting that their region has a lower nominal case-mix change than the national average. Other commenters recommended that reductions be proportional to an individual agency's CMI. For example, some commenters suggested that payment reductions be applied to those HHAs with an average case-mix above 1.20. Commenters stated that we should not implement payment reductions to all HHAs merely because that policy is easier to implement.

Response: For a variety of reasons, as we have noted in previous regulations, we have not proposed targeted reductions for nominal case-mix change. We have not conducted analysis of how and whether individual agencies' coding practices have changed over time because this is not feasible. One reason is that many agencies have small patient populations, which would make it practically impossible to measure nominal case-mix change reliably. Another reason is that we believe changes and improvements in coding have been widespread, so that such targeting would likely not separate agencies clearly into high and low coding-change groups.

Table 1A shows average case-mix by type of agency in 2000 and 2008. All types of agencies, regardless of region or profit status or size or affiliation, have substantial increases in their average case-mix. While for-profit agencies' case-mix grew approximately 19 percent, the case-mix average for non-profit agencies also grew considerably (16.6 percent). Case-mix grew just over 19.5 percent for freestanding agencies while case-mix for facility-based agencies grew just short of 15 percent. For rural agencies, case-mix grew almost 16 percent, while case-mix for urban agencies grew just under 19 percent. Rural agencies will receive an additional 3 percent rural add-on to their payments, which will help offset the case-mix reductions. It should be noted that the agency groups start from different base year values, but in general the percentage change in case-mix is roughly similar across these groups, with the possible exception of the Midwest, for which the percentage change is somewhat higher than the other changes—about 23 percent. No group could be said to have trivial case-mix change. Therefore, we believe our proposal to make across the board payment reductions is consistent with the data, and making distinctions by type of agency would be inappropriate.

TABLE 1A—ESTIMATES OF CASE-MIX CHANGE BY PROVIDER TYPE
[2000–2008]

	Actual case-mix		Case-mix change	
	2000 (IPS period)	2008	Total	Percentage
Overall				
All Agencies	1.0959	1.3085	0.2126	19.4
Ownership Type				
Non-profit	1.0840	1.2641	0.1801	16.6
Government	1.0672	1.2291	0.1619	15.2
For-profit	1.1202	1.3332	0.2130	19.0
Agency Type				
Facility-based	1.0834	1.2433	0.1599	14.8
Freestanding	1.1035	1.3200	0.2165	19.6
Region				
North	1.0422	1.2459	0.2037	19.6
South	1.1251	1.337	0.2118	18.8
Midwest	1.0865	1.3431	0.2566	23.6
West	1.0956	1.2648	0.1692	15.5
Facility Size (Number of 1st Episodes)				
< 99 episodes	1.0898	1.2499	0.1602	14.7
100 or more	1.1057	1.3266	0.2209	20.0
Urban/Rural				
Urban	1.1097	1.3184	0.2087	18.8
Rural	1.0478	1.2136	0.1657	15.8

Although we have stated in past regulations that a targeted system would be administratively burdensome, the reasons we have just presented go beyond administrative complexity. Certain comments seem to assume that the level of case-mix can precisely identify those agencies practicing abusive coding. We do not agree with the comments, which seem to assume that agency-specific case-mix levels can precisely differentiate agencies practicing abusive coding from others. System wide, case-mix levels have risen over time while patient characteristics data indicate little change in patient severity over time. That is, the main problem is the amount of change in the billed case-mix weights not attributable to underlying changes in actual patient severity. Moreover, we believe that a policy of varying payment levels according to regional differences in nominal case-mix change would be perceived as inequitable by beneficiaries. That is, beneficiaries who might have access only to agencies subject to larger payment reductions might believe Medicare's policies disadvantage them unfairly.

Comment: Commenters stated that we should suspend or drop case-mix adjustments because they will cause financial distress/bankruptcy among agencies, particularly "safety-net" agencies that take patients other agencies reject. Commenters further stated that the proposed payment reductions will cause "safety net" providers to have a "negative operating margin" and/or cause not-for-profit agencies to go out of business.

Response: Our analysis of the potential effect of the 2011 payment rate reductions suggests that while negative-margin agencies may increase in number, almost all such agencies are located in counties with other agencies predicted to have positive margins. We also note that predicting the size of the increase in negative-margin agencies is difficult to do because many agencies may find ways to cut costs or increase revenues so that margins do not deteriorate. Identifying the agencies that commenters call "safety-net" agencies is not feasible with our administrative data, so we cannot provide any evidence either to support or refute assertions that safety-net agencies are at greatest risk. Our analysis of margins of not-for-profit agencies shows that they tend to have lower margins than for-profit agencies. However, we do not agree that not-for-profit agencies will necessarily be more likely to exit the HH business than a for-profit agency. We believe the business decision is a complex one with many considerations, such as the organization's mission, the availability of alternate sources of funding, and whether or not the organization is embedded in a larger one. These influential factors are not necessarily associated with the non-profit or for-profit status of an agency, and therefore, we cannot accurately predict the business decision of an agency based solely on their status.

Comment: Commenters stated that we should suspend or drop case-mix adjustments because access would be reduced, particularly among hard-to-place patients. Commenters predicted that the payment reductions would have a "destabilizing effect" on HHAs and negatively impact patient access to HH care.

Response: MedPac has previously recommended to the Congress that HH rates be reduced by 5 percent. (MedPac, *Report to Congress: Medicare Payment*

Policy, March 2009). We believe HH industry margins are sufficient to support a rate reduction of that size. For example, MedPac projected 2011 margins would remain high, at 13.7 percent (assuming the previously planned rate reduction of −2.71 percent in 2011). MedPac also reported that the number of agencies continues to grow, reaching in excess of 10,400 in 2009. This is a 50 percent increase since 2002, although growth in new agencies has been highly uneven geographically. Notably, access to care was sufficient in 2001, when the number of agencies nationally was much lower than it is today (Office of the Inspector General, *Access to Home Health Care after Hospital Discharge,* July 2001, and Office of the Inspector General, *Medicare Home Health Care Community Beneficiaries,* October 2001). Our analysis of cost reports submitted by the end of 2008 indicates that 99 percent of beneficiaries are in counties served by at least two agencies, with more than half of beneficiaries in counties served by at least 11 agencies. Predictions about the number of bankruptcies and effects on access are highly uncertain. Furthermore, we have no indications that payment reductions implemented since 2008 have led to access problems among beneficiaries. During the succeeding period, the total number of agencies has continued to grow, which is indirect evidence that access levels have not deteriorated. We intend to request that the Office of the Inspector General resume investigations of the access impacts of payment reductions. We will continue to monitor access to care in order to identify any unintended consequences of our policies in this final rule. We emphasize that the justification for the nominal case-mix payment reductions is not HHA margins but rather is the increase in billed case-mix weights, which our analysis indicates, is unrelated to changes in underlying patient health characteristics.

Comment: Commenters suggested that we provide funding to HHAs that admit patients that other agencies avoid.

Response: We have received comments of this nature over the years. We are unable to definitively characterize such a categorization of HHAs using administrative data. While we welcome information as to the characteristics and identity of such agencies, so that we can study their performance, we would also need to study carefully the implications of making such distinctions on a permanent basis in our payment system. We expect many issues would arise. In future rulemaking we will solicit comment on the various challenges that might arise in administering payments differently to what some commenters called "full access organizations" and potentially other categories of agencies that might be capable of mitigating access problems, should they arise.

Comment: Some commenters suggested that CMS focus its efforts on the study, which will assess possible changes to the HH PPS in order to ensure access to care.

Response: Section 3131(d) of the Affordable Care Act mandates that the Secretary conduct a study to evaluate costs related to providing care to low-income beneficiaries, beneficiaries in medically underserved areas, and beneficiaries with varying levels of severity of illness. The section directs the study to be focused on ensuring access to care for patients with characteristics associated with especially high costs. We are preparing to launch the mandated study in FY 2011.

Comment: Commenters stated that CMS should suspend or drop nominal case-mix change reductions because those payment reductions are contrary to congressional intent in the Affordable Care Act, which implemented payment reductions on a separate basis. Furthermore, commenters stated that the 3.79 percent case-mix payment reduction should count as the "5 percent cut mandated by the [Affordable Care Act]" and the proposed payment decreases should not be implemented in addition to the Affordable Care Act-mandated payment reductions.

Response: Section 3401(e) of the Affordable Care Act mandated a market basket reduction and future productivity adjustments. In the Affordable Care Act, Congress did not make any changes to the pre-existing provision authorizing CMS to reduce payment rates in response to nominal case-mix change. Nor did the Congress authorize a substitution of the case-mix payment reduction for the Affordable Care Act's five percent payment reduction related to outlier payments (Section 3131(b) of the Affordable Care Act). Therefore, the reductions for nominal case-mix changes comply with current law.

Comment: Commenters stated that CMS should suspend or drop case-mix reductions because CMS should give specific proposals such as therapy documentation and comorbidity case-mix weight changes time to work.

Response: Our proposals are intended to recoup excess outlays that have already been made through 2008, outlays that were not justified by changes in patient severity. Going forward, beginning with 2011, we would expect to see a moderation of nominal case-mix growth because of the proposals mentioned by the commenters. Such moderation would decrease recoupment, if any, proposed in the future.

Comment: A commenter stated that the need for payment reductions in HH care is "consistent with the experience of coding changes in other payment systems." However, the methodology "used to establish the reduction percentage" in the inpatient system was flawed and, therefore, the methodology used to establish the payment reduction for HH is probably flawed as well.

Response: The payment systems, institutional conditions, data resources, case-mix assignment procedures, and many other aspects differ across care settings. Therefore, methodologies must each be judged on their own individual merits. We have explained and justified the methodology in this and in previous regulations cited elsewhere in this preamble.

Comment: We received a comment recommending that we focus the application of the case-mix change adjustment only to visits beyond the 13th day by changing the OASIS scoring and rate calculation for the extended cases rather than reducing the base rate and affecting all visits as a result.

Response: We are unsure of the specific change recommended in this comment, but we would be concerned that any approach to rate reduction based on the length of time in treatment within the 60-day episode would affect fundamental assumptions of the HH PPS system. Most notably, the system assumes that the amount of resources within the 60-day period, rather than the timing of their expenditure within that period, is the appropriate variable use to determine payments in the case-mix-adjusted payment system.

Comment: One commenter stated that a recent study that used data from a nationally representative survey (the Medical Expenditures Panel Survey—MEPS) found a change in real case-mix between 2000 and 2007.

Response: We thank the commenter for the comments. However, we note that the MEPs analysis appears to be based on all Medicare beneficiaries, not just the subset of HH patients. Home health users are less than 10 percent of the fee for service enrolled Medicare population, so it is not certain that the MEPS study of the entire Medicare population is relevant to the question of worsening health status of HH users.

Comment: Commenters stated that CMS should suspend or drop case-mix reductions because the data used to determine the reductions do not

recognize real increases in severity due to earlier and sicker hospital discharges.

Response: While we recognize that average lengths of stay in acute care are in decline, our analysis shows that agencies are, in fact, caring for fewer, not more, post-acute patients. Since 2001, the average length of stay in acute care preceding HH has declined by about one day, from 7 days to 6 days. However, agencies are caring for fewer highly acute patients in their caseloads. The proportion of non-LUPA episodes in which the patient went from acute care directly to HH within 14 days of acute hospital discharge declined substantially between 2001 and 2008, from 32 percent to 23 percent. In addition, the median acute hospital length of stay for these non-LUPA episodes with a 14-day lookback period has remained unchanged at 5 days since 2002 (see Table 1B, 50th percentile). Since 2005, the distribution has been stable, except for a 1-day shortening of lengths of stay at the 5th, 80th, and 99th percentiles. We believe the declining prevalence of recent acute discharges is due in part to more patients incurring recertifications after admission to HH care, and due to more patients entering care from the community. The shortening lengths of stay at the right tail (high percentiles) of the distribution may reflect changing utilization of long-term-care hospitals during recent years. The conclusion we draw from these data is that while patients on average have shorter hospital stays, agencies are also facing a smaller proportion of HH episodes in which the patient has been acutely ill in the very recent past. Also, the detailed data on the distribution of stay lengths suggest that for the most part lengths of stay for such patients remained stable through 2008, particularly since around 2005.

TABLE 1B—PERCENTILES OF ACUTE HOSPITAL LENGTH OF STAY (DAYS)

[2001–2008]

Year	5th	10th	20th	30th	40th	50th	60th	70th	80th	90th	99th
2001	2	2	3	4	5	6	7	8	10	14	32
2002	2	2	3	4	5	5	6	8	10	14	31
2003	2	2	3	4	4	5	6	8	10	13	30
2004	2	2	3	4	4	5	6	7	9	13	29
2005	2	2	3	3	4	5	6	7	9	12	28
2006	1	2	3	3	4	5	6	7	9	12	28
2007	1	2	3	3	4	5	6	7	9	12	27
2008	1	2	3	3	4	5	6	7	8	12	25

Note: Based on a 10 percent random beneficiary sample of FFS HH users; excludes LUPA episodes and includes only episodes where acute hospital discharge occurred within 14 days of the from-date of the 60-day episode claim and the patient's first destination post-discharge under Part A was HH care.

Furthermore, we think that acuity of patients has been increasingly mitigated by lengthening post-acute stays for the substantial number of HH patients who use residential post-acute care (PAC) prior to an episode. Our data show that patients who enter residential PAC before HH admission have experienced increasing lengths of stay in PAC since 2001. Using a 10 percent random beneficiary sample, we computed the total days of stay (including both acute and PAC days) for HH episodes with common patterns of pre-admission utilization during the 60 days preceding the beginning of the episode. We included patients whose last stay was acute, or whose next-to-last stay was acute with a follow-on residential PAC stay, or whose third from last stay was acute followed by two PAC stays. These common patterns accounted for 55 percent of the initial episodes in 2001 and 42 percent in 2008. We found that total days of stay during the 60 days leading up to the episode averaged 12.6 days in 2001, and rose to 12.8 days in 2008. This small change in total days of stay during a period when acute LOS was declining was due to increasing lengths of stay in residential PAC for these patients. For example, within the 30 days before admission, average length of stay in the PAC setting for episodes preceded by an acute stay that was the next-to-last stay, and where the PAC stay was the very last stay before the claim-from date, increased from 12.7 to 14.3 days. Our interpretation of these statistics is that patient acuity has been increasingly mitigated by longer post-acute stays for the substantial number of HH patients that use residential PAC prior to the start of a HH episode. Patient acuity also was mitigated by growing numbers of HH recertifications.

Comment: A commenter stated the data and analysis we used to measure real case-mix change do not recognize that technology improvements in recent years enable patients with more complex conditions to be cared for at home.

Response: We appreciate this comment but possess limited information to evaluate it. The data we do have, from OASIS, suggest that episodes for patients using technological treatments at home are not increasing. OASIS data show that the proportion of episodes involving enteral nutrition has declined from 2.9 percent to 1.6 percent between 2001 and 2008; the proportion of episodes involving intravenous therapy or infusion therapy has stayed stable at around 2.2 percent; and the proportion of episodes involving parenteral nutrition remains at 0.2 percent or less during that period. The proportion of episodes with none of those treatments has increased from 94.8 percent to 96.2 percent. These data are inconsistent with the commenter's assertion, but we solicit commenters to provide us in the future with other types of reliable data on this aspect of patient case-mix.

Comment: Many commenters cited improvements in the accuracy of OASIS coding which could more precisely measure patient severity as a reason why we should drop its proposal to address nominal case-mix growth by reducing payments.

Response: Comments referencing coding improvements, such as increasing accuracy, do not recognize that such improvements are an inappropriate basis for payment. Measurable changes in patient severity and patient need are an appropriate basis for changes in payment. Our analysis continues to find only small changes in patient severity and need.

Comment: Commenters stated that the increase in case-mix is due to the HHA's diligence in ensuring proper coding; CMS's implementation of payment reductions would therefore penalize HHAs for proper coding, while the agencies who were not ethical or diligent in their coding would not be affected as much. Furthermore, a commenter suggested that part of the

"nominal" case-mix changes were due to HHAs' past failures to code properly. The commenter stated that when the HH PPS system was first implemented in 2000, HHAs undercoded in a manner that generated insufficient resources to adequately care for the patient. After modifications were made to the HH PPS system in 2008, coding was still not adequate for the patient. The commenter stated that, for these reasons, the baseline average case-mix is much lower than the actual value.

Response: We agree with the commenter's explanation of previous undercoding as a cause of nominal case-mix growth. Over the years, we have issued and revised instructions for OASIS to reinforce the importance of complete and accurate coding. As we have stated in previous regulations, however, Medicare should not inappropriately make greater reimbursements for a patient population whose level of severity has changed relatively little over the years, notwithstanding more-comprehensive documentation of the health status of these patients.

Comment: A commenter stated that much of the increase in case-mix weights is due to HHAs complying with Medicare instructions regarding patient coding consistent with the 2008 version of the HH PPS.

Response: This comment is difficult to address because the commenter does not cite specifically which documents constitute CMS-issued Medicare instructions "consistent with the 2008 version of the HH PPS." Nor does the comment explain how the increase in case-mix weights was driven by such CMS instructions. However, we believe our release in late 2008 of a revision of Attachment D of the OASIS Instruction Manual would not have had the effect suggested by the comment. (Attachment D was intended to provide guidance on diagnosis reporting and coding in the context of the HH PPS.) First, Attachment D reiterated traditional CMS guidance about how to select diagnoses in home health. Attachment D did not deviate from the fundamental and longstanding instruction that reported diagnoses must be relevant to the treatment plan and the progress or outcome of care. Second, Attachment D's release late in the year suggests it would not have had much impact on the 2008 data.

Comment: We received a number of comments stating that HH patients now have more complex conditions than previous populations of HH patients and that such patients previously would have been referred to health care facilities, but are now being cared for at home. Moreover, the commenters stated that other healthcare settings have developed stricter admission requirements, thereby increasing the number of HHA patients with high severity levels. One commenter cited as evidence diversion of patients to home care from inpatient rehabilitation facilities due to the CMS 60 percent rule and skilled nursing facilities' (SNFs') technology increases. The commenters point to such changes as evidence that policy incentives favor the home setting over institutional care, and therefore, case-mix increases are warranted.

Response: We appreciate the comment, but we have little information with which to evaluate the claim regarding diversion to the home care setting. Possibly relevant is that the proportion of initial non-LUPA episodes preceded by acute care within the previous 60 days has declined between 2001 and 2008, from 70.0 percent to 62.7 percent. This indicates more patients are being admitted from non-institutional settings, for example, the community. However, our data do not indicate whether the patients coming into home care without recent care in a Part A setting were diverted from entering such settings in favor of home-based care. Post-acute institutional utilization data perhaps consistent with the comment suggest a decline in inpatient rehabilitation facilities (IRFs) as a source of HH patients, but this decline may have been partly offset by an increase in SNF utilization as a source. For example, the proportion of initial episodes preceded by an IRF stay that ended sometime during the 30 days before HH admission suddenly declined by more than a percentage point in 2005 and declined another 1.5 percentage points by 2008, while the percentage preceded by a SNF stay increased half a percentage point in 2005 and increased another 0.4 percentage points by 2008 (data based on a 10 percent beneficiary sample of initial, non-LUPA episodes). Furthermore, the fact that acute stays, which normally precede stays in institutional PAC settings, are decreasing in the stay histories of HH patients is inconsistent with the idea that the reduction in IRF stay histories is a sign that more patients are coming to HH as a result of diversion from IRF care.

Comment: Commenters stated that the implementation of the payment reductions should be delayed until the validity of data and methods used to calculate the payment reduction can be verified.

Response: The real case-mix prediction model and its application account for changes in the HH patient population by quantifying the relationship between patient demographic and clinical characteristics and case-mix. The relationships in conjunction with updated measures of patient characteristics are used to quantify real case-mix change. The characteristics in the model include proxy measures for severity, including a variety of measures, namely, demographic variables, hospital expenditures, expenditures on other Part A services, Part A utilization measures, living situation, type of hospital stay, severity of illness during the stay, and risk of mortality during the stay. Measurable changes in patient severity and patient need, factors mentioned by commenters, are an appropriate basis for changes in payment. Our model of real case-mix change has attempted to capture such increases.

We recognize that models are potentially limited in their ability to pick up more subtle changes in a patient population such as those alluded to by various commenters. Yet in previous regulations, we presented additional types of data suggestive of only minor change in the population admitted to HH, and very large changes in case-mix indices over a short period. We included among these pieces of evidence information about the declining proportion of HH episodes associated with a recent acute stay for hip fracture, congestive heart failure, stroke, and hip replacement, which are four situations often associated with high severity and high resource intensity. We found declining shares for these types of episodes as of 2005 (72 FR 49762, 49833 [August 2007]). We presented information showing that resource use did not increase along with billed case-mix (72 FR 49833); stable resource use data suggest that patients were not more in need of services over time, notwithstanding the rising billed case-mix weights that suggested they would be. We also analyzed changes in OASIS item guidance that clarified definitions and could have led to progress in coding practice (72 FR 25356, 25359 [May 2007]). We reported rates of OASIS conditions for the year before the beginning of the HH PPS and 2003, and found some scattered small changes indicative of worsening severity but no dramatic changes commensurate with the increase in case-mix weights (72 FR 25359). In our discussion, we cited specific instances where agencies' changing understanding of coding could have contributed to the adverse changes. However, as previously stated, Medicare payments should be based on patient

level of severity, and not on coding practices.

In the July 2010 proposed rule, we identified a very large, sudden 1 year change (+0.0533) in the average case-mix weight by comparing a 2007 sample that we assigned to case-mix groups using the new 153-group system and a 2008 sample grouped under the same system. It is unlikely that the patient population suddenly worsened in severity to cause an increase of 0.0533 in the average case-mix weight in a single year. Furthermore, we concluded that the large change was not due to our use of the new, 153-group case-mix algorithm in 2008, because when we applied the previous case-mix system and the new system to a sample of 2007 claims, the average weight differed very little (the difference was 0.0054). That is, the algorithms in the previous and new case-mix systems provided highly similar case-mix weights on the sample of 2007 claims. We further examined the diagnosis coding on OASIS assessments linked to the 20 percent claims sample and found a large increase between 2007 and 2008 in the reporting of secondary diagnosis codes (see 75 FR 43242 [July 23, 2010]). The use of secondary diagnosis codes in the case-mix algorithm was introduced in 2008 as part of the new case-mix system.

We are not delaying the CY 2011 payment reduction because we consider these various analyses to be strong evidence that agencies changed coding practice markedly when faced with the new case-mix system in October 2000 and when faced with the refined one in January 2008. The conclusions we reached from the available evidence were that a small amount of real case-mix change has occurred; our model measures this amount to be 10.07 percent of the total change in the average weight since the 12-month period ending September 30, 2000. The remainder of the total change resulted from sources of nominal case-mix change as discussed elsewhere in this preamble. These sources include improvements in coding, changes in therapy prescriptions in response to payment incentives, and changes in such elements of the system as OASIS item definitions and coding guidelines. However, as stated elsewhere in this preamble, we are not finalizing the proposed reduction for CY 2012 pending further study relating to the measurement of real and nominal case-mix change.

Comment: Commenters stated that we should change our methodology so that coding and documentation, and not therapy utilization, are the only factors used in calculating "nominal" case-mix changes.

Response: We thank the commenters for their suggestion. However, the model we use is intended to analyze changes in real case-mix over time and does not distinguish whether these changes are due to increases in therapy use or other factors mentioned by the commenter. We do not believe that it would be appropriate to include utilization-related variables such as the number of therapy visits as variables in the model predicting real case-mix change. In addition, the goal of this analysis was to examine changes in measures of patient acuity that are not affected by any changes in provider coding practices.

Comment: Commenters stated that we should eliminate the proposed payment reductions and rather "conduct targeted claims review and deny payment for claims where the case-mix weight is not supported by the plan of care."

Response: While we appreciate the commenters' suggestion, we cannot act on it, because our resources are not sufficient to conduct claims review on a scale that would be required to counteract the broad-based uptrend in case-mix weights.

Comment: Other commenters stated that CMS decrease the magnitude of the proposed payment reductions.

Response: We have amended the proposal that would have implemented two successive years of payment reductions, with each year's reduction at 3.79 percent. Instead we are finalizing in this rule only the first year's reduction (for CY 2011) while we study additional case-mix data, and methods to incorporate such data, into our methodology for measuring real vs. nominal case-mix change. In the CY 2012 proposed rule, we will make proposals concerning any payment reduction for CY 2012 based on results of those studies and based on claims samples updated through CY 2009. In previous rules, we have stated our intention to incorporate additional types of data, such as Part B data, into our methodology. Efforts so far have been inhibited by problems of data adequacy. In the coming year, we intend to draw on more resources and expertise than we have in the past in order to move forward in completing the examination of additional kinds of data for measuring real vs. nominal case-mix change. As we have stated elsewhere in this regulation, the various types of information and data pointing to the conclusion that nominal case-mix change has been responsible for most of the case-mix growth go beyond the model predicting real case-mix. Much of that extra information cannot be converted into a quantifiable measure, but it is nevertheless very significant in explaining nominal case-mix growth.

Comment: Commenters stated that we should eliminate the case-mix reductions altogether and find other methods to prevent upcoding and "manipulation of therapy and co-morbid condition factors."

Response: We appreciate the commenter's suggestion. As stated elsewhere in this preamble, the payment reductions we proposed were to compensate for past nominal change in case-mix weights that resulted from changed coding practices and/or instructions and behavioral changes among agencies, such as changes in therapy visits prescribed. One approach addressing therapy factors would be to conduct medical necessity evaluations during episodes. An approach to limiting a change in comorbid-condition coding exacerbated by a change in disease definition would be to eliminate hypertension from the case-mix system. We believe these are two proposals that capture the spirit of the commenters' suggestion, but in both instances, we received many comments in opposition. However, we welcome suggestions of other policies that can prevent upcoding and manipulation of case-mix measures.

Comment: Commenters stated that we should suspend or drop case-mix adjustments because adjustment should instead focus on case-mix groups with high weights due to therapy.

Response: The 2008 case-mix model's four-equation structure incorporated a procedure that decelerated payments as therapy visits per episode increase. We plan to recalibrate the case-mix weights in the coming year, and in so doing we will examine our policy of imposing within the case-mix model this deceleration in payment increases. Such examination could lead to an approach suggested by the commenter, were we to more aggressively impose the deceleration. For 2011, we are proposing to maintain the set of case-mix weights we issued in 2008.

Comment: Similarly, commenters stated that we should "target agencies with excessive therapy usage" instead of implementing the proposed payment reductions.

Response: We have not conducted an analysis to identify agencies with excessive therapy usage. We believe that what constitutes excessive therapy must be judged in view of the patient's need during the episode. It is impossible to conduct an analysis that takes the amount of individual need into account based on the information we have; in fact, that is the reason we implemented therapy thresholds in the first place: A

shortage of information on the OASIS sufficient to predict the amount of therapy needed by the patient. What we do have is strong evidence that in general therapy prescriptions changed dramatically under the HH PPS, in response to payment incentives. These prescriptions changed again with the implementation of the revisions to the HH PPS case-mix system in 2008; notably, between 2007 and 2008, we observed a 3-percentage point increase in the percent of episodes with 14 or more therapy visits. Such behavioral change was part of the nominal change causing expenditures that we are now recovering with the case-mix reductions to the rates.

Furthermore, even if agencies with excessive therapy usage were identifiable in an administratively feasible manner, a separate set of concerns relates to the effect on beneficiaries from targeting agencies in the way suggested by the commenters. We are concerned that a policy of targeting agencies with excessive therapy usage might unfairly penalize certain patients. For instance, even in an agency that pads the therapy prescription to reach a certain threshold, there will likely be some patients who need all the therapy visits prescribed. A payment reduction limited to certain agencies is likely to unfairly penalize some of the agency's patients. In addition, as previously stated, we believe that nominal case-mix change has been widespread and that therefore overpayments were widespread as well.

Comment: Commenters stated that we should suspend or drop case-mix reductions in favor of the approach in S.2181/H.R. 3865 (110th Congress), which involved working with the HH industry to develop criteria and evaluating a medical records sample to determine reductions, rather than relying on hypothetical extrapolations. Another commenter mentioned that the Home Health Care Access Protection Act (S. 3315/H.R. 5803) was introduced to "establish a more reliable and transparent process for CMS to follow in evaluating Medicare payments for home health services." The commenter asked if CMS would be willing to cosponsor this legislation.

Response: We intend to work with representatives of the HH industry as we pursue a review over the coming year of the data and methods for measuring real case-mix change. Theoretically, a medical records sample might work, but as a practical matter, we strongly suspect it might not work. It is unlikely that we could finance the collection of samples large enough to produce reliable results. It is expensive to abstract medical records, and we would need a sizable sample of records from the IPS period and from a follow-up year (for example, 2009). Based on our experience in a context involving the retrieval of years-old records, it is not likely that we could find enough records to constitute a valid broad-based sample. The procedure would have nurses group them into a case-mix group, and compare the results with those from a similar procedure performed on recent records. Additional potential problems with using medical records include the strong possibility that records would have insufficient information to allow assignments for the Activities of Daily Living (ADL) items of the case-mix system, have insufficient information to enable independent staging of pressure ulcers, and other kinds of underreporting. It is possible that this procedure might *not* return the findings that the proponents suggest it would, because the nominal case-mix change problem partly results from reporting practices that have changed through time from a state of underreporting to a state of more complete reporting. Therefore, one would expect that the source records would likely reflect underreporting in the early years, just as the OASIS reflected underreporting in the early years.

Comment: One commenter stated that detailed information about the method to calculate the baseline values was not released to the public. Commenters questioned the validity of the 2000 data used to calculate the baseline. Commenters stated that in 2000, there was a limited amount of OASIS data and the data submitted might not have been completely correct. One commenter expanded upon this concept by stating that "a consistent, largely reliable database of information from submissions of the OASIS form was most likely not achieved until sometime during 2003". Commenters stated that initially extensive education and training was needed in order to ensure reliable OASIS data. In addition, commenters stated that since Abt Associates was only able to use 313,447 episodes to calculate the base, there were not enough data to ensure that the base was correct, and therefore, "the final period of IPS should not have been used as a "base" to measure anything."

Response: In our May 2007 proposed rule and our August 2007 final rule, we described the IPS samples and PPS samples that were used to calculate case-mix change. We remind the commenter that 313,447 observations is an extremely large sample by statistical standards, and that agencies began collecting OASIS data in 1999, following issuance of a series of regulations beginning on January 25, 1999 (64 FR 3764). Most of the data we used for the baseline period come from the first 3 quarters of the year 2000—months after collection was mandated to begin in August 1999. By 2000, the vast majority of agencies were complying with the reporting requirements. We question the idea that agencies took three more years to come up to speed with OASIS. We believe the commenter overstates the amount of training needed to complete OASIS reliably. The licensed personnel responsible for assessing patients do not and should not need all the extensive training implied by the comment, because assessment is part of the foundation of their training and professional skill. Indirect evidence that the data from the early years of the HH PPS were sufficiently reliable comes from model validation analysis we conducted during that period. Validation of the 80-group model on a large 19-month claims sample ending June 2002 (N = 469,010 claims linked to OASIS) showed that the goodness-of-fit of the model was comparable to the fit statistic from the original Abt Associates case-mix sample (0.33 vs. 0.34), notwithstanding that average total resources per episode declined by 20 percent. That analysis also showed that all but three variables in the scoring system remained statistically significant.

Comment: Commenters noted that OASIS data from Outcome Concepts Systems demonstrated increased patient acuity from 2006–2008 as measured by ADL and Instrumental Activities of Daily Living (IADL) assessments of decreasing functional capabilities of HH patients. OASIS data demonstrated a "large increase" in acuity as measured by changes in clinical conditions, the number of patients requiring IV therapy, parenteral nutrition, those that have urinary tract infections at the start of care and those with increased inability to manage oral and injectable medications; these commenters noted that OASIS measures were not likely to be "upcoded" to secure higher reimbursement as none had a direct or indirect impact on the level of payment under HH PPS. Further, the decrease in functional capabilities could have been easily correlated with increase in the use of therapy services as both physical and occupational therapists directly address the ADL incapacities that are the focus of these OASIS findings. The commenter referred to reports on the July 23, 2010, Proposed Rule

commissioned by the Home Health Advocacy Coalition and the National Association for Home Health and Hospice, saying both documents indicate "non-case-mix related OASIS items, such as grooming and light meal preparation have shown increasing functional limitations among home health patients."

Response: We believe the commenter is in error in stating that intravenous therapy and parenteral nutrition are not used in the case-mix system. Another inaccuracy in this comment pertains to the cited changes in the frequency of these technological treatments at home, which in fact are not increasing. A large, random sample of OASIS data linked to claims shows that the proportion of episodes involving intravenous therapy or infusion therapy has remained stable at around 2.2 percent and the proportion of episodes involving parenteral nutrition remains at 0.2 percent or less during that period. We are reluctant to use OASIS data to analyze changes in real case-mix because OASIS measures reflect changes in coding practices and payment incentives including quality measurement incentives, all of which are not related to real changes in patients' acuity. We are also concerned that incentives could lead to reports of patient function—whether or not particular function-related items are used in the case-mix assignment—that are consistent with the therapy visits planned. Unfortunately, this problem potentially limits the usefulness of non-case-mix items. We believe that independent measures are the best way to ensure the reliability of our real case-mix methodology. We plan to try to identify independent measures, beyond the independent measures we are currently using in our methodology, as we go forward.

Comment: A commenter stated the case-mix change analysis is flawed in that it relies on hospital DRG data, whereas more than half of Medicare HH patients are admitted to care from a setting other than a hospital, and if they were in a hospital, the HH admission followed much later.

Response: We disagree that the utility of the hospital information in the case-mix change analysis is so limited. Regardless of whether the patient came directly from a non-hospital-setting (for example, home or a post-acute institutional stay), information from a hospital stay preceding HH is typically relevant to the type of patient being seen by the HHA, and thus can provide information about the PPS case-mix measure for the HH episode. A recent hospitalization, whether or not there is an intervening period spent in some other setting before HH admission, is common before admission to home health. Data from a 10 percent random beneficiary sample of HH users indicate that a hospitalization history for new admissions is far more common than the comment may suggest. In 2008, 45.3 percent of patients admitted to home care for a non-LUPA episode had an acute stay within the previous 14 days; 56.1 percent had an acute stay within the previous 30 days; 60.3 percent had an acute stay within the previous 45 days; and 62.7 percent had an acute stay within the previous 60 days. We could have restricted the real case-mix change analysis to new admissions to home health, but because we received many questions about the completeness of the information to be obtained from such an approach, we decided to use all 60-day episodes in the analysis. We believe using all 60-day episodes in the analysis is reasonable, since a majority of new admissions to HH complete their stay in HH within a 60-day episode. Furthermore, non-initial episodes, though they are less than half of episodes in our analysis, are not devoid of recent hospital information. When we look at all new HH admissions, we find that about 15 percent are hospitalized within 30 days of admission (that is, within the first 30 days of the first episode), with the risk of hospitalization rising beyond the 30th day. Many of these hospitalized patients return to HH after discharge, making data for returnees available for our analysis of the acute stay history. While we do not have information specifically about the hospitalization risk of the new admissions who go on to recertification episodes, it seems reasonable to infer that they have risks similar to the overall average 30 day hospitalization rate of 15 percent. The Abt Associates case-mix change report ("Analysis of 2000–2008 Case-mix Change," July 2010, link at *http://www.cms.gov/center/hha.asp*) indicates that about 90 percent of the episodes have a hospitalization history in the data (p. 6), looking back a maximum of 4 years. However, from the information we show here about the likelihood of a hospital stay before and after home health, relatively few of the hospital stays contributing information are as old as 4 years. We also note that the remaining 10 percent of episodes are not dropped from the analysis; these episodes contribute information for the model, specifically, demographic information and various proxy measures derived from Part A utilization and expenditure data.

Comment: Commenters suggested that CMS should also recognize that HH patients are often treated for conditions other than the primary reason for their hospitalization. Furthermore, commenters stated that the primary reason for HH care may be different from the primary reason why a person was admitted into the hospital. Therefore, commenters stated that the DRGs used in the real case-mix prediction model may not be relevant to the patient's condition in the HH setting.

Response: We thank the commenters for their input. However, we would like to remind commenters that the real case-mix prediction model is not limited to diagnoses from inpatient claims. The model also takes into account demographic factors, as well as utilization indicators of health status. Moreover, the model measures the relationship between these factors and case-mix.

Comment: Some commenters stated that payment rate reductions due to case-mix weight changes are not warranted because Medicare expenditures on HH are well within budgeted levels, thereby demonstrating that aggregate spending has not increased enough to permit CMS to exercise its authority to adjust payment rates. Commenters cited budget projections of the Congressional Budget Office (CBO). Another commenter stated while therapy services for HH patients have increased in volume since the start of the HH PPS in 2000, patient outcomes have improved and Medicare spending per patient and in the aggregate overall has stayed well below projections by the CBO. Some commenters stated that payment reductions in HH will lead to more institutional care, for example, by leading to increases in hospital readmissions of post-acute patients.

Response: A CBO projection table shown in one of these comments indicated that, based on projections of March 2004, spending has exceeded projections in 3 of the 5 succeeding years. We have no statutory authority to consider the relationship of CBO projections to HH outlays when setting the HH PPS payment rates. The Secretary's authority to respond to nominal coding change is set out at section 1895(b)(3)(B)(iv) of the Act. There is no evidence that improvement in HH patient outcomes is related to the level of payments achieved through nominal case-mix change. Effects of payment reductions on access and patient outcomes are worthy of study, using carefully designed research. We are aware of the challenges of

conducting conclusive research in this area, in part because other policy changes affecting the study question may co-occur. We have noted elsewhere in this preamble that we intend to request that the Office of the Inspector General resume investigations of the access impacts of payment reductions.

Comment: A commenter stated that a typical case-mix weight change adjustment in other sectors may bring a reduction in profit margins only, whereas in home health the adjustment occurs where the higher payments from increased case-mix weights are offset by increased costs.

Response: Analysis of profit margins indicates that they remain high among HHAs. For example, Medicare margins were 17.4 percent in 2008. This situation suggests that higher payments are not necessarily being offset by increased costs. In March 2010, MedPac estimated that Medicare margins will be 13.7 percent in 2011, taking into account the then-expected payment reduction of 2.71 percent to account for nominal case-mix change (MedPac, *Report to the Congress: Medicare Payment Policy,* March 2010). Our estimates suggest aggregate Medicare profit margins in HH will remain in double digits in 2011 under the payment policies proposed in the July 23, 2010, proposed rule.

Comment: Commenters stated that therapy utilization is a coding adjustment that accompanies not only an increase in reimbursement but also an increase in provider costs, implying that a rate reduction related to increased costs is inappropriate.

Response: We believe that the goal of the Medicare program is to ensure that beneficiaries receive the right care at the right time. The evolution of patterns of therapy utilization since the PPS began leaves doubt that appropriate care has been provided. In the CY 2008 proposed regulation (72 FR 25356) we described a shift in the distribution of therapy visits per episode under the HH PPS that caused two peaks: One below the therapy threshold of 10 therapy visits and the other in the 10 to 13-visit range. Before the HH PPS, the distribution had one peak, at 5 to 7 therapy visits, well below the 10-visit therapy threshold in use prior to the 2008 refinements to the HH PPS. Table 2 shows the distribution of episodes (LUPA and non-LUPA) changed again with the implementation of the 153-group case-mix system and its revised set of thresholds and therapy steps. At the new 7-visit step (7 to 9 visits) there was a sudden 50 percent increase in the proportion of episodes, and at the new 14-visit therapy threshold, there was a 25 percent increase in the proportion of episodes. One commenter, in writing about the questionable prescription of therapy treatment, stated that certain agencies have habitually provided therapy to patients whose natural course of recuperation would have been the same regardless of receipt of therapy. We also note that we implemented a declining payment with each added therapy visit with the 2008 refined case-mix system, with the intent to deter inappropriate padding of therapy prescriptions to higher and higher numbers of visits, as we added new thresholds above 10 visits. However, the pliability of therapy prescriptions, the continued growth in the proportion of episodes utilizing therapy, and the 25 percent increase in the proportion of episodes with high numbers of therapy visits (14 or more) may be evidence that increased costs are more than offset by the increased payment associated with therapy. Therefore, it is not certain that a rate reduction related to increased costs is inappropriate.

TABLE 2—DISTRIBUTION OF HOME HEALTH EPISODES ACCORDING TO NUMBER OF THERAPY VISITS

[2002–2008]

Number of therapy visits	2001 (%)	2002 (%)	2003 (%)	2004 (%)	2005 (%)	2006 (%)	2007 (%)	2008 (%)
None	54	52	51	50	50	50	50	49
1 to 5	14	15	15	15	15	15	14	14
6	3	3	3	3	3	3	3	3
7 to 9	6	6	6	6	6	6	6	9
10 to 13	10	11	13	14	14	15	15	10
14+	12	12	12	12	12	12	12	15

Comment: A commenter stated that the increase in case-mix due to increased therapy services should count towards the "real" case-mix changes, not towards the "nominal" case-mix changes. The commenter thought that as long as the agency provides therapy, the changes in case-mix due to increased therapy services should be considered "real."

Response: We based our nominal change estimate on beneficiary characteristics information, which when applied to the prediction model for real case-mix, to account for whatever changes in patient severity that have occurred since the IPS baseline. The remainder of the change in the national average case-mix weight is classified as nominal. We have not netted out from our estimate of nominal case-mix change any increases in the weights due to additional therapy utilization, because utilization is an aspect of the case-mix system that is under the control of providers, and therefore, is not necessarily a reflection of changes in patient severity, especially in view of the fact that our use of the real case-mix change model accounts for changes in patient severity. Furthermore, the evolution of therapy utilization under the HH PPS suggests that some of the therapy provision under the HH PPS has been subject to financially driven decision-making and as such, it is akin to nominal case-mix change, so we have classified it with nominal change.

Comment: A commenter stated the real case-mix change analysis omits consideration of increased therapy needs in the population. Other commenters stated that therapy use changes were not explained in the model and that CMS admitted that it could not explain the correct amount of therapy expected for patients. The commenter stated CMS should use alternative variables that would be more indicative of the changes in therapy use.

Response: The models were intended to analyze changes in case-mix over time and do not distinguish whether these changes are due to increases in therapy use or other factors. We do not believe that it would be appropriate to include utilization-related variables, such as the number of therapy visits, as predictors in the model, as such, variables are provider-determined. In addition, the goal of these analyses was not to develop refinements to the payment system but rather to examine changes in measures of patient acuity that are not affected by any changes in provider coding practices. CMS has

access to the claims histories and other administrative data for patients in our samples, and we welcome suggestions about how to better use these resources in finding alternative variables more indicative of the need for therapy. Such proposals must recognize that the desirability of any proposed alternative data depends on whether the data generation process involves HH providers.

Comment: A commenter stated that fewer therapy services are being provided in other care settings and therefore, the increases in therapy usage are due to patients' increased need for therapy services in the HH setting.

Response: We have no information suggesting that fewer therapy services are being provided in other care settings. In the SNF setting, more therapy is being provided to SNF patients than used to be the case. This is indicated by the increased share of SNF days for therapy RUG–III groups; the share grew from 75 percent to 85 percent between 2000 and 2006. MedPac has documented increases in rehabilitation intensity in SNFs since 2002 (MedPac, *Report to the Congress, Medicare Payment Policy,* March 2010). For patients who go on to HH from Part A institutional settings, we have no evidence of less therapy utilization in prior settings. We have evidence to the contrary. For example, total billed charges for therapy from all previous Part A settings within the 14 days before HH admission nearly tripled, from an average of $1,154 (2001) per person with any Part A discharge to $2,952 (2008). Total billed charges for therapy increased from $2,068 in 2001 to $3,680 in 2008 per person with any prior Part A stay involving therapy.

Comment: A commenter suggested that CMS "analyze case-mix weight changes based on data beginning in 2005" and "analyze case-mix weight changes for 2008 to current to see how much increase occurred in more recent years." Furthermore, the commenter recommended that CMS "use national benchmarking companies for data if CMS does not have data yet available."

Response: We will be turning to analysis of 2009 data later this year. Unfortunately, the time it takes for a complete year of data to arrive and the added time of cleaning, processing, summarizing, and linking the data currently preclude using the data for the analysis in this final rule. We have concerns that data from benchmarking services would not be nationally representative. Therefore, we intend to use random samples drawn from our own administrative data.

Comment: A commenter believes that the model fails to account for any changes in HHA behavior related to patient populations served. These changes would include a marketing effort targeted to increase the proportion of patients who are high users of therapy. The commenter also stated that the post-acute care industry has changed dramatically since the Abt regressions were first designed. The current use of administrative claims data by Abt and CMS is inadequate, and perhaps even counterproductive. This practice sends the wrong signals as to how HH and facility-based care should be related as the Medicare program moves toward an era of "bundled payments" and other initiatives to coordinate care across settings.

Response: We disagree with this comment. The predictive model for real case-mix was designed in 2007 and includes a comprehensive set of variables. The model looks at case-mix change across a large sample of providers, rather than considering individual provider behavior. If the characteristics of patients have changed due to marketing efforts, this should show up as changes in the mean values of patient characteristics over time. For example, the increase in knee replacement patients since the baseline year causes an increase in the predicted case-mix weight. We will continue to research ways to modify our models and data for analyzing real case-mix change over time. A challenge with using OASIS items is that, for the most part, OASIS items associated with case-mix are already used in the grouper and thus are not appropriate to use in the case-mix change analyses (since changes in case-mix over time may be due to coding changes rather than changes in severity).

Comment: Commenters stated that the model is based on administrative data rather than clinical data.

Response: The model only includes a few variables that are derived from OASIS assessments (measures of patient living arrangement) because the OASIS items can be affected by changes in coding practices. It is not practical to consider other types of HH clinical data (for example, from medical charts) in the model.

Comment: A commenter wrote that the model relies too heavily on assumptions and beliefs rather than empirical evidence.

Response: We disagree with the commenter. The prediction model for real case-mix is an empirical model, the findings of which are based entirely on empirical evidence.

Comment: A commenter stated CMS should suspend nominal case-mix-related payment reductions until it develops an accurate and reliable model to evaluate changes in case-mix weights consistent with the whole nature of patients served in HH care, not just those discharged directly from hospitals.

Response: The commenter does not recognize that many variables in our model are applicable to patients who have not used hospitals recently. Variables relating to demographic status and PAC utilization are among the model's variables. Another set of the model's variables, used to describe the nature of any previous hospital stay, applies to many patients nonetheless, because we searched the claims history to find the last hospital stay that occurred before the episode. We believe that the model includes a rich set of patient measures. Efforts will continue to deploy more information in evaluating changes in HH patients' health characteristics. It is important to note that the omission of any particular variable is not enough to change estimates of unpredicted case-mix change. Variables must have different prevalence rates in the initial and later periods. If prevalence rates for such variables were the same in both periods, the effects would net out; in other words, there would be no systematic difference in the predicted case-mix over time.

Comment: One commenter stated that the "2008 additional case-mix ICD–9 codes and therapy four-equation model logically results in increased case-mix and contributes to the faulty foundation of comparison with IPS and early PPS data."

Response: We disagree with the commenter. We performed our research leading to the four-equation model using an extremely large sample of claims linked to OASIS assessments. Using visit times by discipline reported on the sample of claims, we studied the relationship of the total of wage-weighted visit times per 60-day claim to patient characteristics as reported by agencies on the assessments. The wage-weighted minutes are the best measure available of the cost burden of caring for the patient, given his or her clinical characteristics. This method essentially replicated the original method we used to develop the 80-group case-mix system during the period before OASIS was implemented and before per visit line billing was required. A prototype of OASIS was used at that time. The 2005 coding and reporting practices, as well as the resource use patterns, were the foundation of the 2008 refinements,

along with our replication of the basic analytic approach. We know of few other methods comparable in their ability to yield a fair and representative case-mix model for national application. Given the essential continuity in approach, we fail to see how the 2008 refined model specifically is a reason not to make comparisons with pre-PPS and early PPS data. Our comparisons of population and utilization characteristics, which are the basis for our prediction model of real case-mix, do not involve use of the HH PPS case-mix payment variables or the ICD–9 codes reported by agencies.

Comment: Commenters stated that the Abt report on the real case-mix change analysis ("Analysis of 2000–2008 Case-mix Change", July 2010, link at *http://www.cms.gov/center/hha.asp*) does not discuss what signs are consistent with known relationships and, hence, is not in a position to judge the signs of the coefficients. In addition, commenters stated that while Abt included variables related to inpatient stays, the estimated coefficients are not consistent with expectations that "the coefficient for any stay would be positive and the coefficient for the number of days would be negative." The coefficient has an opposite sign than what is expected.

Response: We thank the commenters for their comments. However, our purpose is to predict case-mix weights using all available and relevant administrative data, rather than to isolate the impact of individual variables. We have noted elsewhere that many coefficients have signs as we expect (Abt Associates 2008; CMS 1541–FC, FR August 29, 2007). Contrary to what the commenter states, it is not clear that a hospitalization would be associated with higher case-mix; it may be that community patients are more clinically complex and have a higher case-mix than those who are discharged from a hospital to home health. This result is consistent with the impact of pre-admission location variables (from OASIS item M0175) in the 80-group case-mix model.

Comment: Abt does not perform any multicollinearity diagnostic statistics or consider the remedy of combining some of the variables. The model uses a large number of variables that do not have much variation. The close interaction among the variables "is likely to pose problems with the prediction of the dependent variables."

Response: Given the objectives of the analysis, we are not particularly concerned about redundancy among variables. It is also important to note that such redundancy, often called multicollinearity, does not actually bias results and may only cause large standard errors of the coefficients for variables that are related to one another. Standard errors are not used in our case-mix change calculations. The Abt Associates report described improvement in the predictive power of the model as each set of variables (for example, APR–DRG variables) was added beyond demographic variables alone. The addition of Part A expenditure variables, the last variable set added to the model, led to little improvement in predictive power, and for that reason might be considered redundant; however, their addition did not change the essential results of the analysis (Abt Associates, 2008), which were that only a small proportion of the case-mix growth could be attributed to changes in patients' characteristics.

Comment: Commenters stated that the Abt models are unreliable because 40 percent of the top variables differ from one model year to the next (original IPS model and the model rebased to 2008 data), and 20 percent of the variables change signs. Commenters also stated that the model CMS uses to assess case-mix weight changes should be at least as accurate and reliable as the case-mix adjustment model that it is assessing. The current PPS case-mix model reportedly originally had an R-squared explanatory power of over 40 percent while the case-mix weight change assessment model falls far short of that benchmark. Commenters stated that the explanatory power of the models falls 46 percent from the original model to the rebased model. The regression model R-square dropped from 19 percent to 10 percent in the 2008 analysis. The R-square of the 80-group HHRG model was at 0.21—much lower than the R-square for the 153-group HHRG model at 0.44. The commenter stated this high R-square of the current PPS case-mix model suggests that the case-mix weight change regression model analysis for 2008 should have had a higher R-square. The decrease in the R-square is "unclear and unexplored."

Response: We thank commenters for their comments. However, we disagree that the difference in R-squares for the two models indicates that the prediction model for real case-mix is unreliable. The nine top drivers of case-mix are the same in both models, as are 15 of the top 20. Most of the predicted case-mix change results from the major "drivers" in the model, and, of the top 50 drivers of case-mix change (which account for more than 60 percent of the total predicted change in the model), 37 have the same sign in both models and the correlation between the coefficients from the two regression models is 0.56. Of the variables that changed signs, most were not statistically significant. We would expect some change over time in the variables that are among the top drivers of case-mix change, given the large number of variables in the model and the differing dependent variables (the 80 case-mix weights for the first model and the 153 case-mix weights for the second model). With regards to the 40 percent R-squared explanatory power benchmark, given that the goal of the case-mix change analyses is to determine the extent to which case-mix changes observed over time are due to changes in patient acuity or other factors (such as coding changes) that are not observed in the model, we do not believe that this is an appropriate statistical performance benchmark for the model.

The explanatory power of the current HH PPS case-mix model is as high as it is in large part because of the therapy-related variables in the model (where a direct measure of resource use is included on the right-hand side of the regression model). We do not believe that it is appropriate to include these types of variables in the case-mix change model because they are provider determined.

Comparing the statistical performance of the two prediction models for real case-mix is not really appropriate to compare strictly the statistical performance of the two models, given that we had to drop the living arrangement variable from the second model and that the dependent variable for each model is a different set of case-mix weights. We also note that a possible contributor to the lower R-square for the second model is the large amount of nominal case-mix change that occurred between 2000 and 2008. Changes in coding practice and resulting assignment of case-mix weights could have led to a situation where the predictor variables in the prediction model for real case-mix collectively have less ability to predict the weights than when the variables were first used with the data from the last year of IPS (2000) to predict the original PPS case-mix weights.

Comment: A commenter stated that no explanation was provided on segmented choice of periods of evaluation. This commenter wrote that it is unclear why Abt subdivided the 2000–08 period into 2000–2007 and 2007–2008. To minimize the possibility for shifts in the relationship between resource requirements and explanatory variables, Abt could have subdivided the 8-year period in half or at least

performed some sensitivity analysis to choose the time periods.

Response: The procedure of identifying nominal case-mix change relies on subtracting an average of predicted weights from the average of actual, billed weights. The case-mix group system changed from one of 80 groups to 153 groups in 2008, causing a change in the set of weights that could be billed to Medicare. Up until 2008, this was not an issue as the same set of weights was used throughout the entire history of the PPS up until that year. To be able to bridge the periods before and after the 153-group model, we rebased the prediction model to the 2008 data, the first year that the 153-group model was used for paying HH providers. We combined the results from the original IPS-period equation with the results from the rebased 2008 equation for this year's analyses. Our application this year of the IPS-period equation was unchanged (except for certain technical changes in the APR–DRG grouper) from our application of it for last year's rule.

Comment: A commenter stated hospital discharge data demonstrate that HH patients are admitted from hospital stays with a higher degree of acuity than in the past. "The acute care (inpatient prospective payment system (IPPS)) CMI for cases discharged to HHAs reflects the patient severity of the patients discharged to home health agencies. As one of the measures for patient severity is prior hospitalization, it is believed to be unaffected by the HH CMI. The CMI for the prior hospitalization can be assumed to be a proxy measure of the "real" case-mix index. Based on our analyses of the 2007 and 2008 MedPAR data (Medicare discharges from short term acute care hospitals), we found that the CMI (MS DRG-based CMI) of cases discharged to HHAs increased by 2.5 percent from 1.588 in 2007 to 1.63 in 2008. Furthermore, we also found that among the acute care cases discharged to HHAs, the proportion of cases categorized as Medicare Severity Adjusted Diagnosis Related Groups (MS DRGs) with complications and comorbidities increased by 3 percentage points from 25 percent in 2007 to 28 percent in 2008. This implies that the real case-mix index due to comorbidities most likely increased for the cases discharged to home health agencies."

Response: The MedPAR data analyzed in this comment cover the period when the MS–DRG system was implemented. We analyzed MS–DRG coding and found evidence of changes in coding and documentation practices that led to increases in billed acute care case-mix weights. CMS actuaries estimated that a 2.5 percent increase in case-mix in the hospital IP PPS was due to coding and documentation changes occurring in FY 2008 (75 FR 50355). The results cited by the commenter may have reflected the weight-increasing hospital coding behaviors addressed by the CMS regulatory analysis. Therefore, we have reason to believe that this measure alone is not good evidence for assessing real case-mix change. We must also point out that our analyses employing the APR–DRG system indicated that the proportion of episodes with a Mortality Risk Level 3 (Major) diagnosis increased over time while the proportion with Mortality Risk Level 2 (Moderate) decreased. However, our regression coefficients (for both the IPS and 2008 model) showed a negative relationship between being in the moderate or major risk of severity groups and case-mix. Thus, the increase in the proportion of patients in the highest mortality risk category led to an estimate of lower predicted case-mix. Given these types of findings, it is not clear the extent to which the CMI changes that the commenter notes, even if they represented an accurate measure, would lead to a prediction of higher case-mix.

Comment: Several commenters suggested we conduct an impact analysis of the proposed rule relative to case-mix, include an evaluation of access in each year of any adjustment, and consider all factors related to access. These commenters felt that the impacts in the proposed rule were factually and legally inadequate, and therefore, violated the Regulatory Flexibility Act (RFA). A commenter stated we should include an evaluation of the effect of the proposed rule on Medicare spending "in a whole sense," not just the effect on HH services spending.

Response: We have provided a complete and comprehensive analysis for the upcoming calendar year. As in past years, we will address options for regulatory relief for the succeeding calendar year in the year before the rate update becomes effective. There is no language in the RFA that requires an analysis of "out-year" expenditures. The state of the art is not adequate for forecasting effects on all Medicare spending.

Comment: Commenters suggested that CMS remove the case-mix adjustment for medical supplies unless CMS can develop a method to accurately determine what percentage of the case-mix change is "real" and what percentage is "nominal."

Response: We believe that coding practice changes have affected the case-mix assignment for the nonroutine medical supplies (NRS) payment level. The OASIS items used in making the case-mix assignment are potentially vulnerable to the same types of forces that affect coding for the episode case-mix group, that is, improvements in coding and more complete coding, more specific definitions, increased reporting of secondary diagnoses, and other causes of coding practice change. However, since the nominal case-mix change measure was designed to apply to the episode case-mix system, the nominal case-mix change measure may not directly apply to the NRS case-mix model. Therefore, we will defer the application of the payment reduction to the NRS conversion factor for CY 2011 until a review of the nominal case-mix change measure can be performed.

Comment: Commenters stated that it appears that the CMS case-mix weight change analysis never specifically evaluated any evidentiary basis for its determination that the hypertension diagnostic coding was a nominal change in case-mix. Instead, we assume that the increased coding of hypertension is upcoding.

Response: We proposed to delete ICD–9–CM code 401.9, Unspecified Essential Hypertension, and ICD–9–CM code 401.1, Benign Essential Hypertension, from the HH PPS case-mix model's hypertension group, in order to correlate with the goals of our HH PPS case-mix system.

We continue to be concerned that the increase in reporting of unspecified hypertension and benign hypertension signals that continued inclusion of these codes in our case-mix system threatens to move the HH PPS case-mix model away from a foundation of reliable and meaningful diagnosis codes. As we described in our proposed rule, the data indicate a jump of approximately 12 percentage points in the reporting of unspecified hypertension when the refined HH PPS added hypertension as a case-mix code in 2008. The proposed rule also described that the data suggested no HH added resource requirements are associated with hypertension, unspecified, which is by far the most commonly reported hypertension code.

In our proposed rule, we also described that the classification of blood pressure (BP) was revised in 2003 by the National Heart, Lung and Blood Institute (NHLBI) in their "Seventh Report of the Joint National Committee on Prevention, Detection, Evaluation, and Treatment of High Blood Pressure" (the JNC 7 report) and published in the May 21, 2003, Journal of the American Medical Association. These revisions

provided specific clinical guidelines for prevention, detection, and treatment of high blood pressure. A key aspect of the guidelines includes the introduction of a "pre-hypertension" level for individuals with a systolic blood pressure of 120–139 mm Hg or a diastolic blood pressure of 80–89 mm Hg. This recognition represented a change from traditional medical views on the implications of blood pressures slightly above 120/80. If an individual is designated as pre-hypertensive, the guidelines stipulate that this individual will generally require health promoting lifestyle modifications to prevent cardiovascular disease. We described our concerns surrounding the new guidelines for hypertension which we suspected might have led to an increased prevalence of codes 401.1 and 401.9 in 2008 HH claims, along with some evidence that HH patients with either unspecified or benign hypertension no longer require extra resources. We described that these results appear possibly consistent with a phenomenon in which agencies increased their reporting of hypertension in situations that did not meet the HH diagnosis reporting criteria; the results are suggestive of changed coding practice in which less-severe episodes are being reported with hypertension in 2008 than used to be the case. As such, we described that we believe including codes 401.1 and 409.9 in the HH PPS case-mix model reduces the model's accuracy, and that we do not believe we should be including these diagnoses in our case-mix system. We received many comments opposed to the removal of these codes.

Comment: Commenters stated that currently CMS is penalizing HHAs twice for the nominal case-mix changes due to hypertension coding by proposing to remove the hypertension codes and by including the case-mix changes due to hypertension coding in the calculations for payment reductions.

Response: We disagree with the commenters who believe that, by removing these codes while also reducing HH base episode payment rates due to coding change, we are in effect double-counting for growth in case-mix unrelated to real changes in patient health status twice. We proposed to remove these codes from the case-mix system beginning in CY 2011. Our updated analysis, which measures changes in case-mix, both nominal and real, used data from the inception of HH PPS through 2008. As such, by removing these hypertension codes we would expect a slower growth of hypertension-related nominal case-mix beginning in CY 2011. However, as explained in response to a different comment (below), we are not finalizing our proposal to remove hypertension codes 401.1 and 401.9. We assure commenters that if we were to remove these codes from our case-mix system we would do so in such as way that we would recalibrate our case-mix weights to ensure that the removal of the codes would result in the same projected aggregate expenditures.

Comment: A commenter stated that the 2008 HH PPS methodology is based upon a determination that a hypertension diagnosis indicates a higher degree of resource need and utilization by patients with that diagnosis. Nothing in the CMS analysis indicates that anything other than this original finding is supportable. As such, concluding that an increase in patients with a hypertension diagnosis is anything other than a change in patient characteristics is illogical and in error.

Response: If the underlying proportion of patients with hypertension has not changed, then the increase in the observed prevalence of hypertension is an indication of a change in coding practices, even if it reflects more accurate coding. As such, the increased prevalence is not real case-mix change, as it does not represent cost increases related to the health status of patients.

Comment: Commenters stated that CMS opines that the 2003 changes in diagnostic coding guidance led to the increase in incidence of hypertension coding rather than changes in patient characteristics. However, the 2003 changes were fully operational at the time in 2007 when CMS proposed and finalized the 2008 HH PPS version that includes hypertension as a factor in the patient classification system.

Response: We believe that the 2003 NHLBI guidance ("Seventh Report of the Joint National Committee on Prevention, Detection, Evaluation, and Treatment of High Blood Pressure", *Journal of the American Medical Association,* May 21, 2003) may have led to changes in coding hypertension, but that diffusion of the new information probably occurred over several years. The case-mix model of the Final Rule referenced by the commenter was based on 2005 data.

Comment: One commenter stated that diagnosis codes 401.1 and 401.9 should be retained in the case-mix system, because very often clinically complex patients such as hypertensive heart disease patients will be diagnosed with the code 401.9 while waiting for proper documentation that is required by ICD–9–CM in order to report a more specific diagnosis code. Another commenter urged CMS to perform additional analysis to assess the severity of individuals with hypertension codes 401.1 and 401.9 in order to determine whether these codes should be eliminated. The commenter suggested that CMS look at the resource use and the change in the number of visits for patients with codes 401.1 and 401.9 from 2005 to 2008 and compare them to data on individuals with other hypertensive diagnosis codes, while controlling for differences in patient characteristics.

Response: We find these comments compelling. HHAs are expected to adhere to ICD–9–CM coding guidance. The commenter states that ICD–9–CM coding guidance requires specific documentation be obtained prior to coding certain complex hypertensive diseases such as hypertensive heart disease, and such documentation may take time to obtain. The commenter states that agencies may have no choice other than to code such patients using code 401.9 pending receipt of such documentation. Therefore, for such patients, deletion of these codes may delay access to needed home care. We agree with the commenter who urged CMS to expand our resource use analysis for hypertension codes 401.1 and 401.9 to control for patient characteristic differences, and also compare the resource usage of patients with these codes to the resource usage of patients with other hypertension diagnosis codes. We agree that this suggested comprehensive analysis will enable us to identify whether there are sub-categories of patients currently assigned codes 401.9 or 401.1 who are more resource intensive, such as the hypertensive heart disease patient, enabling us to revise our case-mix system to account only for those resource intensive patients. As such, we are deferring removal of the hypertension codes from our case-mix model pending completion of the suggested analysis.

In the interim, we are committed to slowing the growth of nominal case-mix by addressing the inappropriate reporting of these codes. We plan to target providers for review who have substantive growth in the reporting of these codes, or higher than expected instances of reporting them. We also reiterate the need for providers to follow the OASIS Attachment D coding guidance, found at *http://www.cms.gov/HomeHealthQualityInits/14_HHQIOASISUserManual.asp,* where we explain that providers must only code a diagnosis if it is addressed in the HH plan of care and affects the patient's responsiveness to treatment and rehabilitative prognosis.

Finally, we would like to clarify that page 12 of the 2003 statement by the National Heart, Lung and Blood Institute (NHLBI) "Seventh Report of the Joint National Committee on Prevention, Detection, Evaluation, and Treatment of High Blood Pressure" (the JNC 7 report), published in the May 21, 2003, *Journal of the American Medical Association* explicitly states that prehypertension is not a disease category, which indicates that the coding of 401.1 or 401.9 for pre-hypertensive patients would not be appropriate. This is consistent with pre-existing ICD–9–CM guidance, which describes essential hypertension as SBP of 140 and above.

Comment: A commenter stated that the proposed 3.79 percent adjustment for nominal case-mix change appears to be based primarily on the inclusion of hypertension as a patient diagnosis and modified provision of therapy services consistent with the HH PPS model revision in 2008.

Response: As previously stated, the proposed adjustments for CY 2011 and CY 2012 took into account all of the nominal case-mix growth we measured between the IPS baseline and CY 2008, and netted out nominal case-mix growth that was already accounted for in previous rate reductions. As of last year's rate update regulation, we anticipated a need to compensate for a total nominal growth of 13.56 percent. This year's analysis showed that reductions previously planned to be implemented were not adequate to compensate for the full total of nominal growth (17.45 percent) that has occurred through 2008. Our method for deriving the real and nominal case-mix change percentages did not isolate any specific sources of nominal growth (such as hypertension coding) upon which to base the reduction. However, the proposed rule for CY 2011 described statistics showing a large 1-year increase in hypertension reporting between 2007 and 2008, and it noted that the observed growth in the numbers of episodes with high numbers of therapy visits was unexpected. The proposed rule also discussed evidence beyond hypertension and therapy, such as increased reporting of secondary diagnoses in general.

In summary, in this final rule, we are implementing the proposed 3.79 percent reduction to the national standardized episode rate for CY 2011. We will defer finalizing a payment reduction for CY 2012 until further study of the case-mix change data and/or methodology is completed. In addition, in this rule, we are withdrawing the proposal to apply the case-mix change reduction to the NRS conversion factor. As part of our review of the nominal case-mix change methodology, we will study its applicability to the NRS model. The NRS conversion factor will be updated in CY 2011 by the market basket update of 1.1 percent and will also be adjusted for outlier payments in accordance with section 3131(b) of the Affordable Care Act. We are also withdrawing our proposal to eliminate ICD9–CM diagnosis codes 401.1, Benign Essential Hypertension, and 401.9, Unspecified Essential Hypertension, from the HH PPS case-mix model's hypertension group, pending the results of a more comprehensive analysis of the resource use of patients with these conditions.

B. Therapy Clarifications

In the CY 2011 HH PPS proposed rule, we discussed analyses that suggested that therapy under the Medicare HH benefit, in many cases, was being over-utilized. Analysis of HH utilization under the original single 10-visit therapy threshold suggests that the threshold offered a strong financial incentive to provide therapy visits when a lower amount of therapy was more clinically appropriate. Essentially, the data suggested that financial incentives to provide 10 therapy visits overpowered clinical considerations in therapy prescriptions. For the CY 2008 final rule, we established a system of three thresholds (6, 14, and 20 therapy visits) with graduated steps in between to meet our objectives of retaining the prospective nature of the payment system, reducing the strong incentive resulting from the single 10 therapy threshold, restoring clinical considerations in therapy provision, and paying more accurately for therapy utilization below the 10-visit therapy threshold.

In the proposed rule, we described that analysis of CY 2008 data continues to suggest that some HHAs may be providing unnecessary therapy. MedPAC states in its March 2010 report that 2008 data also reveal a 26 percent increase of episodes with 14 or more therapy visits (MedPAC, *Report to Congress: Medicare Payment Policy,* Section B, Chapter 3, March 2010, p. 203). While this analysis suggested that therapy payment policies are vulnerable to fraud and abuse, the swift, across-the-board therapy utilization changes also suggest another more fundamental concern. MedPAC wrote in the March 2010 report (MedPAC, 2010, p. 206) that payment incentives continue to influence treatment patterns, and that payment policy is such a significant factor in treatment patterns because the criteria for receipt of the HH benefit are ill-defined. MedPAC also reported that better guidelines would facilitate more appropriate use of the benefit.

As such, in the CY 2011 HH PPS proposed rule, we proposed to clarify our policies regarding coverage of therapy services at § 409.44(c) in order to assist HHAs and to curb misuse of the benefit. Specifically, we proposed the following:

- Require that measurable treatment goals be described in the plan of care and that the patient's clinical record would demonstrate that the method used to assess a patient's function would include objective measurement and successive comparison of measurements, thus enabling objective measurement of progress toward goals and/or therapy effectiveness.
- Require that a qualified therapist (instead of an assistant) perform the needed therapy service, assess the patient, measure progress, and document progress toward goals at least once least every 30 days during a therapy patient's course of treatment. For those patients needing 13 or 19 therapy visits, we proposed to require that a qualified therapist (instead of an assistant) perform the therapy service required at the 13th or 19th visit, assess the patient, and measure and document effectiveness of the therapy. We would cease coverage of therapy services if progress towards plan of care goals cannot be measured, unless the documentation supports the expectation that progress can be expected in a reasonable and predictable timeframe. An exception to this would be when the criteria for needing maintenance therapy are met.
- Clarify when the establishment and performance of a maintenance program is covered therapy.

Comment: A number of commenters were in strong support of our efforts to rein in abuse and overuse of therapy through sound documentation, objective measurement, and appropriate involvement of qualified therapists. Commenters expressed support for proposed additional requirements of documentation of the patient's clinical record, including therapy treatment goals to be described in the plan of care and objective measurement obtained during the functional assessment. One commenter stated that the elements of documentation added in our proposed regulations are reflective of professional standards for the practice of speech-language pathology. Another commenter expressed general support of our therapy coverage and documentation requirements, including those for patient assessment, physician collaboration, plan of care, goal establishment, evaluation of progress

toward goals through objective measures, and documentation, indicating they are all reflective of professional standards of practice for therapy services, such as those established by named major therapy associations. Another commenter expressed support for the proposed therapy coverage requirements regarding functional assessments, treatment plan revisions, and accurate documentation, indicating that these requirements align with professional standards of clinical practice.

Response: We thank the commenters for their support.

Comment: Numerous commenters expressed concern regarding the provision of the proposed rule requiring that a qualified therapist, instead of an assistant, perform the needed therapy service at the 13th and 19th therapy visits. These commenters stated that therapy visits by a qualified therapist beyond those already conducted on the 1st, 30th, and 60th days would be prohibitively expensive to HHAs and an unnecessary intrusion for patients. A number of commenters suggested that requiring a qualified therapist, instead of an assistant, to perform the needed therapy service every 30 days should be sufficient, stating that requiring a qualified therapist to perform the therapy service on the 13th and 19th visits was excessive. A commenter suggested that because only 15 percent of episodes contained more than 13 therapy visits and only 5 percent of episodes contained more than 19 therapy visits, CMS should consider the increased costs of its proposed required therapy changes versus the actual need for the new requirement. Commenters quoted recent findings of a health care consulting company's survey of HH providers regarding the proposed therapy clarifications, stating that most providers believe the proposed therapy changes would lead to scheduling difficulties for therapy visits and would cause difficulties in employing/contracting qualified therapists. A few commenters asked CMS to delay the implementation date of this provision by one quarter to allow more transition time for providers. Several commenters suggested, as an alternative to the requirement that a qualified therapist perform the needed therapy service at the 13th and 19th visit, that adopting ranges would be more acceptable—for example, allowing the qualified therapist visit to occur between the 11th and 13th visits and again between the 17th and 19th visits. Another commenter proposed that CMS should instead defer to State law requirements, asserting that most States require more frequent qualified therapist supervision of assistants than those in the proposed rule, and the proposal's timeframes would be redundant to State laws. The commenter further stated that the proposed defined timeframes are in conflict with § 409.44(a) as they fail to reflect attention to the patient's individual needs. Further, the commenter suggested that CMS abandon the 13th and 19th qualified therapist visit requirement and instead base the reassessment timeframe on individual care needs and changes in patient status. That same commenter added that assistants utilize their clinical reasoning skills every time they treat a patient and advise the supervising therapist regarding the patient's need for continued skill intervention and grading of treatment and, therefore, the requirement for qualified therapist visits at defined timeframes is not reasonable. A commenter classified all our proposed therapy visit rules as arbitrary at best, as well as calling these latest rules regarding the 13th and 19th assessments capricious. One commenter stated that a requirement to re-evaluate patients at the 13th and 19th visits may not be effective in curbing agencies from inappropriately using the benefit in the long-run, suggesting that some agencies will soon learn how to work the revised system to their benefit. A commenter stated that, while overall therapy utilization has increased, it has led to better outcomes for Medicare beneficiaries and overall spending per Medicare patient has remained well below Congressional Budget Office (CBO) projections. Referring to the aforementioned survey results, the commenter described the surveyed HHAs' concern that the proposed clarifications would result in limited improvements in patient care. Several commenters believed that the proposed changes would have an adverse effect on access to care and timeliness of services provided and that these requirements would result in less direct patient care time. Many commenters stated that the documentation requirements were burdensome and costly. Several commenters feared that these requirements would impede access to care in rural areas where there are shortages of qualified therapists.

Response: We thank the commenters for their suggestions. We continue to believe that to ensure Medicare HH patients receive effective, high-quality therapy services, the frequency that a qualified therapist must assess the effectiveness of services performed by assistants must be more clearly defined in Medicare home health coverage regulations. Longstanding Medicare Conditions of Participation (CoPs) regulations at § 484.32(a) require that HH therapy services be administered by a qualified therapist or a qualified assistant under the therapist's supervision, thus requiring a qualified therapist to supervise therapy services to ensure their effectiveness. We believe that in order to adhere to these regulations, a qualified therapist must periodically perform the patient's needed therapy service during the course of treatment to ensure that the therapy being provided by assistants is effective and/or that the patient is progressing toward treatment goals. These visits ensure that the qualified therapist has first-hand knowledge of the patient in order to identify needed changes to the care plan. Additionally, these visits enable a qualified therapist to determine if treatment goals have been achieved or if therapy has ceased to be effective. We note that some States preclude assistants by scope of practice from making determinations such as whether goals are met. As such, we believe that by requiring a qualified therapist, instead of an assistant, to perform the needed therapy service, assess the patient, and measure and document progress toward goals and/or effectiveness of therapy at defined points in the course of treatment, we would lessen the risk that patients continue to receive therapy after the treatment goals have been reached and/or after therapy is no longer effective.

In response to the commenter who stated that while overall therapy utilization has increased, such increased utilization has led to better outcomes for Medicare beneficiaries, we disagree with the conclusion. In their March 2010 report, MedPAC described that functional measure scores for HH patients continue to improve, but also expressed concerns that the measures may not appropriately depict the quality of therapy provided by HHAs. MedPAC reports that there are no measures, which reflect functional improvement for only those patients that receive therapy services. Instead, the measures reflect functional improvement for all patients. Therefore, we believe that the data do not support the commenter's conclusion that higher volumes of therapy have led to better outcomes. The same commenter, pointing to results of the survey described above, stated that the HHAs believe these proposed therapy coverage clarifications would result in limited improvements in patient care. Again, we disagree with these opinions. We refer the commenter to research studies conducted by Linda

Resnick (of Brown University) et al., entitled "Predictors of Physical Therapy Clinic Performance in the Treatment of Patients with Low Back Pain Syndromes" (2008, funded by a grant from the National Institute of Child Health) and "State Regulation and the Delivery of Physical Therapy Services" (2006, funded in part through a grant from the Agency for Healthcare Research and Quality). Both studies concluded that more therapy time spent with a qualified physical therapist, and less time with a physical therapist assistant, is more efficient and leads to better patient outcomes. In these studies, the lower percentage of time seen by a qualified therapist and the greater percentage of time seen by an assistant or aide, the more likely a patient would have more visits per treatment per episode. The studies also concluded that, although delegation of care to therapy support personnel such as assistants may extend the productivity of the qualified physical therapist, it appears to result in less efficient and effective services. We believe that by requiring regular visits by a qualified therapist during a course of treatment we will achieve more appropriate and efficient provision of therapy services while also achieving better therapy outcomes. Regarding the comment that HH expenditures are below CBO projections, we are unclear on the commenter's suggestion. We believe that the commenter may have been suggesting that the growth in HH expenditures does not warrant our attempts to facilitate more appropriate and effective therapy utilization. If so, we disagree with the commenter. We continue to believe that these improved guidelines, as suggested by MedPAC, are an important step in addressing program vulnerabilities while also improving the quality of services provided. We also disagree with the commenters who believe that a qualified therapist visit every 30 days is sufficient, and that the required 13th and 19th visits are excessive and redundant to many state practice supervision requirements, and that the 13th and 19th visit requirement timeframes fail to reflect the patient's individual needs. As we have noted in this and previous rules, at the inception of the HH PPS we analyzed the amount of therapy a HH rehabilitation patient would typically require during a course of treatment. We used clinical judgment to determine that the typical rehabilitation patient in a HH setting would require about 8 hours of therapy, or 10 therapy visits during a course of treatment. We believe that when the unique condition of an individual patient requires more therapy than a typical Medicare HH rehabilitation patient, such a patient should be more closely monitored by a qualified therapist to ensure that high-quality, effective services are being provided and/or acceptable progress toward goals is being achieved. We also continue to believe that to ensure that this monitoring occurs for all high-therapy needs Medicare patients, we cannot depend on individual state supervision requirements. Instead, Medicare coverage clarifications will ensure that all Medicare HH patients benefit from this oversight. We also disagree with commenters that these policies will lead to an intrusion for patients. To the contrary, research suggests that more qualified therapist involvement would further enhance patient care for those patients needing these levels of therapy. We also note that these policies will not result in additional visits or therapy services provided to the patient. The visit by a qualified therapist would not be in addition to the visit that would otherwise occur, as described in the patient's treatment plan. Instead, the qualified therapist, perhaps instead of an assistant, would perform the therapy service at defined points in the course of treatment. In response to the commenter who questioned whether a comprehensive assessment of the patient would need to occur during these qualified therapist visits, we refer the commenter to the regulation text changes at § 409.44(c)(1)(iv) which describes that the qualified therapist must assess a patient's function using objective measurement of function. In other words, the assessment of function would not be a comprehensive assessment of the patient's clinical condition.

In response to the commenters who expressed cost and access to care concerns associated with these policies we note that current CoPs at § 484.12 already require that the HHA and its staff comply with accepted professional standards and principles that apply to professionals furnishing services by a HHA. Those accepted professional standards include complete and effective documentation, such as that which we described in our proposal. (Section 484.55 of the CoPs already requires that HHAs provide a comprehensive assessment that "accurately reflects the patient's current health status and includes information that may be used to demonstrate progress toward achievement of desired outcomes.") In addition, § 484.2 requires that a clinical note be a notation of contact with a patient that is written and dated by a member of the health team, and that describes signs and symptoms, treatment and drugs administered and the patient's reaction, and any changes in physical or emotional condition, which becomes part of the medical record. Further, § 484.48, our longstanding regulation for CoPs and clinical records, requires that a clinical record containing pertinent past and current findings in accordance with accepted professional standards be maintained for every patient receiving HH services. In addition to the plan of care, the record must include treatment plans and activity orders, signed, and dated clinical and progress notes, and copies of summary reports sent to the attending physician. Because these proposed clarifications to our therapy coverage requirements are consistent with long-standing CoP requirements and accepted professional standards of clinical practice, we would expect that many providers have already adopted these practices.

Also, because CoPs at § 484.32 allow therapy services offered by the HHA to be provided by a qualified therapist or a qualified assistant under the supervision of qualified therapist and in accordance with the plan of care, it is our expectation that HHAs are already utilizing qualified therapists regularly to perform the needed therapy services in order to perform the required supervision of assistants.

We agree with the commenter that most HH therapy patients do not receive 13 and/or 19 visits in their course of treatment. In response to the comments which stated the relatively small numbers do not warrant the 13 and 19 qualified therapist visit and documentation requirements, suggesting instead that we target providers with suspect therapy practices for review, we reiterate that we believe these requirements benefit all patients. We believe that these requirements may also deter inappropriate provision of high levels of therapy, and therefore lessen the risk of the associated inappropriate higher HH PPS payments. In summary, by requiring qualified therapist visits when the amount of therapy reaches those high levels, which also correspond to high payment levels, we believe we can simultaneously achieve better patient outcomes, more efficient provision of therapy, and more accurate reimbursement.

We find compelling the commenters' concerns regarding scheduling difficulties. We believe the commenters' concerns regarding scheduling warrant more flexibility in the timing of the 13th and 19th visit requirements. Therefore,

we have decided to allow for some flexibility associated with the 13th and 19th therapy visit rule for patients. Specifically, for beneficiaries in rural areas, the qualified therapist may perform the needed therapy service, reassessment and measurement at any time after the 10th therapy visit but no later than the 13th therapy visit, and after the 16th therapy visit but no later than the 19th therapy visit. And, if extenuating circumstances outside the control of the therapist preclude the therapy service visit, reassessment and measurement at the 13th and 19th timeframes, the qualified therapist may perform the therapy service visit, reassessment and measurement at any time after the 10th therapy visit but no later than the 13th therapy visit, and after the 16th therapy visit but no later than the 19th therapy visit.

Regarding the access to care concerns, we believe that these requirements will ultimately result in more access to effective therapy services. MedPAC reports broad access to HH care for Medicare beneficiaries. As such, we do not expect that these coverage clarifications will result in access to care issues, but we will monitor for unanticipated effects.

We note, however, because of the volume of comments we received on this issue, we believe that many agencies have not been in compliance with the documentation practices and qualified therapist oversight we would expect. Therefore, we have decided to delay the effective date of these requirements until April 1, 2011, to allow agencies that do not currently have such practices in place additional time to transition.

Comment: A number of commenters expressed support for our efforts to require reassessments, but had questions as to how assessment visit requirements at the 13th and 19th visit would work when multiple therapy disciplines are providing care. Specifically, commenters stated that because HH therapy can consist of any combination of three therapy disciplines, it would be difficult for therapists to track the 13th and 19th visits if more than one therapy discipline was serving the patient. Commenters asked how it would be determined which therapist would do the 13th and 19th assessments. Additionally, commenters were concerned that CMS might be expecting a therapist of one discipline to do the assessment for the therapist of another discipline. Commenters stated that it would be unrealistic and cumbersome to track the 13th and 19th visits, especially when there are multiple therapy disciplines involved. In a related comment, a commenter recommended further clarification of the proposed regulations by requesting that CMS further specify that professional standards should be those pertaining to the individual professions. The commenter also stated that, because existing Medicare regulations require compliance with Federal, State, and local laws, requiring the proposed qualified therapist visits at defined points in the course of treatment could contradict State licensure and scope of practice laws.

Response: We concur with the commenters that we need to clarify our expectation when more than one therapy discipline is providing services to the patient. We will clarify the regulation text to state that the policy applies to each discipline separately. The patient's function must be initially assessed and periodically reassessed by a qualified therapist of the corresponding discipline for the type of therapy being provided (that is, PT, OT, and/or SLP). When more than one therapy discipline is being provided, the corresponding qualified therapist would perform the reassessment during the regularly scheduled visit associated with that discipline which was scheduled to occur as near as possible to the 13th and 19th visit, but no later than the 13th and 19th visit.

We also note that a small percentage of patients which receive 13 and 19 therapy visits receive more than 1 therapy discipline. In addition, HHAs must coordinate their patients' care per longstanding conditions of participation at § 484.14(g). As such, we would expect such coordination to already be occurring. Given the low volume of such patients and the added flexibility as described above, we do not believe that the coordination associated with multi-therapy discipline patients will be overly burdensome. However, we will monitor the effects of this provision to identify unintended consequences.

Comment: Several commenters suggested that instead of putting additional requirements on all HHAs in response to a smaller number of HHAs who are abusing the system, CMS should target those agencies that are providing unnecessary therapy. A few commenters urged CMS to consider how the therapy provisions of this rule would affect HHAs, especially in rural areas, where there is a shortage of therapists. A commenter also stated that the notion that HH expenditures were high due to unnecessary therapy visits is inaccurate and provided statistics that he believes prove therapy overutilization is not a problem.

Response: As we have described in previous comment responses, we believe that these proposed requirements will strengthen the integrity of the benefit while also resulting in better patient outcomes. We believe all HHAs, not just suspect agencies, should adhere to these best practices in order to provide high-quality and effective therapy services, consistent with existing CoPs.

Comment: A few commenters expressed concern regarding therapy services possibly not being covered after a hospitalization, as a result of these assessment visit requirements. Specifically, the commenters were concerned that we were imposing new limits on maintenance therapy. Commenters expressed fear that the result of not covering such therapy services might be that many high fall risk patients would be sent home without therapy care, which would lead to increased falls/hospitalizations/fractures that would increase Medicare spending in the end. Another commenter stated that physical therapy and occupational therapy were utilized more for safety evaluations and fall prevention measures, especially for patients on medication, which places them at a higher risk for falls. This commenter added that fall prevention best practice interventions provided in patients' homes save Medicare money. Similarly, a commenter asked CMS to clarify therapy coverage for pain.

Response: We agree with the commenter that fall prevention practices and/or pain management are essential for many HH patients in order to provide the patient with quality care. We remind the commenter that a longstanding coverage requirement for HH therapy services under Medicare is that the services which the patient needs must require the performance by or supervision of a qualified therapist. Whether or not fall prevention services and pain management services are covered therapy depends on the unique clinical condition of the patient and the complexity of the needed therapy services. Many fall prevention services would not require the skills of a therapist. Longstanding regulations allow therapy coverage when, for safety and effectiveness reasons, the unique medical complexities of the patient require a qualified therapist's skills in the establishment or performance of a therapy maintenance program. As such, should the unique clinical condition of a patient require that the specialized skills, knowledge, and judgment of a qualified therapist are needed to design and establish a safe and effective maintenance program in connection

with a specific illness or injury, then such services would be covered as therapy services.

Comment: Commenters were opposed to the requirement that a skilled nursing service must be needed in order to have maintenance therapy covered, and that a maintenance program cannot be established after restorative therapy has ended.

Response: The intent of language in the proposed rule was to clarify that, in order for the establishment of a maintenance therapy program to be considered covered therapy, the specialized skills, knowledge, and judgment of a therapist would be required in developing a maintenance program. Services would be covered to design or establish the plan, to ensure patient safety, to train the patient, family members and/or unskilled personnel in carrying out the maintenance plan, and to make periodic reevaluations of the plan. In the proposed rule, we further noted scenarios in which maintenance therapy may be provided in the home setting.

The language in the proposed rule was not meant to indicate that maintenance therapy could not be provided as the sole skilled service and would be covered only if ancillary to another skilled qualifying service. The proposed clarifications were not intended to expand or limit existing coverage criteria. We regret the confusion these scenarios may have caused. We note that therapy coverage criteria have always been based on the inherent complexity of the service which the patient needs. As such, maintenance therapy has and will continue to be covered in the HH setting when the unique clinical condition of the patient requires the complex services which can only be provided effectively and safely by a qualified therapist. We will revise the proposed regulation text to address the commenters' confusion.

Comment: A number of commenters expressed concern regarding proposed regulation text changes that state therapy visits would not be covered for transient or easily reversible loss or reduction in function. Some commenters who opposed the proposed regulation text changes stated that these changes would disallow coverage of maintenance therapy, citing longstanding Medicare HH coverage policies previously set out in the "Health Insurance For the Aged, Home Health Agency Manual," Pub. 11 (HIM–11) that allowed for the coverage of such maintenance therapy. One commenter recommended striking the language, "transient and reversible loss." A commenter also stated that these proposed regulation changes are in direct conflict with section 1814(a)(2)(C) of the Act. Commenters questioned what criteria define a transient and reversible reduction in function, or when a patient's condition could be expected to improve spontaneously. One commenter stated that it is difficult to determine when conditions are or are not transient and reversible, noting that some patients who present a very serious condition on admission may recover quickly, while others with seemingly less-serious conditions can end up being far more complex as treatments progress. Another commenter stated we must take into account the patient's unique condition.

Response: We disagree with the commenter that the proposed regulation text changes conflict with section 1814(a)(2)(C) of the Act. We believe that the commenter is inferring that by not allowing therapy coverage for an easily reversible reduction in function, we would be denying coverage to a patient who needs therapy, an eligibility criterion listed in section 1814(a)(2)(C) of the Act. We disagree with such interpretation. Consistent with statute, longstanding regulation, and longstanding manual guidance, therapy coverage under the HH benefit is based on a patient's need for skilled services. The therapy services must be of such a level of complexity and sophistication or the condition of the beneficiary must be such that the services required can safely and effectively be performed only by a qualified therapist or a qualified therapy assistant under the supervision of a qualified therapist. Services which do not require the performance or supervision of a qualified therapist are not reasonable and necessary services, even if they are performed by a qualified therapist.

When a patient suffers a transient and easily reversible loss or reduction of function which could reasonably be expected to improve spontaneously as the patient gradually resumes normal activities, the services do not require the performance or supervision of a qualified therapist, and those services are not considered reasonable and necessary covered therapy services. We acknowledge that making a determination that a patient suffers a transient and easily reversible loss or reduction of function which could reasonably be expected to improve spontaneously as the patient gradually resumes normal activities requires clinical judgment and a consideration of the patient's unique condition. We believe that rehabilitation professionals, by virtue of their education and experience, are typically able to determine when a functional impairment could reasonably be expected to improve spontaneously as the patient gradually resumes normal activities. Likewise, we expect rehabilitation professionals to be able to recognize when their skills are appropriate to promote recovery. A prescriptive definition of these sorts of conditions, such as a listing of specific disease states that provide subtext for these descriptions is impractical, as each patient's recovery from illness is based on unique characteristics. In response to the commenter who believes that the therapy clarifications would disallow coverage of maintenance therapy, we assure the commenter that these clarifications do not impose new limits on the criteria for maintenance therapy coverage. We again note that therapy coverage criteria have always been based on the inherent complexity of the service which the patient needs. As such, maintenance therapy has and will continue to be covered in the HH setting when the unique clinical condition of the patient requires the complex services, which can only be provided effectively and safely by a qualified therapist. In addition, we note that these clarifications are consistent with longstanding manual guidance.

Comment: A commenter urged CMS to address therapy coverage for conditions that may not directly impact functional status, such as the role of therapists in wound care.

Response: We reiterate that if the services do not require the performance or supervision of a qualified therapist, those services are not considered to be reasonable and necessary covered therapy services. As such, if a therapist (who is qualified to do so per her or his State Practice Act) would perform services such as wound-care, those services would be covered therapy only if they required the skills of the qualified therapist or qualified assistant under the supervision of a qualified therapist. Should a qualified therapist (who is qualified to do so per her or his State Practice Act) perform wound care that does not require the specialized skills of a therapist and could be routinely performed by agency nursing staff, these services would not be covered therapy services.

Comment: A commenter expressed concern over the proposed therapy coverage clarifications, stating that the proposed regulatory text changes are major changes to current policy and that they are in conflict with Medicare statute and current law. The commenter stated that Medicare coverage will be more difficult to obtain for beneficiaries

with chronic and debilitating conditions if the proposals are finalized. The commenter urged CMS to withdraw the maintenance therapy regulation text changes, stating that maintenance therapy is a covered benefit in home health and that Medicare statute does not require improvement for services to qualify for coverage. The commenter stated that the restoration potential of a patient is not the deciding factor in determining whether skilled services are needed, further stating that even if full recovery or medical improvement is not possible, a patient may need skilled services to prevent further deterioration or preserve current capabilities. The commenter stated that a prescribed therapy service which requires the skills of a therapist to help maintain function or prevent slow deterioration is medically necessary and should be covered under the statute. The commenter stated that current regulations recognize this, but the proposed changes minimize this point, and the commenter urged CMS to not restrict benefits in order to fight fraud.

The commenter expressed concern with the proposal's use of the words "improvement" and "progress," fearing an increased emphasis on these terms in the rules for therapy coverage will limit access to care for patients who require maintenance therapy. Further, the commenter alleged that the proposed rule would require improvement for therapy to be covered. The commenter suggested the word "effective" is more appropriate than "improvement" or "progress."

The commenter believed that the proposed regulation text will require the therapist to use complex and sophisticated therapy techniques in order for maintenance therapy to be covered and will thus be a new coverage limitation preventing needed access to therapy, and that the proposed regulation text which states that maintenance therapy must be required in connection with a specific disease would also newly limit maintenance therapy coverage. Further, the commenter alleged that the revised regulation text does not consider the unique condition of the patient as it must and as does the current regulation text. The commenter stated that the proposal newly categorizes maintenance therapy as not rehabilitative, while the current regulations include both restorative and maintenance therapy as rehabilitative. The commenter stated that, should CMS require improvement as a therapy coverage criterion, CMS would be applying an arbitrary "rule of thumb" which does not consider the patient's individual condition, and such a requirement for improvement conflicts with the current regulation at § 409.42. Further, the commenter stated that the proposed regulation text changes will result in denials of Medicare coverage for beneficiaries with long-term, progressive, or incurable conditions. The commenter also took issue with the proposed regulation text change to require the documentation of progress toward goals.

The commenter further stated that the definition of maintenance therapy is too vague and restrictive. The commenter also took issue with the proposed regulation text, which requires that, in order for maintenance therapy to be covered, the skills of a therapist must be needed to ensure the patient's safety "and" the skills of a therapist are needed to provide a safe and effective maintenance program. The commenter believed that we should replace the "and" with an "or". The commenter also stated that the regulation does not define "reasonable and necessary" in a way that clearly provides for coverage of maintenance therapy. As was also mentioned by other commenters, this commenter was concerned that the proposed regulation text describes coverage of the development of a maintenance program during the last visit(s) for rehabilitative therapy, stating that, often, standard practice is to establish and instruct the patient in an appropriate maintenance program at the outset of a course of therapy. The commenter also spoke to the proposed regulation text change, which appears to indicate that we would not cover the establishment of a maintenance program after a restorative therapy program has ended, or if a beneficiary had never met the criteria for restorative therapy. The commenter stated that the proposed regulation text would result in maintenance therapy becoming a dependent service.

Response: The proposed regulatory text clarifications are intended to neither limit nor expand the coverage of therapy in the HH setting, but instead are intended to provide clear therapy guidelines, as suggested by MedPAC, to deter inappropriate provisions of therapy services. As we have described in earlier responses to comments, we also believe that these guidelines will improve patient outcomes, improve therapy effectiveness, and promote more consistent compliance with the Medicare CoPs. However, as we described in an earlier comment response, we agree with the commenter that the proposed regulation text changes may have been unclear in the descriptive scenarios surrounding coverage of the development of a maintenance program, and we will revise the final regulation text changes at § 409.44(c)(2)(iii)(B) to remove the scenarios described in the proposed rule's § 409.44(c)(2)(iii)(B)(1) through (B)(3).

We also agree with the commenter that there are some additional changes to the proposed regulation text that we should finalize for better clarity. We believe that these changes may alleviate some of the commenter's concerns that the proposed rule limits coverage associated with maintenance therapy, and reassure the commenter that the coverage criteria clarifications are consistent with statute, current regulations, and longstanding manual guidance. Specifically, in response to the commenter's concern that we would have newly categorized maintenance therapy as non-rehabilitation, we will delete the proposed regulation text at § 409.44(c)(2)(iii)(A)(2) and (A)(3) for the final rule. We believe our attempts to clarify these definitions are not needed, as those definitions are well defined in § 409.44(c)(2)(iii)(A) through (iii)(C). We will also finalize some technical changes to the proposed regulation text, including replacing several of the proposed regulatory text references to improvements in function with references to the effectiveness of the care plan goals, as suggested by the commenter.

We agree with the commenter that that current regulations and longstanding manual guidance are consistent in that therapy services are covered in the HH setting based on the inherent complexity of the service which the patient needs. As such, maintenance therapy has and will continue to be covered in the HH setting when the unique clinical condition of the patient requires the complex services, which can only be provided effectively and safely by a qualified therapist.

Regarding the commenter's concern that the proposed rule stated that skilled therapy is not reasonable and necessary unless improvement is documented, we disagree with the commenter's interpretation of the proposed rule. However, we agree that we could have been more clear in the regulation text which describes the documentation requirements at § 409.44(c)(2)(i). In the final rule, we will clearly state that maintenance therapy as defined in § 409.44(c)(2)(iii)(B) and § 409.44(c)(2)(iii)(C) would not be subject to the criteria listed in § 409.44(c)(2)(i)(B)(4).

Concerning the comment that the proposed regulation text, which requires the therapist to use complex and

sophisticated therapy techniques in order for maintenance therapy to be covered, imposes a new coverage limitation associated with maintenance therapy and will prevent needed access to therapy, we refer the commenter to longstanding manual guidance at 40.2.2 E. in chapter 7 of the Medicare Benefit Policy Manual, CMS Pub. 100–2. This section contains longstanding guidance which uses the term "complex and sophisticated procedures" when describing reasonable and necessary maintenance therapy. This same chapter instructs a reviewer to consider the inherent complexity of the service when determining if the skills of a therapist are required. The complexity and sophistication of the service are longstanding criteria used to assess whether the skills of a therapist are required. As such, we disagree with the commenter that this is a new limiting criterion. We also disagree that the proposed regulation text changes do not adequately consider the unique condition of the patient when clarifying coverage requirements. In fact, we believe the proposed regulation text changes at § 409.44(c)(2)(iii) refer more comprehensively than the current regulation text to the patient's unique clinical condition as a criterion for determining whether the complex services which must be provided by a therapist are needed. Regarding the commenter's concern that the proposed regulation text changes newly require that maintenance therapy must be needed in connection with a specific disease, we also disagree. Current regulations at § 409.44(c)(2)(iii) describe that establishing a maintenance program would be covered if the skills of a therapist are needed to provide a safe and effective maintenance program in connection with a specific disease. However, we agree that the words "in connection with the patient's illness or injury" instead of "in connection with a specific disease" would be an improvement to the regulation text and we are making this change in this final rule. We disagree with the commenter that current policy allows maintenance therapy to be covered when the skills of a therapist are needed to ensure the patient's safety OR the skills of a therapist are needed in order to provide a safe and effective maintenance program. We have required in regulation and longstanding manual guidance that the skills of a therapist would be required to ensure both patient safety and effectiveness of a maintenance program for the performance of maintenance therapy to be covered.

We refer the commenter to current regulations at § 409.44(c)(2)(iii) and longstanding manual guidance at 40.2.2 E. in chapter 7 of the Medicare Benefit Policy Manual, CMS Pub. 100–2. Regarding the commenter's concern that current § 409.32(c) mandates the restoration potential of a patient is not the deciding factor in determining whether skilled services are needed, and even if full recovery or medical improvement is not possible, a patient may need skilled services to prevent further deterioration or preserve current capabilities, we reply that we believe the commenter may be misunderstanding the current regulation text at § 409.32(c) or interpreting this out of its proper context. We believe it is important to again note that the emphasis for our therapy coverage criteria is not on the issue of restoration potential per se, but rather on the beneficiary's need for complex services which require the skills of a qualified therapist. Current regulations at § 409.32(c) specify that it is the beneficiary's need for *skilled services* rather than his or her restoration potential that is the deciding factor in evaluating the need for skilled nursing services in the HH setting. A beneficiary's restoration potential has never been a factor at all in identifying those services that constitute skilled *nursing* care. Thus, nursing care can be considered skilled without regard to whether it serves to improve a beneficiary's condition or to maintain the beneficiary's current level of functioning. In fact, as the original version of this regulation's text [as initially codified at 20 CFR § 405.127(b)(2) (40 FR 43897, September 24, 1975)] makes clear, this provision's example of a terminal cancer patient was intended to refer specifically to *nursing* services that can be considered skilled "even though no potential for *rehabilitation* exists" (emphasis added). Longstanding current regulatory language at § 409.44(c) sets out the criteria for skilled therapy (as opposed to the skilled nursing criteria described above) to be a covered service under Medicare's HH benefit. Current regulations specify that HH therapy services are covered based on the inherent complexity of the service which the patient needs, and whether the needed services require the skills of a qualified therapist. Further, current regulations state that HH therapy services are covered if there is an expectation that the patient's condition will improve in a reasonable and predictable timeframe based on the physician's assessment of the beneficiary's restoration potential and unique medical condition of the patient. Current regulations also allow for therapy coverage when, for safety and effectiveness, the unique medical complexities of the patient require a qualified therapist's skills in the establishment or performance of a therapy maintenance program.

Regarding the commenter's concerns that, should we require improvement as a therapy coverage criteria, we would be applying an arbitrary "rule of thumb" which does not consider the patient's individual condition, and as such, the requirement conflicts with the current regulation at § 409.44, we again assure the commenter that we are not expanding or limiting the coverage of HH therapy. To address the commenter's concerns regarding the potential for claims denials based on "rules of thumb," we assure the commenter that such denials are prohibited.

"Rules of thumb" in the Medicare medical review process are prohibited. Intermediaries must not make denial decisions solely on the reviewer's general inferences about beneficiaries with similar diagnoses or on general data related to utilization. Any "rules of thumb" that would declare a claim not covered solely on the basis of elements, such as, lack of restoration potential, ability to walk a certain number of feet, or degree of stability, is unacceptable without individual review of all pertinent facts to determine if coverage may be justified. Medical denial decisions must be based on a detailed and thorough analysis of the beneficiary's total condition and individual need for care.

Similar instructions have appeared as far back as 1992 in the previous, paper-based manuals (available online at *http://www.cms.gov/Manuals/PBM/list.asp*), in section 3900.A of the Medicare Intermediary Manual, Part 3 (CMS Pub. 13–3), and in section 214.7 of the Medicare SNF Manual (CMS Pub. 12).

Regarding the comment that the proposed regulation does not define "reasonable and necessary" in a way that clearly provides for coverage of maintenance therapy, we believe the commenter took issue with proposed clarifications surrounding regulations at § 409.44(c)(2)(iv) which state that the amount, frequency, and duration of services must be reasonable. In these revisions we describe that therapy can be considered reasonable and necessary when the criteria for maintenance therapy are met. We believe the commenter suggests we more definitively state that therapy would be

covered in such a case. We concur, and we will make this change.

Comment: One commenter noted that under a state's approved Medicaid State Plan Amendment, therapies may be authorized as appropriate to maintain function or to slow the rate of decline in function. This commenter therefore requested that we consider whether the proposed rule language should be revised to clarify a potential difference in benefits [under Medicaid versus Medicare] or if revised instructions regarding Conditions of Participation (CoPs) applicability is sufficient. For whatever option we choose, this commenter indicated that we should contemplate using the Medicare rules as the foundation for Medicaid HH program rules as this commenter believes that changes are needed to accommodate the permitted differences in benefits.

Response: We thank the commenter but note such a suggestion is outside the scope of this rule, and the issue for which we solicited comments. We will consider this suggestion in the future as we analyze improvements to the HH PPS.

Comment: Commenters stated that, while they applaud our efforts to better define medical necessity and document therapy services, they were also concerned that the new documentation requirements will be a difficult transition for HHAs, stating that the proposed requirement would require significant time and resources for HHAs to ensure that their therapists and other medical staff are educated and prepared to implement the new requirements into their everyday practices. Consequently, this commenter recommended we provide extensive educational outreach and the commenter asked that we delay implementation of these requirements to provide agencies time to retrain staff.

This commenter also recommended that we elaborate further on provisions of the proposed § 409.44(c)(1), including citing references to resources we used for the phrase "with accepted standards of clinical practice," asking us to indicate that these included resources from professional associations. In addition, this commenter asked that we indicate that the "therapy goals" be established by the qualified therapist in conjunction with the physician. This commenter also requested that we further clarify what we mean by objective measurement of therapy progress by including activities of daily living such as walking, eating, bathing, etc. With respect to § 409.44(c)(2)(i), this commenter asked that we clarify what are considered to be "accepted practice" and "effective treatment." Similar to other commenters, this commenter requested that we further acknowledge multi-therapy cases and insert language that allows for some type of window for completing the reassessment prior to or after the 13th or 19th therapy visits, stating that the adjustment should be made to account for extenuating circumstances that are outside the control of the qualified therapist. Regarding assistants making clinical notes, this commenter suggested that we change the phrase "job title" to "professional designation" and clarify that written and electronic signatures are acceptable. Some commenters asked that we eliminate § 409.44(c)(2)(i) altogether. Regarding § 409.44(c)(2)(iii), this commenter requested that because "rehabilitative" and "restorative" are not interchangeable, we change our regulations to be consistent throughout, using only the word "rehabilitative." This commenter also asked that we add a sentence to clearly state that the maintenance program must be established by the qualified therapist. With respect to § 409.44(c)(2)(iv), this commenter asked that we elaborate on the phrase "with accepted standards of clinical practice" and highlight the importance of educating caregivers to ensure patients receive the appropriate level of care. The commenter also requested that we delay implementation of these requirements until April 2011 to allow time for providers to transition.

Response: We thank the commenter for the suggested clarifications and we have adopted the suggested clarifications with some exceptions. We have retained the language in our current regulatory text at § 409.44(c)(2)(iii) which presently mandates that for therapy to be covered, there must be an expectation that the beneficiary's condition will improve materially in a reasonable (and generally predictable) period of time based on the physician's assessment of the beneficiary's restoration potential and medical condition. Typically, we use the term "rehabilitative" to describe services provided by therapists. In the regulation text, we describe the physician's assessment and therefore we believe the "restorative" terminology is appropriate. However, we will finalize additional changes to the proposed regulation text to achieve more consistency in the usage of these terms. As described in an earlier comment, we have adopted the commenter's request for flexibility associated with the 13th and 19th visit. We believe that clarifications regarding electronic signatures are better addressed in manual guidance. Finally, we will implement this provision beginning April 2011.

Comment: Some commenters urged CMS to transform the HH PPS therapy reimbursement model to one based on clinical outcomes and skill improvement. A commenter urged CMS to adopt tests for clinicians, which assess the clinician's abilities.

Response: We thank the commenter for these suggestions. As we described in earlier comment responses, section 3131(d) of the Affordable Care Act requires CMS to conduct a study on costs involved with providing HH services for patients with high severity of illness, including analysis of potential revisions to outlier payments to better reflect costs of treating Medicare beneficiaries and analyze other HH PPS issues determined by the Secretary. We intend to use this opportunity to assess a variety of HH PPS issues, including our current HH PPS therapy threshold reimbursement.

Comment: A commenter suggested that CMS consider making access to physician-ordered medically necessary music therapy as a covered service.

Response: We thank the commenter but note that Congress would need to enact legislation in order to cover music therapy services under Medicare's HH benefit, as they are not currently covered HH services as defined in section 1861(m) of the Act.

Comment: Commenters provided feedback regarding our plans to revise G-codes to reflect greater detail in the reporting of skilled nursing and therapy services. Many commenters requested more time (6 months to a year or more) be allowed before these new and revised codes become effective, so as to give more time for CMS to provide direction to HHAs and thus provide time for agencies to train staff and modify data collection systems to accommodate these coding changes. Another commenter questioned the lead-time to establish new G-codes, stating that it would be impossible for all necessary program changes to be made to all vendor software within three months. This commenter requested that CMS postpone the new and revised G-codes until 2012 to give agencies and vendors time to reprogram the requirements. The commenter also suggested that the types of descriptions of the codes identified suggest that CMS wants to use the codes to determine medically reasonable and necessary care rather than doing actual medical review of patient clinical records. The commenter noted that 60 to 75 percent of claims in which the appeals are taken to the administrative law judge level are reversed and suggested that we already have an issue

with our medical review and program integrity units that would be further exacerbated by the proposed G-codes.

Response: It is important to note that we provided the information on the new G-codes to the industry as a pre-notification of our intention to collect additional information on the claim. The implementation of this provision will be issued in an administrative change notice. We note that in describing our plans in the proposed rule published on July 23, 2010, we intended to provided the industry with early information so that they could begin planning for this change at that time. We currently plan to implement this reporting requirement in January 2011. However, we thank the commenter, and we will consider this suggestion.

Comment: Commenters expressed concern regarding G-code 6, stating that it has combined two dissimilar activities and should be split to avoid confusion, resulting in possible erroneous data. Specifically, commenters indicated that a G-code for services for the management and evaluation of the plan of care should be separate from a G-code for the services for the observation and assessment of a patient's condition while a patient's treatment is stabilized.

Response: We concur with this suggestion and will adopt the separate G-codes.

Comment: Some commenters asked that in revising and adding G-codes for the reporting of HH services, CMS should also consider creating codes to differentiate between the services provided by a registered nurse (RN) and a licensed practical nurse (LPN).

Response: We thank the commenters for this suggestion and will consider their recommendation in future rulemaking.

In summary, we thank the many commenters for their thoughtful and comprehensive suggestions. After considering these comments, we will finalize the proposed therapy coverage clarifications with several changes. We will delay the implementation of the therapy provisions until April 1, 2011, to allow agencies more transition time. We will finalize exceptions to the 13th and 19th qualified therapy visit requirement to provide some flexibility associated with patients in rural areas, patients receiving more than 1 therapy discipline, and documented exceptional circumstances which would preclude the therapist from performing the needed 13th or 19th visit. We have made regulatory text changes to remove confusing scenarios associated with maintenance therapy, which led commenters to believe that maintenance therapy was a dependent service. We will finalize numerous other regulation text changes to clarify that these changes do not impose new limitations on the coverage of maintenance therapy. The changes include clarifications that when the criteria for maintenance therapy is met, a qualified therapist would be assessing the effectiveness of the therapy provided, rather than the patient's progress. Other changes include the removal of definitions of rehabilitative therapy which was confusing to commenters, and other miscellaneous regulation text clarifications which were suggested and we believe improve the clarity of the regulation text.

C. Outlier Policy

1. Background

Section 1895(b)(5) of the Act allows for the provision of an addition or adjustment to the national standardized 60-day case-mix and wage-adjusted episode payment amounts in the case of episodes that incur unusually high costs due to patient HH care needs. Prior to the enactment of the Affordable Care Act in March 2010, this section stipulated that total outlier payments could not exceed 5 percent of total projected or estimated HH payments in a given year. Under the HH PPS, outlier payments are made for episodes for which the estimated costs exceed a threshold amount. The wage adjusted fixed dollar loss (FDL) amount represents the amount of loss that an agency must absorb before an episode becomes eligible for outlier payments. As outlined in our FY 2000 HH PPS final rule (65 FR 41188 through 41190), Medicare provided for outlier payments not to exceed 5 percent of total payments and adjusted the payment rates accordingly.

2. Regulatory Update

In our November 10, 2009 HH PPS final rule for CY 2010 (74 FR 58080 through 58087), we explained that our analysis revealed excessive growth in outlier payments in discrete areas of the country. Despite program integrity efforts associated with excessive outlier payments in targeted areas of the country, we discovered that outlier expenditures exceeded the 5 percent statutory limit. Consequently, we assessed the appropriateness of taking action to curb outlier abuse.

In order to mitigate possible billing vulnerabilities associated with excessive outlier payments, and to adhere to our statutory limit on outlier payments, we adopted an outlier policy of an agency-level cap on outlier payments at 10 percent of the agency's total payments, in concert with a reduced FDL ratio of 0.67. This policy resulted in a projected target outlier pool of approximately 2.5 percent (the previous outlier pool target was 5 percent of total HH expenditures). For CY 2010, we first returned 5 percent back into the national standardized 60-day episode rates, the national per-visit rates, the LUPA add-on payment amount, and the NRS conversion factor. Then, we reduced the CY 2010 rates by 2.5 percent to account for the new outlier pool targeted to 2.5 percent. This revised outlier policy was adopted for CY 2010 only.

3. Statutory Update

Section 3131(b)(1) of the Affordable Care Act amended section 1895(b)(3)(C) of the Act, "Adjustment for outliers," to state, "The Secretary shall reduce the standard prospective payment amount (or amounts) under this paragraph applicable to HH services furnished during a period by such proportion as will result in an aggregate reduction in payments for the period equal to 5 percent of the total payments estimated to be made based on the prospective payment system under this subsection for the period." In addition, section 3131(b)(2) of the Affordable Care Act amended section 1895(b)(5) of the Act by redesignating the existing language as section 1895(b)(5)(A) of the Act, and revising it to state that the Secretary, "may provide for an addition or adjustment to the payment amount otherwise made in the case of outliers because of unusual variations in the type or amount of medically necessary care. The total amount of the additional payments or payment adjustments made under this paragraph with respect to a fiscal year or year may not exceed 2.5 percent of the total payments projected or estimated to be made based on the prospective payment system under this subsection in that year." As such, our HH PPS outlier policy must reduce payment rates by 5 percent, and target up to 2.5 percent of total estimated HH PPS payments to be paid as outlier payments. We will first return the 2.5 percent held for the target CY 2010 outlier pool to the national standardized 60-day episode rates, the national per-visit rates, the LUPA add-on payment amount, and the NRS conversion factor for CY 2010. We will then reduce these rates by 5 percent as required by section 1895(b)(3)(C) of the Act, as amended by section 3131(b)(1) of the Affordable Care Act. For CY 2011 and subsequent calendar years, the total amount of the additional payments or payment adjustments made may not exceed 2.5 percent of the total payments projected

or estimated to be made based on the PPS in that year as required by section 1895(b)(5)(A) of the Act as amended by section 3131(b)(2)(B) of the Affordable Care Act.

4. Outlier Cap

As stated earlier, for CY 2010, we implemented an agency-level cap by limiting HH outlier payments to be a maximum of 10 percent of an agency's total payments (74 FR 58080 through 58087). Section 3131(b)(2)(C) of the Affordable Care Act makes this 10 percent agency-level cap a permanent statutory requirement, by adding a paragraph, (B) "Program Specific Outlier Cap", to section 1895(b)(5) of the Act. The new paragraph states, "The estimated total amount of additional payments or payment adjustments made * * * with respect to a HHA for a year (beginning with 2011) may not exceed an amount equal to 10 percent of the estimated total amount of payments made under this section (without regard to this paragraph) with respect to the HH agency for the year". Therefore, the 10 percent agency-level outlier cap would continue in CY 2011 and subsequent calendar years as required by section 1895(b)(5)(B) of the Act, as added by section 3131(b)(2)(C) of the Affordable Care Act. In summary, section 3131(b) of the Affordable Care Act requires the following outlier policy: (1) Reduce the estimated total payments by 5 percent; (2) target to pay no more than 2.5 percent of estimated total payments for outliers; and (3) apply a 10 percent agency-level outlier cap.

5. Loss-Sharing Ratio and Fixed Dollar Loss (FDL) Ratio

The July 2000 final rule (65 FR 41189) described a methodology for determining outlier payments. Under this system, outlier payments are made for episodes whose estimated cost exceeds a threshold amount. The payment rate for a 60-day episode is the sum of the wage-adjusted national per-visit rate amounts for all visits delivered during the episode. The outlier threshold is defined as the sum of the episode payment rate for that case-mix group and a FDL amount. Both components of the outlier threshold are wage-adjusted. The wage-adjusted FDL amount represents the amount of loss that an agency must experience before an episode becomes eligible for outlier payments. The wage-adjusted FDL amount is computed by multiplying the national standardized 60-day episode payment amount by the FDL ratio, and wage-adjusting that resulting amount. The wage-adjusted FDL amount is then added to the wage-adjusted 60-day episode payment rate to arrive at the wage-adjusted outlier threshold amount.

The outlier payment is defined as a proportion of the wage-adjusted estimated costs beyond the wage-adjusted outlier threshold amount. The proportion of additional costs paid as outlier payments is referred to as the loss-sharing ratio. Prior to the passage of the Affordable Care Act, the FDL ratio and the loss-sharing ratio were selected so that the estimated total outlier payments would not exceed the 5 percent aggregate level. We chose a value of 0.80 for the loss-sharing ratio, which is relatively high, but preserves incentives for agencies to attempt to provide care efficiently for outlier cases. With a loss-sharing ratio of 0.80, Medicare pays 80 percent of the additional costs above the wage-adjusted outlier threshold amount. A loss-sharing ratio of 0.80 is also consistent with the loss-sharing ratios used in other Medicare PPS outlier policies, such as inpatient hospital, inpatient rehabilitation, long-term hospital, and inpatient psychiatric payment systems.

As discussed in the October 1999 proposed rule (64 FR 58169) and the July 2000 final rule (65 FR 41189), the percentage constraint on total outlier payments creates a tradeoff between the values selected for the FDL ratio and the loss-sharing ratio. For a given level of outlier payments, a higher FDL ratio sets higher FDL amounts and thus reduces the number of cases that receive outlier payments, but allows for setting a higher loss-sharing ratio and higher outlier payments per episode. Alternatively, a lower FDL ratio means lower FDL amounts and therefore allows more episodes to qualify for outlier payments but setting a lower loss-sharing ratio and lower outlier payments per episode.

Therefore, setting these two parameters (that is, FDL ratio and loss-sharing ratio) involves policy choices about the number of outlier cases and their payments. In the CY 2010 HH PPS final rule (74 FR 58086), in targeting total outlier payments as 2.5 percent of total HH PPS payments, we implemented a FDL ratio of 0.67.

For this rule, we have updated our analysis from the CY 2010 HH PPS final rule and we estimate that maintaining a FDL ratio of 0.67, in conjunction with a 10 percent cap on outlier payments at the agency level, would target paid outlier payments to be no more than the 2.5 percent of total HH PPS payments as required by section 1895(b)(5)(A) of the Act, as amended by section 3131(b)(2)(B) of the Affordable Care Act.

The following is a summary of the comments we received regarding the outlier payment policy.

Comment: A commenter supported CMS in its efforts to curb fraud and abuse in the Medicare program. The commenter is not opposed to the proposed implementation of these changes to the outlier policy. However, the commenter cautioned CMS to carefully analyze the effect this outlier policy might have on HHAs in rural and underserved areas. Often times, patients who are sicker and more clinically complex may be treated in the HH setting due to lack of access to other post-acute care settings. HHAs treating such patients would have higher outlier costs than HHAs that are located in urban and higher socioeconomic areas. The commenter strongly urged CMS to ensure that these HHAs were not unfairly audited or penalized for the treatment furnished to these patients. Another commenter stated that some remote rural areas have only one agency per county and many counties have no HHAs. In such rural areas, there would be no other agency to share intake of clients who have costly outlier episodes. State regulations for Medicaid or assisted living programs could force clients to be admitted to a nursing home because agencies in these remote rural markets might not be able to afford to provide care for them. The commenter further urges that small HHAs (that is, those with fewer than 300 patients) in remote rural areas should be exempt from the agency-level outlier cap or have a higher cap. Another commenter recommended exempting agencies with fewer than 60 Medicare patients per year from the outlier policy since even one or two outlier episodes could easily reach the cap. This policy could force some small HHAs to refuse care to patients who are most in need of care.

Response: We will take these comments into consideration when we conduct our study on costs involved with providing ongoing access to HH services for patients with high severity of illness, as required by the Affordable Care Act.

Comment: Several commenters stated that the proposed outlier policy is unfair because all agencies are held accountable for the unscrupulous behavior of a few agencies. The commenters believed that CMS is taking a broad stroke approach to implementing changes that could be detrimental to the many agencies that are operating appropriately and in compliance with the regulations. A commenter stated that the outlier policy would further reduce patient access and would fail to target the abusers. Several

commenters stated that the legislative limit placed on the outlier pool would punish all agencies for the outlier policy abuse of a very limited number of agencies. Several commenters recommended restoring the 2.5 percent reduction to the payment rates. Another commenter stated that the proposed cut of 2.5 percent to the base payment for all HHAs in order to "pay" for this policy was unfair and excessive, especially considering other proposed cuts. The commenter recommended that CMS limit any single year rate reductions including statutory reductions and case-mix change adjustments to no greater than an aggregate 2.5 percent. Another commenter noted that the Affordable Care Act mandated that the reduction in payments for outliers be 5 percent and that the outlier target be 2.5 percent of total payments. As the difference of 2.5 percent remains unallocated in the proposed rule, the commenter suggested that CMS redesignate that difference to the proposed 3.79 percent decrease for case-mix change, resulting in a case-mix adjustment of 1.29 percent decrease. Otherwise, the CY 2011 HHA rate will be hit twice—by the 3.79 percent case-mix decrease and the 2.5 percent outlier pool decrease. Another commenter stated that HHAs have already sustained a significant cut in outlier payments, leaving insulin dependent and wound care patients without a nurse to provide injections and necessary wound care treatment. At any given time, an agency cannot assess whether it has the resources to accept these types of patients. A commenter requested that CMS exempt "special needs" HHAs that serve high-cost patients with multiple clinical issues from the 10 percent agency-level outlier cap. The commenter believed a revision to a higher outlier cap is critical for continued provision of care by agencies serving high-need and high-cost beneficiaries without losing critical outlier funding.

Response: Section 3131(b) of the Affordable Care Act does not allow for exceptions to the mandate of the outlier policy which reduces estimated aggregate HH payments by 5 percent, allows no more than an estimated 2.5 percent of aggregate HH payments to be outlier payments, and requires the 10 percent agency-level outlier cap. We do not have regulatory authority to restore the 2.5 percent to the estimated aggregate HH payments. Nonetheless, we will continue to monitor outlier payments in order to advise the legislators of any unintended consequences of this legislation, such as lack of access to care.

Comment: A commenter stated that he interpreted Table 4 in the July 23, 2010 proposed rule (75 FR 43257) to indicate that each year HHAs can expect an additional 2.5 percent reduction to the base episode rate starting from the prior year's base rate before the market basket update. This additional rolling reduction does not seem contemplated in the Affordable Care Act. A commenter stated that the 2.5 percent rate reduction combined with the standard 3 percent inflation/cost of living increases demanded by their employees will result in their agency being unable to hire staff to serve their patients. CMS does not identify actual outlier payment history when addressing these changes in the rule.

Response: The 2.5 percent reduction is not a rolling reduction. The 2.5 percent reduction is a one-time, but permanent, reduction to the HH rates, which is to be applied in CY 2011.

Table 3 shows outlier payment history as a percentage of total HH PPS payments between CY 2004 and CY 2008.

TABLE 3—OUTLIER PAYMENT HISTORY AS A PERCENTAGE OF TOTAL HH PPS PAYMENTS

[Between CY 2004 and CY 2008]

Year	Outlier payment	Total HH PPS payment	Percentage change
2004	$309,198,604	$11,500,462,624	2.69
2005	527,096,653	12,885,434,951	4.09
2006	701,945,386	14,041,853,560	5.00
2007	996,316,407	15,677,329,001	6.36
2008	1,127,162,152	17,114,906,875	6.59

Comment: A commenter stated that the outlier policy will significantly decrease fraudulent behavior within the Miami-Dade, Florida area. The commenter further supports more open dialogue between the HH community and government officials to improve program integrity within the Medicare program.

Response: We appreciate the comment and the commenter's support.

6. Imputed Costs

Section 3131(d) of the Affordable Care Act requires CMS to conduct a study on costs involved with providing HH services for patients with high severity of illness, including analysis of potential revisions to outlier payments to better reflect costs of treating Medicare beneficiaries. CMS will produce a Report to the Congress containing this study's recommendations no later than March 1, 2014.

To consider outlier policy improvements in the nearer term, we solicited comments regarding alternate policy options and methodologies to better account for high cost patients. In particular, we solicited the industry's input on alternatives in imputing costs in the calculation of the outlier payments.

We have discussed and are exploring the possible use of visit intensity data in the imputing of costs as part of the outlier payment calculation and would be interested in the industry's views on such an alternative. In addition, we solicited feedback concerning the use of diagnoses codes (for example, diabetes) as a factor in the calculation of imputed costs associated with outlier payments. We believe that modifying the fixed dollar loss ratio or the loss-sharing ratio now would not improve the current policy. However, we welcome industry comments on such potential modifications.

The following is a summary of the comments we received regarding imputed costs.

Comment: Several commenters stated that visit intensity data or diagnoses are not the only issues impacting outliers. CMS should consider a comprehensive look at resource utilization which might include these factors. Another commenter stated that the proposed rule does not specify how "visit intensity" is to be measured, such as whether the length of the visit or the frequency of visits would be measured. Several commenters stated that in addition to intensity data and diagnoses, resource

utilization, and other factors affect costs for an outlier episode and should be taken into consideration.

Another commenter suggested using actual, inflation-adjusted, agency-specific costs for each discipline rather than the imputed LUPA rates currently used to calculate the outlier payment. Calculations using such costs would reduce abuse by agencies that game the system by providing excessive numbers of visits at visit costs below the LUPA rate. Using actual costs versus imputed costs would better estimate the needs of patients who are severely impaired. Continued use of imputed costs to administer the outlier leaves the program vulnerable to abuse while simultaneously compromising the usefulness of the outlier costs concept for seriously ill patients of reputable agencies.

Response: We appreciate these comments and will take them into consideration when we conduct a study of outlier payments required by the Affordable Care Act. We will produce a Report to the Congress containing this study's recommendations no later than March 1, 2014.

D. CY 2011 Rate Update

1. Home Health Market Basket Update

Section 1895(b)(3)(B) of the Act requires that the standard prospective payment amounts for CY 2011 be increased by a factor equal to the applicable HH market basket update for those HHAs that submit quality data as required by the Secretary. Section 3401(e) of the Affordable Care Act amended section 1895(b)(3)(B) of the Act by adding a new clause (vi) which states, "After determining the HH market basket percentage increase * * * the Secretary shall reduce such percentage * * * for each of 2011, 2012, and 2013, by 1 percentage point. The application of this clause may result in the HH market basket percentage increase under clause (iii) being less than 0.0 for a year, and may result in payment rates under the system under this subsection for a year being less than such payment rates for the preceding year."

The following is a summary of the comments we received regarding the HH market basket update.

Comment: A commenter believes that the market basket index fails to include consideration of the direct cost increases that CMS rules may have on the delivery of care. Instead, the index evaluates general cost changes such as the cost of caregivers, transportation, insurance, and office space. This approach does not provide CMS with sufficient information to adjust payment rates in relation to regulatory cost increases.

When the HH services "product" changes because of new regulatory requirements, CMS should include in the market basket index an element to address the resulting cost changes. Alternatively, CMS should adjust base payment rates to account for such cost changes as done previously for costs associated with OASIS.

Response: The HH market basket is not designed to account for changes in total costs (such as those associated with the implementation of OASIS–C or other initiatives), but is rather intended to measure the input price pressures that the average HH provider is expected to face in the coming year.

The composition of the market basket itself is made up of a set of mutually exclusive and exhaustive cost categories that reflect the cost structure of the industry (in a given base year). The HH index's cost shares (or weights) are based on data reported on the Medicare cost report forms and are specific to HHAs. Each cost category is assigned an appropriate price proxy whose projected movements are weighted by their respective cost shares and aggregated to arrive at the actual market basket update.

Any cost increases that a provider bears based on regulatory requirements must be reflected in the increasing costs of the inputs on provision of the service. When the market basket is rebased, cost changes will be accounted for in the data, up to and including the base year. We evaluate the cost weight distributions on a periodic basis. If the cost structure of the HH industry changes, such as a greater share of expenses being devoted to wages and salaries, we will propose to rebase and revise the market basket, as appropriate.

Comment: A commenter states that the continued reductions to the home health market basket update each year for 2011, 2012, and 2013 are drastic. These cuts come at a time when labor costs—particularly nurses and therapist—continue to rise.

Response: Since publication of the CY 2011 HH PPS proposed rule, we have updated the HH market basket increase for CY 2011. The updated HH market basket increase is 2.1 percent, which is based on IHS Global Insight Inc.'s third quarter 2010 forecast, utilizing historical data through the second quarter of 2010. A detailed description of the methodology used to derive the HH market basket is available in the CY 2008 HH PPS proposed rule (72 FR 25356, 25435). Due to the new requirement at section 1895(b)(3)(B)(vi) of the Act, the CY 2011 market basket update of 2.1 percent must be reduced by 1 percentage point to 1.1 percent. In effect, the CY 2011 market basket update is 1.1 percent. The statute does not permit us to exercise any discretion with respect to the application of this percentage point reduction.

2. Home Health Care Quality Improvement

a. OASIS

Section 1895(b)(3)(B)(v)(II) of the Act requires that "each home health agency shall submit to the Secretary such data that the Secretary determines are appropriate for the measurement of health care quality. Such data shall be submitted in a form and manner, and at a time, specified by the Secretary for purposes of this clause." In addition, section 1895(b)(3)(B)(v)(I) of the Act dictates that "for 2007 and each subsequent year, in the case of a HHA that does not submit data to the Secretary in accordance with sub clause (II) with respect to such a year, the HH market basket percentage increase applicable under such clause for such year shall be reduced by 2 percentage points." This requirement has been codified in regulations at § 484.225(i).

Accordingly, for CY 2011, we will continue to use a HHA's submission of OASIS data to meet the requirement that the HHA submit data appropriate for the measurement of health care quality. For CY 2011, we proposed to consider OASIS assessments submitted by HHAs to CMS in compliance with HHA Conditions of Participation for episodes beginning on or after July 1, 2009 and before July 1, 2010 as fulfilling the quality reporting requirement for CY 2011. This time period allows for 12 full months of data collection and would provide us the time necessary to analyze and make any necessary payment adjustments to the payment rates in CY 2011. We will reconcile the OASIS submissions with claims data in order to verify full compliance with the quality reporting requirements in CY 2011 and each year thereafter on an annual cycle July 1 through June 30 as described above.

As set forth in the CY 2008 final rule, agencies do not need to submit quality data for those patients who are excluded from the OASIS submission requirements under the Home Health Conditions of Participation (CoP) (§ 484.200 through 484.265), as well as those excluded, as described in the Final Rule Medicare and Medicaid Programs: Reporting Outcome and Assessment Information Set Data as Part of the Conditions of Participation for

Home Health Agencies December 23, 2005 (70 FR 76202) as follows:

- Those patients receiving only non-skilled services;
- Neither Medicare nor Medicaid is paying for HH care (patients receiving care under a Medicare or Medicaid Managed Care Plan are not excluded from the OASIS reporting requirement);
- Those patients receiving pre- or post-partum services; or
- Those patients under the age of 18 years.

As set forth in the CY 2008 final rule (72 FR 49863), agencies that become Medicare-certified on or after May 1 of the preceding year (2010 for payments in 2011) are excluded from any payment penalty for quality reporting purposes for the following CY. Therefore, HHAs that are certified on or after May 1, 2010 are excluded from the quality reporting requirement for CY 2011 payments. These exclusions only affect quality reporting requirements and do not affect the HHA's reporting responsibilities under the CoP. HHAs that meet the quality data reporting requirements would be eligible for the full HH market basket percentage increase. HHAs that do not meet the reporting requirements would be subject to a 2 percent reduction to the HH market basket increase in conjunction with applicable provisions of the Affordable Care Act, as discussed in the section II.X. of this final rule "CY 2011 Payment Update."

Section 1895(b)(3)(B)(v)(III) of the Act further requires that "[t]he Secretary shall establish procedures for making data submitted under sub clause (II) available to the public. Such procedures shall ensure that a HHA has the opportunity to review the data that is to be made public with respect to the agency prior to such data being made public." We will continue to use the subset of OASIS data that is utilized for quality measure development and publicly reported on Home Health Compare as the appropriate measure of HH quality.

To meet the requirement for making such data public, we will continue to use the Home Health Compare Web site, which lists HHAs geographically. Currently, the Home Health Compare Web site lists 12 quality measures from the OASIS data set as described later. The Home Health Compare Web site, which is scheduled to be redesigned this Fall is located at *http://www.medicare.gov/HHCompare/Home.asp.* Each HHA currently has pre-publication access, through the CMS contractor, to its own quality data, as the contractor updates this periodically. We will continue this process, to enable each agency to view its quality measures before public posting of data on Home Health Compare Web site.

The following 12 outcome measures are currently publicly reported:

- Improvement in ambulation/locomotion;
- Improvement in bathing;
- Improvement in transferring;
- Improvement in management of oral medications;
- Improvement in pain interfering with activity;
- Acute care hospitalization;
- Emergent care;
- Discharge to community;
- Improvement in dyspnea;
- Improvement in urinary incontinence;
- Improvement in status of surgical wounds; and
- Emergent care for wound infections, deteriorating wound status.

We will continue to use specified measures derived from the OASIS data for purposes of measuring HH care quality. This would also ensure that providers would not have an additional burden of reporting quality of care measures through a separate mechanism, and that the costs associated with the development and testing of a new reporting mechanism would be avoided.

We have changed the set of OASIS outcome measures that will be publicly reported beginning in July 2011 to include the following outcome measure:

- Increase in number of pressure ulcers.

This outcome measure is the percentage of patient episodes in which there was an increase in the number of unhealed pressure ulcers. This measure is important because pressure ulcers are key indicators of the effectiveness of care and are among the most common causes of harm to patients. Though consensus endorsement is not a requirement for public reporting of HH quality measures, this measure is endorsed by the National Quality Forum (NQF).

As previously stated, although NQF endorsement is not required for public reporting, we will discontinue public reporting of certain outcome measures, which were previously reported on Home Health Compare and are no longer endorsed by NQF. Those measures are the following:

- Discharge to community;
- Improvement in Urinary Incontinence; and
- Emergent Care for Wound Infections, Deteriorating Wound Status.

We solicited comments on these measures in the CY 2011 HH PPS proposed rule.

Additionally, the change to OASIS–C results in modifications to two of the outcome measures as follows:

- Improvement in bed transferring: This measure replaces the previously reported measure improvement in transferring. It provides a more focused measurement of the ability to turn and position oneself in bed and transfer to and from the bed.
- Emergency Department Use without Hospitalization: This measure replaces the previously reported measure: Emergent care. It excludes emergency department visits that result in a hospital admission because those visits are already captured in the acute care hospitalization measure.

To summarize, the following outcome measures, which comprise measurement of HH care quality, will be publicly reported beginning in July 2011:

- Improvement in ambulation/locomotion;
- Improvement in bathing;
- Improvement in bed transferring;
- Improvement in management of oral medications;
- Improvement in pain interfering with activity;
- Acute care hospitalization;
- Emergency Department Use without Hospitalization;
- Improvement in dyspnea;
- Improvement in status of surgical wounds; and
- Increase in number of pressure ulcers.

We implemented use of the OASIS–C (Form Number CMS–R–245 (OMB# 0938–0760)) on January 1, 2010. This revision to OASIS was tested and has been distributed for public comment and other technical expert recommendations over the past few years. The OASIS–C is on the CMS Web site at *http://www.cms.hhs.gov/HomeHealthQualityInits/12_HHQIOASISDataSet.asp#TopOfPage.*

As a result of changes to the OASIS data set, process of care measures are available as additional measures of HH quality. We published information about new process measures in the August 13, 2009 proposed rule (74 FR 40960) and in the November 10, 2009 final rule with comment period (74 FR 58096). We proposed and made final the decision to update the Home Health Compare Web site in October 2010 to reflect the addition of the following 13 new *process* measures:

- Timely initiation of care;
- Influenza immunization received for current flu season;
- Pneumococcal polysaccharide vaccine ever received;
- Heart failure symptoms addressed during short-term episodes;

- Diabetic foot care and patient education implemented during short-term episodes of care;
- Pain assessment conducted;
- Pain interventions implemented during short-term episodes;
- Depression assessment conducted;
- Drug education on all medications provided to patient/caregiver during short-term episodes;
- Falls risk assessment for patients 65 and older;
- Pressure ulcer prevention plans implemented;
- Pressure ulcer risk assessment conducted; and
- Pressure ulcer prevention included in the plan of care.

The implementation of OASIS–C impacts the schedule of quality measure reporting for CY 2010 and CY 2011. While sufficient OASIS–C data are collected and risk models are developed, the outcome reports (found on the Home Health Compare Web site and the contractor outcome reports used for HHA's performance improvement activities) will remain static with OASIS–B1 data. The last available OASIS–B1 reports will remain in the system and on the HHC site until they are replaced with OASIS–C reports. Sufficient numbers of patient episodes are needed in order to report measures based on new OASIS–C data. This is important because measures based on patient sample sizes taken over short periods can be inaccurate and misleading due to issues like seasonal variation and under-representation of long-stay HH patients. Once sufficient OASIS–C data have been collected and submitted to the national repository, we will begin producing new reports based on OASIS–C.

December 2009 was the last month for which OBQI/M data was calculated for OASIS–B1 data and OASIS–B1 OBQI/M reports continue to be available after March 2010. OASIS–C process measures are available to preview as of September 2010 and will be publicly reported in October 2010. OASIS–C outcome measures will be available to preview in May 2011 and will be publicly reported in July 2011.

The following is a summary of the comments we received regarding the Home Health Care Quality Improvement: OASIS proposal.

Comment: One commenter expressed support for the proposed changes in OASIS reporting. Another commenter stated support for quality reporting. Commenters also stated they support the changes in OASIS publicly reported indicators and expressed support for the continued submission of OASIS data and expressed their commitment to continue working with CMS to develop appropriate measures. Commenters also support the adoption of OASIS–C process measures and applaud CMS for creating this patient-focused system.

Response: We appreciate the positive feedback regarding changes in the measures which will be publicly reported and the quality reporting efforts in general. We appreciate the industry's encouragement and willingness to adopt the new methods that reflect the quality of care provided to Medicare beneficiaries.

Comment: One commenter expressed concern with the addition of the Increase in Number of Pressure Ulcers measure to publicly reported outcomes. The commenter stated that it is not an appropriate measure of the homecare agencies' effectiveness of care but rather of the family's effectiveness and that HHAs are not responsible for the care provided 24 hours a day.

Response: Though HH services are provided on an intermittent, part-time basis, and HHA staff are not present in the home 24 hours per day, the HHA is responsible for determining that the level of care provided by the agency is safe and adequate to manage the needs of the patient. Monitoring and addressing adherence to the Plan of Care established by the physician, HHA, patient, and family is the responsibility of the HHA. In many cases, though we agree not all, the provision of skilled nursing services, which includes family/caregiver instruction, in conjunction with the provision of personal care services, can accomplish a great deal in the prevention of new pressure ulcers. We believe this is an important indicator of HHA performance related to best practices, patient safety, and comfort. This measure is also harmonized with similar measures in other settings. We will move forward with reporting Increase in Number of Pressure Ulcers on Home Health Compare in July 2011.

Comment: One commenter urged CMS to maintain "Improvement in Urinary Incontinence" among the publicly reported outcome measures, stating that this measure is of utmost importance to Medicare beneficiaries' quality of life and Medicare costs. Another commenter expressed disappointment in the removal of the outcome measure "Discharge to Community" from public reporting, stating their belief that this measure is one of the best measures of the effectiveness of HHA intervention.

Response: The Improvement in Urinary Incontinence outcome measure did not receive endorsement from NQF when reviewed in March 2009. NQF's rationale primarily involved concerns about reliability of the data, that is, that this information is difficult to capture reliably due to issues with patient reporting. We have also received feedback from providers and consumers, which leads us to believe that the measure lacks salience and meaningful use, particularly among consumers. It appears that consumers are unable to link this outcome to the HHA's performance and cannot attribute improvement to HHA care.

The Discharge to Community measure also did not receive endorsement from NQF when reviewed in March 2009. NQF determined that this measure did not reflect whether patients met their treatment goals, but only that they were discharged from services, which may have been for other reasons unrelated to the care provided. NQF also noted that the acute care hospitalization measure captures many of these patients. However, the comments offered do present meaningful information that we will find useful when considering resubmitting these measures for NQF endorsement. Please note that these measures will continue to be provided to agencies for use in quality/performance improvement efforts.

Comment: One commenter recommended CMS consider ending the requirement that OASIS data be submitted for Medicare Advantage (MA) plans, noting that that they have not found an MA plan that has used the data in the past decade.

Response: Under section 1891(b) of the Act, the Secretary is responsible for assuring that the Conditions of Participation (CoPs) and their enforcement are adequate to protect the health and safety of individuals under the care of an HHA and to promote the effective and efficient use of Medicare funds. Medicare funds are used to pay for care provided to patients covered by MA plans.

Under sections 1861(o), 1871, and 1891 of the Act, the Secretary has established in regulations the requirements that an HHA must meet to participate in the Medicare program. These requirements are set forth at 42 CFR Part 484, Conditions of Participation: Home Health Agencies. The current HH CoPs require that all HHAs participating in Medicare and Medicaid (including managed care organizations providing HH services to Medicare and Medicaid beneficiaries) collect and report OASIS data on adult, non-maternity patients receiving skilled care.

One of the major purposes of collecting and reporting OASIS data is to track the quality of patient outcomes.

It is important that the content of reports depicting the status of patient outcomes and the HHA use of best practices include measures related to *all* Medicare beneficiaries, including those covered by MA Plans. It is also important to include MA beneficiary data in the calculation of agency, state, and national averages in both agency level and public quality measure reports. This quality information is available for use and is actually used not only by payers, but also by researchers, providers, and consumers of HH services. We are not currently considering a change in the OASIS reporting requirements.

Comment: Two commenters urge that CMS remove New York State's LTHHCP agencies from the *Pay for Reporting* (P4R) initiative in order to ensure that these programs will not be adversely/unfairly affected or penalized once CMS implements a *Pay for Performance* system. The commenter also requests that any special needs CHHAs be removed from the P4R initiative for the same reasons.

Response: The *Pay for Reporting* initiative requires that all Medicare certified HHAs submit OASIS assessments. The HH P4R requirements are based in section 5201(c)(2) of the DRA, which provides for an adjustment to the HH market basket percentage update depending on their submission of quality data. HHAs that submit the required quality data using OASIS will receive payments based on the full HH market basket update each calendar year. If a HHA does not submit quality data, the HH market basket will be reduced by 2 percentage points based on annual payment rule and the Congress. The submission of OASIS assessments is also required by the CoPs and as a Condition of Payment. The only exceptions to the reporting requirements are:

- Prepartum and postpartum patients;
- Patients under the age of 18;
- Patients not receiving skilled health care services; and
- Non-Medicare/non-Medicaid patients (patients receiving care under a Medicare or Medicaid Managed Care Plan are not excluded from the OASIS reporting requirement).

Since New York's LTHHCP agencies or any special needs CHHAs do not fall within these exclusions, we are not waiving their reporting requirements.

The Affordable Care Act requires that we submit a Report to Congress outlining a Value Based Purchasing Plan for HHAs by October, 1, 2011. We are in the process of developing the Home Health Value Based Purchasing report and decisions have not yet been made about this issue. Therefore, it would be premature to link a Pay for Performance system to OASIS submission at this time.

Comment: One commenter expressed concern that it is too soon to publicly report the new OASIS–C process measures and request an additional year of study and refinement before these measures are released to the public. The commenter also states that most agencies have no way to identify where they stand with regard to the process items and that many of these items remain problematic and confusing to providers.

Response: The process measure reports, which detail the 47 new process measures based on OASIS–C, were made available to HHAs via the CASPER reporting system as of September 1, 2010. The availability of these reports meets the statutory requirement that HHAs have opportunity to view their measures prior to public reporting. Thirteen of the process measures were posted on Home Health Compare in October 2010.

We recognize that agencies have experienced many changes with the transition to OASIS–C on January 1, 2010 and will need to continue to make adjustments to move their newly measured performance forward. These changes and adjustments are all intended to improve the care provided to beneficiaries and to provide best practices that HHAs may choose to implement for their HH patients. Process measures are mechanisms for assessing the degree to which a provider competently and safely delivers clinical services that are appropriate for the patient in the optimal time period. Through efforts over time, HHAs should see improvements in their process measure reports, including those that are publicly reported. Recognizing that the first set of reports will provide the baseline of performance on which HHAs can build, we will continue with the proposed reporting plan and timeline.

There are several resources available to assist with any remaining confusion within the HH industry related to the process items that include the following:

- In 2009, CMS provided three Train the Trainer calls via the Medicare Learning Network one of which focused on process items and measures. All three transcripts are still available at *http://www.cms.gov/HomeHealthQualityInits/03_EducationalResources.asp#TopOfPage.*
- A new training video specific to Process-Based Quality Improvement (PBQI) is now available on YouTube at *http://www.youtube.com/watch?v=hNno1GIVAPA.*
- Four new and/or revised manuals are also available as downloads from the Home Health Quality Initiatives site at *http://www.cms.gov/HomeHealthQualityInits/.*
- For questions regarding the OASIS items, the OASIS Answers mailbox can be accessed at *cmsoasisquestions@oasisanswers.com.*

Comment: One commenter expressed concern with the increased demands placed upon HHAs to provide information regarding the quality of their services, and that possibly these newer requirements are unfair to HHAs that are honestly trying to provide good services and that agencies would stop admitting patients that are in dire need of HH services because outcomes would not be good. The commenter was concerned at the presence of unscrupulous HHAs that are taking advantage of seniors who are deserving of quality HH care, and advised CMS to be more cautious as to whom they let into the program. Another commenter stated that OASIS is very time consuming and the addition of HHCAHPs is "enough." Some commenters suggested that OASIS–C, HHCAHPS, and general Quality Management requirements are unfunded mandates; that are very costly to implement. One commenter expressed concern that there is no mention of risk adjustments on publicly reported data. Another commenter noted that neither quality measures nor HHCAHPS address communication or swallowing capabilities.

Response: We appreciate these commenters' concerns about fraudulent HH providers. We are also aware that newer requirements, such as OASIS–C and HHCAHPS, may be perceived as an additional and burdensome responsibility that HHAs now have. However, we believe that both the OASIS–C process measures and HHCAHPS will be very useful to both HH beneficiaries and HHAs. Recipients of HH services will have access to more information about the quality of HH care. HHAs can utilize the data gleaned from these new requirements for their internal quality improvement purposes, which will assist them as businesses and providers. The HH quality requirements are intended to provide improved support for agency quality improvement efforts and enhanced quality information for both providers and beneficiaries. Process of care items that measure agencies' use of evidence-based practices that have been shown to prevent exacerbation of serious conditions can improve care received by

individual patients and can provide guidance to agencies on how to improve care and avoid adverse events.

Regarding the addition of process measures and best practices, it is also important to note that HHAs are encouraged to use these best care practices but *they are not mandated* under the current CoPs.

With the exception of requiring that the item be included on the assessment form and answered, we are not prescribing the content of agency clinical assessments or mandating specific processes of care. There is no requirement for agencies to change their care processes to match the evidence-based practices measured in the OASIS C. It is up to each agency to determine which practices it will implement based on its own patients and operations. Regarding risk adjustment, all outcome measures will be risk adjusted for HHA reports and for public reporting. Regarding the absence of measures related to communication and swallowing, the development of both quality measures and patient satisfaction questions are dynamic processes and we will consider these categories in our future efforts.

After considering the comments submitted, we have decided to finalize what was originally proposed.

b. Home Health Care CAHPS Survey (HHCAHPS)

In the HH PPS Rate Update for CY 2010 final rule (74 FR 58078), we expanded the HH quality measures reporting requirements for Medicare-certified agencies to include the CAHPS® Home Health Care (HHCAHPS) Survey for the CY 2012 annual payment update (APU). We are maintaining our existing policy as promulgated in the HH PPS Rate Update for CY 2010, and are moving forward with its plans for HHCAHPS linkage to the P4R requirements affecting the HH PPS rate update for CY 2012.

As part of the U.S. Department of Health and Human Services' (DHHS) Transparency Initiative, we have implemented a process to measure and publicly report patient experiences with HH care using a survey developed by the Agency for Healthcare Research and Quality's (AHRQ's) Consumer Assessment of Healthcare Providers and Systems (CAHPS®) program. The HHCAHPS survey is part of a family of CAHPS® surveys that asks patients to report on and rate their experiences with health care. The HHCAHPS survey presents HH patients with a set of standardized questions about their HH care providers and about the quality of their HH care. Prior to this survey, there was no national standard for collecting information about patient experiences that would enable valid comparisons across all HHAs.

(i) Background and Description of the HHCAHPS

AHRQ, in collaboration with its CAHPS grantees, developed the CAHPS® Home Health Care Survey with the assistance of many entities (for example, government agencies, professional stakeholders, consumer groups and other key individuals and organizations involved in HH care). The HHCAHPS survey was designed to measure and assess the experiences of those persons receiving HH care with the following three goals in mind:

- To produce comparable data on patients' perspectives of care that allow objective and meaningful comparisons between HHAs on domains that are important to consumers;
- To create incentives for agencies to improve their quality of care through public reporting of survey results; and
- To hold health care providers accountable by informing the public about the providers' quality of care.

The development process for the survey began in 2006 and included a public call for measures, review of the existing literature, consumer input, stakeholder input, public response to **Federal Register** notices, and a field test conducted by AHRQ. AHRQ conducted this field test to validate the length and content of the CAHPS® Home Health Care Survey. We submitted the survey to the NQF for consideration and endorsement via their consensus process. NQF endorsement represents the consensus opinion of many healthcare providers, consumer groups, professional organizations, health care purchasers, Federal agencies, and research and quality organizations. The survey received NQF endorsement on March 31, 2009. The HHCAHPS survey received clearance from OMB on July 18, 2009, and the OMB number is 0938–1066.

The HHCAHPS survey includes 34 questions covering topics such as specific types of care provided by HH providers, communication with providers, interactions with the HHA, and global ratings of the agency. For public reporting purposes, we will utilize composite measures and global ratings of care. Each composite measure consists of four or more questions regarding one of the following related topics:

- Patient care
- Communications between providers and patients
- Specific care issues (medications, home safety, and pain)

There are also two global ratings; the first rating asks the patient to assess the care given by the HHA's care providers; and the second asks the patient about his or her willingness to recommend the HHA to family and friends.

The survey is currently available in five languages. At the time of the CY 2010 HH PPS final rule published on November 10, 2009, HHCAHPS was only available in English and Spanish translations. In the proposed rule for CY 2010, we stated that CMS would provide additional translations of the survey over time in response to suggestions for any additional language translations. We now offer HHCAHPS in English, Spanish, Chinese, Russian, and Vietnamese languages. We will continue to consider additional translations of the HHCAHPS in response to the needs of the HH patient population.

The following types of HH care patients are eligible to participate in the HHCAHPS survey:

- Current or discharged Medicare and/or Medicaid patients who had at least one skilled HH visit at any time during the sample month;
- Patients who were at least 18 years of age at any time during the sample period, and are believed to be alive;
- Patients who received at least two skilled care visits from HHA personnel during a 2-month look-back period. (Note that the 2-month look-back period is defined as the 2-month period prior to and including the last day in the sample month);
- Patients who have not been selected for the monthly sample during any month in the current quarter or during the 5 months immediately prior to the sample month;
- Patients who are not currently receiving hospice care;
- Patients who do not have "maternity" as the primary reason for receiving HH care; and
- Patients who have not requested "no publicity status."

We are maintaining for the CY 2012 APU the existing requirements for Medicare-certified agencies to contract with an approved HHCAHPS survey vendor. Beginning in summer 2009, interested vendors applied to become approved HHCAHPS survey vendors. The application process is online at *https://www.homehealthcahps.org*. Vendors are required to attend introductory and all update trainings conducted by CMS and the HHCAHPS Survey Coordination Team, as well as to pass a post-training certification test. We now have 40 approved HHCAHPS survey vendors. In this rule, we also

codify the requirements for being an approved HHCAHPS survey vendor for the CY 2013 APU.

HHAs started to participate in HHCAHPS on a voluntary basis beginning in October 2009. We define "voluntary participation" as meaning that HHCAHPS participation is not attached to the quality reporting requirement for the APU. These agencies selected a vendor from the list of HHCAHPS approved survey vendors, which is available at *https://www.homehealthcahps.org*.

(ii) Public Display of the Home Health Care CAHPS Survey Data

The Home Health Care CAHPS data will be incorporated into the Home Health Compare Web site to complement the clinical measures. The HHCAHPS data displays will be very similar to those of the Hospital CAHPS (HCAHPS) data displays and presentations on the Hospital Compare Web site, where the patients' perspectives of care data from HCAHPS are displayed along with the hospital clinical measures of quality. We believe that the HHCAHPS will enhance the information included in Home Health Compare by providing Medicare beneficiaries a greater ability to compare the quality of HHAs. We anticipate that the first reporting of HHCAHPS data will be in spring/summer 2011. The first reporting of HHCAHPS data will include data that were collected in the voluntary period of HHCAHPS data collection (October 2009 through September 2010), prior to the period when HHCAHPS data collection will count toward the 2012 APU requirements. HHAs will be able to suppress the public reporting of data collected in the voluntary period of data collection.

(iii) Participation Requirements for CY 2012: The Consumer Assessment of Healthcare Providers and Systems (CAHPS®) Home Health Care Survey

In the CY 2010 HH PPS final rule (74 FR 58078, *et seq.*), we stated that HHCAHPS would not be required for the APU for CY 2011. However, we stated that data collection should take place beginning in CY 2010 in order to meet the HHCAHPS reporting requirements for the CY 2012 APU Medicare-certified agencies were asked to participate in a dry run for at least 1 month in third quarter of 2010, and begin continuous monthly data collection in October 2010 in accordance with the Protocols and Guidelines Manual located on the HHCAHPS Web site at *https://www.homehealthcahps.org.*

The dry run data should be submitted to the Home Health CAHPS® Data Center by 11:59 p.m., Eastern Standard Time on January 21, 2011. The dry run data will not be publicly reported on the CMS Home Health Compare Web site. The purpose of the dry run is to provide an opportunity for vendors and HHAs to acquire first-hand experience with data collection, including sampling and data submission to the Home Health CAHPS® Data Center.

The mandatory period of data collection for the CY 2012 APU includes the dry run data in the third quarter 2010, data from the fourth quarter 2010 (October, November and December 2010), and data from the first quarter 2011 (January, February and March 2011). We previously stated that all Medicare-certified HHAs should continuously collect HHCAHPS survey data for every month in every quarter beginning with the fourth quarter (October, November, and December) of 2010, and submit these data for the fourth quarter of 2010 to the Home Health CAHPS® Data Center by 11:59 p.m., Eastern Daylight Time on April 21, 2011. The data from the 3 months of the first quarter 2011 should be submitted to the Home Health CAHPS® Data Center by 11:59 p.m., Eastern Daylight Time on July 21, 2011. These data submission deadlines are firm (that is, no late submissions will be accepted).

These periods (a dry run in third quarter 2010, and 6 months of data from October 2010 through March 2011) have been deliberately chosen to comprise the HHCAHPS reporting requirements for the CY 2012 APU because they coincide with the OASIS–C reporting requirements that are due by June 30, 2011 for the CY 2012 APU. In the previous rule, we stated that the HHCAHPS survey data would be submitted and analyzed quarterly, and that the sample selection and data collection would occur on a monthly basis. HHAs should target 300 completed HHCAHPS survey annually. Smaller agencies that are unable to reach 300 survey completes by sampling would survey all HHCAHPS eligible patients.

We stated that survey vendors initiate the survey for each monthly sample within 3 weeks after the end of the sample month. We wrote that all data collection for each monthly sample would have to be completed within 6 weeks (42 calendar days) after data collection began. Three survey administration modes could be used: mail only; telephone only; and mail with telephone follow-up (the "mixed mode"). We also conveyed that for mail-only and mixed-mode surveys, data collection for a monthly sample would have to end 6 weeks after the first questionnaire was mailed. We stated that for telephone-only surveys, data collection would have to end 6 weeks following the first telephone attempt. These criteria would remain the same for HHCAHPS data collection to meet the CY 2012 APU requirements.

As stated in the CY 2010 HH PPS final rule (74 FR 58078), we would exempt Medicare-certified HHAs certified on or after April 1, 2011 from the HHCAHPS reporting requirements for CY 2012 as data submission and analysis will not be possible for an agency this late in the reporting period for the CY 2012 APU requirements.

We would also exempt Medicare-certified agencies from the HHCAHPS reporting requirements if they have fewer than 60 HHCAHPS eligible unique patients from April 1, 2009 through March 31, 2010. In the CY 2010 HH PPS final rule, we stated that by June 16, 2010, HHAs would need to provide CMS with patient counts for the period of April 1, 2009 through March 31, 2010. We have posted a form that the HHAs need to use to submit their patient counts on the Web site at *https://www.homehealthcahps.org.* This patient counts reporting requirement pertains only to Medicare-certified HHAs with fewer than 60 HHCAHPS eligible, unduplicated or unique patients for that time period. The aforementioned agencies would be exempt from conducting the HHCAHPS survey for the APU in CY 2012. In this rule, we codify the requirement that if an HHA has fewer than 60 eligible unique HHCAHPS patients annually, then they must submit to CMS their total patient counts in order to be exempt from the HHCAHPS reporting requirement.

For CY 2012, we maintain our policy that all HHAs, unless covered by specific exclusions, meet the quality reporting requirements or be subject to a 2 percentage point reduction in the HH market basket percentage increase in accordance with section 1895(b)(3)(B)(v)(I) of the Act.

A reconsiderations and appeals process is being developed for HHAs that fail to meet the HHCAHPS data collection requirements. We proposed that these procedures will be detailed in the CY 2012 HH payment rule, the period for which HHCAHPS data collection would be required for the HH market basket percentage increase. During September through October 2011, we will compile a list of HHAs that are not compliant with OASIS–C and/or HHCAHPS for the 2012 APU requirements. These HHAs would

receive explicit instructions about how to prepare a request for reconsideration of the CMS decision, and these HHAs would have 30 days to file their requests for reconsiderations to CMS. By December 31, 2011, we would provide our final determination for the quality data requirements for CY 2012 payment rates. HHAs have a right to appeal to the Prospective Reimbursement Review Board (PRRB) if they are not satisfied with the CMS determination.

(iv) Oversight Activities for the Consumer Assessment of Healthcare Providers and Systems (CAHPS®) Home Health Care Survey

We stated that vendors and HHAs would be required to participate in HHCAHPS oversight activities to ensure compliance with HHCAHPS protocols, guidelines, and survey requirements. The purpose of the oversight activities is to ensure that HHAs and approved survey vendors follow the Protocols and Guidelines Manual. As stated, all approved survey vendors must develop a Quality Assurance Plan (QAP) for survey administration in accordance with the Protocols and Guidelines Manual. The QAP should include the following:

- An organizational chart;
- A work plan for survey implementation;
- A description of survey procedures and quality controls;
- Quality assurance oversight of on-site work and of all subcontractors work; and
- Confidentiality/Privacy and Security procedures in accordance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104–191, enacted on August 21, 1996).

As part of the oversight activities, the HHCAHPS Survey Coordination Team would conduct on-site visits and/or conference calls. The HHCAHPS Survey Coordination Team would review the survey vendor's survey systems, and would assess administration protocols based on the Protocols and Guidelines Manual posted at *https://www.homehealthcahps.org.* We stated that all materials relevant to survey administration would be subject to review. The systems and program review would include, but not be limited to the following

- Survey management and data systems;
- Printing and mailing materials and facilities;
- Data receipt, entry and storage facilities; and
- Written documentation of survey processes. Organizations would be given a defined time period in which to correct any problems and provide follow-up documentation of corrections for review. Survey vendors would be subject to follow-up site visits as needed.

(v) HHCAHPS Requirements for CY 2013

For the CY 2013 APU, we will begin to require that four quarters of data for HHCAHPS be collected and reported. The data collection period would include second quarter 2011 through first quarter 2012. HHAs will be required to submit to the Home Health CAHPS Data Center data for the second quarter 2011 by 11:59 p.m., Eastern Daylight Time on October 21, 2011; for the third quarter 2011 by 11:59 p.m., Eastern Standard Time on January 21, 2012; for the fourth quarter 2011 by 11:59 p.m., Eastern Daylight Time on April 21, 2012; and for the first quarter 2012 by 11:59 p.m., Eastern Daylight Time on July 21, 2012.

As noted, we exempt HHAs receiving Medicare certification on or after April 1, 2012 from the full HHCAHPS reporting requirement for the CY 2013 APU, as data submission and analysis will not be possible for an agency that late in the reporting period for the CY 2013 APU requirements. However, we require that new HHAs that receive Medicare certification during CY 2012 begin HHCAHPS data collection and submission the quarter following receipt of the CMS Certification Number (CCN) in order to receive the CY 2013 APU.

As noted, we require that all HHAs that have fewer than 60 HHCAHPS-eligible unduplicated or unique patients in the period of April 1, 2010 through March 31, 2011 will be exempt from the HHCAHPS data collection and submission requirements for the CY 2013 APU. For the CY 2013 APU, agencies with fewer than 60 HHCAHPS-eligible, unduplicated or unique patients would be required to submit their counts on the form posted on *https://www.homehealthcahps.org*, the Web site of Home Health Care CAHPS by 11:59 p.m., e.s.t. on January 21, 2012. This deadline is firm, as are all of the quarterly data submission deadlines.

We proposed to codify the HHCAHPS survey vendor requirements to be effective with the CY 2013 APU. In our regulation, we are stating in § 484.250(c)(2) that applicants to become approved HHCAHPS survey vendors must have been in business for a minimum of 3 years and have conducted "surveys of individuals" for at least 2 years immediately preceding the application to become a survey vendor for HHCAHPS. For purposes of the approval process for HHCAHPS survey vendors, a "survey of individuals" is defined as the collection of data from individuals selected by statistical sampling methods and the data collected are used for statistical purposes. An applicant organization must:

- Have conducted surveys of individuals responding about their own experiences, not of individuals responding on behalf of a business or organizations (establishment or institution surveys);
- Be able to demonstrate that a statistical sampling process (that is, simple random sampling [SRS], proportionate stratified random sampling [PSRS], or disproportionate stratified random sampling [DSRS]) was used in the conduct of previously or currently conducted survey(s);
- Be able to demonstrate that it, as an organization, has conducted surveys for at least two years, in which statistical samples of individuals were selected. If staff within the applicant organization has relevant experience obtained while in the employment of a different organization, that experience may not be counted toward the 2-year minimum of survey experience; and
- Currently possess all required facilities and systems to implement the HHCAHPS Survey.

We also proposed that the following examples of data collection activities would not satisfy the requirement of valid survey experience for approved vendors as defined for the HHCAHPS, and these would not be considered as part of the experience required of an approved vendor for HHCAHPS:

- Polling questions administered to trainees or participants of training sessions or educational courses, seminars, or workshops;
- Focus groups, cognitive interviews, or any other qualitative data collection activities;
- Surveys of fewer than 600 individuals;
- Surveys conducted that did not involve using statistical sampling methods;
- Internet or Web-based surveys; and
- Interactive Voice Recognition Surveys.

We also proposed to codify the criteria that would make organizations ineligible to become HHCAHPS approved survey vendors. We proposed to require that any organization that owns, operates, or provides staffing for a HHA not be permitted to administer its own HHCAHPS Survey or administer the survey on behalf of any other HHA. We began the HHCAHPS with the belief, based on input from many stakeholders

and the public, that an independent third party (such as a survey vendor) will be best able to solicit unbiased responses to the HHCAHPS Survey. Since HH patients receive care in their homes, this survey population is particularly vulnerable and dependent upon their HHA caregivers. Therefore, in § 484.250(c), we proposed to require that HHAs contract only with an independent, approved HHCAHPS vendor to administer the HHCAHPS survey on their behalf. Furthermore, in § 484.250(c)(2), we stated that "No organization, firm, of business that owns, operates, or provides staffing for an HHA is permitted to administer its own Home Health Care CAHPS (HHCAHPS) Survey or administer the survey on behalf of any other HHA in the capacity as an HHCAHPS survey vendor. Such organizations will not be approved by CMS as HHCAHPS survey vendors."

Specifically, we proposed that the following types of organizations would not be eligible to administer the HHCAHPS Survey as an approved HHCAHPS vendor:

- Organizations or divisions within organizations that own or operate a HHA or provide HH services, even if the division is run as a separate entity to the HHA;
- Organizations that provide telehealth, telemonitoring of HH patients, or teleprompting services for HHAs; and
- Organizations that provide staffing, whether personal care aides or skilled services staff, to HHAs for providing care to HH patients.

(vi) For Further Information on the HHCAHPS Survey

We encourage HHAs interested in learning about the survey to view the HHCAHPS Survey Web site at *https://www.homehealthcahps.org*. Agencies can also call toll-free (1–866–354–0985), or send an email to the HHCAHPS Survey Coordination Team at *HHCAHPS@rti.org* for more information.

The following is summary of the comments we received regarding the HHCAHPS proposal.

Comment: We received comments that the response rate on HHCAHPS (about 30 percent) will be low and thus difficult to meet the minimum survey requirement.

Response: We conducted a Survey Mode Experiment for the HHCAHPS with 75 HHAs nationwide with data collection conducted between September 21, 2009, and January 5, 2010. The overall response rate (for all three modes of mail only, telephone only and mixed mode of mail with telephone follow-up) was 45.7 percent. As long as the HHCAHPS survey protocols are followed and that the random sampling is completed correctly, the response rate of the HHCAHPS is not of great concern. We have not designated a minimum survey response rate requirement for the HHAs.

Comment: Some commenters believe that the costs to HHAs to implement the HHCAHPS, including administrative and vendor costs, will be very high (estimates range from $3,500 for 300 to 500 surveys, up to $85,000).

Response: The commenters supplied a figure of $3,500 for 300 to 500 surveys, but did not provide the number of surveys conducted for the $85,000 figure. Our Web site research shows that most of the vendors are charging between approximately $2,500 and $5,000 for about 300 survey completes. We recognize that vendors will charge different amounts for the survey, and highly recommend that HHAs "shop around" for the best value for their agency. The HHCAHPS target for the number of survey completes is 300 regardless of agency size, thus the $85,000 is not a realistic figure for the cost of conducting HHCAHPS. The approved HHCAHPS survey vendor list is available on *https://www.homehealthcahps.org*. Currently, 40 vendors are approved to conduct the HHCAHPS survey and additional vendors will be approved in the coming months.

Comment: Some commenters stated that the requirement for HHCAHPS should begin in CY 2013 and not in CY 2012.

Response: We are not delaying the HHCAHPS requirement for the APU to CY 2013, as our data suggest that HHAs began preparation for the HHCAHPS requirement since its pendency has been announced and discussed in prior regulations. HHAs anticipated the HHCAHPS requirement and this has allowed the HHAs to prepare for the HHCAHPS requirement. Our data, as of mid-October 2010 show that nearly 8,000 Medicare-certified HHAs have either applied for an exemption from participation in HHCAHPS or registered for credentialing to begin HHCAHPS. However, we will not have a certain estimate of the HHA participation rate in the HHCAHPS dry run until after the deadline for that data, which is 11:59 p.m., e.s.t. on January 21, 2011.

In the CY 2010 HH PPS final rule (78 FR 58078), we delayed the HHCAHPS requirement for the APU, from CY 2011 to CY 2012. We announced in that final rule (78 FR 58078) that HHAs would need to conduct a dry run in third quarter 2010 and continuously collect survey data beginning in the fourth quarter 2010 and moving forward.

Although we carefully considered the comments that we received requesting that HHCAHPS linkage to the APU be delayed until 2013, we believe that HHAs have had sufficient notice of the HHCAHPS requirements and that we do not need to delay the linkage of HHCAHPS to the CY 2013 APU. We initially discussed the HHCAHPS Survey in the May 4, 2007 proposed rule (72 FR 25356) and in the November 3, 2008 Notice (73 FR 65357). In the CY 2010 HH PPS proposed rule (74 FR 40948), we proposed to expand the HH quality measures reporting requirements to include the CAHPS Home Health Care (HHCAHPS) Survey for the CY 2011 APU. In the CY 2010 HH PPS final rule (74 FR 58078), we stated that the HHCAHPS would be effective with the CY 2012 APU, instead of with the CY 2011 APU.

Comment: Some commenters questioned the threshold of 300 surveys which would be too difficult for small HHAs to achieve, and too little for big HHAs. The commenters stated that they would not be able to make statistically valid comparisons between small and large HHAs with the same sample size of 300 completed surveys per HHA.

Response: We understand concerns about the sample size. However, an established principle in statistics is that a sample size in absolute numbers is more important than a proportion of the population surveyed. Surveying a sample of 300 will produce the same level of precision whether the sample is 10 percent, 1 percent, or even 0.01 percent of the total population. The larger the sample (even if under 300), the less variability there will be in an agency's ratings over time. Therefore, in the final rule we are moving forward with the target sample size of 300 for HHCAHPS as proposed.

We appreciate this question clarifying whether agencies must submit 300 completed surveys on an annual basis. In the proposed rule and in this final rule, we emphasized that HHAs should target 300 completes annually which averages about 25 completes a month. We understand that 300 may be difficult for some small agencies to achieve. Therefore, smaller agencies that are unable to reach 300 survey completes by sampling should survey all HHCAHPS eligible patients. We will accept less than 300 surveys completed annually if an agency is unable to achieve that number. Compliance is based on whether the agency did the survey, following the instructed protocols and not based on the number of patients that responded to the survey.

Comment: We received comments that the HHCAHPS survey is too long.

Response: The version of the HHCAHPS survey that was used in the Agency for Healthcare Research and Quality (AHRQ) field test in 2008 had 58 items, and the length of that survey did not appear to influence the completion of the survey. However, as a result of intensive data analysis and input from the stakeholders and the Technical Expert Panel, over 20 questionnaire items were eliminated from the field test survey. The current 34-item questionnaire (which received National Quality Forum endorsement) was the outcome of this development process. We believe that the length of the survey represents an effective compromise and achieves the goal of providing key quality measures of the patient perspectives of care while at the same time keeping the survey as short as possible. We are not shortening the survey in this final rule.

Comment: Some commenters believe that the HHCAHPS survey questions are too confusing. Other commenters stated that the HHCAHPS survey is poorly crafted.

Response: The developmental work on the Home Health Care CAHPS began in mid-2006, and the first survey was field-tested (to validate the length and content of the survey) in 2008 by the AHRQ and the CAHPS grantees, and the final survey was used in a national, randomized mode experiment in 2009–2010. A rigorous, scientific process was used in the development of the survey, including: A public call for measures; literature reviews; focus groups with HH patients; cognitive interviews (several rounds in 2007) with HH patients; extensive stakeholder input; technical expert panel reviews, comprehensive assessment review and subsequent endorsement in March 2009 by the National Quality Forum (which represents the consensus of many health care providers, consumer groups, professional associations, purchasers, federal agencies and research and quality organizations); and public responses to **Federal Register** notices.

We appreciate the commenters' sensitivity to the HH patients in asking about the usability of the HHCAHPS survey. The Flesch-Kincaid reading test showed that the HHCAHPS survey is at less than a seventh grade level. More importantly though, if patients are unable to answer the survey due to decreased capacities, a family or friend who is not associated with the HH services given to the patient, may assist the patient and answer the questions on behalf of the selected HH patient in the HHCAHPS HHA sample.

Comment: We received comments that the HHAs need more education and information about HHCAHPS before it is a requirement.

Response: We initially discussed the HHCAHPS Survey in the May 4, 2007 proposed rule (72 FR 25356, 25423) and in the November 3, 2008 Notice (73 FR 65357, 65358). In the CY 2010 HH PPS proposed rule (August 13, 2009), we proposed to expand the HH quality measures reporting requirements to include the CAHPS Home Health Care (HHCAHPS) Survey. In the CY 2010 HH PPS final rule, we stated that the HHCAHPS would be effective with the CY 2012 APU. The HHCAHPS requirements for CY 2012 have been discussed on the CMS Home Health and Hospice Open Door Forums from late 2009 to the present. We have posted information regarding the HHCAHPS requirements for CY 2012 on all CMS sponsored Web sites for Medicare and State Medicaid issues. We have spoken on this topic of HHCAHPS requirements for CY 2012 at conferences with the National Association for Home Care and on conference calls with the Visiting Nurse Associations of America. We have spoken about the HHCAHPS requirements for CY 2012 on the CMS State Medicaid sponsored calls. We have maintained a very thorough and up-to-date Web site at *https://www.homehealthcahps.org* that emphasized the importance of starting HHCAHPS in order to meet the requirements for CY 2012.

Comment: We received comments that HHCAHPS does not address communication and swallowing issues for HH care patients.

Response: We appreciate this input from the commenter and note that none of the HHCAHPS questions concern such specific issues since the number of issues that could be addressed in a survey of this length is limited. The main goal of the HHCAHPS is to obtain the patients' perspectives of care regardless of the specific needs of the patients.

Comment: Some commenters question how they will know that the approved survey vendors are truly independent of HHAs and telehealth companies and ask what would happen if they inadvertently utilized an approved HHCAHPS vendor carrying on a prohibited financial relationship with another HHA.

Response: In this final rule, beginning with the CY 2013 APU, we will be requiring that all HHCAHPS approved survey vendors affirm at their oversight review, that they do not provide direct HH care services to the patients of the HHAs to which they are or will be contracting to conduct HHCAHPS on behalf of these HHAs. If an approved HHCAHPS survey vendor has been discovered to have falsified its affirmation, then that vendor will be immediately removed from the approved HHCAHPS survey vendor list. For those HHAs contracting with a vendor that is removed from the approved HHCAHPS vendor list, CMS will allow affected HHAs to transfer their submitted HHCAHPS data to another approved HHCAHPS vendor of their choice, and arrangements will be made should this occur in the middle of a quarterly period when vendor changes are not usually allowed for HHAs. Moreover, the HHCAHPS data from these affected HHAs will be reported on Home Health Compare; however, they will be designated with a footnote that explains the circumstance.

Comment: Some commenters stated that CMS should pay the HHAS for the (administrative) costs associated with HHCAHPS. We received a comment that it will cost $1.70 more per patient to obtain patient satisfaction input.

Response: The collection of the patient's perspectives of care quality data for similar CAHPS surveys, such as the Hospital CAHPS survey, follow the same model wherein the health care providers pay the approved survey vendors for the data collection costs and we pay for the training, technical assistance, oversight of vendors and data analysis costs. HHAs are strongly encouraged to report their respective HHCAHPS costs on their cost reports but should note that these costs are not reimbursable under the HH PPS. It is advised that HHAs "shop around" for the best cost value for them before contracting with an approved vendor to conduct HHCAHPS on their behalf.

Comment: Some commenters believe that the HHCAHPS is not consistent with Hospital CAHPS (HCAHPS).

Response: We believe that the two surveys do not have to be consistent as the populations are different for Hospital and Home Health CAHPS. The differences in the types of questions reflect the differences in the nature of the services provided. However, both CAHPS surveys followed the same processes for the development of the survey and data collection protocols.

Comment: We received comments that about 70 percent of HHAs have not responded to the requirement for HHCAHPS thus far, since about July 2010, only 2,109 of the 10,500 HHAs have signed up, and another 1,114 have applied for exemptions from HHCAHPS. These figures show a poor rate of participation for HHCAHPS thus far.

Response: The HHAs' response to participating in HHCAHPS has changed since July 2010. Recent data show us that very nearly 8,000 of Medicare-certified HHAs have begun to engage in HHCAHPS, by either beginning the vendor approval process for the survey on *https://www.homehealthcahps.org,* or by applying for an exemption from the survey on *https://www.homehealthcahps.org.* We anticipate that this participation rate will increase, especially in the next few months. We are carefully watching the participation rate for HHCAHPS, and we will continue to inform the public about HHCAHPS through the Home Health and Hospice Open Door Forums, Web sites, and other means of communication.

Comment: One commenter stated concerns that while there are unscrupulous HHAS, most of the small HHAs have to comply with more requirements and face difficulty with remaining operational.

Response: We appreciate the commenter's concerns with the complex HHA system, which may allow unscrupulous providers to take advantage of senior citizens needing good HH services. We are aware that newer requirements, such as HHCAHPS, may be perceived as an additional cost and responsibility for HHAs. However, at the same time, we believe that HHCAHPS will benefit both seniors and other users of HH services because the survey will provide transparency and access to more information about the quality of HH care. In addition, HHAs will benefit with the information gleaned from HHCAHPS to utilize for their internal quality improvement purposes that benefit their agencies as businesses and providers of HH services.

Comment: We received a comment asking why interactive voice recognition (IVR) technology or internet-based technology would be excluded as a survey mode.

Response: We appreciate the commenter's knowledge about IVR technology and the possible inclusion of this technology as an additional survey mode for HHCAHPS. Through the period of developing and testing the HHCAHPS survey, the mail only, telephone only, and mail with telephone follow-up modes were found to be the most suitable for the patient population receiving HH care services. However, we are certainly open to continue testing additional survey modes for HHCAHPS, especially with the possibility of internet methodologies in the future.

Comment: We received a comment on how an approved survey vendor can simultaneously be an "independent" HHCAHPS surveyor and provide consultative services to the same HHAs on improving their operations. Such a situation is a classic conflict of interest.

Response: We appreciate this commenter's concerns about the independence that HH CAHPS vendors should maintain from the HHAs that are their clients. However, we believe that one of the goals of the HH care CAHPS survey is that HHAs can identify opportunities for improvement and ways to improve care. As long as the vendor does not directly provide care to patients, the vendor can independently provide guidance regarding methods to improve care provided by the HHA.

Comment: One commenter requested that we reevaluate and eliminate proposed criteria that would exclude potential vendors, as the criteria overstep CMS' authority to restrict legitimate business.

Response: We proposed these vendor requirements because we need to ensure that fully qualified organizations would be capable of undertaking the HHCAHPS surveys. Based on the vast input from stakeholders and the public, we proposed these requirements to ensure that an independent party will be best able to solicit unbiased, un-coerced responses to HHCAHPS survey.

Comment: One commenter stated that HHCAHPS is a proposed change that will be damaging to the HH industry and to the care and services provided to Medicare beneficiaries.

Response: We believe that HHCAHPS will benefit both seniors and other users of HH services because they will have access to more information about the quality of HH care. In addition, HHAs will benefit with the information gleaned from HHCAHPS to use for their internal quality improvement purposes and benefit their agencies as businesses and providers of HH services.

Comment: One commenter requested that CMS extend the deadline for agencies to apply for the HHCAHPS survey exemption beyond the original June 16, 2010 deadline.

Response: We will be extending the deadline for agencies to apply for HHCAHPS survey exemption for the CY 2012 APU to 11:59 p.m., e.s.t. on January 21, 2011. It is noted that the application for exemption from participation in HHCAHPS has to be submitted every year.

Comment: One commenter asked if CMS will require additional consent/authorizations to allow protected health information (PHI) patients to be included in HHCAHPS, since these PHI patients are now in the excluded categories for HHCAHPS. These additional consent/authorizations are required by New York State law.

Response: These PHI patients are ineligible to be included in HHCAHPS by New York State Law. We are prohibited by law to include PHI patients in the HHCAHPS survey under any circumstances. In the HHCAHPS Protocols and Guidelines manual which can be found at *https://homehealthcahps.org,* it states that patients who have a condition or illness for which the state in which the patient resides has regulations or laws restricting the release of patient information for patients with that condition (for example, patients with HIV/AIDS), that these patients are not eligible to be included in the HHCAHPS sampling procedures.

(vii) Provisions of the Final Rule

As a result of the comments, we will be extending the deadline for HHAs to apply for HHCAHPS survey exemption for the CY 2012 APU to 11:59 p.m., e.s.t. on January 21, 2011. Therefore, the deadline for the submission of the dry run data (collected in the third quarter of 2010) for the CY 2012 APU is January 21, 2011, and the deadline to apply for HHCAHPS survey exemption for the CY 2012 APU is also January 21, 2011. It is noted that the application for exemption from participation in HHCAHPS has to be submitted every year.

In this final rule, beginning with the CY 2013 APU, we will be requiring that all HHCAHPS approved survey vendors affirm at their oversight review, that they do not provide direct HH care services to the patients of the HHAs to which they are or will be contracting to conduct HHCAHPS on behalf of these HHAs. If an approved HHCAHPS survey vendor is found to have falsified its affirmation, then that vendor will be immediately removed from the approved HHCAHPS survey vendor list. For those HHAs contracting with an HHCAHPS vendor that is removed from the approved HHCAHPS vendor list, we will allow affected HHAs to transfer their submitted HHCAHPS data to another approved HHCAHPS vendor of their choice and arrangements will be made should this occur in the middle of a quarterly period when vendor changes are not usually allowed for HHAs. Moreover, the HHCAHPS data from these affected HHAs will be reported on Home Health Compare; however, they will be designated with a footnote that explains the circumstance.

There are no other changes noted from the CY 2011 HH PPS proposed rule.

3. Home Health Wage Index

Sections 1895(b)(4)(A)(ii) and (b)(4)(C) of the Act require the Secretary to provide appropriate adjustments to the proportion of the payment amount under the HH PPS to account for area wage differences, using adjustment factors that reflect the relative level of wages and wage-related costs applicable to the furnishing of HH services. We apply the appropriate wage index value to the labor portion of the HH PPS rates based on the site of service for the beneficiary (defined by section 1861(m) of the Act as the beneficiary's place of residence). Previously, we determined each HHA's labor market area based on definitions of Metropolitan Statistical Areas (MSAs) issued by the Office of Management and Budget (OMB). We have consistently used the pre-floor, pre-reclassified hospital wage index data to adjust the labor portion of the HH PPS rates. We believe the use of the pre-floor, pre-reclassified hospital wage index data results in an appropriate adjustment to the labor portion of the costs, as required by statute.

In the November 9, 2005 final rule for CY 2006 (70 FR 68132), we adopted revised labor market area definitions based on Core-Based Statistical Areas (CBSAs). At the time, we noted that these were the same labor market area definitions (based on OMB's new CBSA designations) implemented under the Hospital Inpatient Prospective Payment System (IPPS). In adopting the CBSA designations, we identified some geographic areas where there were no hospitals and, thus, no hospital wage data on which to base the calculation of the HH wage index. We continue to use the methodology discussed in the November 9, 2006 final rule for CY 2007 (71 FR 65884) to address the geographic areas that lack hospital wage data on which to base the calculation of their HH wage index. For rural areas that do not have IPPS hospitals, we use the average wage index from all contiguous CBSAs as a reasonable proxy. This methodology is used to calculate the wage index for rural Massachusetts. However, we could not apply this methodology to rural Puerto Rico due to the distinct economic circumstances that exist there, but instead continue using the most recent wage index previously available for that area (from CY 2005). For urban areas without IPPS hospitals, we use the average wage index of all urban areas within the State as a reasonable proxy for the wage index for that CBSA. The only urban area without IPPS hospital wage data is Hinesville-Fort Stewart, Georgia (CBSA 25980).

On December 1, 2009, OMB issued Bulletin No. 10–02 located at *http://www.whitehouse.gov/omb/assets/bulletins/b10-02.pdf.*

This bulletin highlights three geographic areas whose principal city has changed, and therefore led to the following CBSA names all and within a 0.05 percentage point range changes and new CBSA numbers.

- Bradenton-Sarasota-Venice, FL (CBSA 14600) is replaced by North Port-Bradenton-Sarasota, FL (CBSA 35840).
- Fort Walton Beach-Crestview-Destin, FL (CBSA 23020) is replaced by Crestview-Fort Walton Beach-Destin, FL (CBSA 18880).
- Weirton-Steubenville, WV-OH Metropolitan Statistical Area (CBSA 48260) is replaced by Steubenville-Weirton, OH-WV (CBSA 44600).

The CBSAs and their associated wage index values are shown in Addendum B of this final rule. The wage index values for rural areas are shown in Addendum A of this final rule.

The following is a summary of the comments we received regarding the HH wage index proposal.

Comment: A commenter stated that the budget neutral nature of the methodology means that increases in the wage index in one area of the country necessarily result in decreases in another.

Response: By nature, the construct of the hospital wage index, in the aggregate, is to average at 1.0. Hence, the index is constructed to be budget neutral in the sense that for areas where wage index values increase, those increases are offset by decreases in other areas. The hospital wage index is based on hospital cost data and hospital utilization, and thus in the aggregate, when applied to HH utilization for the purposes of impacts, the average wage index value may not result to be exactly 1.0. For instance, as explained in the impact analysis section for this final rule, the new wage index will result in an estimated increase of $20 million in aggregate payments to HHAs in CY 2011.

Comment: A commenter stated that dropping critical access hospitals (CAHs) from the calculation of the wage index affects HHAs. As CAHs are located in rural areas, the absence of CAH wage data further compromises the accuracy, and therefore the appropriateness, of using a hospital wage index to determine the labor costs of HHAs located in rural areas.

Response: While we understand the commenter's concern, we are not able to address the comment, because the methodology regarding the pre-floor, pre-reclassified hospital wage index calculation (which we continue to believe results in an appropriate adjustment to the labor portion of the costs as required by statute), is outside of the scope of this final rule.

Comment: A commenter stated that, pending development of an industry specific wage index, CMS should investigate the impact of a population density adjustment. A population density adjustment would result in a more accurate wage adjustment that recognizes the productivity lost in time spent in traveling to provide services in less densely populated areas. CMS could simply add a population density factor by zip code during calculation of the labor portion of the payment to account for increased costs of providing services in less densely populated areas. In addition, this adjustment would reduce excess reimbursement for services provided in densely populated urban and congregate living facilities.

Response: We appreciate the commenter's comment, but we do not have evidence that a population density adjustment is an appropriate adjustment to a wage index. Section 3131(d) of the Affordable Care Act requires the Secretary to conduct a study on HHA costs involved with providing ongoing access to care to low-income Medicare beneficiaries or beneficiaries in medically underserved areas, and in treating beneficiaries with varying levels of severity of illness. Because medically underserved areas may be associated with population density, the purview of the above mentioned study may possibly include feasibility of such an adjustment as part of that research. However, we note that in setting up the original HH PPS rates in 2000, we were not able to find any cost differences between rural and urban HHAs. While rural agencies cite the added cost of long distance travel to treat their patients, urban/non-rural agencies also cite added costs such as needed security measures and the volume of traffic that they must absorb. We will consider this suggestion in future research activities.

Comment: A commenter stated that the current wage index does not measure local wages accurately since the wages vary widely in some areas.

Response: The wages are measured at the local level as defined by CBSAs. HHAs are reimbursed based on the site of service of the beneficiary, using the wage index value for that area to adjust payment for geographical differences.

Comment: A commenter stated concerns regarding the use of the pre-floor, pre-reclassified hospital wage index to determine geographically relevant wages for HH workers. The commenter stated that there is a lack of

parity between different health care provider types, each of which is subject to some form of a hospital wage index, but experiences distinct actual values in their specific geographic area. Hospitals are given the opportunity to reclassify as a means of being considered to be in a geographical area with a higher wage index. HHAs are not given this option. Using the pre-floor, pre-reclassified wage index continues to put home care at a distinct disadvantage in attracting and retaining employees. Existing law permits CMS a nearly unlimited degree of flexibility to utilize a wage index that recognizes the geographic differences in labor costs in the provision of HH services across the country. Section 1895(b)(4)(C) of the Act mandates the establishment of area wage index adjustment factors, provides the Secretary discretion to determine which factors to consider, and permits the Secretary to utilize the same wage index adjustment factors that are utilized in composing the hospital wage index. The inherent inequity of HHAs competing for labor in the same service area as a reclassified hospital is similarly overdue for redress. CMS has the statutory authority to select the wage index method to be applied to HHAs and should move the wage index toward some level of comparability with that enjoyed by hospitals.

Response: The regulations that govern the HH PPS currently do not provide a mechanism for allowing providers to seek geographic reclassification. As we have explained in the past (most recently, in the CY 2010 HH PPS final rule (74 FR 58105)), the rural floor and geographic reclassification in the IPPS are statutorily authorized and are only applicable to hospital payments. The rural floor provision is provided at section 4410 of the Balanced Budget Act of 1997 (Pub. L. 105–33) (BBA) and is exclusive to hospitals. The reclassification provision provided at section 1886(d)(10) of the Act is also specific to hospitals.

Comment: In the current environment of deep, across-the-board cuts, the additional impact of inequitable, unpredictable, negative swings in wage index cannot be ignored any longer. Such swings are exacerbated by the current economic climate. The HH wage index is too volatile from one year to the next. CMS should develop a process that would alert HHAs to prospective swings in the hospital wage index prior to hospital wage data finalization, allowing agencies to seek intervention to eliminate or correct for missing or potentially spurious hospital cost report data on labor costs. The extra time would also allow agencies an opportunity to begin planning for changes needed to accommodate an otherwise unexpected wage index swing. At a minimum, the commenters urged CMS to put a ceiling and floor on year-to-year changes in the wage index to mitigate sudden payment changes. Another commenter asked CMS to consider applying the hospital wage index to all healthcare providers in a community. The commenter's opinion is that homecare nurses require more skills and certifications than hospital nurses and home care organizations should be able to reimburse them fairly.

Response: We have consistently used the pre-floor, pre-reclassified hospital wage index to adjust the labor portion of the HH PPS rates. The commenter is referring to rural floor and geographic reclassification provisions in the IPPS, which are only applicable to hospital payments. The rural floor provision is provided at section 4410 of the BBA and is specific to hospitals. The reclassification provision provided at section 1886(d)(10) of the Act is also specific to hospitals. As such, we continue to believe that the use of the pre-floor, pre-reclassified hospital wage index data results in the appropriate adjustment to the labor portion of the costs as required by statute.

Comment: CMS should develop and conduct a voluntary pilot test on a HH specific wage index based on non-hospital, Bureau of Labor Statistics (BLS) data calculated on a county level, rather than on the Core Base Statistical Area (CBSA) level. Several commenters stated that CMS' decision five years ago to switch from the Metropolitan Statistical Areas (MSAs) to the Core-Based Statistical Areas (CBSAs) for the wage index calculation has had serious financial ramifications for HHAs. The commenters recommend that CMS pursue a total reform of the HH wage index.

Response: As we have stated in previous rules, previous proposals to develop a HH-specific wage index were not well received by commenters or the industry. Generally, the volatility of the HH wage data and the resources needed to audit and verify that data make ensuring that such a wage index most accurately reflects the wages and wage-related costs applicable to the furnishing of HH services difficult. As such, we are not adopting a HH-specific wage index at this time. We believe that more importantly, a HH-specific wage index should be reflective of the wages and salaries paid in a specific area, be based upon a stable data source, and significantly improve our ability to determine HH payments without being overly burdensome.

In its June 2007 report titled, "Report to Congress: Promoting Greater Efficiency in Medicare", MedPAC recommended that the Congress "repeal the existing hospital wage index statute, including reclassification and exceptions, and give the Secretary authority to establish new wage index systems." As such, we will continue to review and consider MedPAC's recommendations on a refined alternative wage index methodology for the HH PPS in the future. We believe that the current payment adjustment based on the CBSA areas is the best available method of compensating for differences in labor markets.

Comment: A commenter encourages CMS to analyze HH care providers both by geographic location (urban vs. rural) and by business status (for-profit vs. not-for-profit) such that Medicare payment policy can be modified to reward quality and efficiency and reduce incentives to "pad" documentation and increase revenue.

Response: We will be looking to improve the accuracy of payment to HHAs in the future, through a number of efforts. Section 3131(a) of the Affordable Care Act requires the Secretary to rebase HH payments, beginning in 2014. Factors that will be analyzed and considered include changes in the number of visits in an episode, the mix of services in an episode, the level of intensity of services in an episode, the average cost of providing care per episode, and other factors that the Secretary considers to be relevant. In conducting the analysis for rebasing, we may consider differences between hospital-based and freestanding agencies, between for-profit and nonprofit agencies, and between the resource costs of urban and rural agencies. Additionally, section 3131(d) of the Affordable Care Act requires the Secretary to study and report on the development of HH payment revisions that would ensure access to care and payment for severity of illness. The study is to be on HHA costs involved with providing ongoing access to care to low-income Medicare beneficiaries or beneficiaries in medically underserved areas, and in treating beneficiaries with varying levels of severity of illness. As part of this study, we are required to consult with appropriate stakeholders, such as groups representing HHAs and groups representing Medicare beneficiaries. At the conclusion of this study, we must submit a Report to the Congress by March 1, 2014. Based on the findings of this study, the Secretary may provide for a demonstration project to test whether making payment adjustments for HH services under the

Medicare program would substantially improve access to care for patients with high severity levels of illness or for low-income or underserved Medicare beneficiaries.

4. CY 2011 Annual Payment Update

a. National Standardized 60-Day Episode Rate

The Medicare HH PPS has been in effect since October 1, 2000. As set forth in the July 3, 2000 final rule (65 FR 41128), the base unit of payment under the Medicare HH PPS is a national standardized 60-day episode rate. As set forth in § 484.220, we adjust the national standardized 60-day episode rate by a case-mix relative weight and a wage index value based on the site of service for the beneficiary.

In the CY 2008 HH PPS final rule with comment period, we refined the case-mix methodology and also rebased and revised the HH market basket. To provide appropriate adjustments to the proportion of the payment amount under the HH PPS to account for area wage difference, we apply the appropriate wage index value to the labor portion of the HH PPS rates. The labor-related share of the case-mix adjusted 60-day episode rate is 77.082 percent and the non-labor-related share is 22.918 percent. The CY 2011 HH PPS rates use the same case-mix methodology and application of the wage index adjustment to the labor portion of the HH PPS rates as set forth in the CY 2008 HH PPS final rule with comment period. Following are the steps we take to compute the case-mix and wage adjusted 60-day episode rate:

(1) Multiply the national 60-day episode rate by the patient's applicable case-mix weight.

(2) Divide the case-mix adjusted amount into a labor (77.082 percent) and a non-labor portion (22.918 percent).

(3) Multiply the labor portion by the applicable wage index based on the site of service of the beneficiary.

(4) Add the wage-adjusted portion to the non-labor portion, yielding the case-mix and wage adjusted 60-day episode rate, subject to any additional applicable adjustments.

In accordance with section 1895(b)(3)(B) of the Act, this document constitutes the annual update of the HH PPS rates. The HH PPS regulations at § 484.225 set forth the specific annual percentage update methodology. In accordance with § 484.225(i), for a HHA that does not submit HH quality data, as specified by the Secretary, the unadjusted national prospective 60-day episode rate is equal to the rate for the previous calendar year increased by the applicable HH market basket index amount minus two percentage points. Any reduction of the percentage change will apply only to the calendar year involved and will not be considered in computing the prospective payment amount for a subsequent calendar year.

For CY 2011, we proposed to base the wage index adjustment to the labor portion of the HH PPS rates on the most recent pre-floor and pre-reclassified hospital wage index. As discussed in the July 3, 2000 HH PPS final rule, for episodes with four or fewer visits, Medicare pays the national per-visit amount by discipline, referred to as a LUPA. We update the national per-visit rates by discipline annually by the applicable HH market basket percentage. We adjust the national per-visit rate by the appropriate wage index based on the site of service for the beneficiary, as set forth in § 484.230. We adjust the labor portion of the updated national per-visit rates used to calculate LUPAs by the most recent pre-floor and pre-reclassified hospital wage index. We also proposed to update the LUPA add-on payment amount and the NRS conversion factor by the applicable HH market basket update of 1.4 percent for CY 2011.

Medicare pays the 60-day case-mix and wage-adjusted episode payment on a split percentage payment approach. The split percentage payment approach includes an initial percentage payment and a final percentage payment as set forth in § 484.205(b)(1) and § 484.205(b)(2). We may base the initial percentage payment on the submission of a request for anticipated payment (RAP) and the final percentage payment on the submission of the claim for the episode, as discussed in § 409.43. The claim for the episode that the HHA submits for the final percentage payment determines the total payment amount for the episode and whether we make an applicable adjustment to the 60-day case-mix and wage-adjusted episode payment. The end date of the 60-day episode as reported on the claim determines which calendar year rates Medicare would use to pay the claim.

We may also adjust the 60-day case-mix and wage-adjusted episode payment based on the information submitted on the claim to reflect the following:

- A low utilization payment provided on a per-visit basis as set forth in § 484.205(c) and § 484.230.
- A partial episode payment adjustment as set forth in § 484.205(d) and § 484.235.
- An outlier payment as set forth in § 484.205(e) and § 484.240.

b. Updated CY 2011 National Standardized 60-Day Episode Payment Rate

In calculating the annual update for the CY 2011 national standardized 60-day episode payment rates, we first look at the CY 2010 rates as a starting point. The CY 2010 national standardized 60-day episode payment rate is $2,312.94.

As previously discussed in section II.D. of this final rule ("Outlier Policy"), in our policy of targeting outlier payments to be approximately 2.5 percent of total HH PPS payments in CY 2011, we proposed to return 2.5 percent back into the HH PPS rates, to include the national standardized 60-day episode payment rate. Therefore, to calculate the CY 2011 national standardized 60-day episode payment rate, we first increase the CY 2010 national standardized 60-day episode payment rate ($2,312.94) to adjust for the 2.5 percent set aside in the previous year for CY 2010 outlier payments. We then reduce that adjusted payment amount by 5 percent, for outlier payments as a percentage of total HH PPS payment as mandated by section 3131 of the Affordable Care Act. Next, we update the payment amount by the CY 2011 HH market basket update of 1.1 percent.

As previously discussed in section II.A. of this final rule ("Case-Mix Measurement Analysis"), our updated analysis of the change in case-mix that is not due to an underlying change in patient health status reveals additional increase in nominal change in case-mix. Therefore, we reduce rates by 3.79 percent in CY 2011, resulting in an updated CY 2011 national standardized 60-day episode payment rate of $2,192.07. The updated CY 2011 national standardized 60-day episode payment rate for an HHA that submits the required quality data is shown in Table 4. The updated CY 2011 national standardized 60-day episode payment rate for an HHA that does not submit the required quality data (that is, HH market basket update of 1.1 percent is reduced by 2 percentage points) is shown in Table 5.

TABLE 4—NATIONAL 60-DAY EPISODE PAYMENT AMOUNT UPDATED BY THE HOME HEALTH MARKET BASKET UPDATE FOR CY 2011, BEFORE CASE-MIX ADJUSTMENT AND WAGE ADJUSTMENT BASED ON THE SITE OF SERVICE FOR THE BENEFICIARY

CY 2010 National standardized 60-day episode payment rate	Adjusted to return the outlier funds that paid for the 2.5 percent target for outlier payments in CY 2010	Reduced by 5 percent due to the outlier adjustment mandated by The Affordable Care Act	Multiply by the home health market basket update of 1.1 percent	Reduce by 3.79 percent for nominal change in case-mix	CY 2011 National standardized 60-day episode payment rate
$2,312.94	÷ 0.975	× 0.95	× 1.011	× 0.9621	$2,192.07

TABLE 5—FOR HHAS THAT DO NOT SUBMIT THE QUALITY DATA—NATIONAL 60-DAY EPISODE PAYMENT AMOUNT UPDATED BY THE HOME HEALTH MARKET BASKET UPDATE FOR CY 2011, BEFORE CASE-MIX ADJUSTMENT AND WAGE ADJUSTMENT BASED ON THE SITE OF SERVICE FOR THE BENEFICIARY

CY 2010 National standardized 60-day episode payment rate	Adjusted to return the outlier funds that paid for the 2.5 percent target for outlier payments in CY 2010	Reduced by 5 percent due to the outlier adjustment mandated by the Affordable Care Act	Multiply by the home health market basket update of 1.1 percent minus 2 percentage points (−0.9 percent)	Reduce by 3.79 percent for nominal change in case-mix	CY 2011 National standardized 60-day episode payment rate
$2,312.94	÷ 0.975	× 0.95	× 0.991	× 0.9621	$2,148.71

c. National Per-Visit Rates Used To Pay LUPAs and Compute Imputed Costs Used in Outlier Calculations

In calculating the CY 2011 national per-visit rates used to calculate payments for LUPA episodes and to compute the imputed costs in outlier calculations, the CY 2010 national per-visit rates for each discipline are adjusted for the 2.5 percent set aside during CY 2011 for outlier payments. Then these national per-visit rates are reduced by 5 percent as mandated by section 1895(b)(3)(C) of the Act, as amended by section 3131 of the Affordable Care Act. Next, the national per-visit rates are updated by the CY 2011 HH market basket update of 1.1 percent. National per-visit rates are not subject to the 3.79 percent reduction related to the nominal increase in case-mix. The CY 2011 national per-visit rates per discipline are shown in Table 6. The six HH disciplines are as follows:

- Home Health Aide (HH aide);
- Medical Social Services (MSS);
- Occupational Therapy (OT);
- Physical Therapy (PT);
- Skilled Nursing (SN); and
- Speech Language Pathology Therapy (SLP).

TABLE 6—NATIONAL PER-VISIT AMOUNTS FOR LUPAS (NOT INCLUDING THE LUPA ADD-ON AMOUNT FOR A BENEFICIARY'S ONLY EPISODE OR THE INITIAL EPISODE IN A SEQUENCE OF ADJACENT EPISODES) AND OUTLIER CALCULATIONS UPDATED BY THE CY 2011 HOME HEALTH MARKET BASKET UPDATE, BEFORE WAGE INDEX ADJUSTMENT

Home health discipline type	CY 2010 Per-visit amounts per 60-day episode	Adjusted to return the outlier funds that paid for the 2.5 percent target for outlier payments in CY 2010	Reduced by 5 percent due to the outlier adjustment mandated by The Affordable Care Act	For HHAs that DO submit the required quality data		For HHAs that DO NOT submit the required quality data	
				Multiply by the home health market basket update of 1.1 percent	CY 2011 per-visit payment amount f For HHAs that DO submit the required quality data	Multiply by the home health market basket update of 1.1 percent minus 2 percentage points (−0.9 percent)	CY 2011 per-visit payment amount for HHAs that DO NOT submit the required quality data
HH Aide	$51.18	÷ 0.975	× 0.95	× 1.011	$50.42	× 0.991	$49.42
MSS	181.16	÷ 0.975	× 0.95	× 1.011	178.46	× 0.991	174.93
OT	124.40	÷ 0.975	× 0.95	× 1.011	122.54	× 0.991	120.12
PT	123.57	÷ 0.975	× 0.95	× 1.011	121.73	× 0.991	119.32
SN	113.01	÷ 0.975	× 0.95	× 1.011	111.32	× 0.991	109.12
SLP	134.27	÷ 0.975	× 0.95	× 1.011	132.27	× 0.991	129.65

d. LUPA Add-on Payment Amount Update

Beginning in CY 2008, LUPA episodes that occur as the only episode or initial episode in a sequence of adjacent episodes are adjusted by adding an additional amount to the LUPA payment before adjusting for area wage differences.

The following is a summary of the comments we received regarding the LUPA add-on Payment.

Comment: Several commenters stated that at a time when costs are increasing, the LUPA "add-on reduction" will make it more difficult for agencies to deal with the additional mandates that were added to the start of care visit. This is the first time a reduction is proposed for the LUPA add-on. Costs continue to

escalate, but CMS continues to expect more while decreasing payments.

Response: We assume that the commenter is referring to either the 2.5 percent reduction to the HH PPS payment amounts due to the outlier policy legislated by section 3131(b) of the Affordable Care Act or the 1 percentage point reduction for CY 2011, 2012, and 2013 and the productivity adjustment for CY 2015 and subsequent years to the HH market basket update legislated by section 3401(e) of the Affordable Care Act; or both. As both reductions are legislated by the Affordable Care Act, we have no regulatory authority to do otherwise.

As previously discussed, we are returning 2.5 percent back into the LUPA add-on payment. We then reduce the LUPA add-on payment by 5 percent outlier adjustment as mandated by section 1895(b)(3)(C) of the Act as amended by section 3131 of the Affordable Care Act. Next, we update the LUPA payment amount by the CY 2011 HH market basket update percentage of 1.1 percent. The LUPA add-on payment amount is not subject to the 3.79 percent reduction related to the nominal increase in case-mix. For CY 2011, the add-on to the LUPA payment to HHAs that submit the required quality data will be updated by the HH market basket update of 1.1 percent. The CY 2011 LUPA add-on payment amount is shown in Table 7. The add-on to the LUPA payment to HHAs that do not submit the required quality data will be updated by the HH market basket update (1.1 percent) minus two percentage points.

TABLE 7—CY 2011 LUPA ADD-ON AMOUNTS

CY 2010 LUPA Add-On Amount Adjusted to return the outlier funds, that paid for the original 5 percent target for outliers	Adjusted to return the outlier funds that paid for the 2.5 percent target for outlier payments in CY 2010	Reduced by 5 percent due to the outlier adjustment mandated by the Affordable Care Act	For HHAs that DO submit the required quality data		For HHAs that DO NOT submit the required quality data	
			Multiply by the home health market basket update of 1.1 percent	CY 2011 LUPA Add-On Amount for HHAs that DO submit required quality data	Multiply by the home health market basket update of 1.1 percent minus 2 percentage points (−0.9 percent)	CY 2011 LUPA Add-On Amount for HHAs that DO NOT submit required quality data
$94.72	÷ 0.975	× 0.95	× 1.011	$93.31	× 0.991	$91.46

e. Nonroutine Medical Supply Conversion Factor Update

The following is summary of the comments we received regarding the Nonroutine Medical Supplies (NRS).

Comment: A commenter stated that the calculation for the nonroutine medical supply conversion factor includes a reduction of 3.79 percent for the change in nominal case-mix weight. The commenter does not believe this reduction should be applied to the calculation of the NRS, as the NRS payment amount is not directly affected by changes in case-mix weight.

When CMS developed the refinements to the PPS payment rates effective for calendar year 2008, significant changes were made to the methodology for reimbursing of nonroutine medical supplies. The analysis performed by CMS was designed to "better match NRS payments with NRS costs." "The proposed and final regression models were developed after additional variables from OASIS items and targeting certain conditions expected to be predictors of NRS use based on clinical considerations. To account for paying of NRS through the implementation of a 6-severity group methodology, and to maintain budget neutrality, we reduce the national standardized 60-day episode payment rate (72 FR 49851 through 49852).

The standardized payment amount was adjusted to remove the cost attributed to NRS or $45.87 (72 FR 49865). Therefore, due to this change in methodology the NRS amount paid to HHAs is no longer subject to variation based upon the case-mix weight of the episode. Indeed, an episode with a case-mix of 0.5827 can receive the same NRS payment amount as an episode with a case-mix of 3.4872. Therefore, the case-mix adjustment as proposed should not be applied to the NRS payment amounts.

Response: We appreciate the commenter's perspective and input. Because our case-mix adjustment parameter comes from modeling the episode case-mix weights, not the NRS case-mix levels, we will defer the application of the 3.79 percent case-mix reduction to the NRS payment amounts for CY 2011, pending the results of an independent review of our case-mix and NRS models. Therefore, the NRS payment calculation will not be decreased by 3.79 percent for CY 2011.

Comment: A commenter stated that reimbursement for nonroutine supplies is not adequate to cover current costs for these supplies. Vendors of nonroutine supplies continue to increase costs for agencies.

Response: In our CY 2008 final rule, we implemented the now existing 6-severity group methodology for payment of NRS. As part of that implementation, we built intelligence into the HIPPS code so that we would know when supplies are being provided and when they are not, at all NRS severity levels. Since the expiration of a 6-month grace period, HHAs have been required to denote, through the HIPPS code they submit on the claim, whether supplies were actually provided to the beneficiary during that HH episode of care. As such, we will soon have the improved data on NRS, providing us with a much better capability to analyze and evaluate payment to HHAs for NRS in the future.

Payments for nonroutine medical supplies (NRS) are computed by multiplying the relative weight for a particular severity level by the NRS conversion factor. We first adjust the CY 2010 NRS conversion factor ($53.34) for the 2.5 percent set aside for outlier payments in CY 2010. We then reduce that amount by the 5 percent outlier adjustment as mandated by section 1895(b)(3)(C), as amended by section 3131(b) of the Affordable Care Act. Next, we update by the CY 2011 market basket update of 1.1 percent. As mentioned above in our summary of comments related to the NRS, we will not apply the 3.79 percent case-mix reduction to the NRS payment amounts for CY 2011. The final updated CY 2011 NRS conversion factor for CY 2011 in Table 8A. For CY 2011, the NRS conversion factor is $52.54.

TABLE 8A—CY 2011 NRS CONVERSION FACTOR FOR HHAS THAT DO SUBMIT THE REQUIRED QUALITY DATA

CY 2010 NRS conversion factor	Adjusted to return the outlier funds that paid for the 2.5 percent target for outlier payments in CY 2010	Reduced by 5 percent due to the outlier adjustment mandated by The Affordable Care Act	Multiply by the home health market basket update of 1.1 percent	CY 2011 NRS conversion factor for HHAs that do submit the required quality data
$53.34	÷ 0.975	× 0.95	× 1.011	$52.54

Using the NRS conversion factor ($52.54) for CY 2011, the payment amounts for the various severity levels are shown in Table 8B.

TABLE 8B—RELATIVE WEIGHTS FOR THE 6-SEVERITY NRS SYSTEM

Severity level	Points (scoring)	Relative weight	NRS payment amount
1	0	0.2698	$14.18
2	1 to 14	0.9742	51.18
3	15 to 27	2.6712	140.34
4	28 to 48	3.9686	208.51
5	49 to 98	6.1198	321.53
6	99+	10.5254	553.00

For HHAs that do not submit the required quality data, we again begin with the CY 2010 NRS conversion factor. We first adjust the CY 2010 NRS conversion factor ($53.34) for the 2.5 percent set aside for outlier payments in CY 2010. We then reduce that amount by the 5 percent outlier adjustment as mandated by section 1895(b)(3)(C) of the Act, as amended by section 3131 of the Affordable Care Act. Next, we update the conversion factor by the CY 2011 HH market basket update percentage of 1.1 percent minus 2 percentage points. The CY 2011 NRS conversion factor for HHAs that do not submit quality data is shown in Table 9A.

TABLE 9A—CY 2011 NRS CONVERSION FACTOR FOR HHAS THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA

CY 2010 NRS conversion factor	Adjusted to return the outlier funds that paid for the 2.5 percent target for outlier payments in CY 2010	Reduced by 5 percent due to the outlier adjustment mandated by The Affordable Care Act	Multiply by the proposed home health market basket update of 1.1 percent minus 2 percentage points (−0.9 percent)	CY 2011 NRS conversion factor for HHAs that do not submit the required quality data
$53.34	÷ 0.975	× 0.95	× 0.991	$51.50

The payment amounts for the various severity levels based on the updated conversion factor for HHAs that do not submit quality data are calculated in Table 9B.

TABLE 9B—RELATIVE WEIGHTS FOR THE 6-SEVERITY NRS SYSTEM FOR HHAS THAT DO NOT SUBMIT QUALITY DATA

Severity level	Points (scoring)	Relative weight	NRS payment amount
1	0	0.2698	$13.89
2	1 to 14	0.9742	50.17
3	15 to 27	2.6712	137.57
4	28 to 48	3.9686	204.38
5	49 to 98	6.1198	315.17
6	99+	10.5254	542.06

5. Rural Add-On

The following is summary of the comments we received regarding the rural add-on policy.

Comment: Several commenters stated support for the 3 percent rural add-on to the national standardized 60-day episode rate, national per-visit rates, LUPA add-on amount, and nonroutine medical supplies (NRS) conversion factor for HH services provided in rural areas through December 15, 2015. They state that this rural add-on reflects the higher costs of rural agencies.

Response: The rural add-on is mandated by section 3131(c) of the Affordable Care Act. Section 3131(c) of the Affordable Care Act amended section 421(a) of the MMA, which was amended by section 5201(b) of the DRA. Thus the amended section 421(a) of the MMA provides an increase of 3 percent of the payment amount otherwise made under section 1895 of the Act for HH services furnished in a rural area (as defined in section 1886(d)(2)(D) of the Act), with respect to episodes and visits ending on or after April 1, 2010 and before January 1, 2016. The statute

waives budget neutrality related to this provision, as the statute specifically states that the Secretary shall not reduce the standard prospective payment amount (or amounts) under section 1895 of the Act applicable to HH services furnished during a period to offset the increase in payments resulting in the application of this section of the statute.

The 3 percent rural add-on is applied to the national standardized 60-day episode rate, national per-visit rates, LUPA add-on payment, and NRS conversion factor when HH services are provided in rural (non-CBSA) areas. We implemented this provision for CY 2010, for episodes and visits ending on or after April 1, 2010 and ending before January 1, 2011 through Program Memorandum "Temporary 3 Percent Rural Add-On for the Home Health Prospective payment System (HH PPS)" (Transmittal #674/Change Request #6955, issued April 23, 2010). Refer to Tables 10 thru 13b for these payment rates.

TABLE 10—CY 2011 PAYMENT AMOUNTS FOR 60-DAY EPISODES FOR SERVICES PROVIDED IN A RURAL AREA BEFORE CASE-MIX AND WAGE INDEX ADJUSTMENT

For HHAs that DO submit quality data			For HHAs that DO NOT submit quality data		
CY 2011 national standardized 60-day episode payment rate	Multiply by the 3 percent rural add-on	Total CY 2011 national standardized 60-day episode payment rate	CY 2011 national standardized 60-day episode payment rate	Multiply by the 3 percent rural add-on	Total CY 2011 national standardized 60-day episode payment rate
$2,192.07	× 1.03	$2,257.83	$2,148.71	× 1.03	$2,213.17

TABLE 11—PER-VISIT AMOUNTS FOR SERVICES PROVIDED IN A RURAL AREA, BEFORE WAGE INDEX ADJUSTMENT

Home health discipline type	For HHAs that DO submit quality data			For HHAs that DO NOT submit quality data		
	CY 2011 per-visit rate for HHAs that DO submit quality data	Multiply by the 3 percent rural add-on	Total CY 2011 per-visit rate for rural areas	CY 2011 per-visit rate for HHAs that DO NOT submit quality data	Multiply by the 3 percent rural add-on	Total CY 2011 per-visit rate for rural areas
HH Aide	$50.42	× 1.03	$51.93	$49.42	× 1.03	$50.90
MSS	178.46	× 1.03	183.81	174.93	× 1.03	180.18
OT	122.54	× 1.03	126.22	120.12	× 1.03	123.72
PT	121.73	× 1.03	125.38	119.32	× 1.03	122.90
SN	111.32	× 1.03	114.66	109.12	× 1.03	112.39
SLP	132.27	× 1.03	136.24	129.65	× 1.03	133.54

TABLE 12—TOTAL CY 2011 LUPA ADD-ON AMOUNTS FOR SERVICES PROVIDED IN RURAL AREAS

For HHAs that DO submit quality data			For HHAs that DO NOT submit quality data		
CY 2011 LUPA add-on amount for HHAs that DO submit quality data	Multiply by the 3 percent rural add-on	Total CY 2011 LUPA add-on amount for rural areas	CY 2011 LUPA add-on amount for HHAs that DO NOT submit quality data	Multiply by the 3 percent rural add-on	Total CY 2011 LUPA add-on amount for rural areas
$93.31	× 1.03	$96.11	$91.46	× 1.03	$94.20

TABLE 13A—TOTAL CY 2011 CONVERSION FACTOR FOR SERVICES PROVIDED IN RURAL AREAS

For HHAs that DO submit quality data			For HHAs that DO NOT submit quality data		
CY 2011 conversion factor for HHAs that DO submit quality data	Multiply by the 3 percent rural add-on	Total CY 2011 conversion factor for rural areas	CY 2011 conversion factor for HHAs that DO NOT submit quality data	Multiply by the 3 percent rural add-on	Total CY 2011 conversion factor for rural areas
$52.54	× 1.03	$54.12	$51.50	× 1.03	$53.05

TABLE 13B—RELATIVE WEIGHTS FOR THE 6-SEVERITY NRS SYSTEM FOR SERVICES PROVIDED IN RURAL AREAS

Severity level	Points (scoring)	For HHAs that DO submit quality data			For HHAs that DO NOT submit quality data		
		NRS payment amount for HHAs that DO submit quality data	Multiply by the 3 percent rural add-on	Total NRS payment amount for rural areas	NRS Payment amount for HHAs that DO NOT submit quality data	Multiply by the 3 percent rural add-on	Total NRS payment amount for rural areas
1	0	$14.18	× 1.03	$14.61	$13.89	× 1.03	$14.31
2	1 to 14	51.18	× 1.03	52.72	50.17	× 1.03	51.68
3	15 to 27	140.34	× 1.03	144.55	137.57	× 1.03	141.70
4	28 to 48	208.51	× 1.03	214.77	204.38	× 1.03	210.51
5	49 to 98	321.53	× 1.03	331.18	315.17	× 1.03	324.63
6	99+	553.00	× 1.03	569.59	542.06	× 1.03	558.32

E. Enrollment Provisions for HHAs

In the CY 2011 HH PPS proposed rule, we proposed several payment safeguard provisions designed to: (1) Ensure that enrolling HHAs have sufficient capital on hand to operate the business; (2) improve our ability to verify that HHAs that are changing ownership meet and continue to meet the Conditions of Participation for HHAs as specified in 42 CFR part 484; and (3) improve the quality of care that Medicare beneficiaries receive from HHAs.

1. HHA Capitalization

a. Background

As stated in the CY 2011 HH PPS proposed rule, in the January 5, 1998 **Federal Register** (63 FR 291) we published a final rule that required an enrolling HHA to furnish proof that it has available sufficient funds—or "initial reserve operating funds" (IROF)—to operate the HHA for the 3 month period following the effective date of its provider agreement. This requirement, at § 489.28, was triggered by our concern that HHAs were entering the Medicare program without sufficient funds, which could, as stated in the preamble to the January 5, 1998 final rule, have deleterious consequences on patient care. We stated therein:

> New HHAs generally are small businesses and have the same need for adequate capitalization as have other small businesses, which are just starting. As with other small businesses, a lack of funds in reserve to operate the business until a stream of revenues can be established can seriously threaten the viability of the business. In addition, for new HHAs, which are in business to render patient care services, any condition threatening the viability of the new business can adversely affect the quality of care to their patients and, in turn, the health and safety of those patients. That is, if lack of funds forces an HHA to close its business, to reduce staff, or to skimp on patient care services because it lacks sufficient capital to pay for the services, the overall well-being of the HHA's patients could be compromised. In fact, there could be the risk of serious ill effects as a result of patients not receiving adequate services.

In the January 5, 1998 preamble, we also cited a 1997 OIG report entitled, "Home Health: Problem Providers and their Impact on Medicare" (OEI–09–96–00110), in which the OIG expressed similar concerns about undercapitalized HHAs. The OIG stated:

> If it were not for Medicare accounts receivable, problem agencies would have almost nothing to report as assets. Agencies tend to lease their office space, equipment, and vehicles. They are not required by Medicare to own anything, and they are almost always undercapitalized. On average, cash on hand and fixed assets amount to only one-fourth of total assets for HHAs, while Medicare accounts receivable frequently equal 100 percent of total assets. These agencies are almost totally dependent on Medicare to pay their salaries and other operating expenses. For a home health agency, there are virtually no startup or capitalization requirements. In many instances, the problem agencies lease everything without collateral. They do not even have enough cash on hand to meet their first payroll.

We noted in the CY 2011 HH PPS proposed rule that our Medicare contractors have traditionally determined the provider's compliance with the capitalization provisions in § 489.28 prior to making their recommendation for approval to the State Agency and CMS Regional Office (RO). This can occur many months before the HHA signs its provider agreement. To ensure that the HHA maintains its required level of capitalization during this potentially lengthy period—as well as during the period between when it signs said agreement and the time it is granted Medicare billing privileges (a period which also can last several months)—we proposed at § 489.28(a) to require the HHA to "have available sufficient funds * * * at the time of application submission and at all times during the enrollment process to operate the HHA for the 3 month period after Medicare billing privileges are conveyed by the Medicare contractor."

We believe that confirming capitalization more than once during this process would address our concern that a provider may have redirected these funds—which were originally secured exclusively to meet the capitalization requirements—for a purpose other than to operate the business. Indeed, situations have arisen in which an HHA no longer has sufficient capitalization at the time it is enrolled in Medicare. This defeats the policy behind § 489.28, which is to ensure that HHAs are adequately capitalized when they become Medicare providers. Accordingly, we believe that a prospective HHA must meet and maintain adequate capitalization during the entire period between when it submits its enrollment application to the Medicare contractor up to 3 months after the contractor conveys Medicare billing privileges to the HHA. This will ensure that the HHA has sufficient operating funds at the time of application submission, during the period in which a State Agency or deemed accrediting organization is ensuring that the HHA meets the Conditions of Participation, and when Medicare billing privileges are conveyed.

b. Proposed Provisions

We proposed the following provisions related to capitalization:

- In § 424.510, we proposed to add the IROF requirement specified in § 489.28(a), so as to make it an enrollment requirement for prospective HHAs.
- In § 424.530(a)(8), we proposed to deny Medicare billing privileges to a prospective HHA if it could not furnish supporting documentation (within 30

days of a CMS or Medicare contractor's request) verifying that it met the IROF requirement specified in § 489.28(a). We also proposed to deny Medicare billing privileges to a prospective HHA that failed to meet the IROF requirement at § 489.28(a).

- In § 424.535(a)(11), we proposed to revoke Medicare billing privileges and the corresponding provider agreement if the enrolled HHA was not able to furnish supporting documentation (within 30 days of a CMS or Medicare contractor's request) verifying that it met the IROF requirement specified in § 489.28(a).
- In § 489.28(a), we proposed to require that the HHA have available sufficient IROF at the time of application submission, and at all times during the enrollment process to operate the HHA for the 3 month period after Medicare billing privileges are conveyed by the Medicare contractor (exclusive of actual or projected accounts receivable from Medicare).
- In § 489.28(c), we proposed to add a new paragraph (1) to reemphasize that the Medicare contractor, in selecting comparative HHAs for the purpose of calculating the enrolling HHA's required level of capitalization, could only select HHAs that submitted cost reports to Medicare.
- In § 489.28(g)(1), we proposed to establish that CMS may deny Medicare billing privileges to an HHA unless the HHA meets the initial reserve operating funds requirements of this section.
- In § 489.28(g)(2), we proposed to establish that CMS may revoke the Medicare billing privileges of an HHA that fails to meet the initial reserve operating funds requirements of this section within three months of receiving its billing privileges.

c. Analysis of and Responses to Public Comments

The following is a summary of the comments received on our proposed capitalization provisions, and our responses thereto:

Comment: Several commenters expressed support for our proposal to require multiple instances of capitalization verification between the time an application is submitted up to 3 months after the contractor conveys Medicare billing privileges. One commenter stated that the proposed capitalization requirement would reduce the risk that incoming providers will have inadequate funds to operate. The commenter added that the provider enrollment process can take several months or more; thus, expanding Medicare's authority to verify the IROF more than once is a reasonable safeguard. Another commenter stated that the proposed capitalization requirements are important to ensure that new HHAs have adequate resources to provide quality care to patients.

Response: We appreciate the support of these commenters.

Comment: One commenter stated that the signing of a provider agreement signifies that the HHA has met the requirements to receive payment. The commenter also stated that proposed § 489.28(g)(2) allows CMS to enter into a provider agreement before verification of capitalization is performed at the point that billing privileges are conveyed. From this, the commenter seemed to imply that verification of capitalization after the conveyance of a provider agreement is inappropriate, since the provider has already—via the provider agreement—been deemed to have met the Medicare requirements for participation, including the capitalization requirements. The commenter recommended that we: (1) Verify the IROF at the time of enrollment, the time of the initial survey, and the time the provider agreement is signed; and (2) delete proposed § 489.28(g)(2), as it conflicts with § 489.28(g)(1), which does not allow CMS to convey billing privileges until IROF requirements have been met.

Response: In the August 16, 2010 final rule titled, "Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long Term Care Hospital Prospective Payment System Changes and FY 2011 Rates; Provider Agreements and Supplier Approvals; and Hospital Conditions of Participation for Rehabilitation and Respiratory Care Services; Medicaid Program: Accreditation for Providers of Inpatient Psychiatric Services; Final Rule," we revised the effective date of provider and supplier agreements at § 489.13. Specifically, section 489.13 was revised to clarify that the date of a Medicare provider or supplier approval may not be earlier than the latest date on which all applicable Federal requirements have been met, and that such requirements include review and verification of an application to enroll in the Medicare program by CMS's legacy fiscal intermediary, legacy carrier, or Medicare Administrative Contractor (MAC). These clarifications were necessary because a September 28, 2009 decision of the Appellate Division of the Department of the Appeals Board (DAB) that interpreted § 489.13 as not including enrollment application processing among the Federal requirements that must be met.

Accordingly, the August 16, 2010 final rule mentioned above revised § 489.13(b) to state," Federal requirements include, but are not limited to—

(1) Enrollment requirements established in Part 424, Subpart P, of this chapter. CMS determines, based upon its review and verification of the prospective provider's or supplier's enrollment application, the date on which enrollment requirements have been met;

(2) The requirements identified in § 489.10 and § 489.12; and

(3) The applicable Medicare health and safety standards, such as the applicable conditions of participation, the requirements for participation, the conditions for coverage, or the conditions for certification."

Thus, Medicare billing privileges are conveyed by the Medicare contractor, not through the issuance of a provider agreement. That is, even though the provider has signed a provider agreement, the provider must, after that point, still continue to meet all enrollment requirements before the contractor conveys Medicare billing privileges. Moreover, as stated in this final rule, one of those requirements is the maintenance of adequate capitalization. In fact, even after billing privileges are conveyed, the provider must meet the capitalization requirement for another 3 months. This is consistent with the Medicare enrollment requirement in 42 CFR 424.500 *et seq.* that the provider remain in compliance with all enrollment requirements once it is enrolled in Medicare.

With respect to the commenter's request to delete § 489.28(g)(2) because it conflicts with § 489.28(g)(1), we believe there is no conflict. Section § 489.28(g)(2) provides that the capitalization requirements be maintained for 3 months after billing privileges are conveyed—much like the requirement that the provider continue to meet other enrollment requirements after it is enrolled in Medicare. Section § 489.28(g)(1), on the other hand, provides that capitalization requirements must be met before billing privileges are conveyed. The provisions, in other words, are not mutually exclusive. They simply cover two different timeframes.

Nevertheless, to alleviate any confusion on this issue, we have revised § 489.28(a) to reemphasize that the HHA must maintain capitalization during the 3 month period following its receipt of Medicare billing privileges.

Comment: Several commenters stated that if CMS intends for HHAs to

maintain capitalization 3 months after they are able to bill Medicare, this does not comport with the provisions of § 489.28(g), even after these provisions are changed pursuant to this rule. This is because § 489.28(g) will still state that CMS will only convey Medicare billing privileges to an HHA that satisfies its IROF requirement. Another commenter also requested clarification on how our proposed changes are consistent with the current verbiage in § 489.28(g).

Response: As indicated in our response to the previous commenter, the HHA will still be required to satisfy the IROF requirement before receiving Medicare billing privileges. However, the HHA will also be required to maintain the IROF level during the first 3 months after receiving billing privileges. These two requirements, again, are not inconsistent, but merely address two different timeframes. We have revised § 489.28(a) to make this point more clear.

Comment: One commenter stated that the new capitalization rules could hinder the creation of new HHAs, which, in turn, could harm underserved areas, and that the closure of a new HHA because of the new requirements could disrupt patient care. The commenter recommended flexibility and discretion in applying the capitalization requirements when the HHA's failure to meet the required IROF levels is superseded by the need for the HHA in that community, or when the HHA's financial condition on a prospective basis suggests that it will likely become financially viable.

Response: While we understand and appreciate the commenter's concerns, we feel, for reasons already stated, that it is important for incoming HHAs to meet and maintain the capitalization amount specified by the Medicare contractor at the time of enrollment, throughout the enrollment process, and during the first 3 months after Medicare billing privileges are conveyed. We note, moreover, that if a HHA's Medicare billing privileges are denied or revoked for failing to meet the capitalization requirements, the HHA is afforded administrative appeal rights pursuant to the procedures set forth in 42 CFR part 498.

Comment: One commenter stated that it is unclear whether CMS will require HHAs to show capitalization more than 3 months after they are able to bill the Medicare program.

Response: Section 489.28(a) of the final rule states that the HHA must maintain capitalization up to 3 months after Medicare billing privileges have been conveyed to the provider.

Comment: One commenter stated that the proposed provisions lack clarity as to when an HHA will be required to show capitalization.

Response: We believe that § 489.28(a) is clear as to the points at which proof of capitalization must be shown.

Comment: One commenter recommended that CMS ensure there is transparency throughout the capitalization process. Specifically, the commenter urged CMS to make certain that the applicant: (1) Is able to determine how much capitalization is needed at the time it submits its application through the last stage of the review process; (2) is notified if or when the capitalization amount changes and give the applicant sufficient time to secure any capitalization shortfall; and (3) is subject to capitalization standards that are evidence-based and reviewable by an objective and independent person or entity. Another commenter recommended that CMS require each contractor to: (1) Publish the methodology used to calculate IROF levels for a particular region or State; (2) use current cost report data for each calendar year; and (3) publish ranges of IROF based on current cost report data.

Response: We will ensure that: (1) Sufficient information is available to HHAs prior to submitting their enrollment applications so they know what the appropriate capitalization levels are and the justification for and basis behind them; (2) incoming HHAs are notified when their required capitalization amounts change; and (3) our Medicare contractors calculate the IROF amount consistent with existing regulations and the provisions in this final rule. Moreover, we expect that our contractors will make annual adjustments to the IROF to ensure that the capitalization amount is based on current full cost report data.

Comment: One commenter indicated that the proposed clarification in § 489.28(c)(1) regarding the use of cost reports when selecting comparative HHAs is superfluous, since § 489.28(c) is already clear on this point.

Response: Though we agree that § 489.28(c) already discusses this topic, we have clarified in this final rule that Medicare contractors will use full cost report data to calculate the IROF amount. As such, Medicare contractors will exclude from the IROF calculation those HHAs that do not submit cost report data or that submit low utilization cost report data, as defined in existing program guidance.

Comment: A commenter stated that § 489.28(a) holds that the IROF is to be used to operate the HHA for the 3 month period after its Medicare provider agreement becomes effective. Requiring an HHA to show proof of IROF 3 months after billing privileges have been conveyed will not allow the agency to use these funds as intended by the rule.

Response: We do not agree that the HHA would be unable to use these funds during the first 3 months of operations. Section 489.28(a) simply states that the provider must have adequate capitalization on hand to operate the business for the 3 month period after billing privileges are conveyed.

Comment: One commenter stated that the need to show capitalization three times places a tremendous financial burden on prospective HHAs that are providing care to patients while awaiting reimbursement approval.

Response: We believe this comment underscores our concern about undercapitalized HHAs enrolling in Medicare. Moreover, since most businesses receive monthly banking statements or have ready access to information about their financial net worth, we do not believe that it is burdensome to furnish this information upon a Medicare contractor's request.

2. HHA Changes of Ownership

a. Background

In the CY 2010 HH PPS proposed rule, we also addressed the issue of HHA "flipping" (*e.g.,* rapidly selling the HHA), or the HHA "certificate mill" process. We explained in detail how this process works and our concerns about it in the preamble to that August 13, 2009 rule (74 FR 40948):

> We have recently found instances where owners of a HHA, some of which were working in concert with brokers or organizations operating 'turn-key' businesses, have enrolled or have attempted to enroll in the Medicare program for the specific purpose of selling the Medicare billing privileges and the Medicare provider agreement of their HHA to a third-party. In this scenario, the buyer or seller of the HHA typically would notify Medicare of the sale or change of ownership via the Medicare enrollment application (CMS–855A) after the billing privileges have been transferred when the HHA is sold.
>
> Current CMS policy recommends surveys when there is a change of ownership. However, surveys in cases of a change of ownership do not occur with the frequency that they do when providers initially enroll in Medicare. Consequently, there are instances in which a change of ownership takes place yet the new owner does not undergo a survey, in which case Medicare cannot conclusively ascertain whether the business, under new ownership, meets the Conditions of Participation under 42 CFR part 484. This serves as an incentive for certain prospective providers to enroll in the

Medicare program with the sole purpose of transferring Medicare billing privileges and the associated provider agreement when the business is sold.

This is problematic for two reasons. First, the prospective provider has minimal incentive for ensuring quality care for its patients after it is enrolled because its exclusive objective for participating in Medicare in the first place is to sell the business shortly after receiving Medicare billing privileges. In other words, the provider, aware that it may be able to sell the business without the HHA having to undergo a survey, may have little motivation to ensure that it is in compliance with the Conditions of Participation under 42 CFR part 484, since it intends on selling the business in any event. Medicare beneficiaries, therefore, may receive inadequate services as a result of this activity. Second, without the protection that a survey provides, the HHA may attempt to bill Medicare for these insufficient services. These circumstances increase the risk for an HHA to submit inappropriate and potentially fraudulent claims to Medicare, which places the Medicare Trust Funds at risk.

In short, under this scenario, entrepreneurs apply for Medicare HHA certification, undergo a survey, and become enrolled in Medicare, but then immediately sell the agency. These brokers, in other words, enroll in Medicare exclusively to sell the HHA, rather than to provide services to beneficiaries. This practice allows a purchaser of an HHA to enter the Medicare program through the back door—via the change of ownership process—without having to undergo a State survey. Because of this circumvention of the State survey process, we have no way of knowing whether the HHA, under its new ownership, is still in compliance with the HH conditions of participation.

Largely to address this concern, we proposed in § 424.550(b)(1) of the CY 2010 HH PPS proposed rule that if an owner of an HHA sells (including asset sales or stock transfers), transfers or relinquishes ownership of the HHA within 36 months after the effective date of the HHA's enrollment in Medicare, the provider agreement and Medicare billing privileges do not convey to the new owner. The prospective provider/owner of the HHA must instead: (1) Enroll in the Medicare program as a new HHA under the provisions of § 424.510; and (ii) obtain a State survey or an accreditation from an approved accreditation organization.

We received several comments supporting the establishment of this "36 month rule" and did not receive any specific recommendations that we establish exceptions thereto. We therefore left § 424.550(b)(1) largely intact in the 2010 HH PPS final rule. However, we did reiterate in that rule that the 36-month provision was not only designed to deal with the specific issue of "flipping," but to also address the broader problem of new owners of HHAs entering the program without a State survey being performed:

We wish to make clear that the intent of 42 CFR § 424.550(b)(1) goes beyond the issue of "turn-key" operations. If an HHA undergoes a change of ownership, CMS—at the current time—generally does not perform a State survey pursuant thereto. CMS therefore has no sure way of knowing whether the HHA, under its new ownership and management, is in compliance with the HHA conditions of participation—regardless of whether the ownership change occurred 12, 24, or 36 months after the HHA's initial enrollment. Unless CMS can make this determination, there is a risk that the newly-purchased HHA, without having been appropriately vetted via the survey process, will bill for services when it is out of compliance with the conditions of participation. And in light of the frequency of inappropriate practices, as outlined in the GAO report, of HHAs relative to other provider types, we believe it is imperative that we ensure that the newly-purchased HHA be subject to an appropriate level of review. (74 CFR 58118)

The effective date of § 424.550(b)(1) was January 1, 2010.

b. Proposed Provisions

After the implementation of § 424.550(b)(1), we received a number of comments regarding the impact of this provision on bona fide ownership transactions. Therefore, in this year's HH PPS proposed rule, we proposed to revise § 424.550(b)(1), and to establish several exceptions:

- In § 424.502, we defined the term "change in majority ownership" to mean when an individual or organization acquires more than a 50 percent interest in an HHA during the 36 months following its initial enrollment into the Medicare program or a change of ownership (including asset sales, stock transfers, mergers, or consolidations). This would include an individual or organization that acquires majority ownership in an HHA through the cumulative effect of asset sales, stock transfers, consolidations, and mergers during a 36 month period.
- In § 424.550(b)(1), we proposed that any change in majority ownership within 36 months after the effective date of the HHA's enrollment in Medicare (including asset sales, stock transfers, mergers or consolidations) would require the entity to enroll as a new HHA and undergo a State survey or obtain accreditation.
- In § 424.550(b)(2)(i), we proposed to exempt from § 424.550(b)(1) a publicly-traded company that is acquiring another HHA, and both entities submitted cost reports to Medicare for the previous 5 years.
- In § 424.550(b)(2)(ii), we proposed to exempt from § 424.550(b)(1) an HHA parent company that is undergoing an internal corporate restructuring, such as a merger or consolidation, and the HHA submitted a cost report to Medicare for the previous 5 years.
- In § 424.550(b)(2)(iii), we proposed to exempt from § 424.550(b)(1) those situations where the owners of an existing HHA are changing its existing business structure (for example, partnership to a limited liability company; sole proprietorship to subchapter S corporation), but the individual owners remain the same and there is no change in majority ownership.
- In § 424.550(b)(2)(iv), we proposed to exempt from § 424.550(b)(1) those ownership changes involving the death of an owner who owns a 49 percent or less interest in an HHA (where several individuals or organizations are co-owners of an HHA and one of the owners dies).

We proposed these exceptions to account for certain legitimate transactions that might be unduly affected by the 36-month rule. However, as we stated in the proposed rule, our decision to do so in no way alleviated our ongoing concerns about the "certificate mill" process. We also remained concerned about the broader ability of new HHA owners to enter Medicare through the back door via the change of ownership process, as opposed to the initial enrollment and State survey mechanism.

c. Analysis of and Responses to Public Comments

The following is a summary of the comments received regarding the 36-month rule, and our responses thereto:

(1) General Application of Rule

Comment: One commenter expressed support for the 36-month rule, as well as for our proposed changes and exceptions. The commenter stated that the rule is one means to reduce the number of new HHAs that: (1) Are entering Medicare ill-equipped to provide high-quality care; and (2) easily fall into patterns of behavior that hurt the integrity of the Medicare program. Another commenter stated that the additional clarification to the 36-month rule was positive.

Response: We appreciate and agree with these comments.

Comment: One commenter stated that the survey of an HHA that has changed owners would seem appropriate. New

owners/operators may not be well-educated on home care rules and regulations, and surveys of such agencies would often be in the patients' best interests. Exceptions might be considered when another already-certified and operating HHA with a proven track record purchases another HHA. Still, care transitions and managerial changes can place patient care at risk. Timely and targeted surveys may avoid many problems later on, both for the purchased HHA and its patients.

Response: We appreciate this comment, and share the commenter's belief that surveying new owners would be in the best interests of the HHA's patients.

Comment: Several commenters recommended that we limit the applicability of the 36-month rule to ownership changes occurring within 36 months after the effective date of the HHA's initial enrollment in Medicare, rather than within 36 months after the HHAs most recent ownership change. One commenter added that this single change would eliminate the most significant problems created by the proposed rule.

Response: We believe that applying § 424.550(b)(1) to ownership changes that occur within 36 months of: (1) Initial enrollment and (2) the HHA's most recent ownership change, is needed to ensure that newly-sold HHAs are in compliance with the conditions of participation.

Comment: Several commenters recommended that we rescind the current 36-month rule and establish a technical advisory committee with experts from home care and the finance sector to establish guidelines that will ensure that patient care remains the top priority for existing and new home care agencies.

Response: We disagree that a technical advisory committee is needed to address the provisions of the 36-month rule. We believe that the comments received in response to our proposal and our subsequent changes will result in improved patient care and financially viable HHAs.

Comment: Several commenters stated that the proposed provisions constitute an expansion of the 36-month rule that would block new investments in the HH industry, which, in turn, could inhibit necessary industry consolidation and prevent providers from expanding. The commenters generally believed that the costs of the proposed revisions outweigh any benefits to the Medicare program or its beneficiaries. Another commenter stated that revising the rule to ensure that capital is available will lead to better patient care outcomes, fewer issues in the operations of HHAs, and increased innovations that will lower the overall costs of care.

Response: We disagree with the assertion that the costs of the proposed rule outweigh its benefits. Beyond the issue of "certificate mills" and HHAs' "flipping" ownership to a third-party, we remain concerned about: (1) The sale or transfer of HHAs that have little or no enterprise value except the Medicare billing number, and (2) new owners entering Medicare without the HHA having to undergo a State survey.

Comment: Several commenters stated that for many HHAs that have been enrolled in Medicare for more than 36 months (or even less than 36 months), the proposed rule will deprive them of access to capital, in that no existing HHA can afford to lose its Medicare participation until a new survey is conducted, a process which can take many months. No ongoing business, the commenters stated, can continue to incur expenses with no revenue during that time, and that patient care could therefore suffer. Several commenters further contended that by expanding the rule to apply to changes occurring more than 36 months after initial enrollment, banks will not loan money to, private equity firms will not invest in, and quality HHA organizations will not purchase, existing HHAs. This is because the bank/purchaser realizes it will be unable to effectively (a) foreclose upon, or (b) sell its majority interest in the business, due to the need to enroll as a new provider and undergo a survey. The commenters stated that some financiers have, since the implementation of § 424.550(b)(1), declined to loan money to HHAs because of these concerns, with one commenter adding that this closing of access to funds does not help address the issue of "flipping." One commenter added that CMS should not require enhanced capitalization in one section of the proposed rule while denying access to that capital in another. Another commenter stated that many entities will avoid the HHA business entirely if they cannot exit their investment for 36 months or obtain capital. Meanwhile, enrolled HHAs, another commenter noted, will be reluctant to exit Medicare, which could prove problematic for Medicare if the HHA is poorly-performing or of low-quality. Another commenter stated that lenders already perform due diligence on the HHA before loaning it money. This important safeguard is lost if lenders will not loan funds to the HHA because of the 36-month rule.

Response: As already stated, the 36-month rule is designed to ensure that enrolled HHAs comply with the HHA conditions of participation and furnish quality services to Medicare beneficiaries. Nevertheless, we have adopted, as explained below in more detail, certain exceptions to the 36-month rule. We believe these exceptions will help ensure that HHAs are able to obtain financing, while at the same time protecting the integrity of the Medicare program.

Comment: One commenter suggested that rather than require an HHA to reenroll in Medicare, the entity should instead have to obtain re-accreditation from an approved accreditation organization within 6 months of the ownership change. If reaccreditation is obtained within this period, the reenrollment process should not be required. If reaccreditation is not obtained, reenrollment would be necessary. The commenter believed that the reaccreditation process would be a faster and more cost-effective way to identify and stop the certificate mill process, and would not result in a gap in reimbursement for legitimate HHAs or a reduction in services for patients. Another commenter stated that the HHA should still be able to bill Medicare while awaiting the survey. This will prevent a disruption of services.

Response: Though we appreciate these comments, our concern is that during the period in which the HHA is waiting for the survey to be performed, an entity that is potentially out of compliance with the conditions of participation because of its ownership change may be billing Medicare for services it is not qualified to provide. Accordingly, we are not adopting these recommendations.

Comment: A commenter stated that although the survey requirement of the 36-month rule is essentially based on the old owner's conduct—that is, the owner's sale of its HHA—it is the new owner that must undergo the survey. The commenter believed this was somewhat unfair.

Response: We disagree. In the commenter's scenario, the buyer is voluntarily agreeing to purchase the HHA. If a prospective buyer is uncomfortable with undergoing a survey, it need not proceed with the sale. Moreover, by ensuring that the HHA has submitted full cost reports, we believe this information will assist the buyer in establishing a fair valuation for the HHA it is purchasing.

Comment: One commenter questioned the value of § 424.550(b)(1) on two grounds. First, if an owner has operated a Medicare-enrolled HHA for at least 36 months, it is clear that it is not a broker looking to immediately "flip" the HHA

after enrollment. Second, an HHA can easily circumvent the 36-month rule by simply not disclosing the ownership change; the commenter suggested that by the time CMS learns of the transaction, it may be too late. Several commenters contended that the rule is only triggered when the HHA self-reports the change in ownership to CMS. Legitimate businesses that are willing to self-report under these circumstances are not the types of entities that generally pose a risk to Medicare. It therefore follows that the 36-month rule will prevent only legitimate transactions from taking place. Another commenter stated that if an HHA is enrolled for more than 36 months, this should be adequate proof that the entity is not a certificate mill. Hence, the rule should only apply to the first 36 months of enrollment.

Response: With respect to the first comment, we have, as previously mentioned, elected to apply § 424.550(b)(1) to ownership changes that occur within 36 months of: (1) Initial enrollment, and (2) the HHA's most recent ownership change. Again, our concerns go beyond the issue of "flipping," and touch on the larger question of whether a newly-sold HHA is still in compliance with the conditions of participation.

Regarding the remaining comments, we note that—under the Medicare enrollment regulations at 42 CFR 424.500 *et seq.*—a failure to report an ownership change to CMS can result in a: (1) Retroactive revocation of the provider's Medicare billing privileges, and (2) a bar against reenrolling in Medicare for a period of 1 to 3 years. Hence, it is to the provider's advantage to self-report the ownership change, for failing to do so could keep the provider out of Medicare for a much longer period if the provider's billing privileges are revoked. Moreover, § 424.550(b)(1) is triggered when the change of ownership occurs, rather than whether it is reported. In other words, it is not the submission of a CMS–855A ownership change application that implicates § 424.550(b)(1), but the ownership change itself.

Comment: Several commenters stated that § 424.550(b)(1) was inconsistent with section 1891(c)(2)(B)(i) of the Act. They contended that Congress did not intend for State surveys to take place every time there is a change of ownership, and that if a survey was nevertheless necessary, it had to occur within 2 months of the change. The commenters believed that CMS has therefore exceeded the authority provided to the Secretary under section 1891(c)(2)(B)(i).

Response: We disagree. Nothing in the statute itself prohibits us from enacting § 424.550(b)(1). Section 1891(c)(2)(B)(i) gives CMS the discretion to perform a survey within 2 months if a change of ownership has occurred. This issue was discussed in the legislative history of this provision, which read in part:

> The Committee amendment would *authorize* the States and the Secretary to conduct a standard survey, or an abbreviated version of a standard survey within 2 months after any change in ownership, administration, or management of a facility, as well as after a change in the director of nursing. (H.R. Rep. 100–391(I), 1987 U.S.C.C.A.N. 2313–1) (Emphasis added).

However, as both the statute and the aforementioned language indicate, we are not *mandated* to take this action within the 2 month period. In addition, while we appreciate the need for surveys in such situations to be conducted as rapidly as possible, State survey workloads generally do not permit them to happen within 2 months of the change.

Comment: Several commenters stated that instead of requiring a new enrollment and survey—a process which could take an extended period of time—CMS should use its authority under section 1891(c)(2)(B)(i) to conduct a survey of a sold HHA within 2 months of the sale's effective date. They added that the § 424.550(b)(1) survey requirement will further burden State survey agencies and accreditation organizations. In light of this, they questioned the need for such surveys if both the buyer and seller are legitimate businesses, as shown by their submission of cost reports for 36 months.

Response: While we appreciate this suggestion, the commenters seem to imply that we do not have the authority to conduct a survey outside of that referenced in section 1891(c)(2)(B)(i) of the Act. As already indicated, we do not agree. We further note that a survey performed pursuant to § 424.550(b)(1) is of a new HHA, not an existing one; this is because § 424.550(b)(1) requires the HHA to enroll as a new provider.

Comment: One commenter suggested that CMS hold that an HHA provider number will not transfer upon an ownership change unless either: (1) The new owner has successfully been through the State survey or accreditation process and the parent company has filed cost reports on behalf of other HHAs it owns for 36 months; or (2) the HHA being purchased has filed cost reports for at least 36 months. This would, the commenter explained, significantly curtail, if not eliminate, the certificate mill process.

Response: As already explained, our concerns are not limited to the "flipping" process. We are also concerned with ensuring that newly-sold HHAs are still in compliance with the conditions of participation. Nevertheless, we have adopted an exception to the 36-month rule that is consistent with the commenter's second suggestion.

Comment: Several commenters stated that the primary intent of this provision was to stem the practice of turn-key ventures that establish HHAs for the sole purpose of selling them. The commenters argued that the proposed rule exceeds this intent.

Response: We disagree that this rule exceeds its intent. Again, aside from the issue of "flipping," we believe it is crucial for Medicare to ensure that entities undergoing an ownership change remain in compliance with the conditions of participation. We believe the final rule helps fulfill this intent.

Comment: One commenter stated that the proposed changes are confusing and discriminatory, that the rule conflicts with existing law regarding transfers of ownership, and will effectively halt all mergers and acquisitions in the HH industry unless the HHA is a public company. The commenter stated that many HHAs are small companies, and their investment in our communities should be protected.

Response: We are unable to address the commenter's first and second contentions, as the commenter did not explain how the proposed rule is confusing or discriminatory, or how it is inconsistent with current laws regarding ownership changes. With respect to the third contention, we agree that the volume of HHA ownership changes, including asset sales and stock transfers, could be reduced as a result of the 36-month rule. Yet we also believe that the exceptions outlined in this final rule will allow a number of legitimate HHA ownership changes to proceed.

Comment: Several commenters stated that no evidence of the "certificate mill" problem has been substantiated by CMS. Another commenter stated that CMS has not defined or described the program integrity or quality of care concerns that the proposed rule is designed to address, nor has CMS identified the harm caused by the "flipping" process. This commenter added that if CMS's concerns go beyond the issue of "flipping," this needs to be clearly disclosed so that comments can be furnished.

Response: We disagree with these assertions. In the proposed and final rules for CY 2010 and 2011, we clearly articulated our concerns about this

problem and stated that we have uncovered instances where entities have enrolled in Medicare for the specific purpose of selling their HHAs to other entities looking to obtain Medicare billing privileges. We further explained that this practice allows a new entity to enter Medicare without having to undergo a State survey, which therefore raises questions as to whether the HHA is furnishing quality services to Medicare beneficiaries. In the 2010 proposed and final rules, we also articulated why this issue is especially disconcerting in light of the program integrity issues prevalent in the HHA community. In addition, we have consistently explained our concerns about the need to verify that newly-sold HHAs—even those not specifically engaged in the practice of "flipping"—are in compliance with the conditions of participation.

Comment: One commenter stated that a change in majority ownership does not necessarily imply a change in the management of the HHA's day-to-day operations. A survey should be conducted only if the majority ownership change is accompanied by other factors that raise questions about the entity's compliance. In other words, surveys pursuant to § 424.550(b)(1) should be conducted on a case-by-case basis. Other commenters, too, expressed concern about the "majority ownership" standard, and stated that CMS should instead apply the definition of "change of ownership" in § 489.18 to the 36-month rule, or should require a 100 percent ownership change before § 424.550(b)(1) is triggered.

Response: While we agree that a change in majority ownership of a particular HHA may not always result in a change in the HHA's management, it has been our experience that a change in management routinely occurs when there is a change in ownership.

Comment: Several commenters recommended that the proposed revisions to the 36-month rule be applied prospectively only. Specifically, the commenters believed that no currently-enrolled HHA should be subject to the rule, in that they entered Medicare without a restriction on the sale of the HHA other than those existing at that time. At most, one commenter stated, CMS should apply the rule to HHAs initially enrolled in Medicare on January 1, 2010 (the effective date of the rule) or later. Otherwise, applying the rule to HHAs enrolled prior to that point will affect the business's value and financial stability.

Response: For reasons already stated, it is important for us to confirm that an entity undergoing an ownership change is still in compliance with the HHA conditions of participation. Consequently, we do not believe that all HHAs enrolled prior to January 1, 2010 should be exempt from the provisions of this final rule. As an example, assume that an HHA initially enrolled in Medicare on July 1, 2009. The HHA is subject to § 424.550(b)(1) through July 1, 2012, or 36 months after its date of initial enrollment. If the HHA undergoes a change in majority ownership on September 1, 2011, it will be subject to § 424.550(b)(1) until September 1, 2014, or 36 months after its most recent ownership change.

Comment: Several commenters expressed concern that § 424.550(b)(1) would lead to beneficiaries that are under treatment by an HHA undergoing a § 424.550(b)(1) ownership change to be denied certain services (or discharged and compelled to find care elsewhere), since the HHA will have to enroll as a new entity. Another commenter stated that this could also lead to layoffs of the HHA's staff.

Response: We disagree. As we have stated in a number of forums, there is no shortage of available HH services throughout the country. A patient who may be discharged under the commenter's scenario will retain access to care via other HHAs within the community. We do not think there is a risk of a discharged beneficiary being unable to obtain HHA services from another provider.

Comment: A commenter suggested that instead of the 36-month rule, CMS should use its deactivation authority under § 424.540 to deactivate the billing privileges of an entity undergoing a change of ownership until a State survey is completed; additional ownership changes could be prohibited during that period. The new owner would therefore receive payments, but they would be delayed. This would be consistent with § 424.540(b)(3)(i), which mandates a survey prior to the reactivation of an HHA's billing privileges. Likewise, another commenter suggested that CMS, in the alternative: (1) Require an HHA to notify CMS of the forthcoming sale 60 days in advance (and terminate the HHA if such notice is not given); (2) suspend the HHA's billing privileges effective the date of the sale; and (3) require the HHA to undergo a State survey or obtain accreditation within 6 months of the ownership change. Failure to meet either (1) or (3) would result in the termination of the provider's Medicare enrollment.

Response: We appreciate these suggestions. However, we believe that § 424.550(b)(1) more adequately furnishes the program safeguards we seek because the HHA will be required to enroll as a new provider and be subject to all of the provider enrollment and State survey vetting processes that other new HHAs must undergo.

Comment: Another commenter suggested that CMS mandate that a provider agreement would not transfer upon a change of ownership if both the purchasing and selling entities: (1) Have not successfully been through the State survey process (or deemed accreditation process); and (2) have never filed an HHA cost report.

Response: We appreciate this suggestion. The commenter's first criterion, however, is superfluous because the enrolled HHA that is being purchased will have already gone through the State survey or accreditation process prior to enrollment. Moreover, the second criterion makes no distinction between full cost reports and low or no utilization cost reports. Consequently, under the commenter's scenario, an HHA could be exempt from the 36-month rule so long as it submitted one cost report—even if it was a no utilization cost report. In light of this, we do not believe the commenter's recommendation provides the necessary program safeguards.

Comment: One commenter stated that while the 36-month rule was well-founded in purpose and intent, it will negatively impact bona fide HHAs and the patients they serve and should be redesigned wholesale or significantly revised to better balance the interests of patients, providers, and Medicare. The commenter recommended that CMS work with the health care industry to achieve the program integrity purposes behind the rule.

Response: We believe the exceptions in this final rule strike the necessary balance between our program integrity concerns and our desire to address some of the issues raised by the HHA industry.

Comment: One commenter stated that the 36-month rule will create more harm than good. The commenter cited an example of an HHA that is poorly run. The HHA, rather than being able to freely sell the business, would now be encouraged to hold on to the HHA until the 36-month clock expires. Another commenter added that even in cases where an HHA owner had every intention of maintaining its ownership for more than 36 months after its initial investment, many personal and professional circumstances can occur to impact that timing.

Response: Given the changes we have adopted in this final rule, we believe that the owner of an HHA as described above would need to make the business decision to remain in the Medicare program or to exit the Medicare program voluntarily.

Comment: Several commenters asked for clarification as to whether indirect ownership changes are subject to the 36-month rule.

Response: Indirect ownership changes are not subject to the 36-month rule. We have clarified this in the regulatory text of the final rule. However, CMS will further analyze and monitor this issue, and may consider modifying this policy in future rulemaking.

Comment: One commenter suggested that indirect ownership changes without significant day-to-day management changes be exempt from the 36-month rule.

Response: As previously stated, indirect ownership changes are not subject to the 36-month rule.

Comment: A commenter stated that with the termination of the provider agreement upon the application of § 424.550(b)(1), Medicare loses the assumption of Medicare liabilities that come with the transfer of the provider agreement.

Response: We appreciate this comment, but believe that the 36-month rule helps us address the program integrity concerns we have outlined.

Comment: One commenter stated that because many states require an HHA to maintain a valid Medicare certification as a condition of Medicaid enrollment, loss of the HHA's enrollment in Medicare could prevent the entity from furnishing Medicaid services.

Response: We understand the commenter's concern. However, we believe that owners of an HHA need to consider the impact of any changes of ownership on all of their payer relationships, not just Medicare.

Comment: One commenter stated that CMS needs to apply caution in detailing regulations that financially impact legitimate HHAs and large numbers of patients. This is especially true if, for instance, a State is involved in purchasing or selling a significant number of HHAs and many CMS–855A applications must be completed.

Response: We agree, and have incorporated public comments into this final rule that protect the Medicare program while helping to ensure that HHAs continue to have access to capital markets.

Comment: One commenter stated that several of CMS's concerns about certificate mills may be somewhat misguided. The commenter cited verbiage in the CY 2010 and 2011 HH PPS rules in which we stated that certain HHA brokers sell the business without having seen a patient or hired an employee. The commenter stated that the entity is required to provide services to at least 10 patients prior to obtaining a provider agreement.

Response: In this final rule, we have incorporated the submission of a full cost report for 2 years as an exception to the 36-month rule. Accordingly, we recognize that some HHAs do not submit cost report data or submit low utilization cost reports.

Comment: One commenter stated that the 36-month rule will be extremely damaging to the home care industry and requested that CMS not implement it.

Response: Though we are unsure as to the commenter's specific concerns about the 36-month rule, we believe, for reasons already stated, that it is necessary.

Comment: Several commenters asked whether § 424.550(b)(1) applies if there is a transfer between partners that changes one person's ownership interest from 40 percent to greater than 50 percent. The commenters questioned the provision's applicability, since the parties have not changed but have simply shifted the assets between them.

Response: Section 424.550(b)(1) applies if there is a change in majority ownership. Since, in the example posed by the commenters, there is a change in majority ownership (that is, a person or entity now owns over 50 percent of the HHA) § 424.550(b)(1) indeed applies, assuming the entity does not qualify for an exception under § 424.550(b)(2).

Comment: One commenter stated that there were two typographical errors in the definition of "majority ownership" in § 424.502. First, the word "months" should immediately follow the phrase "during the 36." Second, after "Medicare program," the phrase "or a change of ownership" should be deleted.

Response: We have revised § 424.502 to incorporate the first change, but we are not incorporating the second change.

(2) Exceptions

Comment: One commenter recommended that if additional assurance is required that an HHA is indeed a viable agency and not being "flipped," we could extend the applicability of the proposed 36-month rule to sales of HHAs that have never filed a full cost report or that have filed a no or low utilization cost report pursuant to the Provider Reimbursement Manual.

Response: We agree in part with this commenter, and have adopted the use of full cost reports in our exception criteria for the 36-month provision and in § 489.28(c)(1). Moreover, we agree that an HHA must submit two or more consecutive full cost reports before the agency can receive an exception under § 424.550(b)(2)(i). It is also important to note that we do not believe the submission of a low utilization cost report or no cost report for a given practice location meets the full cost report standard.

Comment: Several commenters recommended that we adopt a public company exception to the 36-month requirement that states, "A company is acquiring another company that is an HHA (or is the parent company of one or more HHAs) and the majority of the HHAs being acquired are bona fide operating HHAs that have submitted cost reports to Medicare for the previous 36 months or longer."

Response: As already stated, an HHA must submit two or more consecutive full costs reports before it can qualify for an exception under § 424.550(b)(2)(i). We believe this exception would effectively block all unwanted "license flipping" transactions, while ensuring that bona fide operating businesses can obtain financing.

Comment: Several commenters expressed concern over the proposed exception in § 424.550(b)(2)(i) for publicly-traded companies that purchase an HHA. Among the arguments they presented were that: (1) It gives an unfair advantage to publicly-traded firms, (2) it restricts competition and is contrary to the public interest; (3) private companies in many cases have the resources and size comparable to publicly-traded companies; (4) a transaction by a privately-held, bona fide HHA is no less legitimate than one involving a publicly-held company; (5) since the statute does not give publicly-traded HHAs any greater rights or privileges, neither should the 36-month rule; (6) the additional legal and oversight requirements applicable to public companies do not make a difference with respect to compliance with Medicare rules to warrant an exclusive exception; and (7) because most HHAs are small, privately-held companies that lack the resources of some larger, publicly-held companies, the latter have an unfair advantage. Several of these commenters also contended that § 424.550(b)(2)(i) should be expanded to include private companies, and that public and private companies should be exempt if the HHA submitted cost reports to Medicare for the previous 3 years. One commenter stated that this will balance the need to protect the Medicare program without restricting

legitimate transactions. Another commenter, believing that proposed § 424.550(b)(2)(i) is unfair, suggested two additional exceptions. One was for an individual or company that purchases an HHA with an initial investment of $15 million (or some other substantial figure). The second should be for buyers that already operate one or more HHAs with aggregate revenues of greater than $25 million. These prospective buyers, the commenter stated, are not of the types that intend to commit fraud.

Response: Section 424.550(b)(2)(i) has been revised to apply to both private and public companies.

Comment: One commenter stated that the public-company exception should be replaced with an exception for a company acquiring another company that is an HHA (or is the parent company of one or more HHAs), and the majority of the HHAs being acquired are bona fide operating HHAs that have submitted cost reports to Medicare for the previous 36 months or longer. The commenter defined "bona fide" as an operating entity that employs caregivers, provides services to beneficiaries and other patients, and has filed Medicare cost reports for the previous 36 months or longer. Another commenter recommended that CMS exempt from the 36-month rule any "experienced" acquiring party, whether a public or private company. The commenter defined "experienced" as an HHA that has had at least one survey within the last 36 months.

Response: Section 424.550(b)(2)(i) has been expanded to include any HHA that has submitted 2 consecutive years of cost reports (excluding low or no utilization cost reports).

Comment: Several commenters questioned why CMS did not propose an exception for non-profit entities. One commenter requested that CMS furnish a rationale for this decision. Another commenter stated that the transfer of control of non-profit, tax-exempt HHAs to another non-profit, tax-exempt entity should be exempt from the 36-month rule because of other safeguards that prevent "flipping" transactions.

Response: Section 424.550(b)(2)(i) is equally applicable to non-profit and for-profit entities.

Comment: One commenter believed that the exceptions to the 36-month rule were reasonable in view of the need to accommodate legitimate changes in ownership. The commenter added, however, that while non-profits are not engaged in buying and selling HHAs or operating large national chains, non-profits that must merge for financial or other reasons should be offered full support by CMS to ensure the continuation of service to vulnerable patients.

Response: We appreciate the commenter's support for our proposed exceptions to the 36-month rule and, as already mentioned, non-profit entities are included within the purview of § 424.550(b)(2)(i).

Comment: One commenter suggested that any change in ownership of a holding company that owns and operates HHAs through subsidiaries be exempt from the 36-month rule, so long as that holding company has one or more consolidated subsidiaries that have submitted cost reports to Medicare for at least 2 years.

Response: While we appreciate this suggestion, it is moot because, as already mentioned, indirect ownership changes are not impacted by the 36-month rule.

Comment: Several commenters suggested that we establish an exception to § 424.550(b)(1) to permit a qualifying bank or other legitimate lending institution to foreclose on a defaulted loan and to permit the lender to, in turn, sell the HHA to an accredited buyer. Failure to do so will curtail the ability of HHAs to secure financing, since banks will be reluctant to loan money to HHAs if, should the HHA collapse financially, the bank will be unable to foreclose on the business. Another commenter agreed, stating that the proposed 36-month rule eliminates the option of foreclosure as security for lenders.

Response: Since there is no enterprise value to an HHA that is in bankruptcy or where the lender forecloses (except the Medicare billing number), we do not believe that this exception should be adopted in formal rulemaking. However, we believe that we would be compelled to follow a court order approving the sale of an HHA.

Comment: Several commenters suggested an exception for ownership changes triggered by a bankruptcy with court approval. This will allow the HHA to obtain needed capital.

Response: As stated above, we will comply with court orders, but we do not believe that a bankruptcy exception to the 36-month rule is necessary.

Comment: One commenter suggested that we create an exception to § 424.550(b)(1) to allow a buyer that already operates an accredited HHA to acquire an unrelated HHA if the accrediting body extends the buyer's accreditation to include the newly-acquired HHA. Accrediting organizations, the commenter stated, will only extend accreditation if they are satisfied with the buyer's ability to operate the HHA in accordance with its standards.

Response: We appreciate this suggestion. However, we believe that § 424.550(b)(1) and its associated exceptions more adequately provide the program safeguards we desire.

Comment: Several commenters stated that the exception in § 424.550(b)(2)(iv) is superfluous because the death of an owner of 49 percent or less of the business does not result in a change in majority ownership anyway. The commenters suggested that the exception be revised to include the death of a majority owner, provided the remaining owners or partners retain their ownership. One commenter expressed concern that § 424.550(b)(2)(iv) applies only when a deceased owner has less than a 50 percent ownership interest and that the exception applies to all types of business structures. This, the commenter states, could cause the entity undue hardship. Another commenter stated that the transfer of ownership from death should be completely exempt from the 36-month rule, and added that the currently proposed exception does not clarify the types of ownership interests to which it applies.

Response: We have revised § 424.550(b)(2)(iv) to state that the death of an owner does not trigger the 36-month rule.

Comment: A commenter requested clarification of the term "several individuals" as used in proposed § 424.550(b)(2)(iv), which reads: "The death of an owner who owns 49 percent or less interest in an HHA (where several individuals or organizations are co-owners of an HHA and one of the owners dies.)" The commenter asked whether a trust qualifies as an "individual."

Response: The term "several individuals" refers to more than one person, not to trusts. However, the verbiage in parentheses was meant to include all owners regardless of type. It was used only to describe situations in which an HHA has multiple owners. Yet the issue is largely moot based on our aforementioned revisions to § 424.550(b)(2)(iv).

Comment: One commenter asked whether the exception in § 424.550(b)(2)(iv) applies if a corporation owned by three people establishes an HHA under a 49 percent, 49 percent, and 1 percent stock ownership scenario, and one person dies.

Response: As stated above, we have revised § 424.550(b)(2)(iv) to state that the death of an owner does not trigger the 36-month rule.

Comment: Several commenters recommended that CMS reduce the cost reporting time for the proposed exceptions to the 36-month rule from 5 years to 2 years. The commenters believed that 2 years was sufficient.

Response: We agree, and have revised this final rule accordingly.

Comment: Several commenters stated that an ownership change resulting from estate planning should be exempt because it shows a commitment to the delivery of care.

Response: We believe that the expansion of § 424.550(b)(2)(i) will allow a number of bona fide estate transactions to proceed.

Comment: Several commenters stated that the "parent company" exception in § 424.550(b)(2)(ii) should be revised to include the parent's subsidiaries, including the HHA itself. That is, as we understood the comment to read, if the HHA itself is internally restructuring, this should not trigger the 36-month rule, regardless of the number of cost reports the entity has submitted.

Response: We have removed the cost report submission requirement from § 424.550(b)(2)(ii). We note further that § 424.550(b)(2)(iii) exempts certain situations in which the HHA itself is changing its business structure.

Comment: A commenter recommended an exception for changes of ownership involving entities that share a common corporate ownership.

Response: We are not in a position to adopt this suggestion for this particular final rule. Nevertheless, we may consider it as part of a future rulemaking effort.

Comment: One commenter stated that the exception in § 424.550(b)(2)(iii) for a change in business structure should apply if there is no change in the individual owners, regardless of whether there is a change in majority ownership. The commenter further stated that there should be no qualifiers on allowing corporate restructurings where the chain of ownership remains the same. The experience of the HHA—which we interpreted to mean, from the provider's comment, as the filing of cost reports for the previous 5 years—has no bearing on whether the restructuring changes the day-to-day operations.

Response: If the majority ownership is not changing, § 424.550(b)(2)(iii) is inapplicable. However, we have revised § 424.550(b)(2)(iii) to state that a change in business structure—such as a change either to or from a corporation, a partnership (general or limited), or an LLC—does not trigger § 424.550(b)(1) if there is no change in the owners of the HHA.

The cost report submission requirement specified in proposed § 424.550(b)(2)(i) and (ii) was not part of proposed § 424.550(b)(2)(iii), and we have not inserted it into the final version of the latter provision.

Comment: One commenter stated that further clarification is needed related to the internal restructuring that qualifies for the exception.

Response: Though we are uncertain as to type of clarification the commenter seeks, we believe that the exceptions in § 424.550(b)(2)(ii) and (iii) regarding internal restructuring, and the revisions made to the latter, are clear. We note that several examples of the types of restructuring impacted by § 424.550(b)(2)(iii) are included within that provision. CMS, however, may in the future issue further guidance on this subject as needed.

(3) Miscellaneous Program Safeguard Comments

The following is a summary of comments we received on the proposed rule that do not specifically address the merits of our proposed changes to the capitalization provisions and the 36-month rule.

Comment: Several commenters recommended that we provide education to Medicare contractors regarding the implementation of any new provisions related to changes in ownership.

Response: We agree with these commenters, and will develop manual instructions to implement the provisions of this final rule.

Comment: Several commenters stated that this portion of the proposed rule is confusing, contains certain internal language conflicts, and requires clarification. Another commenter stated that further clarification is needed to determine the rule's full impact on HHAs.

Response: Without further information as to the provisions that are of concern to these commenters, we are unable to address these comments.

Comment: One commenter stated that the proliferation of new for-profit HHAs is contributing to the fraud, abuse, and misuse of the HH benefit, and recommended that CMS impose a moratorium on the certification of new HHAs effective immediately. If, the commenter stated, CMS's assertion that there is already adequate access to HH services is true, then adding further capacity creates inefficiency in the system by adding more fixed costs and, in some situations, provider-induced demand.

Response: While we appreciate this comment, it is outside the scope of this final rule.

Comment: Another commenter expressed great concern about the ease of entry into the HH marketplace and raised questions as to the qualifications of certain HHAs that are granted deemed status. The commenter urged CMS to use the final rule to suspend all deemed status certifications and impose a national "cooling off period" for new entries to the marketplace. The commenter suggested that this occur for a minimum of 18 months following publication of this final rule.

Response: While we appreciate this comment, it is outside the scope of this final rule.

Comment: One commenter stated that CMS should ensure that the Medicare contractor completes the processing of tie-in notices within 21 days of its receipt of said notice.

Response: This comment is outside the scope of this final rule.

Comment: One commenter stated that the proposed changes will limit a health system's ability to engage in good business practices.

Response: Without further information as to the specific business practices the commenter refers to, we are unable to address this comment.

4. Provisions of Final Rule

Based on the public comments, we are adopting the provisions of the proposed rule with the following revisions:

- In § 424.502, we have inserted the word "months" immediately after the phrase "during the 36." We have inserted the term "direct" to clarify that the definition of majority ownership only applies to changes in direct ownership of the HHA. We have also changed the verbiage "following the initial enrollment into the Medicare program or a change of ownership" to "following the HHA's initial enrollment into the Medicare program or the 36 months following the HHA's most recent change in majority ownership," so as to more clearly articulate the definition's applicability.
- In § 424.550(b)(2)(i), we have replaced the "publicly-traded exception" with an exception for an existing HHA that has submitted 2 consecutive years of Medicare full cost reports. For purposes of this exception, low utilization or no utilization cost reports do not qualify as full cost reports. We have also inserted the phrase "or within 36 months after the HHA's most recent change in majority ownership," to ensure consistency with the verbiage in the definition of "change in majority ownership" in § 424.502.

• In § 424.550(b)(2)(ii), we have eliminated the 5-year period for cost report submissions.

• In § 424.550(b)(2)(iii), a change in majority ownership of the HHA will be exempt from § 424.550(b)(1) if the HHA is changing its existing business structure—such as from a corporation, a partnership (general or limited), or an LLC to a corporation, a partnership (general or limited) or an LLC—and the owners remain the same.

• In § 424.550(b)(2)(iv), the death of an owner will not trigger § 424.550(b)(1).

• In § 489.28(a), we reemphasized that the HHA must also have available sufficient initial reserve operating funds for the 3 month period following the conveyance of Medicare billing privileges.

F. Home Health Face-to-Face Encounter

As a condition for payment, the Affordable Care Act mandates that, prior to certifying a patient's eligibility for the HH benefit, the physician must document that the physician or a permitted nonphysician practitioner (NPP) has had a face-to-face encounter with the patient. The Affordable Care Act allows the Secretary to determine a reasonable timeframe for the encounter to occur. The certifying physician must document the face-to-face encounter regardless of whether the physician himself or herself or one of the permitted NPPs perform the face-to-face encounter. The Affordable Care Act describes NPPs who may perform this face-to-face patient encounter as a nurse practitioner or clinical nurse specialist, as those terms are defined in section 1861(aa)(5) of the Act, who is working in collaboration with the physician in accordance with State law, or a certified nurse-midwife (as defined in section 1861(gg) of the Act, as authorized by State law), or a physician assistant (as defined in section 1861(aa)(5) of the Act), under the supervision of the physician.

We proposed a change to the timeframe of the face-to-face encounter. The goal of the Affordable Care Act provision is to achieve greater physician accountability in certifying a patient's eligibility and establishing a patient's plan of care. We believe these goals can be achieved better if the face-to-face encounter occurs closer to the HH start of care, increasing the likelihood that the clinical conditions exhibited by the patient during the encounter are related to the primary reason the patient comes to need HH care. Therefore, we proposed that the encounter occur within the 30 days preceding the start of HH care, if the reason for the encounter is related to primary reason the patient requires home care. If no such encounter occurred prior to the start of HH care, we proposed that the encounter must occur within 2 weeks after the start of care.

Additionally, as part of the Affordable Care Act mandated encounter documentation, we proposed that the physician document on the certification how the clinical findings of the encounter support the eligibility requirements that a patient be homebound and need intermittent skilled nursing or therapy. The Affordable Care Act allows NPPs to perform the face-to-face encounter and inform the certifying physician. We also proposed that a NPP performing the face-to-face encounter with a patient cannot be employed by the HHA providing care, consistent with current policy which precludes a physician who certifies a patient's HH eligibility from having a financial relationship with the HHA.

For a complete description of the Home Health Face-to-Face Encounter proposed implementation approach we refer readers to the CY 2011 HH PPS proposed rule published on July 23, 2010.

Comment: A number of commenters stated concern regarding the feasibility of implementing a face-to-face encounter requirement and they suggested that the face-to-face encounter requirement be removed altogether. Commenters stated opposition to implementation of the face-to-face encounter requirement, fearing that it would cause agencies to go out of business and place stress on the physician-HHA relationship. Another commenter suggested that the face-to-face requirements would also place a strain on the relationship between emergency personnel, such as hospitalists and ER physicians, and primary care physicians. Additionally, some commenters stated that the face-to-face encounters could cause decreased access to physician care services since the physician would be inundated performing face-to-face encounters and would not have enough time to provide medically-related services. Furthermore, a commenter suggested that CMS allow the certifying physician to decide whether or not a face-to-face encounter was even needed. Commenters described the challenges and health risks associated with homebound patients visiting a physician's office for the face-to-face encounter, and some patients would need to be transported via ambulance to see a physician or NPP for the encounter. A few commenters stated that there should be an audit process after HH services are provided as an alternative to implementing face-to-face encounter requirements. Many commenters suggested that the face-to-face encounter requirements would delay and decrease access to HH services, resulting in unnecessary and prolonged visits to hospitals or emergency care settings, which ultimately increase Medicare costs. Commenters also described the burden and additional costs, which agencies will incur as a result of this requirement, with many commenters stating that the requirement will risk access to HH care for Medicare beneficiaries. A commenter asked CMS to explain the rationale behind the requirement for a face-to-face encounter and of HH care. Another commenter asked CMS to clarify whether the face-to-face encounter would be required solely for the first episode or also for consecutive episodes.

Response: We note that section 6407(a) of the Affordable Care Act (as amended by section 10605) amends the requirements for physician certification of HH services by requiring that, prior to making such certification, the physician must document that the physician himself or herself or specified NPP has had a face-to-face encounter with the patient. The legislation mandates the face-to-face encounter as a condition for payment. We are required by law to implement this provision and we do not have the authority to waive the requirement or to adopt alternatives to it. The provision does provide us with some flexibility in the implementation, such as providing us with the discretion to set a reasonable timeframe for this encounter.

While we are sensitive to commenters' concern regarding care risk associated with this requirement, we also note that in enacting this provision, the Congress allowed practitioners other than the certifying physician to perform the encounter. Specifically, the Affordable Care Act describes NPPs who may perform this face-to-face patient encounter as a nurse practitioner or clinical nurse specialist, as those terms are defined in section 1861(aa)(5) of the Act, who is working in collaboration with the physician in accordance with State law, or a certified nurse-midwife, as defined in section 1861(gg) of the Act, as authorized by State law, or a physician assistant, as defined in section 1861(aa)(5) of the Act, under the supervision of the physician. The Affordable Care Act also allows the encounter to be satisfied through the use of telehealth services, subject to the requirements in section 1834(m) of the

Act. We remind the commenter that a criterion to be eligible for Medicare's HH benefit has always been that the patient must be under the care of a physician. In response to the commenter who requested that we provide a rationale for the face-to-face encounter, we reiterate that this is a mandate of the Affordable Care Act and, because this is a statutory requirement, we must require this encounter as a condition of payment. However, we believe that more physician and/or practitioner involvement with the HH patient will improve the quality of care provided to the HH patient by providing the physician, who is managing the care plan, with more direct clinical information about the patient which is obtained from the encounter. If a NPP performed the encounter, the NPP would communicate the patient's clinical information obtained during the encounter to the certifying physician. We also believe increased physician involvement will enable the certifying physician to more accurately certify the "homebound" and "in need of skilled services" eligibility requirements, thus promoting more appropriate use of Medicare's HH benefit.

In response to the commenter who asked CMS to clarify whether the encounter is required only for the first episode, we believe that the commenter is asking whether the provision applies to the initial certification or whether it also applies to each subsequent recertification as well. We note that the Congress enacted the requirement to apply to the physician's certification, not the recertification. Therefore, we have interpreted this provision to apply to the initial certification only. In response to the commenter's concern about transporting homebound patients to see a physician in order to meet the requirement, we remind the commenter that we are allowing an encounter which occurred prior to home health admission to satisfy the requirement, with certain caveats, as we describe in more detail in the following response. Also in response to the burden concerns, we refer commenters to a 2001 survey by the OIG which reported that of the physicians in the study sample, 86 percent who sign home health orders see their patients under home health care at least monthly. (*The Physician's Role in Medicare Home Health* (OIG publication No. OEI–02–00–00620)).

Comment: Some commenters expressed concern about the proposed certification timing requirements, stating that the proposed requirements may prevent patients from receiving necessary HH services due to the inability to have a face-to-face encounter in the required timeframe. The time requirement may not be met due to the shortage of certifying physicians and their limited availability and/or the patients' limited transportation options, especially for homebound patients and those who live in rural areas. A commenter also suggested that patients with dementia or behavioral health conditions may have a particularly difficult time meeting the face-to-face requirements. A few commenters described a survey of HHAs which suggested that the proposed timeframe will decrease access to care and cause delays. In order to prevent delays or decreased access to HH care, commenters suggested increasing the timeframe in which a face-to-face encounter must occur. Several commenters believed that if physicians have seen the patient within the last 6 months, then that visit should satisfy the encounter requirement. Some commenters stated that the Congress intended that the face-to-face encounter could occur up to 6 months prior to the initiation of HH services up to and including the date the physician signs the certification. Other commenters suggested other timeframes, such as 90 days prior to the start of care and up to one month after the start of care.

A commenter suggested that CMS start with a long timeframe for the face-to-face encounter requirement and then slowly transition to a shorter timeframe to better address any unforeseen issues and ease the transition associated with this requirement.

One commenter believed there should be stricter requirements for the face-to-face encounter. Two commenters suggested that CMS remove the provision, which allows a face-to-face encounter to be performed after the start of services. One of the two commenters further stated that the reason for the face-to-face encounter requirement is to ensure that the there is an independent evaluation of the need for HH services before they are provided. Allowing services to be provided before this assessment is made may cause confusion if the face-to-face requirements cannot be met, potentially causing a sudden termination of services and a lack of payment for the services already provided. The commenter stated that CMS can prevent these scenarios by requiring that a face-to-face encounter occur before the start of HH services. The commenter also stated that the 30-day timeframe proposed in the face-to-face encounter requirements was appropriate for patients who were discharged from the hospital or emergency room. However, the commenter thought that the 30-day timeframe should be shortened to 15 days for patients who are admitted to the HH setting from the community. The commenters suggested that CMS may want to consider an extended timeframe for the encounter in rural settings. Another commenter believed that the face-to-face requirements be altered or completely removed in rural areas.

Other commenters urged CMS to abandon the proposed requirement which states that the encounter must be related to the reason the patient needs home care, describing concerns with enforcement of such a provision. Commenters have suggested that when a patient's condition changes, communication between the certifying physician and the HHA is sufficient and can replace the need for a more current face-to-face encounter.

A commenter asked CMS how it would ensure that there was, in fact, a face-to-face encounter within the timeframe.

Other commenters stated that there may be scenarios where patients are seen by specialists who do not act as their certifying physician. In this case, a primary care physician would need to perform a face-to-face encounter; however, the encounter could be redundant since the patient was already seen by the specialist. Similarly, another commenter stated that often patients will be referred to HH services by resident physicians or hospitalists and they may not be able to see a primary care physician for the face-to-face encounter. In addition, while the patient is in the hospital or emergency care setting, the primary care physician may not have hospital privileges and may not be allowed to see the patient. Furthermore, commenters have stated that even if hospitalists and emergency room physicians are allowed to certify the face-to-face encounter, they may be hesitant to do so since they would not want to or be able to take over the plan of care responsibilities. A commenter suggested that the primary care physicians be allowed to certify HH services after reading the hospitalist's discharge summary. Also, a commenter stated that there already are problems with delays in starting HH services due to patients' lack of follow-up visits or infrequent visits with their primary care physician. Other commenters have stated that some patients do not have a primary care physician and may need to be treated by a community-based or clinic physician, which may take longer than 14 days to have the face-to-face encounter. Moreover, commenters expressed concern with a timeframe of 2 weeks after the start of care to have the

face-to-face encounter, stating that, should a timely encounter not occur, the HHA would then lose money for services provided during that time and the patient would not receive all of the necessary services. The HHA would be held financially liable when the patients or physicians are at fault. A few commenters asked whether an agency could require patients to sign an Advanced Beneficiary Notification (ABN), which would allow the agency to hold the patient financially responsible if a face-to-face encounter did not occur as required. Commenters expressed concerns where a patient might not be able to secure an appointment or obtain transportation within the 2-week timeframe or who may be physically unable to get to the doctor's office. Another commenter suggested that there be an exception provision to the timeframe requirements if there was sufficient documentation that showed that there was a reasonable attempt to schedule a face-to-face encounter with a physician. A commenter also asked CMS to clarify whether partial payment would apply if the encounter occurred, but did not occur during the required timeframe.

Some commenters thought that a hospitalist's or specialist's face-to-face encounter could serve as the certifying encounter. Other commenters also thought that the hospitalist or specialist could sign the plan of care. Additionally, commenters suggested that the physician who has the best understanding of the patient's condition should serve as the certifying physician and a primary care physician can then formulate and sign the plan of care and take over responsibility for further care. Alternatively, a commenter proposed that the "HHA medical director" be allowed to act as the certifying physician in the face-to-face encounter or the HHAs hire physicians to perform the face-to-face encounter. Another commenter asked if and how a part-time HHA medical director could serve as a primary care certifying physician.

Furthermore, a commenter suggested that a HHA employee find out the patient's last face-to-face physician encounter and document the date. If the date was within 6 months of the HH referral, then the patient could receive HH services. If the patient had not seen a physician in 6 months, the commenter proposed that the patient see a physician before he or she could be enrolled in HH care services. The commenter also recommended that the date of the face-to-face encounter be placed on the plan of care.

A commenter also thought that the same timing standards currently used for certification be applied to the face-to-face encounter certification.

Response: In the proposed rule, we proposed that the encounter occur within the 30 days preceding the start of HH care, if the reason for the encounter is related to the primary reason the patient requires home care. If no such encounter occurred prior to the start of HH care, we proposed that the encounter must occur within 2 weeks after the start of care. We believe that this timeframe increases the likelihood that the clinical conditions exhibited by the patient during the encounter are related to the primary reason the patient comes to need HH care. We also believe that this timeframe best meets the program integrity and quality goals associated with the provision. The timeframe ensures that the certifying physician can accurately determine whether the patient meets the homebound and skilled need eligibility criteria while also ensuring that the physician understands the current clinical needs of the patient to establish an effective care plan. Additionally, a recent study shows that physician involvement with the HH patient within 30 days prior to HH admission results in significantly better patient outcomes. Patients receiving a face-to-face physician visit within 30 days of HH care were 1.45 times more likely to be discharged without hospitalization than patients who did not receive a face-to-face physician visit during their episode of care (Wolff et al., 2009, p. 1151 [1]). We incorporated studies such as this one and our clinical judgment in the creation and formation of the proposed timeframe. However, we found some of the commenters' concerns compelling. Regarding the feasibility of the proposed timeframes and the corresponding access to care risks, especially in rural areas, we will revise the timeframes described in the proposed rule to allow the encounter to occur up to 90 days prior to the start of care, if the reason for the encounter is related to the reason the patient comes to need HH care. If no such encounter has occurred, we will allow the encounter to occur up to 30 days after the start of care. This alternative timeframe was recommended in comments submitted by a major association of home care physicians. The comments described that chronic illnesses among the elderly are commonly associated with an office visit every 3 months, and by adopting a timeframe where the encounter could occur up to 3 months prior to the start of care, we would significantly mitigate the access to care risk. For those patients who had no encounter during the 3 months prior to the start of care which was related to the reason the patient comes to need HH care, we will allow the encounter to occur up to 30 days after the start of care. We continue to believe that it is essential for the encounter to be related to the reason the patient comes to need home care. Otherwise, the encounter does not meet what we believe to be the goals of the provision—to enable more appropriate use of the benefit while also improving the physician's ability to manage the patient's care. However, we understand the commenters' concerns surrounding enforcement of this provision. It is not our intent that those who enforce the provision would take such a literal interpretation to look for a cause and effect relationship between a diagnosis on the physician's claim and the diagnosis on the HH claim. Instead, it is our intent that should a patient's clinical condition change significantly between the time of the encounter and the start of home health care such that the physician's or NPP's ability to accurately assess eligibility and care plan would be at risk, a more current encounter would be necessary in order to meet the goals of the statutory requirement. As such, to address the commenters' concerns, we will expand on this requirement in manual guidance which we believe is the appropriate venue for such clarification.

We disagree with the commenters who stated that the Congress intended for us to allow the face-to-face encounter timeframe to encompass the 6 months prior to the date on which the physician signs the certification. If this was the Congress's intent, the legislative provision would not have included specific language, "reasonable timeframe as determined by the Secretary," which allows the Secretary to determine the timeframe.

We disagree with the commenter who suggested that the encounter must occur prior to the start of care. We believe that it will not be uncommon that a patient needs home care but has not seen a physician in the 3 months prior to the start of care and this should not preclude access. As is the practice today, the HHA would be responsible for ensuring that services are provided to eligible patients, and the face-to-face encounter, associated documentation, and signing of the certification would occur after the start of care.

In response to the commenters who believe that we should abandon the proposed criterion that the encounter

[1] Wolff, J. L., Meadow, A., Boyd, C. M., Weiss, C. O., & Leff, B. (2009). Physician evaluation and management of Medicare home health patients. *Medical Care. 47*(11), 1147–1155.

has to be related to the reason the patient has come to need HH, we continue to believe that in order to achieve what we believe to be the goals of the provision, the encounter must occur close enough to the HH start of care to ensure that the clinical conditions exhibited by the patient during the encounter are related to the primary reason for the patient's need for HH care. It ensures that the certifying physician can accurately determine whether the patient meets the homebound and skilled need eligibility criteria while also ensuring that the physician understands the current clinical needs of the patient to establish an effective care plan.

In response to the commenter who wanted to know how we would ensure that there was, in fact, a face-to-face encounter within the timeframe, we will issue instructions to the contractors who perform medical reviews to ensure compliance with this regulation. We also expect that other program integrity oversight efforts will be effective vehicles to monitor compliance with this condition of payment. We also expect that surveyors will monitor compliance with this requirement. In response to the commenter who asked that we clarify whether partial payment would apply if the encounter occurred outside the required timeframe, we reply that the Affordable Care Act established this provision as a condition of payment and therefore we would have no statutory authority to partially pay an agency if they complied with some but not all of the provision.

To address the commenters' concerns surrounding which physician must perform the face-to-face encounter and document that the face-to-face encounter occurred, we remind the commenter that the Affordable Care Act requires the certifying physician to document that the physician himself or herself or specified NPP has had a face-to-face encounter (including through the use of telehealth, subject to the requirements in section 1834(m) of the Act) with the patient. The Affordable Care Act describes NPPs who may perform this face-to-face patient encounter as a nurse practitioner or clinical nurse specialist (as those terms are defined in section 1861(aa)(5) of the Act) who is working in collaboration with the physician, in accordance with State law, a certified nurse-midwife (as defined in section 1861(gg)of the Act, as authorized by State law), or a physician assistant (as defined in section 1861(aa)(5)of the Act), under the supervision of the physician.

Where the patient is admitted to HH from the hospital, we believe that current practice associated with the HH certification would apply to the face-to-face encounter as well. In most cases, we would expect the same physician to refer the patient to HH, order the HH services, certify the beneficiary's eligibility to receive Medicare HH services, and sign the plan of care. It would be this physician who would be responsible for documenting on the certification that he or she, or a specified NPP working in collaboration with the certifying physician, had a face-to-face encounter with the patient. However, we recognize that, in certain scenarios, one physician performing all of these functions may not always be feasible. An example of such a scenario would be a patient who is admitted to HH upon hospital discharge. While we would still expect that in most cases, a patient's primary care physician would be the physician who refers and orders HH services, documents the face-to-face encounter, certifies eligibility, and signs the plan of care, there are valid circumstances when this is not feasible for the post-acute patient. For example, as several commenters pointed out, some post-acute HH patients have no primary care physician. In other cases, the hospital physician assumes primary responsibility for the patient's care during the acute stay, and may (or may not) follow the patient for a period of time post-acute. In circumstances such as these, it is not uncommon practice for the hospital physician to refer a patient to HH, initiate orders and a plan of care, and certify the patient's eligibility for HH services. In the patient's hospital discharge plan, we would expect the hospital physician to describe the community physician who would be assuming primary care responsibility for the patient upon discharge. It would be appropriate for the physician who assumes responsibility for the patient post-acute to sign the plan of care and thus be considered "under the care" of that community/personal physician throughout the time the patient is receiving HH services. In a scenario such as this, if the hospital physician certifies the patient's HH eligibility and initiates the orders for services, the hospital physician could document that a face-to-face encounter occurred and how the findings of that encounter, which in this scenario would have occurred during the patient's acute stay, support HH eligibility. The community physician designated on the discharge plan would assume responsibility for the patient at some point after acute discharge, updating orders, signing the plan of care, etc.

It is important to reiterate that to be eligible for Medicare's HH benefit, the patient must be under the care of a physician, and it is ultimately the responsibility of the HHA that this criterion is met. We have always held the HHA responsible for ensuring that there is a physician-signed plan of care, physician-signed orders, and a physician-signed certification. Therefore, we will also hold the agencies responsible for the certifying physician's encounter documentation. By statute, this documentation is a requirement for payment just as a physician-signed certification of eligibility is a requirement for payment. As such, the requirements for the face-to-face encounter documentation have many similarities to the existing certification requirements. We have no flexibility to adopt exceptions to the statutory face-to-face documentation requirements.

In response to the commenters who suggested that they deliver an HHABN to the HH patient describing the patient's possible financial liability should the face-to-face encounter not occur as required, this practice is not permitted. The HHABN, Form CMS–R–296, has been approved by the Office of Management and Budget (OMB) to provide limitation of liability protections to Original Medicare beneficiaries receiving HH services under section 1862(a)(1)(A)of the Act for care that CMS or its contractors determines is not reasonable and necessary under Medicare; section 1862(a)(9) for custodial care; (g)(1)(A) for care when the beneficiary is not homebound; and section 1862(g)(1)(B) for care provided to a beneficiary who is not in need of skilled nursing care. The HHABN must not be used to transfer liability to the beneficiary when technical requirements for payment, such as a face-to-face encounter, are not met. The HHABN is not approved for this use.

In response to the commenters who requested that HHA medical directors act as the certifying physician in the face-to-face encounter or that the HHAs hire physicians to perform the face-to-face encounter, we remind the commenters of longstanding regulatory prohibitions in § 424.22 which impose financial restrictions on the relationship between the HHA and the certifying physician. We continue to believe that these financial restrictions strengthen the integrity of the benefit.

Comment: Commenters have also expressed concern about the requirement that the face-to-face encounter be related to the reason the patient needs HH services and concern

about the documentation and rationalization requirements. Commenters also stated that the HHA has no control over the quality of the physician's documentation and no method to enforce proper physician documentation. A commenter suggested that the increased documentation responsibilities placed on the primary care physician would result in fewer referrals to HH. The commenter also stated that since the HHAs have no control over the quality of a physician's documentation, there should be a "without fault" provision applied when there is proper certification but lack of proper documentation. Furthermore, another commenter stated that it will be extremely costly for agencies to change their documentation systems to ensure the face-to-face encounter documentation is sufficient. Moreover, the commenter stated that there should be payment guarantees so that HHAs are not penalized because of improper physician documentation. A commenter suggested that CMS not finalize the proposed requirement that the physician's own medical record documentation be consistent with the encounter documentation on the certification. Another commenter suggested that CMS should not withhold payment for failing to meet the encounter documentation and instead impose other sanctions. One commenter also suggested that CMS provide payment even when a face-to-face encounter does not occur if the HHA can show that it informed patients and physicians of the requirements. In addition, a commenter suggested that agencies be protected from potential patient complaints that may be a by-product of these requirements. Another commenter suggested that CMS should not withhold payment for failing to meet the encounter documentation and instead impose other sanctions. Some commenters have suggested a gradual implementation of the new face-to-face requirements, or delaying the implementation of the new face-to-face encounter requirements. Commenters stated that the face-to-face encounter documentation requirements will slow the HHAs' efforts to move to electronic health records. Commenters have also stated that there are language barriers with communicating the new face-to-face encounter requirements. Other commenters requested that CMS permit HHAs to include standardized language on the certification form which would be signed and dated by the certifying physician to suffice as the encounter documentation. Commenters asked CMS to educate physicians and beneficiaries about the new face-to-face requirements, the rationale for the requirements, and their responsibility in these requirements.

Response: We thank the commenters for their suggestions. Regarding the comment, which suggested that we permit HHAs to include standardized face-to-face encounter language on the certification form, which would be signed and dated by the certifying physician, we remind the commenter that the statutory language in the Affordable Care Act requires that prior to certifying, the physician must document that the face-to-face encounter occurred. The law requires this as a condition for HH payment. We proposed that the documentation of the encounter be a separate and distinct section of, or an addendum to, the certification, and that the documentation include why the clinical findings of the encounter support HH eligibility. We believe that our proposed documentation requirements meet the Congress' intent for more physician involvement in determining the patient's eligibility and managing the care plan. We believe that were we to allow the HHA to craft standard language which the physician would then simply sign, we would not achieve the sort of physician involvement in the eligibility determination and care plan which was the Congress' intent. As such, we believe that if a HHA were to develop standardized encounter language to be signed by the physician, they would not be adhering to the statutory payment requirements that the "physician document" the encounter. Similarly, regarding the comment that we should not withhold payment, or should consider imposing other non-payment sanctions, or hold the HHA "without fault" for failing to meet the encounter documentation requirement, we reiterate that the law requires the physician to document that the face-to-face encounter occurred prior to certifying HH eligibility, as a condition of payment. Under section 6407(b) of the Affordable Care Act, we have no legal authority to exempt a HHA from this requirement, or to impose alternate sanctions if a HHA fails to meet a statutory payment condition.

Regarding the commenter who requested that we should not require the physician's own medical record documentation to be consistent with the documentation on the certification, we understand the commenter's concern, and we will revise the proposed regulation text to make clear that we are not holding the HHA responsible for the physician's own medical record documentation associated with the encounter. We would expect that a physician who performs a medically necessary physician service, which also satisfies the face-to-face encounter requirement, would maintain medical record documentation concerning the encounter, and the clinical findings associated with that encounter would be consistent with the physician's certification documentation. However, it is not our intent to penalize the HHA if the physician's own medical record documentation associated with the encounter is not in good order. Rather, we would look to the physician to fulfill his or her responsibility for ensuring appropriate medical record documentation associated with the encounter, and any associated Medicare billing. Regarding the commenter who asked us to protect agencies from complaints, which may be associated with this provision, we are unsure what the commenter means. We will continue to require providers to adhere to quality care practices while adhering to Medicare's Conditions of Participation.

We concur with the commenter who suggests that we educate physicians regarding this new law, and will do so via open door forums, listserv announcements, and MedLearn articles.

Regarding the comments which requested that we delay the face-to-face requirements, the comment that the face-to-face encounter documentation requirements will slow the HHAs' efforts to move to electronic health records, and the comments that suggested there are language barriers with communicating the new face-to-face encounter requirement, we again reiterate that this is a statutory requirement, which we must implement. We do not understand the rationale behind the commenter's fear that this requirement would delay adoption of electronic health records. We suspect this commenter is concerned that agency resources which might have been directed toward adopting electronic health records would be re-directed to implement this provision. We again reiterate that this is a statutory requirement, which we are required to implement.

We are also confused why the commenter believes that language barriers would preclude the face-to-face encounter, and remind the commenter that being under the care of a physician is a longstanding eligibility requirement for the HH benefit.

Comment: Commenters stated concern regarding the requirements for a face-to-face encounter by telehealth, stating that the current qualifications for telehealth coverage should not apply to the face-to-face encounter by telehealth

and that CMS has overly strict requirements on the parameters for a face-to-face encounter by telehealth. The current qualifications require the patient to go to an "originating site" outside of their home; however, by doing so, the patient's homebound status and therefore eligibility for HH services may be questioned. The commenter requested that CMS use section 1834(m) of the Act solely to define telehealth and expand the definition of telehealth services to allow for the use of equipment in the patient's home. Some commenters suggested that the face-to-face encounter by telehealth can be satisfied via telephone calls from the physician to the patient. Other comments suggested that CMS allow face-to-face telehealth visits at the patient's home and that the use of technology, such as video chat and remote assessment devices, be allowed in the telehealth visits.

Response: There are several codes that are currently defined as Medicare telehealth services that could be used to furnish and bill for medically necessary physician services, which would satisfy the encounter requirement, if furnished by telehealth. However, section 1834(m) requires the patient to be located at one of several specified types of originating sites, and we have no flexibility to permit telehealth services to be furnished to a patient in the home.

Regarding the comment that a patient's visit to a physician's office or telehealth originating site would threaten the patient's homebound status, we note that longstanding policy describes that if a patient leaves the home for health care treatment, the patient would nevertheless be considered homebound.

Comment: Several commenters stated concern regarding the proposed restriction that NPPs who are employed by the HHA cannot perform the face-to-face encounter. Commenters state that the proposed regulation imposes stricter financial criteria on the relationship between the HHA and NPPs who are performing the face-to-face encounter than has previously been applied to physicians who certify HH eligibility. Commenters stated that by having the same financial relationship criteria for certifying physicians and NPPs performing a face-to-face encounter, CMS will minimize conflict of interest while maximizing the number of medical personnel who are qualified to perform the face-to-face encounter. Other commenters believe that HHA NPPs should be allowed to perform the face-to-face encounter, noting that the increase in integrated health systems and associated efficiencies in providing care would justify allowing the practitioner to be an employee of the HHA. Several commenters also requested that NPPs be allowed to certify HH eligibility.

Response: We believe that given the HH program integrity concerns in certain pockets of the country surrounding the certification of HH eligibility, it is imperative that NPPs be subject to the same financial limitations with the HHA as currently apply to the certifying physician. We agree with the commenters that the NPPs should not be subject to harsher financial limitations with the HHA than the certifying physician and we have revised the proposed § 424.22 accordingly. In response to the commenter who requested that NPPs be allowed to certify HH eligibility, we remind the commenter that sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act prohibit this.

Comment: Commenters expressed concern about the requirements for a physician signature and date on the encounter certification, stating that often physicians will not date documents. Commenters stated opposition to the requirement for a date from the physician, stating that this requirement would cause unnecessary burdens as the agency could frequently be resending certifications back to physicians to obtain the date. Commenters stated that since CMS has previously allowed the agency to date the certification based on the receipt date for other documents, CMS should apply the same policy to the encounter certification date. One commenter explicitly stated that the receipt date is adequate proof that the agency received the required documentation before billing for the HH services.

Response: The requirement that a physician date the certification reflects longstanding manual guidance. As such, this is existing policy. We are taking this opportunity to codify this in regulation for clarification.

Comment: Some commenters suggested that CMS increase the reimbursement associated with the current billing code (G0180) which physicians use when billing for their services associated with Medicare HH certification. Other commenters questioned whether the face-to-face encounter visits would be separately reimbursed by Medicare. Commenters wanted CMS to clarify whether the certification will be billed separately from the face-to-face encounter. Furthermore, the commenters wondered what the pay codes would be for the face-to-face encounter and suggested that there would be delayed RAP payment to agencies since agencies would need to wait until the proper certification and documentation were collected in order to receive payment. Another point commenters brought up was that residents may have more than one residence and therefore they may need more than one certifying physician, further burdening patients who require HH services. Also, commenters stated that by requiring the face-to-face encounter, the patient must pay an additional twenty percent copayment for the physician visit, which may be costly, particularly for those patients who were recently discharged from the hospital and were required to pay their Medicare hospital deductible as well. Commenters brought up the example that a patient may not want to have a face-to-face encounter with a physician when there is no medical reason for the visit. Moreover, a commenter proposed that CMS continue to pay RAPs through its current method; however, CMS should change the payment of the final claims based on the signed certification.

Response: It is our intention to allow RAP payments as we currently do today while the HHA is awaiting physician completion of the certification. If the face-to-face encounter included medically-necessary covered physician services to the HH patient, the physician could bill Medicare for these covered services under the physician fee schedule. Regarding the physician billing practices associated G0180, we see no need to change those requirements or the associated reimbursement. Regarding the post acute patient co-pay concern, we refer the commenter to the response to the comment above which describes the role of the hospitalist in the face-to-face encounter. Regarding the broader copayment comment, we again remind the commenter that a HH patient must be under the care of a physician as an eligibility requirement, and therefore would expect that regular physician visits to occur during the HH course of treatment. As such, we do not believe that a face-to-face encounter would impose a new copayment financial burden on the patient.

Comment: Some commenters were supportive of our proposal to allow NPPs to have the face-to-face encounter. Commenters also agreed that employees of the HHA should not be allowed to do the face-to-face encounter. The commenters also agreed with the face-to-face encounter requirements and the documentation requirements and that the encounter requirements should be able to be fulfilled through the use of telehealth.

Response: We thank the commenters for their support.

Comment: Some commenters expressed concern that the face-to-face encounter requirement would bring into question a patient's right to refuse a clinical visit for care that is for regulatory compliance only and not medically necessary.

Response: We again remind the commenters that this is a mandate of the Affordable Care Act and, because this is a statutory requirement, we must require this encounter as a condition of payment. We would expect that practitioners would typically be conducting a medically necessary service to the patient, and this service would also meet the face-to-face encounter requirement. We disagree with the commenters that such encounters satisfy a regulatory requirement only. We refer again to the research,[2] which shows that physician visits result in better HH patient outcomes. Finally, we also remind the commenters that, in order to be eligible for the Medicare HH benefit, a patient must be under the care of a physician. Should a patient refuse to have a face-to-face encounter with the physician responsible for care, CMS would question whether the patient was legitimately under the care of the physician.

We thank the commenters for their insightful comments. In summary, we will finalize the proposed implementation approach with the following exceptions:

We will revise the timeframes described in the proposed rule to allow the encounter to occur up to 90 days prior to the start of care, if the reason for the encounter is related to the reason the patient comes to need home health care. If no such encounter has occurred, we will allow the encounter to occur up to 30 days after the start of care. We will also revise the proposed regulation to re move the requirements concerning the physician's own medical record documentation. We will also revise the regulation text to impose the same financial restrictions with the HHA to nonphysician practitioners who perform the face-to-face encounter as currently apply to certifying physicians.

G. Future Plans to Group HH PPS Claims Centrally During Claims Processing

Generally speaking, Medicare makes payment under the HH PPS on the basis of a national standardized 60-day episode payment rate that is adjusted for case-mix and geographic wage variations. The national standardized 60-day episode payment rate includes services from the six HH disciplines (skilled nursing, HH aide, physical therapy, speech language pathology, occupational therapy, and medical social services) and nonroutine medical supplies. Durable medical equipment covered under HH is paid for outside the HH PPS payment. To adjust for case-mix, the HH PPS uses a 153-category case-mix classification to assign patients to a home health resource group (HHRG). Clinical needs, functional status, and service utilization are computed from responses to selected data elements in the Outcome & Assessment Information Set (OASIS) instrument. On Medicare claims, the HHRGs are represented as Health Insurance Prospective Payment System (HIPPS) codes.

At a patient's start of care, at the start of each subsequent 60 day episode, and when a patient's condition changes significantly, the HHA is required to perform a comprehensive clinical assessment of the patient and complete the OASIS assessment instrument. The OASIS instrument collects data concerning 3 dimensions of the patient's condition: (1) Clinical severity (orthopedic, neurological or diabetic conditions, etc.); (2) Functional status (comprised of 6 activities of daily living {ADL}); and (3) Service utilization (therapy visits provided during episode). HHAs enter data collected from their patients' OASIS assessments into a data collection software tool. For Medicare patients, the data collection software invokes HH PPS Grouper software to assign a HIPPS code to the patient's OASIS assessment. The HHA includes the assigned HIPPS code on the Medicare HH PPS bill, ultimately enabling our claims processing system to reimburse the HHA for services provided to patients receiving Medicare's HH benefit.

Additionally, the HHA is separately required to electronically submit OASIS assessments for their Medicare and Medicaid patients to CMS via their state agency. On the HH PPS Web site at *http://www.cms.gov/homehealthpps/01_overview.asp,* we provide a free OASIS assessment data collection tool (HAVEN) which includes the HH PPS grouper software, a separate HH PPS grouper program which can be incorporated into an HHA's own data collection software, and HH PPS data specifications for use by HHAs or software vendors desiring to build their own HH PPS grouper. Most HHAs do not use the HAVEN freeware, instead preferring to employ software vendors to create and maintain a customized assessment data collection tool which can be integrated into the HHA's billing software. Likewise, many vendors employed by HHAs do not utilize the HH PPS grouper freeware, instead preferring to build their own HH PPS grouper from the data specifications which we provide.

In 2008, we deployed the first refinements to the HH PPS since its inception in 2000. Prior to the 2008 refinements, we made infrequent, minor changes to the HH PPS grouper software. Effective with the refinements, the HH PPS grouper became more complex and more sensitive to the yearly ICD–9–CM code changes. As a result, since 2008, HHAs have been required to update their HH PPS grouper software at least once each year. Most HHAs employ software vendors to effectuate these updates. HHAs have expressed concerns to CMS that the frequent grouper updates coupled with the additional complexity of the grouper has resulted in unexpected costs and an increased burden to them.

In addition, since the 2008 refinements were implemented, we have identified a significant increase in OASIS assessments submitted with erroneous HIPPS codes. These errors occur when HHAs or their software vendors inaccurately replicate the HH PPS grouper algorithm into the HHA's customized software. The significant increase in these errors since 2008 suggests that many HHA software vendors are struggling to accurately replicate the complex algorithms in the HH PPS grouper. We inform HHAs if the submitted HIPPS on the OASIS is inaccurate and provides HHAs with the correct HIPPS to enable the HHA to accurately bill Medicare. However, HHAs have expressed concerns that the HH PPS grouper complexities increase their vulnerability to submit an inaccurate HIPPS code on the Medicare bill. Further, some HHAs have expressed concern that this vulnerability will further increase when the U.S. health care industry permanently transitions from ICD–9 to ICD–10 for medical diagnosis and procedure coding in October 2013, because the ICD–10–CM migration will require major changes to an already complex HH PPS grouper.

Because of these concerns, we have begun analyzing options to streamline the process which assigns HIPPS codes. We are analyzing an option, which would enable us to assign HIPPS codes to the HH PPS bills during claims processing. If we are successful in

[2] Wolff, J.L., Meadow, A., Boyd, C.M., Weiss, C.O., & Leff, B. (2009). Physician evaluation and management of Medicare home health patients. *Medical Care. 47* (11), 1147–1155.

implementing this option, OASIS assessment data collection tools would no longer invoke HH PPS grouper software to assign HIPPS codes to the OASIS assessments. Further, HHAs would no longer be required to include HIPPS codes on HH PPS bills. Such a process would relieve the HHA of all responsibility associated with the HH PPS grouper. If we can centralize the assignment of the HIPPS code to the HH PPS bill during claims processing, we will achieve process efficiencies, improve payment accuracy by improving the accuracy for HIPPS codes on bills, decrease costs, and burden to HHAs, and better position HHAs and CMS for an easier transition from ICD–9 to ICD–10 codes in the future.

Several changes have occurred recently that allow CMS to consider this option of assigning HIPPS codes to the HH PPS bills during claims processing. National claims coding standards have expanded the number of positions of data available in the treatment authorization field on the bill from 18 to 30. In addition, the National Uniform Billing Committee has created occurrence code 50 for assessment reference dates. This new code 50 will allow a separate field for HHAs to report the M0090 assessment date currently carried in the treatment authorization field. These two changes provide enough space on the HH PPS bill for HHAs to encode all the OASIS payment items on the bill, thus potentially enabling the HIPPS code to be computed during claims processing.

However, a major challenge exists with the feasibility of computing the HH PPS group during claims processing is the awarding of case-mix points for reported primary and secondary diagnoses. A centralized HH PPS grouper would look to the diagnoses on the HH PPS bill for grouping. The Health Insurance Portability and Accountability Act (HIPAA) authorized CMS to require that all diagnoses on the bill comply with ICD–9–CM coding guidelines as set out at 45 CFR 162.1002 (65 FR 50370, August 17, 2000). Currently, when certain conditions apply, to prevent the loss of case-mix points, the HH PPS grouper will award case-mix points to some diagnoses reported as a secondary diagnosis when the assignment is performed to comply with ICD–9–CM coding requirements. We currently instruct HHAs to report these diagnoses in M1024 (previously M0246) on the OASIS to prevent loss of case-mix points.

We provide detailed guidance on this topic in page 5 of Appendix D within the OASIS Implementation Manual, which can be accessed at *http://www.cms.gov/HomeHealthQualityInits/downloads/HHQIAttachmentD.pdf.* This coding guidance has been provided to prevent the loss of case-mix points when an underlying case-mix diagnosis is associated with the primary V-code diagnosis.

As required by 45 CFR 162.1002, those diagnoses currently encoded in M1024 (formerly M0246) which should not be reported as primary or secondary diagnoses cannot be reported on the bill. In an attempt to solve this problem, we are analyzing options to map diagnoses currently reported in M1024 (formerly M0246) to diagnoses that are reportable as primary and secondary diagnoses in the HH setting, per ICD–9–CM coding guidelines. We have been encouraged with our ability to map some trauma codes reported in M1024 to after-care codes, which are reportable as primary and secondary diagnoses in the HH setting. However, additional analysis and mapping are needed to fully resolve this challenge.

We solicited public comments on the potential enhancement described above to assign the HIPPS code to the HH PPS bill during claim processing. This enhancement would require HHAs to report all the OASIS items necessary to group the episode on the HH PPS bill. As stated above, reporting on OASIS items on the bill would address the costs and burden HHAs currently experience with regards to frequent updates of a complex HH PPS grouper, address vulnerabilities that HHAs have associated with the possible submission of inaccurate HIPPS codes on the claim, while better positioning HHAs and CMS for the ICD–9 to ICD–10 transition. We are in the early stages of assessing the feasibility of such changes, and wanted to seize the opportunity to solicit the public for their comments on this topic.

The following is summary of the comments we received regarding the proposal to group HH PPS claims centrally.

Comment: Several commenters stated their support of our proposal to centralize grouping of HH PPS claims as long as the HH grouper continued to remain available for HHAs and their vendors.

Response: We recognize that HHAs and their vendors will continue to have a need for the HH grouper software. Therefore, we do not have any plans to discontinue this process should we decide to implement the grouping of HH PPS claims during claims processing.

Comment: One commenter suggested that we anticipate and plan to develop the appropriate claim response for claims that contain data errors that prevent the calculation of a HIPPS code.

Response: We appreciate this feedback and will be sure to address this concern should we decide to move forward with this proposal. We will note that currently our claims processing system has specifications that define valid values for each field. The necessary guidance would be provided to HHAs and their vendors for implementation of this requirement.

Comment: One commenter stated that our proposal does not specify the effect of this proposed change on the current Resident Assessment Protocol (RAP) and final claim processing timelines.

Response: The proposal to group HH PPS claims centrally during claims processing has no effect on the RAP or final claims processing timelines. In fact, the RAP is not utilized in the HH setting. In terms of the final claims processing timelines, the long standing guidelines for our contractors will continue to apply. The guidance can be accessed at *http://www.cms.gov/manuals/downloads/clm104c01.pdf* through the Internet only manual, IOM 100–4 Chapter 1 Section 80.2.1.

Comment: Several commenters stated that while we identified a concern regarding the increased number of errors in HIPPS codes submitted, we did not acknowledge errors identified by HHAs and their vendors in the HHRG released by us.

Response: Beginning in 2010, we put into place a mechanism for our contractor that developed the HHRG software for CMS to beta test any updates to the software with interested parties. All issues noted during beta testing are to be addressed by our contractor prior to final release of an updated HHRG. Our aim is to permit proper vetting of any grouper such that we can avoid errors within our HHRG in the future.

Comment: One commenter stated that grouping HH PPS claims centrally during claims processing does not reduce burden upon HHAs because the burden of reporting HIPPS codes is replaced with one of reporting OASIS items.

Response: OASIS information reported on claims under this proposal would be reported in claims fields currently used by HHAs; so we do not believe that requiring a replacement of data in current fields represents an additional burden.

Comment: Several commenters stated that our solicitation of comments did not provide enough detail surrounding the impact upon accounts receivable information to provide meaningful comments. The commenters suggested a separate **Federal Register** notice be issued.

Response: We appreciate this feedback and believe that based upon our plans to continue to provide the HHRG software, that the concern about potential impact upon HHA operations and their accounting needs will be addressed. In addition, should we decide to implement this provision in a future regulation, we will address additional details through a notice of proposed rulemaking in which additional comments can be provided by HHAs.

Comment: One commenter stated concern that our future plans to group HH PPS claims centrally during claims processing will create a burden on HHAs and their vendors.

Response: We appreciate this feedback and believe that since the data being reported duplicates the information necessary for OASIS, we are not creating additional burden for HHAs and their vendors. In addition, as noted above, the proposed reporting of this information would replace other data in currently used claims fields.

Comment: Several commenters stated that there are no details surrounding how the grouper assignment would be communicated back to the agencies and on claims.

Response: The HIPPS code that our claim processing system assigns will be added to the claim record so that the provider will be able to view the assignment upon online look-up. The HIPPS code assigned will also be returned on the electronic remittance advice.

Comment: A commenter asked about OASIS data corrections identified after the claim is submitted and how the corrections process will be handled and its effect on payment. In addition, the commenter would like to know whether HIPPS code will be assigned at the RAP or on the final claim.

Response: The HIPPS code would be assigned on both the RAP and the final claim. If OASIS data corrections caused the HIPPS code assigned to the episode to change, the HHA would be able to cancel and resubmit the RAP for the episode. This resubmission process to the RAP presently occurs. HHAs that do not maintain grouping software for their internal purposes would have access to the HIPPS code calculated by the State OASIS system.

Comment: A commenter asked how Medicare Advantage (PFFS) payors will be able to calculate the HHRG in the future based upon implementation of this proposal. In addition, the commenter stated concerns that if the HHRG software is not made available that the HHAs will be unable to advise patients of the copayment amounts.

Response: We appreciate this feedback and again want to reassure HHAs and their vendors that we plan to continue to make the HHRG software updates available for use which will permit the Medicare Advantage plans to use the HHRG to assist claims processing. In addition, the HHAs and their vendors will be able to continue to advise patients of copayments due.

H. New Requirements Affecting Hospice Certifications and Recertifications

Section 3132 of the Affordable Care Act requires hospices to adopt some of MedPAC's hospice program eligibility recertification recommendations, including a requirement for a hospice physician or nurse practitioner to have a face-to-face visit with patients prior to the 180th-day recertification, and to attest that such a visit took place. The Affordable Care Act was enacted too late in the calendar year for the implementation proposals relating to these new requirements to be included in a Hospice Wage Index Proposed Rule. Therefore, these proposals were included in the Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices Proposed Rule. As such, we are responding to comments and issuing our implementation plan in this final rule.

In its March 2009 *Report to Congress,* MedPAC wrote that additional controls are needed to ensure adequate accountability for the hospice benefit. MedPAC reported that greater physician engagement is needed in the process of certifying and recertifying patients' eligibility for the Medicare hospice benefit. The Commission reported that measures to ensure accountability would also help ensure that hospice is used to provide the most appropriate care for eligible patients. MedPAC recommended these measures be directed at hospices that tend to enroll very long-stay patients. Specifically, MedPAC recommended that a hospice physician or advanced practice nurse visit the patient to determine continued eligibility prior to the 180-day recertification and each subsequent recertification, and attest that such visits took place. (MedPAC, *Report to the Congress: Medicare Payment Policy,* Chapter 6, March 2009, pp. 365 through 371.)

Section 3132(b) of the Affordable Care Act requires hospices to adopt MedPAC's hospice program eligibility recertification recommendations. Specifically, the Affordable Care Act amends section 1814(a)(7) of the Act to require that on and after January 1, 2011, a hospice physician or nurse practitioner (NP) must have a face-to-face encounter with every hospice patient to determine the continued eligibility of that patient prior to the 180-day recertification, and prior to each subsequent recertification. Furthermore, the Affordable Care Act requires that the hospice physician or NP attest that such a visit took place, in accordance with procedures established by the Secretary of the HHS. The Affordable Care Act provision does not amend the statutory requirement that a physician must certify and recertify a patient's terminal illness. By statute, only a physician (not a NP) may certify a patient's terminal illness, however, section 3132 (b)(2) of the Affordable Care Act allows a NP to furnish a face-to-face encounter; in the case where the NP provides the face-to-face encounter, the NP would then need to provide the clinical findings from that encounter to the physician who is considering recertifying the patient. This new statutory requirement will better enable hospices to comply with hospice eligibility criteria and to identify and discharge patients who do not meet those criteria.

Hospices which admit a patient who previously received hospice services (from the admitting hospice or from another hospice) must consider the patient's entire Medicare hospice stay to determine in which benefit period the patient is being served, and whether a face-to-face visit will be required for recertification.

As required by the Affordable Care Act, we made several proposals regarding § 418.22(a)(3), (a)(4), (b)(3), (b)(4), and (b)(5) in order to implement this new statutory requirement. We believe that required visits should be fairly close to the recertification date, so that the visit allows a current assessment of the patient's continued eligibility for hospice services. These visits can be scheduled in advance, particularly for those patients with diagnoses where life expectancy is harder to predict. As such, in § 418.22(a)(4), we proposed that hospice physicians or NPs make these visits no more than 15 calendar days prior to the 180-day recertification and subsequent recertifications, and that the visit findings be used by the certifying physician to determine continued eligibility for hospice care. We noted that this 15-day timeframe also aligns the timeframe for recertification visits with the timeframe required for the comprehensive assessment update, as specified in our Conditions of Participation (CoPs) at § 418.54(d). This timeframe requirement is also consistent

with the timeframe required for the review of the plan of care, as specified in our CoPs at § 418.56(d). We wrote that the 15-day timeframe provides a balance between flexibility in scheduling the visit and enabling a relatively current assessment of continued eligibility, while also allowing efficiency in update and review processes, as required by the hospice CoPs.

As noted earlier, the statute requires that the face-to-face encounter be used to determine the patient's continued eligibility for hospice services. We proposed that the clinical findings gathered by the NP or by the physician during the face-to-face encounter with the patient be used in the physician narrative to justify why the physician believes that the patient has a life expectancy of 6 months or less. Accordingly, we added this proposed requirement to § 418.22(b)(3) as subparagraph(v).

Because the statute also requires the hospice physician or NP to attest that the face-to-face encounter occurred and by statute only a physician may certify the terminal illness, at § 418.22(b)(4) we proposed that the face-to-face attestation and signature be either a separate and distinct area on the recertification form, or a separate and distinct addendum to the recertification form, that is easily identifiable and clearly titled. We also proposed that the attestation language be located directly above the physician or NP signature and date line.

The attestation is a statement from the certifying physician or from the NP which attests that he or she had a face-to-face encounter with the patient. If the face-to-face encounter was provided by a NP, the attestation should also include a statement that the clinical findings of that encounter have been provided to the certifying physician for use in determining continued eligibility for hospice care. We proposed that the attestation include the name of the patient visited, the date of the visit, and that it be signed and dated by the NP or physician who made the visit. Hospices are free to use other attestation language, provided that it incorporates these required elements. These elements must be included whether the visit is made by a NP or a physician. We note that it is possible that the certifying hospice physician is the same physician who made the visit.

As previously mentioned, we proposed to revise § 418.22 to incorporate these requirements and we proposed to add paragraphs (a)(4) and (b)(4) to implement the requirements for a face-to-face encounter with long-stay hospice patients and the attestation of that face-to-face encounter.

In requiring a timeframe in which the face-to-face encounter must occur, for consistency, we believe it is important to also clarify required timeframes for all certifications and recertifications. Long-standing guidance in our Medicare Benefit Policy Manual's chapter on hospice benefit policy allows the initial certification to be completed up to 14 days in advance of the election, but does not address the timeframe for advance completion of recertifications (see CMS Pub. No. 100–02, chapter 9, section 20.1). To clarify our policy in the regulations, and to be consistent with the timeframe for the newly legislated face-to-face encounter for recertifications, we proposed that both certifications and recertifications be completed no more than 15 calendar days prior to either the effective date of hospice election (for initial certifications), or the start date of a subsequent benefit period (for recertifications). This proposed timeframe also aligns with the CoP timeframe for updating the comprehensive assessment (§ 418.56(d)), and with the CoP timeframe for reviewing the plan of care (§ 418.54(d)). Finally, this proposed 15-day advance certification or recertification timeframe would also help ensure that the decision to recertify is based on current clinical findings, enabling greater compliance with Medicare eligibility criteria. We believe the new statutory requirements reflect the Congress' desire for increased compliance with Medicare eligibility and, in order to implement these provisions, we proposed to revise § 418.22(a)(3).

Furthermore, longstanding manual guidance stipulates that the physician(s) must sign and date the certification or recertification. However, the HHS Office of Inspector General (OIG) recently found that certifications for some hospice patients failed to meet Federal requirements, including the signature requirement (HHS OIG, "Medicare Hospice Care for Beneficiaries in Nursing Facilities: Compliance with Medicare Coverage Requirements, September 2009"). In keeping with the Congress' desire for increased compliance with Medicare eligibility criteria, and to achieve consistency with the 180-day recertification attestation requirements, we proposed to add language to the certification requirements in our regulations to clarify that these documents must include the signature(s) of the physician(s) and the date each physician signed the document.

Additionally, with the new statutory requirements for a face-to-face encounter prior to the 180-day recertification, and for every recertification thereafter, it is important for hospices to easily identify which benefit periods require a recertification visit. Hospice patients are allowed two 90-day benefit periods followed by an unlimited number of 60-day benefit periods, so every 60-day benefit period is by definition beyond the 180-day recertification. Because we do not currently require that certifications or recertifications show the dates of the benefit period to which they apply, we proposed to add language to our certification and recertification regulations to make this a requirement for all hospices. While many hospices already include this information, there are some that do not. Having the benefit period dates on the certification would make it easier for the hospice to identify those benefit periods which would require a face-to-face encounter and would ease enforcement of this new statutory requirement.

Section 1814(a)(7)(A) of the Act requires a valid certification or recertification for Medicare coverage. Additionally, section 1814(a)(7)(D) of the Act now also requires a face-to-face encounter with patients who reach the 180th-day recertification. We proposed to revise our regulations to require that the physician's signature(s), date signed, and the benefit period dates be included on the certification or recertification because we believe this information is necessary to determine if these documents are valid, and to ease the implementation of the new statutory requirements. We believe these requirements are consistent with practices in the hospice industry, and we do not believe these proposals will be burdensome to hospices. As such, we proposed to add § 418.22(b)(5) to incorporate these signature and date requirements.

The following is a summary of the comments we received regarding the new requirements affecting hospice certification and recertification proposals.

Comment: Commenters asked for clarification of whether 180 days of hospice care must be provided before the face-to-face encounter was required, or whether the face-to-face was required when a patient enters the 3rd or later benefit periods. Several commenters suggested that we clarify the proposal so that the focus is on benefit periods, which they believe is consistent with the intent of the statute and the regulation, and which is easier to track; these commenters suggested we change

the regulatory text to reference election periods rather than days.

In contrast, other commenters suggested we reword the proposal so that an encounter and its accompanying attestation will be required after 180 days of hospice care and every 60 days thereafter. The commenters wrote that basing the encounter timeframe on benefit periods rather than actual days of care would result in some patients requiring visits after only a short time in hospice, which the commenters believe was not in keeping with CMS' intent to have patients with long lengths of stay assessed for continued eligibility. A commenter suggested that those 180 days must be continuous in order to trigger a face-to-face encounter.

Other commenters wrote that each new hospice admission should begin as day 1 for that hospice. One said that patients with a history of inappropriate admissions to different hospices should not cause the appropriate admissions to hospices to be penalized. Another wrote that although Medicare hospice is not fee-for-service, hospices still assume the risk of enrolling patients with high-cost medical needs based on the expectation that other patients will have lower cost medical needs. This commenter wrote that if a patient has had a previous hospice stay, and those days are counted toward the 180th-day recertification requirement, payment for those days was made to another hospice. The commenter also believes this invalidates an argument that the hospice has "accrued" sufficient funds to cover the additional costs of the required visits. The commenter suggested we not consider a patient's total hospice history in defining the 180th-day recertification requirement, but only focus on days of care within the specific hospice providing care. The commenter suggested that this would also eliminate problems related to accurately tracking time spent in hospice.

Another commenter wrote that if a patient had a significant break in hospice service, CMS should restart the time clock for the 180th-day recertification. Several commenters suggested that we consider each new terminal diagnosis to restart the clock as day 1; these commenters were referring to situations where a patient receives hospice care for a terminal diagnosis from which he or she recovers, and later receives hospice care for a different terminal diagnosis.

Other commenters asked for information about how to count the days when a hospice patient becomes eligible for Medicare in the midst of a non-Medicare hospice stay or when the patient has previously received hospice care outside of the Medicare hospice benefit.

Response: The relevant language in the Affordable Care Act reads, "* * * a hospice physician or nurse practitioner has a face-to-face encounter with the individual to determine continued eligibility of the individual for hospice care prior to the 180th-day recertification and each subsequent recertification * * *" The Medicare statute, as amended by the Affordable Care Act, does not define the term "180th-day recertification." For purposes of this provision, the Medicare statute also does not specifically address how the face-to-face encounter requirement should apply in the situation in which a beneficiary completes the first 90-day benefit period and is recertified for a second 90-day benefit period but does not receive 90 days of service in the second benefit period due to (for example) a revocation in the middle of the benefit period.

In interpreting the statutory term "180-day recertification," we considered the statutory scheme and the existing language used in the statute and in our regulations, all of which is structured around the concept of benefit periods which, by statute, cannot last longer than a maximum number of days (90 days for the first two and 60 days for subsequent benefit periods). The fact that the statute imposes a *maximum* number of days per period does not mean that an individual must receive hospice services for the maximum number of days before a statutory requirement can be imposed on subsequent benefit periods. For example, for payment to be made to a hospice provider with respect to a beneficiary, section 1814(a)(7) of the Act requires a certification (and recertification) at the beginning of each benefit period, the first two of which can last as long as 90 days each. Previously, we have interpreted these provisions to require a recertification at the beginning of each subsequent benefit period, even if the prior benefit period did not last the maximum number of days due to, among other things, the beneficiary's revocation under section 1812(d)(2)(B) of the Act. Thus, the regulatory language at § 418.22 requires certifications at the beginning of benefit periods rather than requiring certifications after a certain number of days of service was actually provided to a beneficiary.

For the foregoing reasons, we are defining the 180th-day recertification to be the recertification which occurs at the start of the 3rd benefit period—that is, the benefit period following the certification for a second, 90-day benefit period, regardless of whether the beneficiary received a full 90 days of service in the second 90-day benefit period. We note that, as one commenter wrote, this method of counting the time will also be easier for hospices to track. We also believe that the statute considers the patient's total hospice benefit period, rather than starting the clock at day 1 or period 1 for each new hospice or for a different terminal diagnosis. Furthermore, this method of counting benefit periods is consistent with how our systems operate when tracking Medicare hospice beneficiaries.

We agree with the commenter who wrote that hospices assume the risk of enrolling patients with high-cost medical needs based on the expectation that other patients will have lower cost medical needs. As such, we believe that hospices should consider costs of patient care in the aggregate, and not on a per-patient basis. Therefore, we did not argue in the proposed rule that a hospice "accrues" sufficient funds on a per-patient basis to cover the cost of the visit based on a patient having prior days of care with that hospice.

To illustrate this benefit period method of counting, if a hospice patient elected the benefit for the first time on June 1st, completed the 1st 90 day period (on August 30th), began the 2nd 90 day period, but revoked 30 days into the benefit period (on September 29th), and re-elected hospice the following January, the beneficiary would be in his 3rd benefit period. The 3rd benefit period would require a face-to-face visit at admission even though he had not received 180 calendar days of care.

The Medicare hospice benefit periods only apply to Medicare hospice patients, regardless of whether Medicare is the primary or secondary coverage. In other words, non-Medicare stays are not considered when counting benefit periods to determine when a face-to-face encounter must occur. The first Medicare benefit period would begin on the effective date of the first Medicare hospice election.

To clarify the language used about the timing of the requirement, we are modifying our proposal and the regulatory text to refer to the face-to-face encounter as being required prior to the 3rd benefit period recertification and each subsequent recertification.

Comment: Several commenters were concerned that they could not provide a face-to-face encounter within 15 days prior to the 180th-day recertification or each subsequent recertification. One wrote that this timeframe is a barrier to rational geographic batching of visits. They cited difficulties due to shortages

of physicians and NPs, particularly in rural areas. Several commenters said they would need to hire additional staff but were concerned about being able to successfully recruit a physician or NP because of shortages, particularly in rural areas.

One wrote that there are not enough well-trained hospice practitioners in this country to handle the potential volume of these visits and asked if we were concerned that the influx of providers required to make these visits would "water down" the quality of the assessments, and negatively impact the delivery of care to hospice patients.

Some noted that they have a part-time Medical Director with a busy private practice, who is simply not available to make the visits. One noted that in urban areas, traffic tie-ups add to the time required to make these visits. Others wrote that visits in rural areas require significant travel time, sometimes as long as 4 hours; one added that during these visits, their Medical Director would also be completely unavailable by phone for other patient and staff needs because in some remote areas there is limited cell phone service.

One asked if there was a requirement regarding the location(s) where a required face-to-face visit could occur. Another commenter wrote that the language of the proposed regulation at § 418.22(c)(4) implies that the practitioner must visit the patient at his or her home, rather than allowing the patient to come to the physician or NP. This commenter suggested that we change the regulatory text from "must visit" to "have a face-to-face encounter" as specified by section 3132 of the Affordable Care Act. A commenter noted that in some areas, patients would have to come to the physician, creating a burden on patients and families. Several commenters added that they cannot get frail or dying patients to the physicians because many cannot sit up in a car, and in rural areas, Emergency Medical Services (EMS) may be the only option for transportation.

Another commenter wrote that patients would not be able to afford the ambulance ride to a physician's office to make the visit; others were concerned that forcing a patient to travel to a physician was an undue hardship on both the patient and the family, would expose the patient to potentially infectious patients in the doctor's office, and could lead to exacerbation of symptoms such as severe pain or dyspnea.

One commenter suggested we consider the impact of the required visit on the family; another commenter wrote that the required visits would be an added stress to the family as they wait for confirmation from hospice staff that hospice care can continue. Another commenter wrote that if a patient required ambulance transport to a doctor's office, it would be an unreimbursed expense for the hospice, and asked if Medicare could cover the ambulance ride outside of the hospice per diem payment amount. One commenter said EMS will not cross county lines, yet 21 percent of the hospice's patients lived in a different county.

Another commenter asked if the hospice could discharge a patient if the patient or family refused the physician visit, or delayed it, and noted that with 15 days, there may not be time for adequate discharge planning. Several noted that some states have minimum discharge requirements, such as Alabama with a minimum 30-day requirement, which make the 15-day timeframe unworkable; one commenter asked how to handle the situation where the recertification visit determines that discharge is needed, but it occurs with less than 30 days to plan, as required by some State laws. This commenter asked that we allow for adequate discharge planning.

A few commenters asked what the hospice should do if the visit cannot be made due to scheduling difficulties, inclement weather, unsafe road conditions, or due to an emergency. Another commenter said that a hospice physician might not have an attending physician's dictation from the visit in time to make the attestation, and ask for more time to make the visits. One commenter wrote that the time constraints do not fit well with patients' conditions if their disease trajectories are in rapid decline. A commenter asked what would be the impact on a hospice if the required visit was not made in the allowable timeframe but was earlier or later. This commenter also asked if this requirement only affected Medicare hospice patients. Many commenters asked for more time to make the visit, suggesting 21 or 30 days.

Response: We appreciate commenters' input on the problems in scheduling these face-to-face encounters, and we recognize that rural hospices, in particular, may experience more logistical difficulty due to the shortage of physicians or NPs in some areas. Based on concerns and recommendations from the public comments on potential logistical issues, we are revising our proposed policy to change the visit timeframe from up to 15 days prior to the start of the 180th-day recertification, and each subsequent recertification, to a visit timeframe of up to 30 calendar days prior to the 3rd benefit period recertification, and each subsequent recertification. We believe this additional time will provide hospices with the flexibility they need to meet this Congressional mandate, to provide adequate time for discharge planning when indicated, and to accommodate other logistical issues discussed in the public comments.

We are unclear about the meaning of the comment related to State laws about discharge, and believe it may be outside the scope of this rule. We are only able to focus on the Medicare statute and payment regulations, which require that patients who are no longer eligible for the benefit be discharged. The statute does not allow us to pay for hospice care for patients who are not eligible for the benefit.

The regulations at § 418.26(d) require hospices to have a discharge planning process in place "that takes into account the prospect that a patient's condition might stabilize or otherwise change such that the patient cannot continue to be certified as terminally ill." The word "prospect" in this regulatory text indicates that hospices should be considering whether stable or improving patients might become ineligible in the future, and plan for a possible future discharge.

Hospices are required to follow State laws in additional to federal laws. However, we do not see the recertification requirement and any State discharge requirements as being in conflict.

If a patient or family member refuses to allow the hospice physician or NP to make the required visit, a hospice could consider discharge for cause, as the refusal would impede the hospice's ability to provide care to the patient. The hospice would need to follow the procedures for discharge for cause, which are given in § 418.26.

In response to the comment suggesting that we change the proposed regulatory text at 418.22 (C)(4) from "must visit" to "have a face-to-face encounter" as language of the proposed regulation implies that the practitioner must visit the patient at his or her home, rather than allowing the patient to come to the physician or NP, we are revising the proposed language. We believe that the Affordable Care Act allows hospices the flexibility for patients to have a face-to-face encounter with a hospice physician or nurse practitioner. We are revising the regulatory text at § 418.22(a)(4) to now read, "As of January 1, 2011, a hospice physician or hospice nurse practitioner must have a face-to-face encounter * * *" We expect that hospices will not require patients to

come to the hospice physician or NP for the encounter if doing so would exacerbate symptoms or otherwise jeopardize the patient's well-being; the hospice Conditions of Participation (CoPs) in § 418.100(a) require that hospices provide care that optimizes patient comfort, and is consistent with the patient's and family's needs and goals. All patient transport must occur within the context of optimizing patient comfort and meeting the specific needs and goals of patients and their families. If transportation to a hospice physician would not optimize patient comfort and/or meet the goals and needs of the patient and family, the hospice physician or NP would need to travel to the patient. If a hospice patient travelling to the hospice physician or NP required ambulance transportation because of his or her medical condition, the ambulance transportation would be included in the hospice per diem; it could not be billed to patient.

We believe that the face-to-face encounters will not be an added stress to family members if they know they are a routine part of the hospice recertification process, and if the family understands that the visit has the potential to improve the quality of care for their loved one.

In response to the commenter's concern that the patient's attending physician's dictation might not be available to the hospice in the 15 days prior to the recertification, and this would prevent the hospice from meeting the 15-day timeframe that was originally proposed, we believe that the commenter appears to misinterpret the statutory requirement. Pursuant to section 3132(B) of the Affordable Care Act, a hospice physician or hospice NP must perform the encounter. The definition of hospice physician is addressed later in this section.

In response to the comments asking for clarification about to which patients the face-to-face encounter requirement applies, we note that it only applies to Medicare hospice patients.

Finally, we proposed clarifying some language in our benefit policy manual and aligning timeframes so that recertifications could not be completed more than 15 days prior to the start of the subsequent benefit period. While the entire recertification cannot be completed more than 15 days prior to the start of the benefit period, we are clarifying that the face-to-face encounter and its accompanying attestation are only parts of the recertification, and therefore can be completed up to 30 calendar days prior to the start of the 3rd benefit period recertification and each subsequent recertification.

Comment: Several commenters have asked if the hospice face-to-face encounter is billable, and if so what reimbursement code should be used. A number of commenters wrote that their hospices do not have the resources to accomplish this if the visit is not billable; one wrote that this requirement could have the potential to drive smaller providers out of the market. They wrote that this requirement would be a financial burden, especially to rural providers, in the face of reductions due to the budget neutrality adjustment factor (BNAF) phase-out and future market basket cuts, declining charitable donations, increased costs, and demands for competitive wages. A few commenters mentioned that hospices will be absorbing more than a 14 percent reduction in their Medicare and Medicaid reimbursement levels over the next 10 years; they wrote that these reductions are especially difficult for the hospice community since hospice programs are disproportionately dependent upon Medicare and Medicaid for reimbursement. These commenters believe the upcoming payment reductions place increasing financial pressure on hospices that seek to deliver quality care and comply with additional administrative and regulatory requirements.

A number of commenters wrote that they could not afford this unfunded mandate. One rural commenter noted that their reimbursement is already lower due to wage index adjustments, and yet the costs of these required visits will fall more heavily on rural providers, with long distances to see patients; this commenter believes the burden to rural hospices was becoming "almost insurmountable." Commenters also mentioned the administrative costs of coordinating the visits, of changing existing forms and documents, and of increased liability risks, and several believe that these are not included in the current hospice reimbursement. Another noted that hospices would be expected to pay physicians or NPs for their travel time, visit time, and mileage, and would have additional administrative costs while receiving the same per diem payment amount. One commenter said that his hospice would be forced to reduce services to patients to pay for these visits. One commenter wrote that this requirement creates a 2-tiered system where providers are compensated better for patients under the 180-day recertification requirement than for beneficiaries who require a face-to-face encounter.

Several said that they would have to hire someone full-time to make the visits, which would create significant financial hardship without reimbursement; one wrote that those monies would be better spent on providing quality care and on fair wages for employees. A few added that having a physician or NP spend hours traveling to see patients would be a waste of scarce human resources in areas where there are physician or NP shortages. A few mentioned that the net result would be less patient care, and more time spent on paperwork.

Nearly all commenters suggested some form of reimbursement for the visit, with one commenter writing that all physician visits mandated by payers should be billable separately by the physician directly to the payer for reimbursement. One commenter was concerned that because these required visits are medically unnecessary, there would be no reimbursement for them, yet hospices would still incur costs from making the visits. Another commenter added that many physicians or NPs would order tests such at CAT scans or lab tests to obtain results that justify recertification of patients, and yet would not receive reimbursement for these tests.

A few commenters suggested that any part of the visit that becomes medically necessary, including those where the doctor changes the plan of care (POC) or makes medication adjustments, should be billable. One commenter asked if a hospice could bill the patient for the face-to-face visit if it was not covered.

One commenter wrote that when the Medicare hospice benefit was originally designed, physician face-to-face visits were viewed as an encounter for additional counseling, education, information, and support. The commenter asked why any physician face-to-face visit would not be billable. Another commenter cited our regulations at § 418.304, and asked if the face-to-face visit was considered part of the establishment and updating of the plan of care, or is it outside the services listed, and could be billed separately. If the visits are part of the per diem amount, the commenter encouraged CMS to review the payment rates and increase the per diem to reflect this new, mandated service.

A number of commenters believe that the face-to-face requirement was beyond the administrative services provided by the hospice Medical Director, and outlined in the hospice claims processing manual in section 40.1.1 (see Internet Only Manual, 100–04, chapter 11). Several commenters wrote that since active clinical work and a comprehensive analysis will be required of the physician (as distinguished from simple documentation in the medical

record), they believed that a billable visit is appropriate. Another wrote that while the medical decision-making is primarily directed at determining prognosis, in many cases, changes in medication and patient management may also be suggested. A different commenter wrote that the face-to-face encounter requires direct patient care services, including a comprehensive clinical assessment and is comparable to the billing for evaluation and management services provided in other settings and should be reimbursed as such. Another commenter wrote that there is no precedent for a physician to be required by law to provide a thorough medical assessment of a seriously ill patient and be constrained from coding, billing, or seeking usual and customary reimbursement for such care.

For any portion of the visit that is billable, commenters asked how to document that billable portion, including whether to make one note or two. A number of commenters wrote that their anticipated costs for the visits would far exceed any reimbursement, particularly given the travel time and mileage costs. Another also noted that there is currently no physician reimbursement for Medicaid patients visited by the hospice physician.

A few commenters noted that NP services that are equivalent to physician services are not currently billable unless the NP is the patient's attending physician. One asked if this would change under the proposed rule.

A commenter wrote that the Medicare CoPs speak to the actions of a physician providing medical care to a hospice patient as separate from the role of the Medical Director, and that these services are accounted for differently in the per diem payment rate. This commenter wrote that the roles of these two physicians are distinct, and that CMS should consider providing adequate reimbursement for the services being required. Another commenter asserted that if Medicare wants quality healthcare, Medicare must allow practitioners to bill for their time.

A few commenters wrote that there was an established precedent in Skilled Nursing facilities that encounters to meet mandated requirements are billable and reimbursed by CMS, beyond the administrative duties of the Medical Director. Given this information, they asked us to clarify if the mandated visit would be billable.

A commenter asked if we plan to track face-to-face encounters with a particular CPT code, and if it should be reported on the claim. Another commenter asked if we are concerned about the distortion of the actual cost associated with providing care to hospice patients if these visits are not captured on the claim. Some commenters asked us to devise a HCPCS code to compensate the hospice physician or NP for the time and mileage for making these visits. Others asked us to develop a billing code that would include mileage costs and travel time, and increase the per diems to reflect the additional administrative costs related to the proposal. One recommended a separately reimbursable fee schedule amount specific to face-to-face encounter visits.

Response: We appreciate the commenters concerns about the financial effects of the face-to-face requirement. However, the billing regulations for hospice do not allow for physician reimbursement for administrative activities of physicians. The certification or recertification of terminal illness is not a clinical document, but instead is a document supporting eligibility for the benefit. In the 1983 Hospice Care Final Rule, certifications of terminal illness were described as "simply determinations as to the patient's medical prognosis, not the plan of care or the type of treatment actually received" (48 FR 56010). As such, the certification or recertification of terminal illness has been excluded from separate physician reimbursement and has been considered an administrative activity of the hospice physician. The face-to-face requirement is part of the recertification, and therefore is an administrative activity included in the hospice per diem payment rate. In contrast, the SNF bundle specifically excludes the services of physicians and other advanced practiced disciplines including NPs. Therefore, SNF physicians or NPs can bill for mandated encounters, as these visits are not part of the bundled payment.

The hospice face-to-face encounter is an administrative requirement related to certifying the terminal illness mandated by the Affordable Care Act. By itself, it would not be billable, as it is considered administrative, as explained above and in section 40.1.1 of the Claims Processing Manual (Internet Only Manual 100–04, chapter 11): "Payment for physicians' administrative and general supervisory activities is included in the hospice payment rates. These activities include participating in the establishment, review and updating of plans of care, supervising care and services and establishing governing policies." Determining continued patient eligibility would fall under the "general supervisory services" described at § 418.304(a)(1), rather than under review and update of plans of care described at § 418.304(a)(2).

However, if a physician or nurse practitioner provides reasonable and necessary non-administrative patient care such as symptom management to the patient during the visit (for example, the physician or NP decides that a medication change is warranted), that portion of the visit would be billable. We believe that allowing for this type of billing will not only increase the quality of patient care, but also will help defray the costs to hospices of meeting this requirement. Hospices may not bill patients for face-to-face encounters or for any medically necessary physician services provided during the encounter, as these are hospice services. Billing for medically necessary care provided during the course of a face-to-face encounter should flow through the hospice, as the physician or NP who sees the patient is employed by or where permitted, working under arrangement with the hospice (for example, a contracted physician).

The commenter who wrote that hospices cannot bill for physician services provided by a NP unless the NP is the attending physician is correct. The regulations at § 418.304(e) only allow nurse practitioner services to be billed when the nurse practitioner is the patient's designated attending physician. In order to be billable, this regulation also requires that the NP must provide medically reasonable and necessary services that are physician level services, and not nursing services (that is, in the absence of a nurse practitioner, the services would be provided by a physician and not by a nurse). The regulation also excludes billing for services related to the certification of terminal illness.

The hospice physician or NP that has the face-to-face encounter with the patient should ensure that any clinical findings of the visit(s) are communicated back to the interdisciplinary group (IDG), for use in coordinating the patient's care. This is particularly true if the physician or NP discovers unmet medical needs during the billable or non-billable portion of the visit, so that the IDG can coordinate with any attending physician. Hospices are not to provide services that are duplicative of what the attending physician is doing and are responsible for coordinating with the attending physician if they provide any reasonable and necessary patient care when having a face-to-face encounter. If there is a billable portion attributable to the visit, hospices must maintain medical documentation that is clear and precise

to substantiate the reason for the services that went beyond the face-to-face encounter, and which apply to the billed services; this can be done in one note.

At this time, we do not plan to track these required visits with a special CPT code, or to create any additional HCPCS codes related to these visits. In the coming years, we will be reforming the hospice payment system, and will be analyzing hospice costs and reimbursements to ensure that providers are being paid fairly.

We are unclear about the meaning of the comment that indicated that there is currently no physician reimbursement for Medicaid patients visited by the hospice physician. However, we note that the Medicare hospice benefit reimburses hospice physicians and attending physicians for reasonable and necessary care provided to hospice patients, whether the patients are dually eligible or not. If the commenter is referring to patients who have Medicaid only, we suggest that the commenter see his or her State Medicaid Manual, particularly sections 4305.05 and 4307, which deal with the Medicaid hospice benefit and with physician services, respectively. The paper-based State Medicaid Manual can be accessed through our Web site, at *http://www.cms.hhs.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=-99&sortByDID=1&sortOrder=ascending&itemID=CMS021927.*

Finally, the hospice face-to-face encounter is only required for recertifications when the patient is in the 3rd benefit period or beyond. By definition, hospice patients are terminally ill, with a prognosis of 6 months or less if, the illness runs its normal course. Therefore, the majority of hospice patients should not require a face-to-face encounter.

Comment: A number of commenters wrote that hospices cannot currently access accurate information in a timely manner to determine the status of previous hospice services. The commenters expressed concern that a hospice might admit a patient without having complete or accurate information about previous hospice services, and therefore not be aware that a face-to-face encounter could be required, resulting in denial of payment. Commenters stressed that without timely, accurate information, it is impossible for hospices to comply with this regulation.

Several asked if the fiscal intermediary standard systems (FISS) was available 24 hours per day, 7 days per week, or if the fiscal intermediaries (FIs) or Medicare Administrative Contractors (MACs) could impose down times for maintenance, holidays, weekends, or other reasons, noting that many hospice admissions take place after hours and on weekends, and recommended that we review FISS operating hours to ensure that it is available at all times. A few wrote that FISS cannot be accessed via secure internet site from any computer, but that hospices are required to purchase individual licenses and connection capabilities for each computer. One wrote that if a patient is discharged alive from a hospice more than six months from the inquiry date in the Eligibility Home Health Inquire (ELGH), the ELGH screen fails to reflect the previous hospice election, inaccurately suggesting to the provider that the patient had never elected hospice. One noted that using the look-up systems to determine a patient's hospice history is cumbersome. This commenter also asked how far back benefit period records are kept within FISS. Several commenters noted that many hospices do not bill in a timely fashion, which places the receiving hospice at risk even if the Common Work File (CWF) or other resources are dutifully checked at time of admission. One commenter asked that we explore options to access the FISS system, and to ensure timeliness and availability of the complete hospice history.

A few commenters asked who would be responsible for monitoring the patient's time in hospice, to know if a face-to-face encounter was required. The commenters stated they would not know the patient's history otherwise. One asked how a hospice would know when the last face-to-face encounters took place on patients who are transferred or who came from out of the area. This commenter also asked if a hospice could rely on a previous face-to-face encounter if the patient is being transferred from another hospice within 60 days of the last face-to-face encounter. Several commenters asked if the Provider Statistical and Reimbursement Report (PS&R) would be able to provide benefit period information.

Some also wrote that hospices should not be held accountable for failure to provide a visit if the data systems were unable to provide them with the accurate and timely information needed, or if the provider miscalculated the certification or recertification dates and/or face-to-face visit requirement because of inaccurate system information. Several asked that we provide clear guidance as to what would constitute a "best effort" to secure a patient's full hospice history for establishing the proper benefit period, and "hold harmless" those providers who have met the "best effort" standard. One commenter suggested we delay implementation of the face-to-face requirement until there is a CMS system in place that is available 24 hours per day, 7 days per week, and that providers not be responsible for knowing about prior hospice use if the data are not available in FISS. This commenter suggested that FISS operating hours be reviewed and that CMS consider requiring the FI/MAC contractors to have FISS available for longer hours and on nights, weekends, and holidays.

Response: Hospices are responsible for verifying which benefit period a patient is in at admission by using the CWF to determine the beneficiary's benefit period. The CWF is used because the FISS is responsible for the actual processing and payment of claims, and does not track benefit periods. There are several CWF query systems to determine which benefit period a hospice patient is in. Both ELGH and Health Insurance Query for Home Health Agencies (HIQH) give real time data; hospices should be using the CWF queries for the most accurate beneficiary information. If providers are unsure how to use the CWF queries, they should contact their MACs.

Because CWF has 9 host sites, a provider would have to search through up to 9 databases to determine if a patient who moved from another part of the country received prior hospice care; a beneficiary's records are only in 1 of the 9 databases, so as soon as the beneficiary is located, the search may cease. Although this may be cumbersome, the CWF is required to be available from 6 a.m. to 6 p.m. Monday through Friday and 6 a.m. to noon on Saturdays, by the time zone of the host site. We strive to have the CWF available beyond these minimum timeframes, but there are some regular downtimes: every Saturday, usually from 4 p.m. to past midnight, Sundays from 7 p.m. to 9 p.m. (central time), and the third Sunday of every month from 12 a.m. to 4 a.m. (central time).

The PS&R system cannot currently provide the information needed to determine the current benefit period, and the revised system is still under development.

If CWF is not available, hospices have another option for verifying a patient's hospice benefit periods, using an inquiry that is usually available 24 hours per day, 7 days per week, 365 days per year: the Health Insurance Portability and Accountability Act (HIPAA) Eligibility Transaction System (HETS), specifically the 270/271

transaction. Those hospices that file their claims through a clearinghouse, or which have a direct connection to CMS, or whose MAC provides an Internet portal, would have access to the HETS system as a data source for their eligibility. The HETS 270/271 inquiry is in real time, but claim information lags up to 24 hours. It is also a national database, therefore there is no need to search multiple host sites. A 270 transaction is a transaction query and a 271 transaction is the response to the user. A 270 transaction query for a patient's benefit periods will return up to 3 years of data, showing all prior hospice benefit periods. This query system can be used if the CWF system is not available; providers can go to *http://www.cms.gov/HETSHelp/* for information on the HETS 270/271 transaction, or they can call 1–866–534–7315. Therefore, hospices have multiple ways of verifying a patient's prior hospice history to determine which benefit period the patient is in.

If a beneficiary has received hospice care at another provider, commenters are correct that the CWF may not be up-to-date if that previous provider has not billed promptly. We share commenters' interest that the benefit period information available via the CWF or the 270/271 transaction should be as up-to-date as possible. Hospices have a financial incentive to bill in a timely fashion, and in our claims processing manual, we have encouraged providers to file their Notice of Elections as soon as possible after an election; similarly, we have often encouraged providers during the public CMS Open Door Forum discussions to bill in a timely fashion. In addition to checking our data systems for benefit period information, hospices can also ask the beneficiary (or his or her representative) if he or she has received hospice care previously. In putting forth their "best effort" to identify whether a patient requires a face-to-face encounter, hospices should not rely solely on data systems to determine the benefit period, but should also talk with the patient or representative where possible, and should document the information they find along with the methods used to find the information.

Several commenters suggested that we "hold harmless" those who rely on the CWF response information to determine whether a face-to-face encounter is required. We are unable to provide flexibility as the statutory language in the Act requires a certification or recertification in order for Medicare to cover hospice days of care. If a hospice has not had a required face-to-face encounter, then the recertification would not be complete, and we would be unable to cover the days of care that were under that recertification.

However, we believe that the flexibility afforded to hospices in determining benefit period data eliminates most situations where a hospice does not have accurate benefit period data. Furthermore, we believe that in many cases, the patient or his or her representative will know if hospice care was provided previously. Based on analysis of our FY 2007 claims data, about 20 percent of all hospice beneficiaries reach benefit period 3 or later, and thus would require a face-to-face evaluation. Of that 20 percent, only a fraction of those beneficiaries might have benefit period data that are not up-to-date in the systems, and which cannot be verified with the patient or representative. In addition, of that fraction, another fraction will show benefit period 1 or 2, rather than period 3 or later, due to having prior hospice care. Therefore, given the historical data, we do not believe that this situation will be common or that there is a need to hold hospices harmless.

The Affordable Care Act requires that a hospice physician or NP have a face-to-face encounter with any patient that it admits in the 3rd or later benefit period; prior face-to-face encounters performed by previous providers cannot be used to substitute for a face-to-face encounter that is required by the current hospice. In a transfer situation, the benefit period does not change, so the originating hospice would have been responsible for any required face-to-face encounter if the patient was in the 3rd or later benefit period. When a patient is in the 3rd or later benefit period transfers to a new hospice, the receiving hospice must recertify the patient, but it does not have to have a face-to-face encounter for that current period if it can verify that the previous hospice provided the visit.

In response to comments asking that we delay the effective date, we note that we are unable to delay implementation of the face-to-face requirement since the statutory language requires that it begins on January 1, 2011.

Comment: Several commenters were concerned about requirements when a patient with a prior hospice stay requires a visit upon admission to a new hospice. This group of commenters along with others also noted that during a time of crisis, the need to admit the patient for pain and symptom control should take precedence over provision of any required face-to-face encounter. Another commenter was concerned that requiring a face-to-face encounter would create barriers to timely access and increase costs in situations where a patient elects hospice, revokes, re-elects, revokes, and re-elects in a short time period. Recertification at this 3rd benefit period would require a face-to-face encounter. One commenter noted that if a visit is required at admission, it may unduly delay needed care or prove impossible prior to death if the patient is actively dying. Several commenters wrote that if a patient requires a face-to-face visit at admission, it will likely result in a break in service until the physician can make the visit; one suggested this may lead to patient and family complaints. This commenter asked whether these complaints should be referred to CMS, since the commenter has no control over this legislative mandate, and added that denial of service is a serious issue, especially if the patient is near death.

Several commenters asked that we waive the face-to-face requirement for patients who, because of prior hospice enrollment, require a face-to-face encounter at admission, but whose death is imminent or who die within a week.

One commenter asked what would be required if a patient transferred near the end of the 2nd 90-day period (for example, at day 175), and the recertification was not completed. The commenter wondered how much time the receiving hospice would have to complete the face-to-face encounter. Another commenter asked if providers could rely on the previous hospice's face-to-face encounter if the patient was being transferred from another hospice within 60 days of the last face-to-face encounter, and wondered how hospices would know when the last face-to-face encounter took place. A commenter suggested that the initial and comprehensive assessment be communicated to the Medical Director, to replace the need for a face-to-face encounter, when a patient would require one upon admission. When a visit is required upon admission, several commenters suggested timeframes after admission to allow the visit, including 2 days, 5 days, 15 days, and 21 days.

Response: During a time of crisis, the need to admit a patient and provide pain and symptom control is a priority. Since this is a new admission, whether the patient is coming from another provider type, from home, or is transferring from another hospice, we understand that the receiving hospice may not have up to 30 calendar days prior to the start of the benefit period to have a face-to-face encounter. However, the statute requires that the visit occur "*prior* to the 180th-day recertification and each subsequent recertification

* * *" (emphasis added). We do not have the ability to waive a statutory requirement or to allow the initial and comprehensive assessments to replace the required encounter.

As noted previously, in a transfer the benefit period remains the same. When a patient in the 3rd or later benefit period transfers to a new hospice, the receiving hospice must recertify the patient; however, since the benefit period does not change with a transfer, the receiving hospice does not have to have a face-to-face encounter for that current period if it can verify that the previous hospice provided the visit. According to the hospice CoPs at § 418.104(e), the sending hospice must forward to the receiving hospice the patient's clinical record, which includes the certifications and recertifications of terminal illness, if requested. The clinical record can be used to verify whether or not the sending hospice provided any required face-to-face encounters.

Our regulations describe recertification as a process. We currently allow 2 calendar days after a period begins for a hospice to provide either a written or a verbal certification or recertification. If a verbal certification is provided, the written certification, including the narrative, must be completed prior to filing the claim. Therefore, certification or recertification can occur at a point in time, but often occur over a period of time.

In response to the comment asking whether complaints should be referred to CMS, we note that hospices are free to refer complaints to us at CMS or to Congressional representatives. We welcome input, and would consider it when evaluating our policies given the constraints of the statute. We appreciate the concerns that commenters have raised about providing a visit upon admission, particularly in rural areas. We will be examining this issue to see how it fits with the statutory and regulatory language. In the meantime, we will monitor the program for any unintended consequences.

Comment: A number of commenters requested flexibility in who could make the face-to-face visits, and asked us to clarify our interpretation of "hospice physician or NP". One asked if there was a distinction between the physician as an employee (who received a W–2 from the hospice), a contract physician (who receives a Form 1099 from the hospice), or a volunteer. Others asked if certification in hospice and palliative care was required, or if full-time, part-time, or per diem status mattered. One commenter wrote that the proposal to require a "hospice physician or nurse practitioner" to perform the face-to-face encounter was materially different from the language in section 3132 of the Affordable Care Act. This commenter suggested that we take an approach consistent with the definition of "physician designee" in § 418.3, and allow the patient's primary care physician, specialist, hospitalist, hospice Medical Director, or other qualified physician to perform the visit, provided that physician is willing to certify eligibility for the benefit and communicate the encounter results to the hospice certifying physician.

Several commenters suggested allowing a Physician's Assistant (PA) to perform the face-to-face encounter; a few noted that in rural areas, PAs are more common than NPs. Other commenters asked if a hospitalist could perform the visit. A third commenter wrote that if a physician can collaborate with a NP to make the visit, why not also with a registered nurse (RN). One commenter said that the requirement that a physician make the visit was an insult to both the RN case manager and to the patient, and suggested that the RN case manager is capable of making the visit. The commenter added that the proposed rule sends the message that an RN case manager is good enough when it merely involves a human being's needs, but when it comes to reimbursement/money, a physician is required. Another commenter wrote that the Scope of Practice and Nurse Practice Acts for all Registered Nurses specifically allows for physical assessment and expects pathophysiology expertise. The commenter also added that RNs are as equally qualified as a NP to perform these assessments and report findings to the hospice Medical Director to establish eligibility.

Another commenter raised concerns about using a contracted physician to make the visit; this physician may be trained and may have reviewed the chart, but it would likely be the first time this doctor has seen the patient. The commenter wrote that based on the nurse's notes, the patient has a steady decline, but if the physician sees the patient on a good day, the physician may not believe that the patient is eligible for hospice care, and may recommend discharge. The commenter believes and highly respects the qualifications of physicians, in this case the trained nurse, certified in hospice and palliative care, has been seeing the patient multiple times per week, and is a better judge of the patient's eligibility.

Several commenters asked if NPs could sign the certification or recertifications. A few commenters asked that we allow medical residents or fellows to provide the face-to-face visits if they are rotating through a hospice or in a setting where hospice patients reside. One commenter asked if hospices can contract with physicians to only provide the face-to-face encounters, and what employment requirements would those physicians need to meet. Another commenter asked if a hospice could have volunteer physicians make the visit or contract with another hospice, to have their physician or NP make the visit.

A few commenters recommended that a hospice be allowed to contract with a NP for the purpose of making required face-to-face visits, rather than requiring a W–2 employment relationship only. A commenter also asked that we clarify that NPs providing the face-to-face visit must meet Medicare's general qualifications for a NP and must be licensed by the State in which they are practicing, but that they do not have to have a particular specialty certification or credentials in order to be considered a "hospice nurse practitioner" for purposes of providing the face-to-face visits. A few commenters asked if the NP must be the patient's designated attending in order to make the required visit. One asked if hospices could contract with a NP even though the hospice did not have a contract with the physician supervising the NP. The commenter added that in her area, there were competing hospitals, which could create a conflict of interest if the hospice Medical Director was associated with one hospital and the contracted NP with a competing hospital. Another commenter asked that we clarify how supervision will work for contracted NPs whose role is to make the face-to-face visits.

Other commenters suggested that advanced practice nurses such as Clinical Nurse Specialists (CNS) could make the visit and that allowing them to do so would decrease the burden of the visits in areas where there are shortages of physicians or NPs, enabling them to meet the requirement. One noted that CNS can become certified in hospice and palliative care.

A number of commenters suggested allowing the patient's attending physician to perform the required visits. These commenters noted that in many rural areas, the hospice physicians do not assume direct medical care of the hospice patients, but instead determine continued eligibility through review of clinical findings reported by the members of the IDG. The commenters wrote that the attending physicians are involved in these hospice patients' care, have a history with the patient, and may

be geographically closer to the patient. In advocating for allowing attending physicians to make these required visits, one commenter noted that because of historical knowledge and perspective, the attending physician's medical opinion should be deemed relevant and critical to the delivery of hospice care, and indeed his or her signature is required on the initial certification. One commenter stated that the proposed regulation fails to recognize the ongoing relationship between an attending physician and the patient, by excluding attending physicians from the encounter. Another wrote that attending physicians would make better use of resources and be more in line with the emphasis placed on attending physician involvement in the 2008 Medicare CoPs for hospices. A different commenter wrote that allowing the attending physician to make visits would be in keeping with Medicare's Home model. A few asked if hospices could contract with the patient's attending physician to make the visit, and if so, would the billing be through the hospice or through Part B. One suggested that such billing should flow through the hospice.

A commenter suggested that for hospice patients residing in a facility, the facility physician should be allowed to perform these face-to-face visits and report them to the physician who will sign the plan of care; the commenter added that this would promote coordination of care between the facility and hospice.

A few commenters noted that in some rural areas, the only available physicians are employed by Rural Health Clinics (RHCs) or Federally-Qualified Health Centers (FQHCs). Federal requirements applicable to both of these provider types create barriers to hospices wishing to work with them. One commenter stated that Medicare has recommended that RHC physicians treat hospice patients after business hours in a separate space other than the RHC, billing under Part B, which further inhibits health care provider accessibility. Another commenter asked for additional conversations with us to discuss this issue.

A commenter stated that if a "hospice physician" is interpreted to mean a doctor who is employed by or under contract with a hospice, or the patient's attending physician, hospices will begin making contracts with doctors to pay a fee for eligibility certifications whenever the hospice staff physicians are unable to have the encounter. The commenter believed that the potential for abuse is obvious, with payment given for favorable eligibility determinations.

Response: The statutory language in the Affordable Care Act limits the disciplines of those who can provide a hospice face-to-face encounter to a hospice physician or NP. A few commenters asked why RNs could not meet the requirement, particularly since they are involved in the patient's ongoing care. This statutory provision was based upon a recommendation made by MedPAC. In its 2009 *Report to Congress,* MedPAC reported that a panel of hospice experts agreed that more physician accountability was needed in the certification and recertification process. They wrote that the panel discussed a tension that can exist between the physician and nonphysician hospice staff which can lead to inappropriate recertification in some cases. MedPAC's panelists believed that physicians sometimes deferred too much authority for making eligibility decisions to nonphysician staff. They added that by virtue of their day-to-day contact with patients, these staff members may form emotional attachments with patients that can color their view and their charting of a patient's continued eligibility for hospice (Medicare Payment Advisory Commission, *Report to Congress: Medicare Payment Policy,* Chapter 6, March 2009, page 365, available at *http://www.medpac.gov/documents/Mar09_EntireReport.pdf*). The panelists' comments were part of the impetus for MedPAC's recommendation regarding the face-to-face encounter which the Congress enacted in the Affordable Care Act. Accordingly, by law, RNs (other than NPs) are not allowed to perform the face-to-face visit. This is in no way intended to insult or to diminish the importance of RNs in hospice care—they are key to patient care in hospice, and provide quality, compassionate care to those at end-of-life.

A commenter was concerned about a scenario where a contracted physician who is unfamiliar with the patient might see the patient on a day when the patient is doing well, clinically, and thus recommend for discharge when the patient is in fact eligible. The determination of eligibility involves considering the terminal illness, related conditions, co-morbidities, functional status, clinical indicators, laboratory results, etc. We believe the potential for a truly eligible terminally ill patient being found ineligible because he or she was doing well clinically, on the day of the encounter, is unlikely. Even so, the decision to discharge the patient is not made simply by the contracted physician, but involves the members of the IDG and the patient's attending physician. Hospices should already have policies and procedures in place for handling a situation where there is disagreement about continuing eligibility.

PAs and CNSs are not authorized by the Affordable Care Act to perform the face-to-face visit. Moreover, section 1814(a)(7) of the Act explicitly prohibits NPs from certifying or recertifying hospice patients, and limits this function to physicians only. Therefore, we cannot adopt a policy to allow NPs to certify or recertify patients without change in the statute.

Hospices cannot routinely contract with NPs, because NPs fall under nursing, which is a core service. The only situations under which a hospice could contract with a NP would be under extraordinary circumstances or if the NP service is highly specialized. Extraordinary circumstances generally would be a short-term temporary event that was unanticipated, and would not include face-to-face encounters, which are administrative in nature and which are usually planned. Examples of allowable extraordinary circumstances might include, but are not limited to, unanticipated periods of high patient loads (such as an unexpectedly large number of patients requiring continuous care simultaneously), staffing shortages due to illness, receiving patients evacuated from a disaster such as a hurricane or a wildfire, or temporary travel of a patient outside the hospice's service area. Hospices may qualify for an "extraordinary circumstance" exemption when they believe that the nursing shortage has affected their ability to directly hire sufficient numbers of nurses. For details on this waiver, please see the letter from CMS' Survey and Certification group found at *http://www.cms.gov/Surveycertificationgeninfo/downloads/SCLetter10_31.pdf.*

Hospices can employ NPs on a full-time, part-time, or per diem basis if needed to have face-to-face encounters. As long as the NP is receiving a W–2 form from the hospice, or is volunteering for the hospice, the NP is considered to be employed by the hospice.

Commenters asked about other physicians who could be considered "hospice physicians" who could be used to meet the face-to-face requirement, including attending physicians. We believe that to be a "hospice physician", a physician must be either employed by or working under arrangement with a hospice (*i.e.,* contracted). Section 418.3 defines a hospice employee as someone who is receiving a W–2 form from the hospice or who is a volunteer. We agree

with commenters that the attending physician has had a history with the patient, has signed the initial certification, and has typically remained involved in the patient's care while the patient is under the hospice benefit. We do not wish to diminish this physician's role; however, the regulations have considered services of attending physicians to be outside of the hospice benefit (which is one reason why their services are billed to Part B rather than through the hospice to Part A), and therefore we cannot include the attending physician as a "hospice physician." By limiting "hospice physician" to those physicians who are employed by or working under contract with a hospice, we also increase accountability, as the hospice is in control over its employees and contracted physicians, but not over an outside attending physician who might have the encounter. Furthermore, as part of the effort to increase accountability, we are clarifying that the hospice physician who has the face-to-face encounter must be the same physician who is composing the narrative and signing the certification. Given that the hospice is ultimately responsible for the certification, part of which is the face-to-face attestation, the hospice needs control over the timing of the staff visit, and over the preparation and review of visit documentation, which is used for the narrative and to inform the decision whether to recertify or not.

Other commenters suggested that non-hospice physicians other than attending physicians should be able to make the visit (for example, hospitalists, specialists, primary care physicians, etc). In addition to not meeting the statutory criteria of being a "hospice physician," we agree with the commenter who wrote that allowing physicians who are not involved with the patient's overall care to have the visit could lead to abuse, where an unscrupulous doctor might continue to support eligibility of ineligible patients for a fee. Additionally, we do not believe that allowing any physician to have the required face-to-face encounter would be appropriate because determining eligibility for hospice care requires knowledge of the patient's complete medical situation, including the terminal illness, related conditions, and other co-morbidities. Medical residents or fellows who are rotating through a hospice may provide the required face-to-face encounter if they are employed by the hospice or are working under contract with the hospice, and if they will be composing the narrative and signing the recertification.

Physicians or NPs who volunteer for a hospice are considered employees, and could make the required visits. No payment is made for physician or NP services furnished voluntarily. However, some physicians and NPs may seek payment for certain services while furnishing other services on a volunteer basis. Payment may be made for services not furnished voluntarily if the hospice is obligated to pay the physician or NP for the services.

We allow hospices to contract with another hospice to serve their patients, and would allow a hospice to arrange with another hospice to use its physicians to have the required face-to-face encounter. Likewise, hospices can contract with physicians for the purpose of having face-to-face encounters with their patients, but as previously noted, the contracted physician must then be the same physician who composes the narrative and signs the certification. Hospice physicians and NPs can be full-time, part-time, or work on a per diem. Hospice physicians and NPs are not required to have certification in hospice and palliative care.

NPs providing the face-to-face visit must meet Medicare's general qualifications for a NP and must be licensed as NPs by the State in which they are practicing. Physicians must meet the existing requirements for physicians in section 1861(r) of the Act. They must meet all State and local requirements as required in § 418.116. Finally, they must meet the licensed professional requirements at § 418.62.

If physicians employed by RHCs or FQHCs are also employed by or working under arrangement with a hospice, they could have the required face-to-face encounter, however they must follow statutory and regulatory requirements in doing so.

In summary, we are defining "hospice physician" as a physician employed by the hospice or working under arrangement with, or under contract with, the hospice. A hospice NP would be a NP employed by the hospice.

Comment: Several commenters asked if the encounter could be done using telephone or video technology, and still meet regulatory requirements. A few suggested that a nurse could be present to do the physical examination under the direct supervision of the physician, who could still see the patient and interact with him or her. Commenters suggested such an approach would be less burdensome and less costly, accomplish the same objectives, and open the door for critical but cost effective physician care to underserved or rural areas. Commenters were concerned about lack of human resources to accomplish the visit, particularly in rural areas, where driving distances can be great, increasing the cost of visits, and where there can be shortages of physicians or NPs. A commenter wrote that allowing telehealth would be consistent with the objectives of health care reform, and would offset travel time and travel costs. A few commenters noted that if telehealth were available, it would not help them due to lack of proper communication infrastructure in some remote areas; others noted that they would be willing to invest in telehealth to counterbalance the cost of sending a physician on home visits.

Response: We appreciate the commenters' concerns about meeting the face-to-face requirements in rural areas, and their suggestions to consider telehealth. However, section 1834(m) of the Act does not include hospices as an originating site for telehealth. Therefore, hospice patients would have to go to an originating site for the face-to-face encounter. In our analysis of claims data, we found that only 2.9 percent patients who would require a face-to-face encounter are in rural areas. Given this small volume of patients, we believe that not having telehealth does not hamper hospices' ability to meet the Affordable Care Act requirements; however, we will continue to monitor this for any unintended consequences.

Comment: A commenter wrote that in her hospice, the Medical Director would perform the face-to-face encounter and write the physician narrative. This commenter and others asked if the narrative and the face-to-face attestation could be combined; one asked if the visit note could serve in place of the narrative when the attending performs both functions. Several commenters suggested the face-to-face requirements were partially duplicative of the narrative. One notes that physicians are used to judging a patient's condition based on records. Other commenters asked for clarification of the differences between the face-to-face attestation and the physician narrative, and about the format, wording, and location of the attestation, and about how notes for the face-to-face encounter should be entered in the chart; a few asked for consistent guidelines for the narrative and the face-to-face attestation. One commenter asked if the same physician is responsible for both the visit and the narrative, could the recertification visit documentation form be combined with the recertification of terminal illness brief narrative form with both attestations so that the physician does

not have to dictate two separate notes and sign two separate forms.

A few commenters asked if the certification narrative and the face-to-face may be performed by more than one individual, or if hospice physicians could cover for each other. A commenter asked why a NP would provide an attestation of the face-to-face in addition to the physician. One commenter wrote that the face-to-face attestation should be a separate and distinct section of the narrative, and that providers should use an addendum form for the face-to-face attestation if the NP or a different physician from the certifying physician has the encounter. Another commenter asked if the NP could prepare the narrative and have the physician sign off on it. A few asked if electronic signatures were permitted for the attestation, narrative, and/or certification or if the face-to-face attestation could be dictated. One asked if a medically necessary visit is made within the same timeframe (proposed at 15 days), could the visit documentation serve as the narrative requirement, or would a separate narrative note be necessary. This commenter also asked whether it was a problem if the date of the visit did not coincide with the date of the attestation.

A commenter asked that the attestation also include the National Provider Identifier (NPI) of the physician or NP making the visit, to increase accountability. Another commenter asked us to clarify what goes directly above the certification signature—the narrative or the face-to-face attestation. Other commenters asked that the narrative attestation be placed above the physician's signature attesting that he/she composed the narrative based on his/her review of the medical record, or if applicable, his or her examination of the patient. Another commenter asked for guidance regarding the validity of the narrative if a clerical mistake is made in recording benefit period dates or certification dates. This same commenter noted that if his hospice uses contracted physicians or NPs to make the required face-to-face visits, these practitioners will be less familiar with the patient's history and disease progression, and stated that the narrative has the potential to be more informative about the patient's eligibility than the visit.

Another commenter asked if separate documentation would be required for any billable services provided during the visit, or could the narrative serve as the documentation. This commenter also asked what the documentation requirements for this visit would be. Several asked if there would need to be separate notes for the face-to-face encounter versus any billable portion of the visit.

A commenter wrote that attesting that an encounter has occurred and that documentation has been relayed does not confirm that the information was utilized in confirming eligibility. This commenter believes that the responsibility for verifying that all eligibility requirements have been met should remain with the certifying physician and be included in a single attestation.

A few commenters wrote that the additional attestation required for the face-to-face encounter creates an additional paperwork burden, and creates issues with forms, transcribing, timely documentation, and software updates. One commenter wrote that the final implementation date should be delayed to allow time for providers to update electronic and paper forms. A different commenter believed that it was burdensome, redundant, and unnecessary to require a physician or NP to attest in writing to having had a face-to-face encounter, and reiterated that the responsibility for verifying that the patient meets all eligibility criteria should remain with the physician and be included in a single attestation.

Response: The face-to-face requirement was added to the requirements for physician recertifications. Those requirements are described in detail in our regulations at § 418.22. In brief, currently hospices provide a signed certification or recertification which:

- States that the patient is terminally ill, with a prognosis of 6 months or less if the illness runs its normal course;
- Includes a written narrative either immediately prior to the physician's signature, or as a signed addendum. The narrative includes a statement under the physician signature attesting that by signing, the physician confirms that he/she composed the narrative based on his/her review of the patient's medical record or, if applicable, his or her examination of the patient; and,
- Is accompanied by clinical information or other documentation supporting the diagnosis.

The Affordable Care Act added a fourth component to the certification, with the face-to-face encounter and its attestation that the visit occurred. We proposed that the face-to-face attestation and signature be either a separate and distinct area on the recertification form, or a separate and distinct addendum to the recertification form, that is easily identifiable and clearly titled. We also proposed that the attestation language be located directly above the physician or NP attestation signature and date line.

Like the physician narrative, the face-to-face requirement is designed to increase physician accountability in the certification process, and to ensure that beneficiaries are eligible for the hospice benefit. While the purposes of the narrative and the face-to-face visit are similar, we do not believe that the two are duplicative of each other. There is value in having a physician see a patient, rather than just reviewing medical records about that patient, in determining continued eligibility.

The face-to-face attestation is a statement from the certifying physician or the NP which attests that he or she had a face-to-face encounter with the patient; if a NP had the encounter, the attestation should also state that the clinical findings of that encounter have been provided to the certifying physician for use in determining continued eligibility for hospice care. Unlike the narrative, the face-to-face attestation does not detail the clinical findings of the visit, but simply attests that the visit occurred. The regulations describing the narrative require that it be composed by the certifying physician, therefore a NP could not prepare it. We agree with the commenter who suggested that including the NPI of the individual who visited the patient increases accountability and we will consider including the NPI the face-to-face attestion in the future. We do not want to prescribe language that hospices should use in preparing the face-to-face attestation, provided the attestation includes the elements we have described.

The face-to-face attestation statement includes the date of the visit, and the signature of the physician or NP who made the visit, along with the date signed.

The date of the face-to-face encounter does not have to match the date that the attestation was signed; however, both dates should be included.

Several commenters asked if the narrative could be combined with the face-to-face attestation. The face-to-face encounter can be conducted by either a hospice physician who completes the certification, or a NP, and the face-to-face attestation must be signed by the person who conducted the visit. The narrative must be composed by the certifying physician, who by signing, attests that he or she composed it based on his or her review of the medical records and on examination of the patient (if any). We are clarifying that if a physician is the clinician who has the face-to-face encounter, then the same

physician should compose the narrative and sign the recertification.

The hospice has the option of putting both the face-to-face attestation and the narrative, with its accompanying attestation and signature, on the same page of the recertification. We would require that the format be such that the face-to-face attestation appears separate and distinct from the narrative and its attestation; hospices are free to decide how to separate the sections (that is, through spacing, through lines, etc.). We agree that for consistency, the narrative and its accompanying attestation should be above the physician's signature, and the face-to-face attestation should be above its accompanying signature, and are changing the regulatory text to reflect this. If the narrative and its attestation and the face-to-face attestation are included as part of the certification (rather than as an addendum), we suggest, but do not require, the order of the content to appear as follows: The face-to-face attestation (if applicable), followed by the physician narrative, followed by a narrative attestation, followed by the physician signature. We believe this order is logical as it allows the narrative attestation signature to be the same as the certification or recertification signature for those hospices which include the face-to-face attestation and narrative as part of the main certification document.

Hospices also have the option of placing the face-to-face attestation, the physician's or NP's signature, the narrative, and its attestation and signature, on a single page as an addendum to the main certification or recertification. They may also have the face-to-face attestation and narrative on separate pages as addenda to the certification and recertification documents. Finally, hospices may also include either the face-to-face attestation or the narrative in the main certification document, and have the other as an addendum. We are seeking to give hospices greater flexibility in how they include this information as part of their recertifications.

In summary, the narrative and face-to-face attestation may be included in the main certification document, but should be separate sections. They may also be on a single page as part of the main certification or recertification document, or as an addendum. The face-to-face attestation is completed by the person who visited the patient: either a hospice physician or a NP. If a NP saw the patient and completed the face-to-face attestation, the physician should not also complete the face-to-face attestation, because the physician did not make the visit. However, a certifying physician would still have to compose the narrative, using clinical findings from any face-to-face visit, and sign the narrative attestation.

We agree that attesting that an encounter has occurred and that documentation has been relayed does not confirm that the information was utilized in confirming eligibility. That is why we require hospice physicians to use the information from the face-to-face encounter in composing the narrative. We cannot combine the narrative and the face-to-face attestations into a single attestation because the statute allows NPs to perform face-to-face visits, but NPs cannot compose or sign the narrative.

The face-to-face encounter must be documented in accordance with hospice policy using currently accepted standards of practice. The documentation from the face-to-face encounter is part of the clinical record, and should be used in composing the written narrative. It is not necessary for the physician or NP to make separate notes for any billable services provided, as long as the visit documentation clearly supports any billable services that were provided. Visit notes are not a substitute for a physician narrative, which is a brief explanation of the clinical findings that supports continuing eligibility for the hospice benefit; the narrative draws on information from a variety of sources, and not just from notes of any face-to-face encounter which occurs.

While the mandated face-to-face attestation does create additional paperwork for hospices, we believe that we have provided sufficient flexibility for providers to meet the requirement. We appreciate hospices' concerns about required software changes and the timing required to make those changes. As noted earlier and again later in this final rule, our timeframe was driven by the required implementation date set by the Affordable Care Act, which was enacted in late March 2010. The statute requires implementation as of January 1, 2011; thus, it does not provide flexibility with respect to the date of implementation.

Electronic signatures are permitted on hospice certifications and recertifications; the narrative and the face-to-face attestation are parts of the certification or recertification, and therefore may also be signed electronically. If a physician forgets to date the certification, our longstanding policy described in our benefit policy manual in section 20.1 (Internet only manual 100–02, chapter 9) states, "If the physician forgets to date the certification, a notarized statement or some other acceptable documentation can be obtained to verify when the certification was obtained." The certification or recertification applies to the benefit period dates noted on the document, therefore, if those dates are recorded incorrectly, the hospice could potentially have days of service denied for coverage during a medical review.

Comment: A few commenters asked how the recertification visits relate to the local coverage determinations (LCDs). One commenter wrote that her hospice already completes guidelines from the LCDs for recertification, but much of this information requires prior knowledge of the patient condition to determine deterioration. The commenter noted that if the expectation is that the physician will be verifying the patient's condition based on the LCDs, this should be clear. The commenter was concerned about the situation where a physician or NP visits the patient, documents clear and valid reasons for recertification, but subsequent review determines the patient is not eligible based simply on lack of certain measures of decline. A few commenters asked us to provide clear guidance on what the face-to-face encounter should include (that is, elements that make up an encounter) for purposes of satisfying the requirement.

One commenter asked how a hospice should handle a situation where the physician determines the patient is no longer hospice eligible and discharges him, but the Quality Improvement Organization (QIO) finds the patient is hospice appropriate. The commenter wrote that it could not admit the patient in good conscience and asked for guidance.

Another commenter stated that he hoped that CMS is funding research to improve LCDs, saying that there is no formula for predicting "six months or less," especially for non-cancer diagnoses.

Response: In general, the face-to-face encounter for recertification requires that the same clinical standards be met as for the initial certification. The face-to-face encounter enables the clinician to assess the signs and symptoms in relation to the patient's terminal illness to determine whether the patient meets the clinical standards for recertification. When assessing the patient for hospice recertification, the medical records in addition to the face-to-face examination are utilized to provide a rationale for recertification. The clinical findings should include evidence from the three following categories:

(1) Decline in clinical status guidelines (for example, decline in

systolic blood pressure to below 90 or progressive postural hypotension);

(2) Non disease-specific base guidelines (that is, decline in functional status) as demonstrated by Karnofsky Performance Status or Palliative Performance Score and dependence in two or more activities of daily living; and

(3) Co-morbidities. For more information about the criteria, please see local coverage determinations (L13653, L25678, or L29881). These LCDs are on the CMS Web site in the Medicare Coverage Database at *http://www.cms.gov/mcd/overview.asp.* They are also on the local contractors' Web pages.

Predicting life expectancy is not an exact science. We are not currently funding research related to LCDs; research that could inform LCDs is completed through a number of venues, including academic institutions, the private sector, and some government agencies. In determining life expectancy for conditions with less predictable trajectories, hospice physicians are also free to use any disease-specific scores or scales that can help them in predicting life expectancy. Some providers already do so, and have reported that it improves the accuracy of their prognoses.

If a patient improves or stabilizes sufficiently over time while in hospice, such that he/she no longer has a prognosis of 6 months or less from the most recent recertification evaluation or definitive interim evaluation, that patient should be considered for discharge from the Medicare hospice benefit. Such patients can be reenrolled for a new benefit period when a decline in their clinical status is such that their life expectancy is again 6 months or less. Conversely, patients in the terminal stage of their illness, who originally qualify for the Medicare hospice benefit but stabilize or improve while receiving hospice care, yet have a reasonable expectation of continued decline for a life expectancy of less than 6 months, remain eligible for hospice care.

A patient's condition may temporarily improve with hospice care. When improvement is evident in documentation such as physician orders, medications, hospital records, doctor's records, other health records, test reports, etc, contractors consider the length-of-stay and the length of sustained improvement.

There should be clear evidence of the status of the patient's conditions and the clinical factors that caused the patient to be not eligible or to be recertified as terminally ill. If the patient is recertified, the medical records should reflect the length of time the symptoms have been evident, evidence of progressive deterioration or sudden deterioration, and increase in frequency and intensity of hospice services and medications.

If a patient appeals a pending discharge to the QIO, the QIO decision is binding; a hospice could not discharge a patient as ineligible if the QIO deems that patient to be eligible. The provider is required to continue to provide services for the patient. In the QIO response, the QIO should advise the provider as to why it disagrees with the hospice, which should help the provider to re-evaluate the discharge decision. If at another point in time the hospice believes that the patient is no longer hospice eligible, the provider should give timely notice to the patient of its decision to discharge. The patient could again appeal to the QIO, and the hospice and patient would await a new determination from the QIO based on the situation at that time.

Comment: A number of commenters were concerned that the required face-to-face encounter would create access problems for patients, would delay care and thereby lead to unnecessary patient suffering, or would reduce the quality of patient care. One commenter wrote that doctors may be less willing to refer patients to hospice if required to have these encounters, while others were concerned that patients would be discharged; several suggested that the face-to-face requirement could lead to overall Medicare costs increasing as these patients use emergency rooms and inpatient services at end-of-life rather than hospice. Several commenters were concerned that those who were actively dying would have care delayed if they required a visit upon admission due to previous hospice stays, as the hospice may have to wait to get a hospice physician or NP to see the patient.

Some commenters wrote that access to hospice services may be limited for patients who live in outlying areas, because of the travel time required to make the visits. Another commenter wrote that lack of transport to bring rural patients to a physician would lead to denying access to care for many elderly or bedbound patients unable to have a timely face-to-face visit. A few commenters suggested they may have to reduce their service areas to meet the requirement, which would jeopardize access to hospice services for beneficiaries in outlying areas. Another commenter believed that with staff shortages, meeting the face-to-face requirement would require the hospice to pull practitioners from patients who need the care and expertise of a physician or a NP to make required visits. The commenter believed this would reduce services and lower the quality of care that patients receive. A few commenters wrote that the requirement could lead to patient discharge, with one noting that the subsequent hospice would then have to incur the cost of the required visit. One commenter wrote that discharging patients could lead to ethical dilemmas or charges of patient abandonment. A few commenters suggested that the result of this mandate would be increased cost to the health care system if long-stay patients are discharged from hospice care. One commenter asked what options would be available to a hospice, or to the patients, if agencies in medically underserved areas are unable to locate physicians or NPs who are able and willing to make the required face-to-face visits.

A few commenters said that volunteer Medical Directors used by rural providers cannot make these visits, which would force the hospice to discharge patients. Another commenter said that with the maturation of the baby boomer generation, demand for hospice services would be rising, at the same time that fewer qualified physicians are pursuing careers in gerontology or palliative care, and believes that this would intensify the current situation. Another commenter wrote that it is in his agency's best interest to have physicians certified in hospice and palliative care to make the visits, but that recent requirements for an internship mean these physicians will be in shorter supply, and therefore, more costly to hospices.

A few commenters were concerned that hospice programs may not be able to manage this burden, and their closure would affect vitally important access to hospice services. One wrote that the data collected by the Community Hospice Partnership, a national coalition researching the economic sustainability of not-for-profit hospices, estimates that the cumulative reductions in reimbursement would lead to closure of 65 percent of Wisconsin's rural hospices by 2014. The commenter added that this proposed face-to-face requirement was not considered in the analysis, meaning rural Wisconsin providers would be more severely affected.

Response: We appreciate the commenters' concern about the timeliness and quality of patient care and about patient access to hospice services. We believe that this provision was included in the Affordable Care Act to ensure the continued eligibility of

hospice patients, who are supposed to have a life expectancy of 6 months or less. MedPAC, the OIG, and CMS have concerns about the appropriateness of some long-stay patients, who may have been admitted to hospice care too early in the course of their illness. The hospice face-to-face encounter is only required for recertifications when the patient is in the 3rd benefit period or beyond, which is after 6 months of hospice care for those who complete each benefit period. As mentioned previously, we found that only 2.9 percent of all Medicare hospice beneficiaries were in the 3rd or later benefit period and in rural areas, where physician or NP shortages are greatest. Therefore, only a small percentage of all Medicare hospice patients will both require these encounters and will be in a rural area where physician is more of a concern.

With that perspective, we believe that physicians will not hesitate to refer appropriate patients to hospice. We clarify, for the commenter, that it is the responsibility of the hospice to ensure that the face-to-face encounter occurs. We do not allow outside attending physicians to have the face-to-face encounter, and the hospice is responsible for either providing the encounter itself or for arranging for the encounter. Therefore, we do not believe that physicians will reduce referrals inappropriately, leading to unnecessary suffering and increased Medicare costs for patients at end-of-life. As noted in a previous comment, a patient may require a visit at admission and be actively dying. In this situation, a hospice physician or NP might see the patient anyway, given the circumstances cited; hospices are supposed to provide physician services to their patients when needed during a time of crisis. Our data suggest that only 1.1 percent of hospice beneficiaries live in rural areas and require a face-to-face encounter at admission. Therefore, we believe this is an infrequent situation, which will not lead to delays in care or in the admission of the patient.

While we appreciate the additional training and experience of those physicians who specialize in gerontology or in palliative care, we do not require a hospice physician or NP to be certified in those specialties. Volunteer physicians are considered hospice employees, and are permitted to have face-to-face encounters with patients. As previously noted, we also are allowing hospices to bill for any medically reasonable and necessary patient care provided by a hospice physician, or by a hospice NP who is also the patient's attending physician, in the course of a face-to-face visit. Therefore, hospices will receive some financial relief for the costs of having these required visits, and should not experience the financial burden some commenters described.

As noted previously, we have also doubled the time allowed for making a required visit to 30 calendar days prior to the recertification date to better enable hospices to meet this requirement. Given the additional time for having face-to-face encounters, we do not believe that hospices will need to discharge patients due to lack of time to complete the face-to-face encounters, which could result in increases in non-hospice healthcare costs or which may raise ethical issues. Similarly, if a hospice physician or attending NP cannot travel to the patient for the required visit due to distance, time, or other reasons, and the hospice is encountering a shortage of physicians or NPs such that it cannot find any to hire or any physicians to contract with, the hospice can have the patient come to the physician or NP for the face-to-face encounter, provided the hospice meets the requirements in the CoPs regarding patient safety and comfort. Having the patient come to the physician or NP, when appropriate, can also be considered if a hospice is concerned that using its staff to make required face-to-face visits would reduce services or lead to lower quality patient care. We believe that requiring a face-to-face encounter with a hospice physician or nurse practitioner will lead to increased quality of care for hospice patients, rather than decreasing quality of care.

We are unable to comment on the data collected by the Community Hospice Partnership, or their findings, as we do not have those data, the study methods, or findings, however, the reimbursement allowed to hospices for providing reasonable and necessary patient care in the course of a required face-to-face encounter should provide financial relief to providers.

Comment: Several comments suggested alternative approaches to the face-to-face encounter to ensure continued hospice eligibility. One commenter suggested that hospices can better manage their patients by performing an automatic chart review for long-stay patients, and include better prognostication information on their recertifications. This commenter also wrote that her hospice is researching using validated prognostication tools which are disease specific, and which can be done by a RN just as effectively as by a physician. A different commenter wrote that his hospice uses a detailed review process for patients not showing decline, and is therefore already performing what the proposed rule is trying to accomplish. This commenter suggested that we initially enforce the face-to-face requirements for all hospices but allow those providers that have a lower rate of long-stay patients to "opt out" in the future. The commenter believes this would force hospices to focus on admission practices and not place an undue burden on responsible providers. Another commenter wrote that his hospice's Discharge Management process is redundant in relation to the face-to-face requirement, and asked that we eliminate it. Another suggested that we require a separate comprehensive assessment for long-stay patients.

One commenter wrote that it seemed like her hospice was being punished because a lack of Federal oversight has allowed some hospice programs to go astray. Several commenters understand the need to combat fraud and abuse; one also suggested that uncontrolled growth in the number of providers, vulnerabilities in the payment systems, and a diminished commitment to integrity by some newer providers was at the core of the problem, and led to ill-conceived regulatory changes. These commenters suggested that better enforcement of existing regulations, closer inspection of documentation through ADRs/medical review, review by recovery audit contractors, comprehensive error rate testing audits, Medicaid program integrity audits, zone program integrity audits, OIG investigations, more frequent surveys, and/or other interagency efforts to combat Medicare fraud would be a better approach. One commenter suggested that if we are concerned about the growth of hospice, we should implement a moratorium on new hospice providers for 5 years, where no new hospices could enter a market unless an existing hospice in that same area closes. A few commenters wrote that they believe the cap reimbursement mechanism is the best control of utilization rather than "Monday morning quarterbacking prognosis" or seeking confirmation of prognosis by a visit by a physician or other practitioner.

A few suggested we delay or suspend implementation (often suggesting a delay until January or February 2012), or eliminate the requirement altogether. One commenter asked that if we decide to delay implementation, we notify the industry immediately, rather than waiting for publication of the final rule, so that hospices could effectively plan their staffing and hiring. Another noted that hospices have not been allowed

adequate time in practice to determine the increased level of physician involvement to meet this requirement. One wrote that we should eliminate the face-to-face visit prior to readmission, if the two physicians agree to the certification of terminal illness. Another commenter suggested we only require a face-to-face encounter if the Medical Director has not made a visit within the recertification period for other medical issues.

Several suggested that we only require the face-to-face for hospices that have a higher than average length of stay, or that we apply the requirement to patients with stays greater than 240 days. Other commenters suggested we waive the requirement for hospices that tend not to enroll very long-stay patients, or for small and rural hospices with less than a 25–50 person daily census, or for all rural hospices. Another commenter suggested we exempt patients and providers in Health Professional Shortage Areas from the requirement. One commenter suggested that we only apply this mandate to continuous service greater than 180 days with no break in service. A few suggested we require the visit at 180-days but only at every other or every third recertification thereafter, or every 180 days thereafter; another suggested we not require the visit at the benefit periods after 180 days until the total effects of the mandate have been evaluated. Some suggested a phased or stepped approach to implementation, such as applying it to hospices with a high proportion of long-stay patients first. Another suggested 100 percent review of patient stays over 180 days in providers with an unusually high percentage of "long-stay" patients. This commenter wrote that this would be a welcome edit targeted at problem providers.

The same commenter also suggested that the face-to-face encounter be crafted around the provider and not the patient, with the encounter required prior to the 180th day of care within a provider, rather than over the patient's entire hospice history, with subsequent visits required again at each 180-day interval within that provider. This commenter suggested that if the patient transfers or is later admitted to another hospice, the 180-day count would start over. To avoid having unscrupulous providers that own other provider numbers in the same geographic area make patient transfers designed to dodge the visit requirement, the commenter suggested we could have a 100 percent review of long-stay providers, using an edit of chain-related providers.

Another commenter suggested that if there was greater than a 3- or 6-month hiatus between hospice admissions, the mandate should not apply to the total hospice stay, but instead would start with the subsequent hospice admission.

Other commenters suggested that the hospice Medical Director could meet the requirement with a phone consultation with the patient while a hospice nurse was seeing the patient, at the time of the recertification visit. Another commenter believes that since the patient is reviewed by the hospice team at least every 14 days, a physician is already certifying his/her belief that the patient is indeed eligible. Others wrote that hospice nurses are trained in recognizing and documenting the appropriateness of patients, and are familiar with the patients' history. These commenters stated the requirement was an unnecessary burden on hospices since nurses are adequately handling this now, and could communicate with the physician regarding the continued need for care and recertification.

Some commenters were concerned that the impact of the narrative requirement from the August 6, 2009 FY 2010 hospice wage index final rule (74 FR 39384) was not yet known, and were concerned about the effect of the face-to-face requirement on rural providers. One suggested we conduct studies first to determine the effectiveness of the narrative before requiring the face-to-face encounter. Others suggested that we waive the requirement in areas of documented physician shortages, and others suggested that we waive the requirement for patients that require a face-to-face encounter at admission and who die within a week or who are imminently terminal.

Response: We agree with the commenter who suggested that providers can improve their patient management by performing automatic chart reviews or other review processes for long-stay patients. We also encourage hospices to consider using validated prognostication tools, when available, to inform the larger process of estimating life expectancy.

We agree that preventing fraud and abuse is important; Medicare and other agencies continue in their efforts to identify providers who are abusing the hospice benefit. We also agree that the hospice aggregate cap is an effective means of controlling inappropriate utilization. We believe that while both fraud and abuse prevention and the aggregate cap are helpful in preventing inappropriately long stays, they are not the only means to do so. The face-to-face requirement should reduce inappropriately long stays as physician accountability in the recertification process increases. In the effort to prevent fraud and abuse, the aggregate cap and the face-to-face encounter are complementary approaches to dealing with abuses in the hospice benefit.

A few commenters suggested targeted medical reviews, and the Affordable Care Act also requires medical reviews of certain long-stay cases.

State governments, not the Federal Government, control whether to place a moratorium on new providers, so that comment is outside of our purview.

In its 2009 *Report to Congress,* MedPAC reported that a panel of hospice experts agreed that more physician accountability was needed in the certification and recertification process (Medicare Payment Advisory Commission, *Report to Congress: Medicare Payment Policy,* Chapter 6, March 2009, pg 365, available at *http://www.medpac.gov/documents/Mar09_EntireReport.pdf*). The panelists' comments were part of the impetus for MedPAC's recommending the face-to-face encounter that the Congress enacted in the Affordable Care Act. Requiring another comprehensive assessment for long-stay patients would shift the burden of gathering information to ensure eligibility from physicians back to RNs and other staff, which would defeat the purpose of the MedPAC recommendation and would not follow the statutory language. Allowing a physician to speak by phone with the nurse while he or she is present with the patient is not a face-to-face encounter as required by the law.

Section 3132(b)(2) states that the face-to-face encounter is effective beginning on January 1, 2011. The statute is clear and we have no discretion to delay, phase-in, or suspend implementation, regardless of the type of hospice (*e.g.,* rural, those with small censuses, those in areas of physician shortages) or for any other reason (other than a change in law). Nor can we apply the mandate to select situations, such as to patients with more than 180 days of continuous service, to patients who haven't seen the medical director for another reason within the recertification period. We also cannot allow some providers to "opt-out" of the requirement after a period of time, nor can we limit the requirement to those hospices with a higher percentage of long-stay patients, or to those patients where two physicians agree to the recertification. We cannot craft the timeframe for the face-to-face encounter around the provider, as the statutory language is explicit in requiring it at certain benefit periods. Benefit periods are counted

based upon a patient's total Medicare hospice history, rather than a patient's hospice history with a given provider. We cannot deviate from the statutory language which specifies when the face-to-face encounter must occur ("prior to the 180th-day recertification and each subsequent recertification"). We will continue to monitor the data for any unintended consequences from the physician narrative or from the hospice face-to-face requirement.

Comment: A few commenters asked if hospices would be expected to perform a face-to-face encounter in December 2010 for patients who will require a face-to-face encounter during January 2011. One asked that we "grandfather" in patients whose recertification would require a face-to-face visit in January 2011. Others asked that the requirement only be effective for patients admitted to hospice on or after January 1, 2011 rather than including patients who were admitted prior to January 1, 2011, and whose stays crossed into 2011. One commenter wrote that this would allow hospices to marshal the necessary personnel and training resources, to create systems, and to minimize disruption in patient care.

Response: In implementing the hospice face-to-face requirement, we must follow the relevant statutory language in the Affordable Care Act, which says, "a hospice physician or nurse practitioner has a face-to-face encounter with the individual to determine continued eligibility of the individual for hospice care prior to the 180th-day recertification and each subsequent recertification * * *".

The language does not require hospices to have a face-to-face encounter with existing patients who entered the 3rd or later benefit period in 2010, and were recertified in 2010. It does require that patients who enter the 3rd or later benefit period in 2011 have the face-to-face encounter; the statutory language does not give us flexibility to "grandfather" in existing patients. We also believe that by extending the timeframe for the face-to-face encounter from 15 to 30 calendar days, hospices will have the flexibility to meet this requirement for patients who will enter the 3rd or later benefit periods in 2011.

Comment: A commenter stated that she is not aware of any data indicating that a physician who sees a patient in a face-to-face encounter once in a 6-month period is better able to prognosticate than a skilled hospice nurse who has seen the patient serially over a 6-month timeframe. The commenter added that unless the physician's one time face-to-face assessment results in a more accurate prognosis, this requirement is of very questionable value in the efforts to improve the process. Another commenter wrote that the additional burden from the visit does not support a face-to-face encounter; one wrote that those who provide care ethically and in compliance with regulations would have an additional paperwork burden, but this will not effectively eliminate the unethical providers. Another commenter wrote that it would be extremely cumbersome to develop processes in-house with electronic records and software to meet the face-to-face requirements. One commenter wrote that the proposal goes beyond the mandates of the Affordable Care Act in proposing additional layers of payment cuts on top of the disproportionate cuts already scheduled for hospice.

Another commenter said that it is not always feasible, practical, or efficient to require face-to-face encounters as proposed. A commenter believed that the attestation and narrative requirement already created a burden greater than the benefit for physicians, patients, and agencies, and that this additional face-to-face requirement would serve as a further barrier to care in areas where patients are already underserved, an economic hardship for small nonprofit providers, and would ultimately result in decreased quality of care for patients and increased costs to Medicare through unnecessary testing, procedures, hospitalizations, and readmissions. A commenter wrote that this face-to-face encounter requirement would lead to decreased utilization of hospice services, decreases lengths of stay if hospices discharge patients too soon, which may diminish the purpose of hospice and mute its services. Other commenters wrote that requiring a face-to-face visit by a physician or NP adds a layer of complexity not only to the hospice, but also to the patient's routine, due to travel, location, and additional paperwork without any compensatory benefit. One commenter wrote that this new requirement does little to truly benefit the patient or to protect the hospice benefit from abuse. Another wrote that patients in small rural communities would be inconvenienced because of the fraudulent behavior of large for-profit hospices.

Response: We appreciate the commenters' thoughts on the value of the face-to-face encounter. We are taking a long-term view of the encounter, and expect that it will increase physician accountability, lead to discharge of ineligible beneficiaries thereby reducing some lengths of stay, and improve the quality of patient care. While we value the hospice nurse's experience with the patient, and his or her assessment of the patient's prognosis, we believe that face-to-face encounters with hospice physicians or NPs can only improve upon that process.

We do not believe this requirement will decrease hospice utilization by eligible patients. We also do not claim that by itself, this requirement will eliminate all abuse of the hospice benefit. As noted previously in this section, this mandate complements other efforts related to protecting the hospice benefit from fraud and abuse.

This requirement does not cut payments, nor do we believe it is overly burdensome. We have provided financial relief for the cost of the visits by allowing billing of reasonable and necessary patient care by the hospice physician or hospice attending NP that occurs during a required face-to-face encounter. We have also provided additional flexibility in the timing of visits, to assist rural providers. We believe these changes help ensure that this requirement does not serve as a barrier to care in underserved area, and will monitor for any unintended consequences.

While changes in certification requirements may lead to additional paperwork or to software changes, we do not believe that these will be burdensome or overwhelming; rather they are a routine cost of doing business. We have also provided hospices with great flexibility in how they include the face-to-face attestation as part of their recertification documents. We agree that the allowable timeframe for making changes to software or to electronic records is short, and have addressed these concerns later in this section.

We believe that in the long-term, it will strengthen the hospice benefit by returning it to the benefit the Congress intended, for patients who are terminally ill with 6 months or less to live. We are concerned that the hospice benefit is being used by some providers to care for chronically ill patients rather than terminally ill patients, or to serve as a long-term care benefit. We believe that this face-to-face requirement may help to ensure the continued viability of Medicare's hospice benefit for those at end-of-life.

Comment: A number of commenters wrote to support the intent of the rule to certify only those hospice patients who remain eligible for the hospice benefit or to increase physician accountability, though a few mentioned that those who abuse the benefit would find a way to circumvent the requirement or that the proposed rule

was too stringent. One wrote that it is a wise way to counter the growing use of hospice services by those who are chronically ill, rather than terminally ill. Another commenter values the sort of practice, which was proposed as it ties the persons of the treatment team with the patient and with the family. A few commenters also supported our proposal that a certification or recertification could be completed 15 days prior to the start of the benefit period. A commenter from a non-profit hospice wrote that the Congress' and CMS' faith in the value of physician certification to halt abuse was reasonable, and was important for the nonprofit hospice community to support.

Response: We thank the commenters for their support.

Comment: A commenter was concerned that the timing of the proposed rule, with the open comment period until September 14th and a final rule not due out until late October or mid-November, puts a considerable burden on providers and their patient management software companies. The commenter wrote that software changes would need to be made based on the proposed rule, and that her software company could not beta test its changes because there is not enough time to do so, and to get the software out in November. The commenter added that any changes CMS makes between the proposed and final rules are difficult to accommodate, but obviously necessary. The commenter believes that in the future it would be more reasonable for CMS to publish proposed rules with adequate time for comments, review, and a final rule to be published several months before the effective date, so that software companies and their clients would have adequate time to prepare for the changes. The commenter added that due to the number of unresolved issues with the face-to-face proposal, the regulation effective date may be delayed which would also impact the timing of hiring of additional staff. A few commenters wrote that the timeframe, from publication of the final rule to its effective date, means that hospices have little time to meet with current physician staff to determine if they can manage the required visits, and to hire and train additional physicians and NPs if needed; several asked for more time to hire and train additional staff.

Response: The hospice face-to-face requirement was included in the Affordable Care Act, which was enacted on March 23, 2010. Conforming amendments were added to that law on March 30, 2010. We typically publish hospice payment-related proposed rules in April and final rules in late July or early August. Because of the internal process to publish a proposed rule by the end of March and the date the Affordable Care Act was signed into law, it was too late to include the provisions related to the face-to-face requirement in a hospice proposed rule. The most appropriate rulemaking publication we could use was the HH proposed and final rules. In addition, the HH payment rules have an effective date of January 1st while the hospice payment rules are effective on October 1st.

When we propose and finalize changes to policies, we try to do so with a timeframe that provides adequate time and flexibility to providers, contractors, and software vendors, to implement final rule requirements. In this case, the timing of the enactment of the Affordable Care Act led us to propose the requirements later than usual; the effective date of the face-to-face requirement is mandated in the statute, and we cannot change it. However, the timing of the proposed rule allowed for a 60 day public comment period and the final rule will be effective on January 1, 2011.

Comment: Some commenters asked if they were expected to report the required face-to-face visit on their claims. One wrote that if hospices are expected to report the visit, they should be paid for it. A commenter asked whether hospices should report the NP's NPI number on the claim or the NPI number of the physician supervising the NP. Several commenters asked if any special codes should be included on claims when the face-to-face visit is combined with a patient care visit, or when the face-to-face visit occurs during a medically necessary physician visit.

Response: We are not requiring any visit reporting for the required face-to-face encounter on hospice claims. This is consistent with our policy of not currently requiring reporting of other administrative activities on hospice claims. Hospice claims currently show the NPI of the attending physician (who may be a NP) and the certifying physician, at the claim level rather than showing the NPI of a practitioner at the line-item level. If hospice physicians or attending NPs provide billable services (as described previously in this section) during the course of the visit, those are to be billed on the claim following usual physician billing procedures, using revenue code 0657 and the appropriate CPT codes. If billable NP attending physician services are included on the claim, the claim should also include a GV modifier, since NP services are paid at 85 percent of services provided by physicians. The NP's NPI number would only be reported on the claim if the hospice NP is also the patient's attending physician.

Comment: A commenter wrote that hospice programs have raised concerns that hospice physicians or NPs may, during their visit to gather clinical findings to meet the face-to-face encounter requirement, be expected, by the patient or family members, to treat the patient for issues that are not related to the terminal diagnosis. The commenter noted that this is a particular concern in cases where the patient is not under the direct medical care of the hospice Medical Director but under the care of his or her primary care physician. The commenter suggested that CMS should acknowledge the potential for such professional/ethical conflicts and make every effort to avoid establishment of any barriers (either through hospice CoPs or coverage requirements) that would prevent the physician or NP from providing adequate notice or explanation to a patient or responsible family member regarding the purpose of the hospice face-to-face encounter.

Response: The hospice physician is responsible for providing care for the terminal illness and related conditions, and for caring for any unmet medical needs that the patient's attending physician (if any) has not addressed. If both the hospice physician and the attending physician are involved in the patient's care, the patient is taught who to consider "primary" and contact first. The hospice is to collaborate with the patient's attending physician (if any) in obtaining the initial certification, in performing the comprehensive assessment and any updates to that assessment, in developing the written plan of care, in discharging the patient, etc. Therefore, there should already be a working relationship with the patient's attending physician; in having a required face-to-face encounter, the physician or NP should coordinate with the attending physician in providing any care to the patient. Because the required face-to-face encounter is usually an expected event, the hospice has time for such coordination. If the hospice physician or attending NP provides reasonable and necessary patient care while making a required face-to-face visit, the hospice may bill for those non-administrative physician services, as described previously in this final rule.

Comment: A commenter wrote that CMS has provided no clarity regarding the hospice's exposure should the face-to-face requirement not be met.

Response: The face-to-face requirement is part of the hospice recertification process. Having a valid recertification is a statutory requirement for coverage and payment. We would have grounds to demand and recoup payments for claims that were paid based on an invalid recertification due to not satisfying the face-to-face requirement.

Comment: A commenter recommended that CMS continue to accept the hospice date stamp on POCs returned to the agency by physicians who forget or fail to date their signature on this document.

Response: At this time, there is nothing to preclude a hospice from using a date stamp if a physician fails to date his or her signature on the POC.

Comment: One commenter wrote that including the benefit period dates on the certification and recertification forms imposes a clerical task in physician charting. The commenter asked why this was proposed if the face-to-face encounter requirement is based upon actual days of care.

Response: As noted previously, the face-to-face encounter is based upon benefit periods and not on actual days of care. Therefore, it is helpful to show benefit periods on the certification. As we wrote in the proposed rule, having the benefit period dates on the certification makes it easier for the hospice to identify those benefit periods which require a face-to-face encounter, and will ease enforcement of this new statutory requirement. Additionally, including the benefit period dates on certifications or recertifications simplifies the medical review process. The physician does not have to be the one to fill in the benefit period dates, but he or she should know what period of time the document covers.

Comment: A commenter wrote that this rule was proposed as intended to be applied to hospices that routinely skew the length of stay averages with long lengths of stay and exceed the hospice caps. The commenter added that it is now applicable to every certified hospice regardless of appropriate lengths of stay or not.

Response: Our proposal is entirely based on section 3132(b) of the Affordable Care Act. The Affordable Care Act did not limit the face-to-face requirement to certain hospices, but required it of all certified hospices.

Comment: A commenter wrote that if CMS plans to reimburse the face-to-face visits, long term care (LTC) facilities should not be involved in hospice billing as the proposed rule is clearly focused on hospice operations, not those of the LTC that contracts with the hospice so patients may receive hospice services. The commenter asked that if CMS anticipates any increased responsibilities of LTC providers, that his organization be included in any stakeholder discussions. Finally, the commenter asked that we clarify that the role of LTC providers will not change under this new regulation.

Response: These requirements affect hospices only and do not affect or change the responsibilities of LTC providers that serve hospice patients who reside in their facilities.

Comment: A commenter asked if the new requirement for physician or NP face-to-face encounters replaces current RN assessments of hospice patients.

Response: This new requirement does not affect the roles and responsibilities of hospice nurses. Hospice nurses should continue to care for and assess patients in accordance with the CoPs. They should continue to provide care for the palliation and management of the terminal illness and related conditions.

Comment: A commenter asked if the new face-to-face requirement allowed the Medical Director to certify hospice patients. Several commenters urged that electronic signatures be accepted for certifications and recertifications or on the attestations. Another commenter asked if having a different diagnosis at admission would affect the face-to-face requirement.

Response: Hospice Medical Directors have always been able to certify or recertify hospice patients. Additionally, electronic signatures on certifications and recertifications continue to be allowed; the narrative and the face-to-face attestation are parts of the certification, and therefore both can be signed electronically. The new face-to-face requirement does not affect either of these policies. The face-to-face encounter is required based upon being in the 3rd or later benefit period, considering the entire hospice history, regardless of diagnosis.

Comment: A commenter wrote that if the face-to-face encounter must occur within 2 weeks of the start-of-care date, and be documented, the industry could not afford this. This commenter noted also that hospices have little or no influence over physician behavior to comply with the additional scheduling and documentation requirements of this proposed rule.

Response: We believe this comment is related to the HH face-to-face requirement, but it was unclear from the language used, so we will respond from a hospice perspective. The hospice face-to-face certification is not required at start-of-care unless, when considering the patient's entire hospice history, the start-of-care coincides with the recertification at the 3rd or later benefit period. If a hospice employs or contracts with a physician, it has influence regarding physician compliance with these requirements.

Comment: A commenter wrote that a recent Duke University study showed that patients who died under the care of hospice cost the Medicare program an average of $2,300 less than those who did not. This commenter believes that the current reimbursement model no longer fits with the evolution of the hospice benefit since 1983. The commenter also believes that this maturation of hospice necessitates a full scale review and evaluation of the current reimbursement model. The commenter added that changes to the benefit and payment system should preserve access the hospice benefit, quality care, and reasonable reimbursement rates to maintain a viable and stable delivery system. The commenter also wrote that hospice patients should not have to forgo curative care that might lengthen their lives and enhance their quality of life. This commenter also wrote that the Congress should prevent CMS from implementing payment rate cuts in hospice until the Secretary is able to justify that the cuts do not negatively impact patients and access to care. The commenter suggested that the Congress prevent us from implementing the payment rate to ensure the full market basket update for the hospice benefit, and that they preserve the BNAF; commenters suggested a rural add-on payment to ensure access for rural patients and to compensate for the financial burden of the face-to-face visits.

A few commenters who opposed the elimination of the BNAF wrote that we moved the hospice wage index away from one which was agreed upon years ago; one asked that we suspend the phase-out until a better approach for wage index adjustment is developed. Another commenter believes the hospice wage patterns do not mirror those of hospitals. This commenter wrote that hospices compete in the same labor market as hospitals, which are allowed to reclassify. The commenter urged us to develop a voluntary pilot project to test a hospice specific wage index, and hopes that we will slow the phase-out. A few commenters also urged that we maintain the aggregate hospice cap, as it protects against abuse of the benefit. One supported our efforts to improve the calculation and enforcement of the cap, provided those efforts do not take away from payment

reform. A different commenter suggested we have standards for data submitted on cost reports and not use data from agencies that submit reports that are missing required information.

Response: Some of these comments are outside the scope of this rule so we will not respond to them in this final rule. However, we will respond to those comments related to the Affordable Care Act. Section 3132(a) of the Affordable Care Act requires that we begin reforming the hospice payment system no earlier than October 1, 2013. We have been collecting additional data from hospices for several years now, in preparation for payment reform. Any reformed payment model that we propose would preserve access to hospice care, encourage quality care, and would fairly pay providers. Section 3140 of the Affordable Care Act requires that we conduct a concurrent care demonstration project where hospice services will be provided without the beneficiary having to forgo curative care. The results of this 3-year demonstration project will help inform future decisions about any changes to the hospice benefit. In the Affordable Care Act, the Congress also reduced the market basket update for hospice, but those reductions will not occur until 2013, and therefore are not included in the FY 2011 payment rates. We do not have the statutory authority to provide a rural add-on to hospices. The BNAF phase-out was finalized in the August 6, 2009 final rule, and is outside the scope of this rule. Likewise, the hospice wage index, cost reports, and cap are outside the scope of this rule, and therefore we cannot comment, though we appreciate the commenter's support regarding the hospice aggregate cap.

In summary, as a result of the comments we received on the proposed rule, we are finalizing the proposals made in the proposed rule with the following changes:

- We are changing the regulatory text at § 418.22(a)(4) to clarify that we are counting a beneficiary's time across all hospices based upon benefit periods rather than on actual days of hospice care. Therefore, a face-to-face encounter will be required prior to the 3rd benefit period recertification and each recertification thereafter.
- We are clarifying in the regulatory text at § 418.22(a)(4) that the hospice physician or nurse practitioner is not required to go to the patient for the face-to-face encounter, but that the patient is allowed to travel to the hospice physician or nurse practitioner when medically appropriate.
- We are changing the regulatory text at § 418.22(a)(4) so that hospice physicians or nurse practitioners will have up to 30 calendar days prior to the 3rd benefit period recertification, and up to 30 calendar days prior to each recertification thereafter, to have the face-to-face encounter.
- We are changing the regulatory text at § 418.22(b)(3)(iii) so that the narrative attestation is directly above physician's signature, rather than directly below it.
- We clarified that hospices may bill for reasonable and necessary care provided to the patient by a hospice physician in the course of having a required face-to-face encounter with a patient.

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information (COI) requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

A. ICRs Regarding Therapy Coverage Requirements

As described previously in this rule, we are clarifying our coverage requirements for skilled services provided by therapists, which are described in § 409.44(c). Our clarifications include requirements to: Document necessity for a course of therapy (§ 409.44(c)(1)); include clinic notes which reflect progress toward goals, which incorporate the functional assessment and reassessments, which justify medical necessity, which describe the content of progress notes, and which include objective evidence of the expectation that the patient's condition will improve (§ 409.44(c)(2)(i)); document any variable factors that influence the patient's condition or affect the patient's response to treatment, and include objective measurements of progress toward goals in the clinical record (409.44(c)(2)(iv)).

These clarifications to our coverage requirements in § 409.44(c) are already part of our current Conditions of Participation (CoPs) and are approved under OMB# 0938–1083. The current CoPs at § 484.12 already require that the HHA and its staff comply with accepted professional standards and principles that apply to professionals furnishing services in an HHA. Those accepted professional standards include complete and effective documentation, such as we described in our proposals. Additionally, § 484.32 of the CoPs already requires in part that the therapist prepare clinical and progress notes. Section 484.55 of the CoPs already requires that HHAs provide a comprehensive assessment that "accurately reflects the patient's current health status and includes information that may be used to demonstrate progress toward achievement of desired outcomes". Because these clarifications to our coverage requirements in § 409.44(c) reflect longstanding policy from our CoPs as well as from accepted standards of clinical practice, we believe that these requirements will not create any additional burden on HHAs.

Additionally, our coverage regulations at § 409.44(c)(2)(i) already mandate that for therapy services to be covered in the HH setting, the services must be considered under accepted practice to be a specific, safe, and effective treatment for the beneficiary's condition. We are revising § 409.44(c)(2)(i) to require a functional assessment on the 13th and 19th therapy visit, and at least every 30 days, to determine continued need for therapy services, and to ensure material progress toward goals. The functional assessment does not require a special visit to the patient, but is conducted as part of a regularly scheduled therapy visit. Functional assessments are necessary to demonstrate progress (or the lack thereof) toward therapy goals, and are already part of accepted standards of clinical practice, which include assessing a patient's function on an ongoing basis as part of each visit.

Our current CoPs at § 484.55 already require that HHAs "identify the patient's continuing need for home care * * *". Functional assessments of therapy need guide HHAs in determining whether continued therapy is necessary. Therefore, we believe that the requirement to perform a functional assessment at the 13th and 19th visits, and at least every 30 days, will also not

create any burden on HHAs. Rather, we have clarified the minimum timeframes for functional assessments in the coverage regulations. Longstanding CoP policy at § 484.55 requires HHAs to document progress toward goals; therefore, we again do not believe that performing or documenting functional assessments at these 3 time-points would create a new burden. Both the functional assessment and its accompanying documentation are already part of existing HHA practices and accepted standards of clinical practice, and are approved under OMB# 0938–1083. Therefore, we do not believe these proposed requirements place any new documentation requirements on HHAs. We also believe that a prudent HHA would self-impose these requirements in the course of doing business.

We are revising the currently approved PRA package (OMB# 0938–1083) to describe these clarifications to the regulatory text.

B. ICRs Regarding HHA Capitalization

As stated above, we are revising § 489.28(a) to state that a newly enrolling HHA must consistently maintain sufficient capitalization between the time it submits its enrollment application until 3 months after its provider agreement becomes effective. The HHA will therefore be required to submit proof of capitalization at multiple points during this period.

In the proposed rule, we estimated that a newly enrolling HHA would be required to submit such proof 3 times prior to receiving Medicare billing privileges, and that the burden involved in doing so would be 1.5 hours on each occasion. We further projected that 500 newly enrolling HHAs (of which 200 would become enrolled) would be requested to furnish this data. The total annual burden would therefore be 2,250 hours (500 HHAs × 3 submissions × 1.5 hours).

We are adopting the aforementioned estimates for this final rule. These estimates are reflected in Table 14.

TABLE 14—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

OMB No.	Requirement	Respondents	Responses	Hour burden	Total
None	§ 489.28(a)	500	500	4.5	2,250

C. ICRs Regarding the Home Health Face-To-Face Encounter Requirement

The Affordable Care Act amends the requirements for physician certification of HH services contained in sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act by requiring that prior to certifying a patient as eligible for HH services, the physician must document that the physician/NPP has had a face-to-face encounter (including through the use of telehealth. The Affordable Care Act provision does not amend the statutory requirement that a physician must certify a patient's eligibility for Medicare's HH benefit (see sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act). In this rule, we are amending § 424.22(a)(1)(v) to require the certifying physician sign and date the documentation entry into the certification that the face-to-face patient encounter occurred no more than 90 days prior to the HH start of care date by himself or herself, or by an allowed NPP for initial certifications. We are requiring that the certifying physician's documentation of the face-to-face patient encounter be either a separate and distinct area on the certification, or a separate and distinct addendum to the certification, that is easily identifiable and clearly titled, dated, and signed by the certifying physician, and that it include the clinical findings of that encounter.

The burden associated with the documentation requirement for the patient's face-to-face encounter by the physician and certain allowed nonphysician practitioners includes the time for each HHA to develop a revised certification form or certification addendum which the HHA provides to the physician. The revised certification form or addendum to the certification must allow the physician to record that a face-to-face patient encounter has occurred. The revised form or addendum must also include the patient's name, a designated space for the physician to provide the date of the patient encounter, a designated space for the physician's documentation of the face-to-face encounter, and a designated space for the physician to provide his/her signature and the date signed.

There were 9,432 HHAs that filed claims in CY 2008. We estimate it would take each HHA 15 minutes of the HH administrator's time to develop and review the above described form language and 15 minutes of clerical time for each HHA to revise their existing initial certification form or to create an addendum with that form language. The estimated total one-time burden for developing the patient encounter form would be 4,716 hours.

The certifying physician's burden for composing the face-to-face documentation which includes how the clinical findings of the encounter support eligibility; writing, typing, or dictating the face-to-face documentation; signing, and dating the patient's face-to-face encounter is estimated at 5 minutes for each certification. We estimate that there would be 2,926,420 initial HH episodes in a year based on our 2008 claims data. As such, the estimated burden for documenting, signing, and dating the patient's face-to-face encounter would be 243,868 hours for CY 2011.

We reiterate that our longstanding policy has been that physicians must sign and date the certification statement that the patient is in need of HH services and meets the eligibility requirements to receive the benefit. Therefore, our making this requirement explicit in the regulation poses no additional burden to HHAs.

Additionally, it has been our longstanding manual policy that physicians must sign and date the certification and any recertifications. Our current regulations only address the physician's signing of the certification and recertification. In this rulemaking, we are strengthening our regulations at § 424.22 to achieve consistency with the timing and documentation of the face-to-face encounter and to mirror our longstanding manual policy by revising our regulations to make it a requirement that physicians not only sign, but also date certifications and recertifications. Because it has been our longstanding manual policy that physicians sign and date certifications and recertifications, and we are merely making this requirement explicit in our regulations, there is no additional burden to physicians.

Based on the criteria for payment of physician supervision of a patient receiving Medicare-covered services provided by a participating HHA as stipulated in the description of HCPC code G0181, our making the patient encounter requirement explicit in the regulation poses no additional burden to physician offices. Tables 15 and 16

summarize the burden estimate associated with these requirements.

TABLE 15—ESTIMATED ONE-TIME FORM DEVELOPMENT BURDEN

OMB No.	Requirement	HHAs	Responses	Hour burden	Total (hours)
0938–1083	§ 424.22(a)(1)(v)	9,432	1	.5	4,716

TABLE 16—ESTIMATED PHYSICIANS BURDEN FOR DOCUMENTING, SIGNING, AND DATING ENCOUNTER

OMB No.	Requirement	Patients	Responses	Hour burden	Total (hours)
0938–1083	§ 424.22(a)(1)(v)	2,926,420	1	.0833333	243,868

Details of our burden estimates are availabe in the Paperwork Reduction Act (PRA) package approved under OMB# 0938–1083. We are revising this currently approved package to incorporate these requirements.

D. ICRs Regarding the Requirements for Hospice Certification Changes

As described previously in this final rule, as of January 1, 2011 the Affordable Care Act requires physicians or NPs to attest that they determined continued hospice eligibility through a face-to-face encounter with all hospice patients prior to the 3rd benefit period recertification and at every subsequent recertification. We will require the physician or NP to sign and date an attestation statement that he or she had a face-to-face encounter with the patient, and include the date of that visit. This attestation would be a separate and distinct part of the physician recertification, or an addendum to the physician recertification.

The burden associated with this attestation requirement is the time for each hospice to develop simple attestation language to attach as an addendum or include as part of the recertification document, and the time for the physician or NP to include the patient name, the date that the patient was visited, the visiting physician or NP signature, and the date signed. As of February 2010, there were 3,429 hospices with claims filed in FY 2009. We estimate it would take each hospice 15 minutes of administrative time to develop and review the attestation language, and 15 minutes of clerical time to revise their existing recertification form or to create an addendum. The estimated total one-time burden for developing the attestation form would be 1,714 hours.

The burden for completing the attestation form is estimated at 30 seconds for each recertification at 180 days or beyond. We used the distribution of lengths of stay from hospice claims data to estimate the percentage of patients who required recertification at 180 days, and at subsequent 60-day benefit periods. We estimated that there would be 457,382 recertifications at 180 days or beyond, each of which requires an attestation. We assume that 90 percent of the visits were performed by physicians and 10 percent by nurse practitioners, based on our analysis of FY 2009 physician and NP hospice billing data, with 30 seconds time allowed to sign and date the attestation statement, and to write in the name of the patient and the date of the visit, resulting in an estimated total burden to complete the attestation form of 3,811 hours for CY 2011. In the FY 2010 hospice rule (74 FR 39384), we finalized a requirement that the recertifying physician include a brief narrative explanation of the clinical findings which support continued hospice eligibility. Effective January 1, 2011, regulation text changes to require this narrative to describe why the clinical findings of the face-to-face encounter, occurring at the 180-day recertification and all subsequent recertifications, continue to support hospice eligibility. However, these regulation changes are for clarification. The narrative requirement finalized in FY 2010 requires that the narrative include why the clinical findings of any physician/NP/patient encounter support continued hospice eligibility. Therefore, the only documentation burden associated with this requirement is the signed and dated attestation that the encounter occurred.

In addition, commenters asked that we change the regulatory language at § 418.22(b)(3)(iii) to require the physician's signature to follow the narrative attestation statement, rather than to be above it on the form. The commenters believed that the signature should "close the loop", and that this placement would be consistent with the face-to-face attestation requirements. We agree with the commenters, and are finalizing this as a change in the regulation. We do not believe that moving the signature underneath the narrative attestation (rather than leaving it above it) creates any additional burden to hospices. The estimate of administrative burden to create the face-to-face attestation includes enough administrative time for form revision to cover moving the narrative attestation signature line.

We reiterate that our longstanding policy has been that physicians must sign and date the certification and any recertifications. Therefore, our making this requirement explicit in the regulation poses no additional burden to hospices. We also clarified the timeframe which the certifications and recertifications cover by requiring physicians to include the dates of the benefit period to which the certification or recertification applies. We believe this is already standard practice at nearly all hospices, but are addressing it in regulation. Using the distribution of lengths of stay from 2007 and 2008 claims data, we estimate that there would be 1,733,663 initial certifications and recertifications during the course of a year. We estimate that it would take a physician 30 seconds at most to include the benefit period dates. We estimate that the time to require physicians to include the benefit period dates on the certification or recertification would be 30 seconds per certification or recertification, for a total burden of 14,447 hours for CY 2011. Table 17 summarizes the burden estimate associated with these requirements.

TABLE 17—ESTIMATED ANNUAL RECORDKEEPING BURDEN

OMB No.	Requirements	Units	Responses	Hour burden	Total
0938–1067	418.22(b)(4)	3,429 hospices	1	0.50	1,714
0938–1067	418.22(b)(4)	457,382 ≥180-day recerts	1	0.0083333	3,811
0938–1067	418.22(b)(5)	1,733,663 All certs. & recerts	1	0.0083333	14,447

Details of our burden estimates are available in the PRA package approved under OMB# 0938–1067. We are revising this currently approved package to incorporate these requirements.

We received one comment about the burden estimate of the hospice face-to-face attestation, and one about an addition to the face-to-face attestation.

Comment: A commenter wrote that the administrative burden calculated by CMS did not include the staff time required to track down these face-to-face encounters. The administrative cost that was calculated is not included in the reimbursement for hospices.

Response: The above mentioned burden estimate only reflects the burden associated with any additional required *documentation.* In this case, the additional required documentation is the attestation of the face-to-face encounter. Our burden estimate includes the administrative time to develop an attestation form as well as the time that we believe would be required to revise the hospice's existing certification or recertification forms, if necessary. The requirement as stated in § 418.22 pertains to additional documentation only, that is, documentation requirements subsequent to the face-to-face encounter; therefore, the estimate above does not include any burden associated with the administrative coordination and conduct of face-to-face encounters or tracking the encounters.

E. ICRs Regarding the Home Health Care CAHPS Survey (HHCAHPS)

As part of the DHHS Transparency Initiative on Quality Reporting, we are implementing a process to measure and publicly report patients' experiences with HH care they receive from Medicare-certified HHAs with the Home Health Care CAHPS (HHCAHPS) survey. The HHCAHPS was developed and tested by the Agency for Healthcare Research and Quality (AHRQ) and is part of the family of CAHPS surveys, is a standardized survey for HH patients to assess their HH care providers and the quality of the HH care they received. Prior to the HHCAHPS, there was no national standard for collecting data about HH care patients' perspectives of their HH care.

Section 484.250, Patient Assessment Data, will require an HHA to submit to CMS HHCAHPS data in order for CMS to administer the payment rate methodologies described in § 484.215, § 484.230, and § 484.235. The burden associated with this is the time and effort put forth by the HHA to submit the HHCAHPS data, the patient burden to respond to the survey, and the cost to the HHA to pay the survey vendor to collect the data on their behalf. This burden is currently accounted for under OMB# 0938–1066.

The HHCAHPS survey received OMB clearance on July 18, 2009, and the number is 0938–1066. In that PRA package, we did not state the burden to the HHAs concerning the hours that they would need to secure an approved HHCAHPS vendor and to pay for that vendor. In this rule, we have included the burden directly affecting HHAs, which is the burden to select a survey vendor from *http://www.homehealthcahps.org* and to sign a contract with that survey vendor that will conduct HHCAHPS on behalf of the HHA. We have determined that this would take 16.0 hours for each HHA. It is noted that 91 percent of all HHAs (9,890 HHAs of a total of 10,998 HHAs) would be conducting HHCAHPS, since about 9 percent of HHAs will be exempt from conducting HHCAHPS because they have less than 60 eligible patients in the year. In Table 18, we have listed this burden to the HHAs:

TABLE 18—ESTIMATED ANNUAL BURDEN ON HHAS FOR VENDOR SELECTION

OMB No.	Requirements	Units	Responses	Hour burden	Total
0938–1066	§ 484.250(c)(2)	9,890	1	16.0	158,240

OMB Number 0938–1066 will be revised to reflect the update concerning burden to the HHAs for vendor services for HHCAHPS.

Section 5201 of the DRA requires HHAs to submit data for purposes of measuring health care quality, and links the quality data submission to payment. This requirement is applicable for CY 2007 and each subsequent year. If an HHA does not submit quality data, the HH market basket percentage increase will be reduced 2 percentage points. In accordance with the statue, we published a final rule (71 FR 65884, 65935) in the **Federal Register** on November 9, 2006 to implement the pay-for-reporting requirement of the DRA, codified at § 484.225(h) and (i).

In the CY 2010 HH PPS proposed rule (August 13, 2009), we to expand the HH quality measures reporting requirements to include the CAHPS® Home Health Care (HHCAHPS) Survey, as initially discussed in the May 4, 2007 proposed rule (72 FR 25356, 25452) and in the November 3, 2008 Notice (73 FR 65357,65358). As part of the DHHS Transparency Initiative, we proposed to implement a process to measure and publicly report patient experiences with HH care using a survey developed by AHRQ in its CAHPS® program. In the CY 2010 HH PPS final rule, we stated our intention to move forward with the HHCAHPS and link the survey to the CY 2012 annual payment update under the DRA "pay-for-reporting" requirement.

As part of this requirement, each HHA sponsoring a HHCAHPS Survey must prepare and submit to its survey vendor a file containing patient data on patients served the preceding month that will be used by the survey vendor to select the sample and field the survey. This file (essentially the sampling frame) for most HHAs can be generated from existing databases with minimal effort. For some small HHAs, preparation of a monthly sample frame may require more time. However, data elements needed on the sample frame will be kept at a minimum to reduce the burden on all HHAs.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget.

Attention: CMS Desk Officer, [CMS–1510–F]

Fax: (202) 395–6974; or

E-mail: *OIRA_submission@omb.eop.gov.*

IV. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We estimate that this rulemaking is "economically significant" as measured by the $100 million threshold, and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared a Regulatory Impact Analysis that to the best of our ability presents the costs and benefits of the rulemaking.

1. CY 2011 Update

The update set forth in this final rule applies to Medicare payments under HH PPS in CY 2011. Accordingly, the following analysis describes the impact in CY 2011 only. We estimate that the net impact of the proposals in this rule is approximately $960 million in CY 2011 savings. The $960 million impact to the proposed CY 2011 HH PPS reflects the distributional effects of an updated wage index ($20 million increase) plus the 1.1 percent HH market basket update ($210 million increase), for a total increase of $230 million. The 3.79 percent case-mix adjustment applicable to the national standardized 60-day episode rates ($700 million decrease) plus the 2.5 percent returned from the outlier provisions of the Affordable Care Act ($490 million decrease) results in a total decrease of $1,190 million, which, when added to the $230 million increase, totals savings of $960 million in CY 2011. The $960 million in savings is reflected in the first row of column 3 of Table 19 below as a 4.89 percent decrease in expenditures when comparing the current CY 2010 HH PPS to the proposed CY 2011 HH PPS.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $7.0 million to $34.5 million in any 1 year. For the purposes of the RFA, our updated data show that approximately 95 percent of HHAs are considered to be small businesses according to the Small Business Administration's size standards with total revenues of $13.5 million or less in any one year. Individuals and States are not included in the definition of a small entity. The Secretary has determined that this final rule would have a significant economic impact on a substantial number of small entities. In the proposed rule, we stated that our analysis reveals that nominal case-mix continues to grow under the HH PPS. Specifically, nominal case-mix has grown from the 11.75 percent growth identified in our analysis for CY 2008 rulemaking to 17.45 percent for this year's rulemaking. Because we have not yet accounted for all of the increase in nominal case-mix, that is case-mix that is not real (real being related to treatment of more resource intense patients), case-mix reductions are necessary. As such, we believe it appropriate to reduce the HH PPS rates now, so as to move towards more accurate payment for the delivery of HH services. We have amended the proposal that would have implemented two successive years of payment reductions, with each year's reduction at 3.79 percent. Instead we are finalizing in this rule only the first year's reduction (for CY 2011) while we study additional case-mix data, and methods to incorporate such data, into our methodology for measuring real vs. nominal case-mix change. Other reductions to HH PPS payments discussed in this rule were mandated in provisions in the Affordable Care Act. Our analysis shows that small HHAs and large HHAs are impacted relatively similarly by the final provisions of this rule. Further detailed impact assessment, by facility type, is presented in the analysis below.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This final rule applies to HHAs. Therefore, the Secretary has determined that this final rule would not have a significant economic impact on the operations of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2010, that threshold is approximately $135 million. This final rule is not anticipated to have an effect on State, local, or tribal governments in the aggregate, or on the private sector, of $135 million or more.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this final rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that it would not have substantial direct effects on the rights, roles, and responsibilities of States, local or tribal governments.

B. Anticipated Effects

This final rule sets forth updates to the HH PPS rates contained in the CY 2010 notice published on November 10, 2009. The impact analysis of this final rule presents the estimated expenditure effects of policy changes proposed in this rule. We use the latest data and best analysis available, but we do not make adjustments for future changes in such

variables as number of visits or case-mix.

This analysis incorporates the latest estimates of growth in service use and payments under the Medicare HH benefit, based on Medicare claims from 2008. We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to errors resulting from other changes in the impact time period assessed. Some examples of such possible events are newly-legislated general Medicare program funding changes made by the Congress, or changes specifically related to HHAs. In addition, changes to the Medicare program may continue to be made as a result of the BBA, the BBRA, the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, the MMA, the DRA, the Affordable Care Act, or new statutory provision. Although these changes may not be specific to the HH PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon HHAs.

Table 19 represents how HHA revenues are likely to be affected by the policy changes proposed in this rule. For this analysis, we used linked HH claims and OASIS assessments; the claims represented a 20-percent sample of 60-day episodes occurring in CY 2008. The first column of Table 19 classifies HHAs according to a number of characteristics including provider type, geographic region, and urban and rural locations. The second column shows the payment effects of the wage index only. The third column shows the payment effects of all the policies outlined earlier in this rule. For CY 2011, the average impact for all HHAs is a .08 percent increase in payments due to the effects of the wage index. The overall impact, for all HHAs, in estimated total payments from CY 2010 to CY 2011, is a decrease of approximately 4.89 percent. There is very little difference in the estimated impact on HHAs when looking at the type of facility. Freestanding HHAs are estimated to see a 4.88 percent decrease in payments while facility based HHAs are estimated to see a 4.92 percent decrease. Similarly, voluntary not-for-profit HHAs are estimated to see a 4.97 percent decrease in payments, while for-profit HHAs are estimated to see a 4.84 percent decrease in payments. Rural agencies are estimated to see a 4.67 percent decrease in payment in CY 2011, while urban agencies are estimated to see a 4.93 percent decrease in payments. Agencies in New England (−5.39 percent) and in the South (−5.19 percent) are estimated to experience the largest decreases, while HHAs in the Pacific (−4.49 percent) and the West (−4.66 percent) are estimated to have less of a decrease in payments in CY 2011. In general, smaller agencies are estimated to see less of a decrease in payments in CY 2011, than are larger agencies, with agencies with 100–199 first episodes estimated to see a 4.73 percent decrease and agencies with 200 or more first episodes estimated to see a 4.93 percent decrease in payment in CY 2011.

We supplemented our impact analysis from the proposed rule by linking to Medicare cost report data which has total revenues for HHAs. Using total revenues and the $13.5 million threshold of the RFA, we categorized an HHA as being either small or large. To perform this analysis, we were able to match approximately 72 percent of the cost report data to our model. For the remainder of the agencies in the model, we proxy for large agencies as those agencies with at least 750 first episodes (doing so results in approximately 95 percent of agencies being classified as small and 5 percent of agencies being large, which is reflective of what our cost report files show us). This analysis provides similar results to the one using first episodes as a measure of an agency's size in that small HHAs fare slightly better, a 4.84 percent decrease in payments, than do large HHAs, which are estimated to experience a 5.01 percent decrease in payments in CY 2011.

Section 3131(c) of the Affordable Care Act amended section 421(a) of the MMA. The amended section 421(a) of the MMA provides an increase of 3 percent of the payment amount otherwise made for HH services furnished in a rural area, with respect to episodes and visits ending on or after April 1, 2010 and before January 1, 2016. Column 3 of Table 19 displays a comparison of estimated payments in CY 2010, including a 3 percent rural add-on for the last three quarters of CY 2010, to estimated payments in CY 2011, including a 3 percent rural add-on for all four quarters of CY 2011.

TABLE 19—IMPACTS BY AGENCY TYPE

Group	Comparisons	
	Percent change due to the effects of the updated wage index only	Impact of all CY 2011 policies [1] (percent)
All Agencies:	0.08	−4.89
Type of Facility:		
Free-Standing/Other Vol/NP	−0.10	−4.99
Free-Standing/Other Proprietary	0.16	−4.85
Free-Standing/Other Government	−0.23	−4.97
Facility-Based Vol/NP	−0.08	−4.95
Facility-Based Proprietary	0.20	−4.68
Facility-Based Government	−0.06	−4.86
Subtotal: Freestanding	0.10	−4.88
Subtotal: Facility-based	−0.05	−4.92
Subtotal: Vol/NP	−0.09	−4.97
Subtotal: Proprietary	0.17	−4.84
Subtotal: Government	−0.15	−4.92
Type of Facility (Rural * Only):		
Free-Standing/Other Vol/NP	0.00	−4.70
Free-Standing/Other Proprietary	0.26	−4.61
Free-Standing/Other Government	−0.43	−5.01
Facility-Based Vol/NP	−0.10	−4.73
Facility-Based Proprietary	0.20	−4.53

TABLE 19—IMPACTS BY AGENCY TYPE—Continued

Group	Comparisons	
	Percent change due to the effects of the updated wage index only	Impact of all CY 2011 policies [1] (percent)
Facility-Based Government	−0.12	−4.78
Type of Facility (Urban * Only):		
Free-Standing/Other Vol/NP	−0.12	−5.03
Free-Standing/Other Proprietary	0.15	−4.89
Free-Standing/Other Government	0.02	−4.93
Facility-Based Vol/NP	−0.07	−5.01
Facility-Based Proprietary	0.20	−4.78
Facility-Based Government	0.03	−4.95
Type of Facility (Urban* or Rural*):		
Rural	0.10	−4.67
Urban	0.07	−4.93
Facility Location: Region*:		
North	−0.34	−5.19
South	0.18	−4.80
Midwest	0.01	−4.98
West	0.33	−4.66
Outlying	−0.11	−5.03
Facility Location:		
Area of the Country:		
New England	−0.54	−5.39
Mid Atlantic	−0.23	−5.08
South Atlantic	0.05	−4.94
East South Central	−0.09	−5.04
West South Central	0.41	−4.58
East North Central	0.07	−4.95
West North Central	−0.22	−5.11
Mountain	−0.15	−5.05
Pacific	0.54	−4.49
Outlying	−0.11	−5.03
Facility Size: (Number of First Episodes):		
< 19	0.21	−4.88
20 to 49	0.20	−4.86
50 to 99	0.26	−4.77
100 to 199	0.25	−4.73
200 or More	0.01	−4.93
Facility Size: (estimated total revenue)		
Small (estimated total revenue <= $13.5 million)	0.14	−4.84
Large (estimated total revenue > $13.5 million)	−0.08	−5.01

Note: Based on a 20 percent sample of CY 2008 claims linked to OASIS assessments.

*Urban/rural status, for the purposes of these simulations, is based on the wage index on which episode payment is based. The wage index is based on the site of service of the beneficiary.

REGION KEY:

New England = Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont; **Middle Atlantic** = Pennsylvania, New Jersey, New York; **South Atlantic** = Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia; **East North Central** = Illinois, Indiana, Michigan, Ohio, Wisconsin; **East South Central** = Alabama, Kentucky, Mississippi, Tennessee; **West North Central** = Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota; **West South Central** = Arkansas, Louisiana, Oklahoma, Texas; **Mountain** = Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming; **Pacific** = Alaska, California, Hawaii, Oregon, Washington; **Outlying** = Guam, Puerto Rico, Virgin Islands.

[1] Percent change due to the effects of the update wage index, the 1.1 percent HH market basket update, the 3.79 percent reduction to the national standardized episode rates, the national per-visit rates, the LUPA add-on payment amount, the 5 percent decrease in the rates due to the Affordable Care Act, the new approximate 2.5 percent target for outliers as a percentage of total HH PPS payments, a 0.67 FDL ratio, 10 percent outlier cap, and the 3 percent rural add-on.

In a separate, supplemental analysis, as merely an indicator of possible access to care issues, we looked at estimated margins of HHAs, by county, and the estimated effect that the provisions of this rule might have on HHA margins. We note that predicting the size of the increase in negative-margin agencies as a result of this rule is difficult to do because many agencies may find ways to cut costs or increase revenues so that margins do not deteriorate. We also note that margin analysis alone is not an accurate access to care indicator. Many factors affect whether agencies with low or negative margin would close or not, such as the organization's mission, the availability of alternate sources of funding, and whether or not the organization is embedded in a larger one.

We performed the following analysis for the purposes of identifying potential access risks associated with this rule. In particular, we looked to identify whether the finalized policies of this rule might increase the number of counties not served by at least one HHA with a positive margin. The analysis demonstrated that the occurrence of such counties was very infrequent. Looking further, we also identified that the counties we identified had at least one HHA in a contiguous county with a positive margin. As we have previously described, we believe HH

industry margins are sufficient to support a rate reduction of this size. We note here as we have elsewhere in this rule that MedPac projected 2011 margins would remain high, at 13.7 percent (assuming the previously planned rate reduction of −2.71 percent in 2011), and MedPAC also reported that the number of agencies continues to grow, reaching in excess of 10,400 in 2009, a 50 percent increase since 2002. We again note that access to care was not found to be inadequate in 2002, when the number of agencies nationally was much lower than it is today. Thus, we do not believe that the finalized policies in this rule will result in access to care issues. We would note that the above described analysis is an indicator that access to care will not be an issue as a result of the provisions of this rule.

C. Alternative Considered

As stated above, in section IV.A. of this rule, Overall Impact, we estimate that this final rule would have a significant economic impact on a substantial number of small entities. In the proposed rule, our analysis on the impact on small HHAs was from an episodic perspective. As a result of the public comments received on the proposed rule, we supplemented our impact from the proposed rule by linking to Medicare cost report data, which has reported total revenues for HHAs. The results of that supplemental analysis reveal that in using Medicare cost report data and a $13.5 million threshold to determine small versus large HHAs, the effect on small HHAs is virtually unchanged from that which was described in the proposed rule.

In CY 2008 rulemaking, we promulgated case-mix reductions of 2.75 percent for CY 2008, CY 2009, CY 2010, and 2.71 percent for CY 2011. Since that rulemaking, our analysis still shows that case-mix continues to grow. More specifically, nominal case-mix has grown from the 11.75 percent growth identified in our analysis for the CY 2008 rulemaking to 17.45 percent for this rule. While the 2.71 percent case-mix reduction was promulgated in CY 2008 rulemaking, because nominal case-mix continues to grow and thus to date we have not accounted for all of the increase in nominal case-mix growth, we believe it appropriate to reduce HH PPS rates now, so as to move towards more accurate payment for the delivery of HH services under the Medicare HH benefit.

Furthermore, we have amended our proposal from the proposed rule, which would have implemented 2 successive years of case-mix reductions at 3.79 percent, and are instead finalizing only one 3.79 percent reduction for CY 2011. We will study additional case-mix data, and methods to incorporate such data, into our methodology for measuring real versus nominal case-mix change in future rulemaking.

The other reductions to the HH PPS payments discussed in this rule and included in the final provisions of this rule are not discretionary as they are required by the Affordable Care Act.

D. Accounting Statement and Table

Whenever a rule is considered a significant rule under Executive Order 12866, we are required to develop an Accounting Statement showing the classification of the expenditures associated with the provisions of this final rule.

Table 20 provides our best estimate of the decrease in Medicare payments under the HH PPS as a result of the changes presented in this final rule based on the best available data. The expenditures are classified as a transfer to the Federal Government of $960 million.

TABLE 20—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE 2010 HH PPS CALENDAR YEAR TO THE 2011 HH PPS CALENDAR YEAR

Category	Transfers
Annualized Monetized Transfers.	Negative transfer—Estimated decrease in expenditures: $960 million.
From Whom to Whom	Federal Government to HH providers.

E. Conclusion

In conclusion, we estimate that the net impact of the proposals in this rule is approximately $960 million in CY 2011 savings. The $960 million impact to the proposed CY 2011 HH PPS reflects the distributional effects of an updated wage index ($20 million increase), the 1.1 percent HH market basket update ($210 million increase), the 3.79 percent case-mix adjustment applicable to the national standardized 60-day episode rates ($700 million decrease), as well as the 2.5 percent returned from the outlier provisions of the Affordable Care Act ($490 million decrease). This analysis above, together with the remainder of this preamble, provides a Regulatory Impact Analysis.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 409

Health facilities, Medicare.

42 CFR Part 418

Health facilities, Hospice care, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 424

Emergency medical services, Health facilities, Health Professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 484

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 489

Health facilities, Medicare, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapters IV and V as set forth below:

PART 409—HOSPITAL INSURANCE BENEFITS

■ 1. The authority citation for part 409 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart E—Home Health Services Under Hospital Insurance

■ 2. Section 409.44 is amended by revising paragraphs (c)(1), (c)(2)(i), (c)(2)(iii), and (c)(2)(iv) to read as follows:

§ 409.44 Skilled services requirements.

* * * * *

(c) * * *

(1) Speech-language pathology services and physical or occupational therapy services must relate directly and specifically to a treatment regimen (established by the physician, after any needed consultation with the qualified therapist) that is designed to treat the beneficiary's illness or injury. Services related to activities for the general physical welfare of beneficiaries (for example, exercises to promote overall fitness) do not constitute physical therapy, occupational therapy, or speech-language pathology services for Medicare purposes. To be covered by Medicare, all of the requirements apply as follows:

(i) The patient's plan of care must describe a course of therapy treatment and therapy goals which are consistent with the evaluation of the patient's

function, and both must be included in the clinical record. The therapy goals must be established by a qualified therapist in conjunction with the physician.

(ii) The patient's clinical record must include documentation describing how the course of therapy treatment for the patient's illness or injury is in accordance with accepted professional standards of clinical practice.

(iii) Therapy treatment goals described in the plan of care must be measurable, and must pertain directly to the patient's illness or injury, and the patient's resultant impairments.

(iv) The patient's clinical record must demonstrate that the method used to assess a patient's function included objective measurements of function in accordance with accepted professional standards of clinical practice enabling comparison of successive measurements to determine the effectiveness of therapy goals. Such objective measurements would be made by the qualified therapist using measurements which assess activities of daily living that may include but are not limited to eating, swallowing, bathing, dressing, toileting, walking, climbing stairs, or using assistive devices, and mental and cognitive factors.

(2) * * *

(i) The services must be considered under accepted standards of professional clinical practice, to be a specific, safe, and effective treatment for the beneficiary's condition. Each of the following requirements must also be met:

(A) The patient's function must be initially assessed and periodically reassessed by a qualified therapist, of the corresponding discipline for the type of therapy being provided, using a method which would include objective measurement as described in § 409.44(c)(1)(iv). If more than one discipline of therapy is being provided, a qualified therapist from each of the disciplines must perform the assessment and periodic reassessments. The measurement results and corresponding effectiveness of the therapy, or lack thereof, must be documented in the clinical record.

(B) At least every 30 days a qualified therapist (instead of an assistant) must provide the needed therapy service and functionally reassess the patient in accordance with § 409.44(c)(2)(i)(A). Where more than one discipline of therapy is being provided, a qualified therapist from each of the disciplines must provide the needed therapy service and functionally reassess the patient in accordance with § 409.44(c)(2)(i)(A) at least every 30 days.

(C) If a patient is expected to require 13 therapy visits, a qualified therapist (instead of an assistant) must provide all of the therapy services on the 13th therapy visit and functionally reassess the patient in accordance with § 409.44(c)(2)(i)(A). Exceptions to this requirement are as follows:

(*1*) The qualified therapist's visit can occur after the 10th therapy visit but no later than the 13th therapy visit when the patient resides in a rural area or when documented circumstances outside the control of the therapist prevent the qualified therapist's visit at the 13th therapy visit.

(*2*) Where more than one discipline of therapy is being provided, the qualified therapist from each discipline must provide all of the therapy services and functionally reassess the patient in accordance with § 409.44(c)(2)(i)(A) during the visit associated with that discipline which is scheduled to occur close to but no later than the 13th therapy visit per the plan of care.

(D) If a patient is expected to require 19 therapy visits, a qualified therapist (instead of an assistant) must provide all of the therapy services on the 19th therapy visit and functionally reassess the patient in accordance with § 409.44(c)(2)(A). Exceptions to this requirement are as follows:

(*1*) This required qualified therapist service can instead occur after the 16th therapy visit but no later than the 19th therapy visit when the patient resides in a rural area or documented circumstances outside the control of the therapist preclude the qualified therapist service at the 19th therapy visit.

(*2*) Where more than one discipline of therapy is being provided, the qualified therapist from each discipline must provide the therapy service and functionally reassess the patient in accordance with § 409.44(c)(2)(i)(A) during the visit which would occur close to but before the 19th visit per the plan of care.

(E) Pursuant to the requirements described in paragraphs (c)(2)(i)(A)(B), (C), and (D) above, subsequent therapy visits will not be covered until the following conditions are met:

(*1*) The qualified therapist has completed the reassessment and objective measurement of the effectiveness of the therapy as it relates to the therapy goals.

(*2*) The qualified therapist has determined if goals have been achieved or require updating.

(*3*) The qualified therapist has documented measurement results and corresponding therapy effectiveness in the clinical record in accordance with § 409.44(c)(2)(i)(H) of this section.

(F) If the criteria for maintenance therapy, described at § 409.44(c)(2)(iii)(B) and (C) of this section are not met, the following criteria must also be met for subsequent therapy visits to be covered:

(*1*) If the objective measurements of the reassessment do not reveal progress toward goals, the qualified therapist together with the physician must determine whether the therapy is still effective or should be discontinued.

(*2*) If therapy is to be continued in accordance with § 409.44(c)(2)(iv)(B)(*1*) of this section, the clinical record must document with a clinically supportable statement why there is an expectation that the goals are attainable in a reasonable and generally predictable period of time.

(G) Clinical notes written by therapy assistants may supplement the clinical record, and if included, must include the date written, the signature, professional designation, and objective measurements or description of changes in status (if any) relative to each goal being addressed by treatment. Assistants may not make clinical judgments about why progress was or was not made, but must report the progress or the effectiveness of the therapy (or lack thereof) objectively.

(H) Documentation by a qualified therapist must include the following:

(*1*) The therapist's assessment of the effectiveness of the therapy as it relates to the therapy goals;

(*2*) Plans for continuing or discontinuing treatment with reference to evaluation results and or treatment plan revisions;

(*3*) Changes to therapy goals or an updated plan of care that is sent to the physician for signature or discharge;

(*4*) Documentation of objective evidence or a clinically supportable statement of expectation that the patient can continue to progress toward the treatment goals and is responding to therapy in a reasonable and generally predictable period of time; or in the case of maintenance therapy, the patient is responding to therapy and can meet the goals in a predictable period of time.

* * * * *

(iii) For therapy services to be covered in the home health setting, one of the following three criteria must be met:

(A) There must be an expectation that the beneficiary's condition will improve materially in a reasonable (and generally predictable) period of time based on the physician's assessment of the beneficiary's restoration potential and unique medical condition.

(*1*) Material improvement requires that the clinical record demonstrate that the patient is making improvement towards goals when measured against his or her condition at the start of treatment.

(*2*) If an individual's expected restorative potential would be insignificant in relation to the extent and duration of therapy services required to achieve such potential, therapy would not be considered reasonable and necessary, and thus would not be covered.

(*3*) When a patient suffers a transient and easily reversible loss or reduction of function which could reasonably be expected to improve spontaneously as the patient gradually resumes normal activities, because the services do not require the performance or supervision of a qualified therapist, those services are not to be considered reasonable and necessary covered therapy services.

(B) The unique clinical condition of a patient may require the specialized skills, knowledge, and judgment of a qualified therapist to design or establish a safe and effective maintenance program required in connection with the patient's specific illness or injury.

(*1*) If the services are for the establishment of a maintenance program, they must include the design of the program, the instruction of the beneficiary, family, or home health aides, and the necessary periodic reevaluations of the beneficiary and the program to the degree that the specialized knowledge and judgment of a physical therapist, speech-language pathologist, or occupational therapist is required.

(*2*) The maintenance program must be established by a qualified therapist (and not an assistant).

(C) The unique clinical condition of a patient may require the specialized skills of a qualified therapist to perform a safe and effective maintenance program required in connection with the patient's specific illness or injury. Where the clinical condition of the patient is such that the complexity of the therapy services required to maintain function involve the use of complex and sophisticated therapy procedures to be delivered by the therapist himself/herself (and not an assistant) or the clinical condition of the patient is such that the complexity of the therapy services required to maintain function must be delivered by the therapist himself/herself (and not an assistant) in order to ensure the patient's safety and to provide an effective maintenance program, then those reasonable and necessary services shall be covered.

(iv) The amount, frequency, and duration of the services must be reasonable and necessary, as determined by a qualified therapist and/or physician, using accepted standards of clinical practice.

(A) Where factors exist that would influence the amount, frequency or duration of therapy services, such as factors that may result in providing more services than are typical for the patient's condition, those factors must be documented in the plan of care and/or functional assessment.

(B) Clinical records must include documentation using objective measures that the patient continues to progress towards goals. If progress cannot be measured, and continued progress towards goals cannot be expected, therapy services cease to be covered except when—

(*1*) Therapy progress regresses or plateaus, and the reasons for lack of progress are documented to include justification that continued therapy treatment will lead to resumption of progress toward goals; or

(*2*) Maintenance therapy as described in § 409.44(c)(2)(iii)(B) or (C) is needed.

PART 418—HOSPICE CARE

■ 3. The authority citation for part 418 continues to read as follows:

Authority: Secs 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart B—Eligibility, Election and Duration of Benefits

■ 4. Section 418.22 is amended by—

■ A. Revising paragraphs (a)(3) and (b)(3)(iii).

■ B. Adding paragraphs (a)(4), (b)(3)(v), (b)(4), and (b)(5).

The revisions and additions read as follows:

§ 418.22 Certification of terminal illness.

(a) * * *

(3) *Exceptions.* (i) If the hospice cannot obtain the written certification within 2 calendar days, after a period begins, it must obtain an oral certification within 2 calendar days and the written certification before it submits a claim for payment.

(ii) Certifications may be completed no more than 15 calendar days prior to the effective date of election.

(iii) Recertifications may be completed no more than 15 calendar days prior to the start of the subsequent benefit period.

(4) *Face-to-face encounter.* As of January 1, 2011, a hospice physician or hospice nurse practitioner must have a face-to-face encounter with each hospice patient, whose total stay across all hospices is anticipated to reach the 3rd benefit period, no more than 30 calendar days prior to the 3rd benefit period recertification, and must have a face-to-face encounter with that patient no more than 30 calendar days prior to every recertification thereafter, to gather clinical findings to determine continued eligibility for hospice care.

(b) * * *

(3) * * *

(iii) The narrative shall include a statement directly above the physician signature attesting that by signing, the physician confirms that he/she composed the narrative based on his/her review of the patient's medical record or, if applicable, his/her examination of the patient.

* * * * *

(v) The narrative associated with the 3rd benefit period recertification and every subsequent recertification must include an explanation of why the clinical findings of the face-to-face encounter support a life expectancy of 6 months or less.

(4) The physician or nurse practitioner who performs the face-to-face encounter with the patient described in (a)(4), must attest in writing that he or she had a face-to-face encounter with the patient, including the date of that visit. The attestation of the nurse practitioner shall state that the clinical findings of that visit were provided to the certifying physician, for use in determining whether the patient continues to have a life expectancy of 6 months or less, should the illness run its normal course. The attestation, its accompanying signature, and the date signed, must be a separate and distinct section of, or an addendum to, the recertification form, and must be clearly titled.

(5) All certifications and recertifications must be signed and dated by the physician(s), and must include the benefit period dates to which the certification or recertification applies.

PART 424—CONDITIONS FOR MEDICARE PAYMENT

■ 5. The authority citation for part 424 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart B—Certification and Plan Requirements

■ 6. Section 424.22 is amended by—

■ A. Adding paragraph (a)(1)(v).

■ B. Revising paragraph (a)(2), (b)(1), and (d).

The revisions and additions read as follows:

§ 424.22 Requirements for home health services.

(a) * * *

(1) * * *

(v) The physician responsible for performing the initial certification must document that the face-to-face patient encounter, which is related to the primary reason the patient requires home health services, has occurred no more than 90 days prior to the home health start of care date or within 30 days of the start of the home health care by including the date of the encounter, and including an explanation of why the clinical findings of such encounter support that the patient is homebound and in need of either intermittent skilled nursing services or therapy services as defined in § 409.42(a) and (c) respectively. Under sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act, the face-to-face encounter must be performed by the certifying physician himself or herself or by a nurse practitioner, a clinical nurse specialist (as those terms are defined in section 1861(aa)(5) of the Act) who is working in collaboration with the physician in accordance with State law, a certified nurse midwife (as defined in section 1861(gg)of the Act) as authorized by State law, or a physician assistant (as defined in section 1861(aa)(5) of the Act) under the supervision of the physician. The documentation of the face-to-face patient encounter must be a separate and distinct section of, or an addendum to, the certification, and must be clearly titled, dated and signed by the certifying physician.

(A) The nonphysician practitioner performing the face-to-face encounter must document the clinical findings of that face-to-face patient encounter and communicate those findings to the certifying physician.

(B) If a face-to-face patient encounter occurred within 90 days of the start of care but is not related to the primary reason the patient requires home health services, or the patient has not seen the certifying physician or allowed nonphysician practitioner within the 90 days prior to the start of the home health episode, the certifying physician or nonphysician practitioner must have a face to face encounter with the patient within 30 days of the start of the home health care.

(C) The face-to-face patient encounter may occur through telehealth, in compliance with Section 1834(m) of the Act and subject to the list of payable Medicare telehealth services established by the applicable physician fee schedule regulation.

(D) The physician responsible for certifying the patient for home care must document the face-to-face encounter on the certification itself, or as an addendum to the certification (as described in paragraph (a)(1)(v) of this section), that the condition for which the patient was being treated in the face-to-face patient encounter is related to the primary reason the patient requires home health services, and why the clinical findings of such encounter support that the patient is homebound and in need of either intermittent skilled nursing services or therapy services as defined in § 409.42(a) and (c) respectively. The documentation must be clearly titled, dated and signed by the certifying physician.

(2) *Timing and signature.* The certification of need for home health services must be obtained at the time the plan of care is established or as soon thereafter as possible and must be signed and dated by the physician who establishes the plan.

(b) * * *

(1) *Timing and signature of recertification.* Recertification is required at least every 60 days, preferably at the time the plan is reviewed, and must be signed and dated by the physician who reviews the plan of care. The recertification is required at least every 60 days when there is a—

* * * * *

(d) *Limitation of the performance of physician certification and plan of care functions.* The need for home health services to be provided by an HHA may not be certified or recertified, and a plan of care may not be established and reviewed, by any physician who has a financial relationship as defined in § 411.354 of this chapter, with that HHA, unless the physician's relationship meets one of the exceptions in section 1877 of the Act, which sets forth general exceptions to the referral prohibition related to both ownership/investment and compensation; exceptions to the referral prohibition related to ownership or investment interests; and exceptions to the referral prohibition related to compensation arrangements.

(1) If a physician has a financial relationship as defined in § 411.354 of this chapter, with an HHA, the physician may not certify or recertify need for home health services provided by that HHA, establish or review a plan of treatment for such services, or conduct the face-to-face encounter required under sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act unless the financial relationship meets one of the exceptions set forth in § 411.355 through § 411.357 of this chapter.

(2) A Nonphysician practitioner may not perform the face-to-face encounter required under sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act if such encounter would be prohibited under paragraph (d)(i) if the nonphysician practitioner were a physician.

Subpart P—Requirements for Establishing and Maintaining Medicare Billing Privileges

■ 7. Section 424.502 is amended by adding the definition of "Change in Majority Ownership" in alphabetical order to read as follows:

§ 424.502 Definitions.

* * * * *

Change in Majority Ownership occurs when an individual or organization acquires more than a 50 percent direct ownership interest in an HHA during the 36 months following the HHA's initial enrollment into the Medicare program or the 36 months following the HHA's most recent change in majority ownership (including asset sale, stock transfer, merger, and consolidation). This includes an individual or organization that acquires majority ownership in an HHA through the cumulative effect of asset sales, stock transfers, consolidations, or mergers during the 36-month period after Medicare billing privileges are conveyed or the 36-month period following the HHA's most recent change in majority ownership.

* * * * *

■ 8. Section 424.510 is amended by adding paragraph (d)(9) to read as follows:

§ 424.510 Requirements for enrolling in the Medicare program.

* * * * *

(d) * * *

(9) In order to obtain enrollment and to maintain enrollment for the first three months after Medicare billing privileges are conveyed, a home health agency must satisfy the home health "initial reserve operating funds" requirement as set forth in § 489.28 of this chapter.

* * * * *

■ 9. Section 424.530 is amended by adding paragraph (a)(8)to read as follows:

§ 424.530 Denial of enrollment in the Medicare program.

(a) * * *

(8) *Initial Reserve Operating Funds.* (i) CMS or its designated Medicare

contractor may deny Medicare billing privileges if, within 30 days of a CMS or Medicare contractor request, a home health agency (HHA) cannot furnish supporting documentation which verifies that the HHA meets the initial reserve operating funds requirement found in § 489.28(a) of this title.

(ii) CMS may deny Medicare billing privileges upon an HHA applicant's failure to satisfy the initial reserve operating funds requirement found in 42 CFR 489.28(a).

* * * * *

■ 10. Section 424.535 is amended by adding paragraph (a)(11) to read as follows:

§ 424.535 Revocation of enrollment and billing privileges in the Medicare program.

(a) * * *

(11) Initial Reserve Operating Funds. CMS or its designated Medicare contractor may revoke the Medicare billing privileges of an HHA and the corresponding provider agreement if, within 30 days of a CMS or Medicare contractor request, the HHA cannot furnish supporting documentation verifying that the HHA meets the initial reserve operating funds requirement found in 42 CFR § 489.28(a).

* * * * *

■ 11. Section 424.550 is amended by adding paragraphs (b)(1) and (b)(2) to read as follows:

§ 424.550 Prohibitions on the sale or transfer of billing privileges.

* * * * *

(b) * * *

(1) Unless an exception in (b)(2) of this section applies, if there is a change in majority ownership of a home health agency by sale (including asset sales, stock transfers, mergers, and consolidations) within 36 months after the effective date of the HHA's initial enrollment in Medicare or within 36 months after the HHA's most recent change in majority ownership, the provider agreement and Medicare billing privileges do not convey to the new owner. The prospective provider/owner of the HHA must instead:

(i) Enroll in the Medicare program as a new (initial) HHA under the provisions of § 424.510 of this subpart.

(ii) Obtain a State survey or an accreditation from an approved accreditation organization.

(2)(i) The HHA submitted two consecutive years of full cost reports. For purposes of this exception, low utilization or no utilization cost reports do not qualify as full cost reports.

(ii) An HHA's parent company is undergoing an internal corporate restructuring, such as a merger or consolidation.

(iii) The owners of an existing HHA are changing the HHA's existing business structure (for example, from a corporation to a partnership (general or limited); from an LLC to a corporation; from a partnership (general or limited) to an LLC) and the owners remain the same.

(iv) An individual owner of an HHA dies.

* * * * *

PART 484—HOME HEALTH SERVICES

■ 12. The authority citation for part 484 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395(hh)).

Subpart E—Prospective Payment System for Home Health Agencies

■ 13. Section 484.250 is revised to read as follows:

§ 484.250 Patient assessment data.

(a) An HHA must submit to CMS the OASIS–C data described at § 484.55 (b)(1) and Home Health Care CAHPS data in order for CMS to administer the payment rate methodologies described in § 484.215, § 484.230, and § 484.235 of this subpart, and meet the quality reporting requirements of section 1895 (b)(3)(B)(v) of the Act.

(b) An HHA that has less than 60 eligible unique HHCAHPS patients annually must submit to CMS their total HHCAHPS patient count to CMS in order to be exempt from the HHCAHPS reporting requirements.

(c) An HHA must contract with an approved, independent HHCAHPS survey vendor to administer the HHCAHPS on its behalf.

(1) CMS approves an HHCAHPS survey vendor if such applicant has been in business for a minimum of three years and has conducted surveys of individuals and samples for at least 2 years. For HHCAHPS, a "survey of individuals" is defined as the collection of data from at least 600 individuals selected by statistical sampling methods and the data collected are used for statistical purposes. All applicants that meet these requirements will be approved by CMS.

(2) No organization, firm, or business that owns, operates, or provides staffing for a HHA is permitted to administer its own Home Health Care CAHPS (HHCAHPS) Survey or administer the survey on behalf of any other HHA in the capacity as an HHCAHPS survey vendor. Such organizations will not be approved by CMS as HHCAHPS survey vendors.

PART 489—PROVIDER AGREEMENTS AND SUPPLIER APPROVAL

■ 14. The authority citation for part 489 continues to read as follows:

Authority: Secs. 1102, 1819, 1820(e), 1861, 1864(m), 1866, 1869, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395i–3, 1395x, 1395aa(m), 1395cc, 1395ff, and 1395hh).

Subpart B—Essentials of Provider Agreements

■ 15. Section 489.28 is amended by—

■ A. Revising paragraphs (a) and (g).

■ B. Adding paragraph (c)(1).

■ C. Reserving paragraph (c)(2).

The addition and revisions read as follows:

§ 489.28 Special capitalization requirements for HHAs.

(a) *Basic rule.* An HHA entering the Medicare program on or after January 1, 1998, including a new HHA as a result of a change of ownership, if the change of ownership results in a new provider number being issued, must have available sufficient funds, which we term "initial reserve operating funds," at the time of application submission and at all times during the enrollment process up to the expiration of the 3-month period following the conveyance of Medicare billing privileges to operate the HHA for the three-month period after Medicare billing privileges are conveyed by the Medicare contractor, exclusive of actual or projected accounts receivable from Medicare.

* * * * *

(c) * * *

(1) In selecting the comparative HHAs as described in this paragraph (c), the CMS contractor shall only select HHAs that have provided cost reports to Medicare. When selecting cost reports for the comparative analysis, CMS will exclude low utilization or no utilization cost reports.

(2) [Reserved.]

* * * * *

(g) *Billing Privileges.* (1) CMS may deny Medicare billing privileges to an HHA unless the HHA meets the initial reserve operating funds requirements of this section.

(2) CMS may revoke the Medicare billing privileges of an HHA that fails to maintain and comply with the initial reserve operating funds requirements of this section for the three-month period after it receives its Medicare billing privileges.

Authority: (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—

Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: October 26, 2010.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: October 29, 2010.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

Note: The following addenda will not be published in the Code of Federal Regulations.

BILLING CODE 4120–01–P

ADDENDUM A: CY 2011 WAGE INDEX BASED ON CBSA LABOR MARKET AREAS FOR RURAL AREAS;

CBSA Code	Nonurban Area	Wage Index
01	Alabama	0.7380
02	Alaska	1.2626
03	Arizona	0.9095
04	Arkansas	0.7222
05	California	1.2056
06	Colorado	0.9933
07	Connecticut	1.1128
08	Delaware	0.9757
10	Florida	0.8409
11	Georgia	0.7566
12	Hawaii	1.1189
13	Idaho	0.7556
14	Illinois	0.8343
15	Indiana	0.8391
16	Iowa	0.8545
17	Kansas	0.7981
18	Kentucky	0.7830
19	Louisiana	0.7712
20	Maine	0.8588
21	Maryland	0.9175
22	Massachusetts[1]	1.1769
23	Michigan	0.8555
24	Minnesota	0.9038
25	Mississippi	0.7620
26	Missouri	0.7655
27	Montana	0.8517
28	Nebraska	0.8911
29	Nevada	0.9350
30	New Hampshire	1.0207
31	New Jersey[1]	------
32	New Mexico	0.8911
33	New York	0.8185
34	North Carolina	0.8359
35	North Dakota	0.6831
36	Ohio	0.8561
37	Oklahoma	0.7860
38	Oregon	1.0029
39	Pennsylvania	0.8480
40	Puerto Rico[1]	0.4047
41	Rhode Island[1]	------
42	South Carolina	0.8413
43	South Dakota	0.8536
44	Tennessee	0.7886
45	Texas	0.7806
46	Utah	0.8649
47	Vermont	0.9591
48	Virgin Islands	0.7993
49	Virginia	0.7841
50	Washington	1.0184
51	West Virginia	0.7474
52	Wisconsin	0.9186
53	Wyoming	0.9528
65	Guam	0.9611

[1] All counties within the State are classified as urban, with the exception of Massachusetts and Puerto Rico. Massachusetts and Puerto Rico have areas designated as rural, however, no short-term, acute care hospitals are located in the area(s) for CY 2011

ADDENDUM B.- CY 2011 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS

CBSA Code	Urban Area (Constituent Counties)	Wage Index
10180	Abilene, TX Callahan County, TX Jones County, TX Taylor County, TX	0.8003
10380	Aguadilla-Isabela-San Sebastián, PR Aguada Municipio, PR Aguadilla Municipio, PR Añasco Municipio, PR Isabela Municipio, PR Lares Municipio, PR Moca Municipio, PR Rincón Municipio, PR San Sebastián Municipio, PR	0.3471
10420	Akron, OH Portage County, OH Summit County, OH	0.8843
10500	Albany, GA Baker County, GA Dougherty County, GA Lee County, GA Terrell County, GA Worth County, GA	0.9036
10580	Albany-Schenectady-Troy, NY Albany County, NY Rensselaer County, NY Saratoga County, NY Schenectady County, NY Schoharie County, NY	0.8653
10740	Albuquerque, NM Bernalillo County, NM Sandoval County, NM Torrance County, NM Valencia County, NM	0.9456
10780	Alexandria, LA Grant Parish, LA Rapides Parish, LA	0.7995
10900	Allentown-Bethlehem-Easton, PA-NJ Warren County, NJ Carbon County, PA Lehigh County, PA Northampton County, PA	0.9194
11020	Altoona, PA Blair County, PA	0.8620
11100	Amarillo, TX Armstrong County, TX Carson County, TX Potter County, TX Randall County, TX	0.8644
11180	Ames, IA Story County, IA	0.9970
11260	Anchorage, AK Anchorage Municipality, AK Matanuska-Susitna Borough, AK	1.1964
11300	Anderson, IN Madison County, IN	0.9192
11340	Anderson, SC Anderson County, SC	0.8691
11460	Ann Arbor, MI Washtenaw County, MI	1.0124
11500	Anniston-Oxford, AL Calhoun County, AL	0.7918
11540	Appleton, WI Calumet County, WI Outagamie County, WI	0.9361
11700	Asheville, NC Buncombe County, NC Haywood County, NC Henderson County, NC Madison County, NC	0.9001
12020	Athens-Clarke County, GA Clarke County, GA Madison County, GA Oconee County, GA Oglethorpe County, GA	0.9659

CBSA Code	Urban Area (Constituent Counties)	Wage Index
12060	Atlanta-Sandy Springs-Marietta, GA Barrow County, GA Bartow County, GA Butts County, GA Carroll County, GA Cherokee County, GA Clayton County, GA Cobb County, GA Coweta County, GA Dawson County, GA DeKalb County, GA Douglas County, GA Fayette County, GA Forsyth County, GA Fulton County, GA Gwinnett County, GA Haralson County, GA Heard County, GA Henry County, GA Jasper County, GA Lamar County, GA Meriwether County, GA Newton County, GA Paulding County, GA Pickens County, GA Pike County, GA Rockdale County, GA Spalding County, GA Walton County, GA	0.9549
12100	Atlantic City-Hammonton, NJ Atlantic County, NJ	1.1129
12220	Auburn-Opelika, AL Lee County, AL	0.7190
12260	Augusta-Richmond County, GA-SC Burke County, GA Columbia County, GA McDuffie County, GA Richmond County, GA Aiken County, SC Edgefield County, SC	0.9538
12420	Austin-Round Rock-San Marcos, TX Bastrop County, TX Caldwell County, TX Hays County, TX Travis County, TX Williamson County, TX	0.9514
12540	Bakersfield-Delano, CA Kern County, CA	1.1707
12580	Baltimore-Towson, MD Anne Arundel County, MD Baltimore County, MD Carroll County, MD Harford County, MD Howard County, MD Queen Anne's County, MD Baltimore City, MD	1.0255
12620	Bangor, ME Penobscot County, ME	0.9777
12700	Barnstable Town, MA Barnstable County, MA	1.2823
12940	Baton Rouge, LA Ascension Parish, LA East Baton Rouge Parish, LA East Feliciana Parish, LA Iberville Parish, LA Livingston Parish, LA Pointe Coupee Parish, LA St. Helena Parish, LA West Baton Rouge Parish, LA West Feliciana Parish, LA	0.8583
12980	Battle Creek, MI Calhoun County, MI	0.9656
13020	Bay City, MI Bay County, MI	0.9221
13140	Beaumont-Port Arthur, TX Hardin County, TX Jefferson County, TX Orange County, TX	0.8488
13380	Bellingham, WA Whatcom County, WA	1.1390
13460	Bend, OR Deschutes County, OR	1.1372
13644	Bethesda-Rockville-Frederick, MD Frederick County, MD Montgomery County, MD	1.0525
13740	Billings, MT Carbon County, MT Yellowstone County, MT	0.8674
13780	Binghamton, NY Broome County, NY Tioga County, NY	0.8719

CBSA Code	Urban Area (Constituent Counties)	Wage Index
13820	Birmingham-Hoover, AL Bibb County, AL Blount County, AL Chilton County, AL Jefferson County, AL St. Clair County, AL Shelby County, AL Walker County, AL	0.8611
13900	Bismarck, ND Burleigh County, ND Morton County, ND	0.7348
13980	Blacksburg-Christiansburg-Radford, VA Giles County, VA Montgomery County, VA Pulaski County, VA Radford City, VA	0.8314
14020	Bloomington, IN Greene County, IN Monroe County, IN Owen County, IN	0.8989
14060	Bloomington-Normal, IL McLean County, IL	0.9439
14260	Boise City-Nampa, ID Ada County, ID Boise County, ID Canyon County, ID Gem County, ID Owyhee County, ID	0.9273
14484	Boston-Quincy, MA Norfolk County, MA Plymouth County, MA Suffolk County, MA	1.2178
14500	Boulder, CO Boulder County, CO	1.0065
14540	Bowling Green, KY Edmonson County, KY Warren County, KY	0.8666
14740	Bremerton-Silverdale, WA Kitsap County, WA	1.0667
14860	Bridgeport-Stamford-Norwalk, CT Fairfield County, CT	1.2547
15180	Brownsville-Harlingen, TX Cameron County, TX	0.9173

CBSA Code	Urban Area (Constituent Counties)	Wage Index
15260	Brunswick, GA Brantley County, GA Glynn County, GA McIntosh County, GA	0.9209
15380	Buffalo-Niagara Falls, NY Erie County, NY Niagara County, NY	0.9530
15500	Burlington, NC Alamance County, NC	0.8863
15540	Burlington-South Burlington, VT Chittenden County, VT Franklin County, VT Grand Isle County, VT	0.9947
15764	Cambridge-Newton-Framingham, MA Middlesex County, MA	1.1250
15804	Camden, NJ Burlington County, NJ Camden County, NJ Gloucester County, NJ	1.0386
15940	Canton-Massillon, OH Carroll County, OH Stark County, OH	0.8749
15980	Cape Coral-Fort Myers, FL Lee County, FL	0.9195
16020	Cape Girardeau-Jackson, MO-IL Alexander County, IL Bollinger County, MO Cape Girardeau County, MO	0.8983
16180	Carson City, NV Carson City, NV	1.0465
16220	Casper, WY Natrona County, WY	0.9655
16300	Cedar Rapids, IA Benton County, IA Jones County, IA Linn County, IA	0.8844
16580	Champaign-Urbana, IL Champaign County, IL Ford County, IL Piatt County, IL	1.0235
16620	Charleston, WV Boone County, WV Clay County, WV Kanawha County, WV Lincoln County, WV Putnam County, WV	0.7895

CBSA Code	Urban Area (Constituent Counties)	Wage Index
16700	Charleston-North Charleston-Summerville, SC Berkeley County, SC Charleston County, SC Dorchester County, SC	0.9354
16740	Charlotte-Gastonia-Rock Hill, NC-SC Anson County, NC Cabarrus County, NC Gaston County, NC Mecklenburg County, NC Union County, NC York County, SC	0.9420
16820	Charlottesville, VA Albemarle County, VA Fluvanna County, VA Greene County, VA Nelson County, VA Charlottesville City, VA	0.9342
16860	Chattanooga, TN-GA Catoosa County, GA Dade County, GA Walker County, GA Hamilton County, TN Marion County, TN Sequatchie County, TN	0.8829
16940	Cheyenne, WY Laramie County, WY	0.9392
16974	Chicago-Joliet-Naperville, IL Cook County, IL DeKalb County, IL DuPage County, IL Grundy County, IL Kane County, IL Kendall County, IL McHenry County, IL Will County, IL	1.0593
17020	Chico, CA Butte County, CA	1.1533
17140	Cincinnati-Middletown, OH-KY-IN Dearborn County, IN Franklin County, IN Ohio County, IN Boone County, KY Bracken County, KY Campbell County, KY Gallatin County, KY Grant County, KY Kenton County, KY Pendleton County, KY Brown County, OH Butler County, OH Clermont County, OH Hamilton County, OH Warren County, OH	0.9699
17300	Clarksville, TN-KY Christian County, KY Trigg County, KY Montgomery County, TN Stewart County, TN	0.7888
17420	Cleveland, TN Bradley County, TN Polk County, TN	0.7731
17460	Cleveland-Elyria-Mentor, OH Cuyahoga County, OH Geauga County, OH Lake County, OH Lorain County, OH Medina County, OH	0.9050
17660	Coeur d'Alene, ID Kootenai County, ID	0.9364
17780	College Station-Bryan, TX Brazos County, TX Burleson County, TX Robertson County, TX	0.9588
17820	Colorado Springs, CO El Paso County, CO Teller County, CO	0.9481
17860	Columbia, MO Boone County, MO Howard County, MO	0.8282

CBSA Code	Urban Area (Constituent Counties)	Wage Index
17900	Columbia, SC Calhoun County, SC Fairfield County, SC Kershaw County, SC Lexington County, SC Richland County, SC Saluda County, SC	0.8733
17980	Columbus, GA-AL Russell County, AL Chattahoochee County, GA Harris County, GA Marion County, GA Muscogee County, GA	0.9027
18020	Columbus, IN Bartholomew County, IN	0.9434
18140	Columbus, OH Delaware County, OH Fairfield County, OH Franklin County, OH Licking County, OH Madison County, OH Morrow County, OH Pickaway County, OH Union County, OH	1.0141
18580	Corpus Christi, TX Aransas County, TX Nueces County, TX San Patricio County, TX	0.8585
18700	Corvallis, OR Benton County, OR	1.0455
18880	Crestview-Fort Walton Beach-Destin, FL Okaloosa County, FL	0.8842
19060	Cumberland, MD-WV Allegany County, MD Mineral County, WV	0.8186
19124	Dallas-Plano-Irving, TX Collin County, TX Dallas County, TX Delta County, TX Denton County, TX Ellis County, TX Hunt County, TX Kaufman County, TX Rockwall County, TX	0.9860
19140	Dalton, GA Murray County, GA Whitfield County, GA	0.8622
19180	Danville, IL Vermilion County, IL	0.9693
19260	Danville, VA Pittsylvania County, VA Danville City, VA	0.8168
19340	Davenport-Moline-Rock Island, IA-IL Henry County, IL Mercer County, IL Rock Island County, IL Scott County, IA	0.8400
19380	Dayton, OH Greene County, OH Miami County, OH Montgomery County, OH Preble County, OH	0.9140
19460	Decatur, AL Lawrence County, AL Morgan County, AL	0.7621
19500	Decatur, IL Macon County, IL	0.7916
19660	Deltona-Daytona Beach-Ormond Beach, FL Volusia County, FL	0.8736
19740	Denver-Aurora-Broomfield, CO Adams County, CO Arapahoe County, CO Broomfield County, CO Clear Creek County, CO Denver County, CO Douglas County, CO Elbert County, CO Gilpin County, CO Jefferson County, CO Park County, CO	1.0718
19780	Des Moines-West Des Moines, IA Dallas County, IA Guthrie County, IA Madison County, IA Polk County, IA Warren County, IA	0.9621
19804	Detroit-Livonia-Dearborn, MI Wayne County, MI	0.9699

CBSA Code	Urban Area (Constituent Counties)	Wage Index
20020	Dothan, AL Geneva County, AL Henry County, AL Houston County, AL	0.7435
20100	Dover, DE Kent County, DE	0.9921
20220	Dubuque, IA Dubuque County, IA	0.8774
20260	Duluth, MN-WI Carlton County, MN St. Louis County, MN Douglas County, WI	1.0565
20500	Durham-Chapel Hill, NC Chatham County, NC Durham County, NC Orange County, NC Person County, NC	0.9664
20740	Eau Claire, WI Chippewa County, WI Eau Claire County, WI	0.9639
20764	Edison-New Brunswick, NJ Middlesex County, NJ Monmouth County, NJ Ocean County, NJ Somerset County, NJ	1.1006
20940	El Centro, CA Imperial County, CA	0.9258
21060	Elizabethtown, KY Hardin County, KY Larue County, KY	0.8449
21140	Elkhart-Goshen, IN Elkhart County, IN	0.9465
21300	Elmira, NY Chemung County, NY	0.8445
21340	El Paso, TX El Paso County, TX	0.8475
21500	Erie, PA Erie County, PA	0.8360
21660	Eugene-Springfield, OR Lane County, OR	1.1384

CBSA Code	Urban Area (Constituent Counties)	Wage Index
21780	Evansville, IN-KY Gibson County, IN Posey County, IN Vanderburgh County, IN Warrick County, IN Henderson County, KY Webster County, KY	0.8433
21820	Fairbanks, AK Fairbanks North Star Borough, AK	1.1080
21940	Fajardo, PR Ceiba Municipio, PR Fajardo Municipio, PR Luquillo Municipio, PR	0.3883
22020	Fargo, ND-MN Clay County, MN Cass County, ND	0.8064
22140	Farmington, NM San Juan County, NM	0.9339
22180	Fayetteville, NC Cumberland County, NC Hoke County, NC	0.9323
22220	Fayetteville-Springdale-Rogers, AR-MO Benton County, AR Madison County, AR Washington County, AR McDonald County, MO	0.8616
22380	Flagstaff, AZ Coconino County, AZ	1.2443
22420	Flint, MI Genesee County, MI	1.1496
22500	Florence, SC Darlington County, SC Florence County, SC	0.8252
22520	Florence-Muscle Shoals, AL Colbert County, AL Lauderdale County, AL	0.8144
22540	Fond du Lac, WI Fond du Lac County, WI	0.9223
22660	Fort Collins-Loveland, CO Larimer County, CO	0.9892
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Broward County, FL	1.0160

CBSA Code	Urban Area (Constituent Counties)	Wage Index
22900	Fort Smith, AR-OK Crawford County, AR Franklin County, AR Sebastian County, AR Le Flore County, OK Sequoyah County, OK	0.7599
23060	Fort Wayne, IN Allen County, IN Wells County, IN Whitley County, IN	0.9362
23104	Fort Worth-Arlington, TX Johnson County, TX Parker County, TX Tarrant County, TX Wise County, TX	0.9474
23420	Fresno, CA Fresno County, CA	1.1422
23460	Gadsden, AL Etowah County, AL	0.7180
23540	Gainesville, FL Alachua County, FL Gilchrist County, FL	0.9160
23580	Gainesville, GA Hall County, GA	0.9223
23844	Gary, IN Jasper County, IN Lake County, IN Newton County, IN Porter County, IN	0.9084
24020	Glens Falls, NY Warren County, NY Washington County, NY	0.8507
24140	Goldsboro, NC Wayne County, NC	0.9067
24220	Grand Forks, ND-MN Polk County, MN Grand Forks County, ND	0.7717
24300	Grand Junction, CO Mesa County, CO	0.9850
24340	Grand Rapids-Wyoming, MI Barry County, MI Ionia County, MI Kent County, MI Newaygo County, MI	0.9169
24500	Great Falls, MT Cascade County, MT	0.8289
24540	Greeley, CO Weld County, CO	0.9496
24580	Green Bay, WI Brown County, WI Kewaunee County, WI Oconto County, WI	0.9586
24660	Greensboro-High Point, NC Guilford County, NC Randolph County, NC Rockingham County, NC	0.8882
24780	Greenville, NC Greene County, NC Pitt County, NC	0.9370
24860	Greenville-Mauldin-Easley, SC Greenville County, SC Laurens County, SC Pickens County, SC	0.9644
25020	Guayama, PR Arroyo Municipio, PR Guayama Municipio, PR Patillas Municipio, PR	0.3686
25060	Gulfport-Biloxi, MS Hancock County, MS Harrison County, MS Stone County, MS	0.8877
25180	Hagerstown-Martinsburg, MD-WV Washington County, MD Berkeley County, WV Morgan County, WV	0.9254
25260	Hanford-Corcoran, CA Kings County, CA	1.1205
25420	Harrisburg-Carlisle, PA Cumberland County, PA Dauphin County, PA Perry County, PA	0.9296
25500	Harrisonburg, VA Rockingham County, VA Harrisonburg City, VA	0.9158
25540	Hartford-West Hartford-East Hartford, CT Hartford County, CT Middlesex County, CT Tolland County, CT	1.0927
25620	Hattiesburg, MS Forrest County, MS Lamar County, MS Perry County, MS	0.7714

CBSA Code	Urban Area (Constituent Counties)	Wage Index
25860	Hickory-Lenoir-Morganton, NC Alexander County, NC Burke County, NC Caldwell County, NC Catawba County, NC	0.8693
25980[1]	Hinesville-Fort Stewart, GA Liberty County, GA Long County, GA	0.8958
26100	Holland-Grand Haven, MI Ottawa County, MI	0.8632
26180	Honolulu, HI Honolulu County, HI	1.1807
26300	Hot Springs, AR Garland County, AR	0.9151
26380	Houma-Bayou Cane-Thibodaux, LA Lafourche Parish, LA Terrebonne Parish, LA	0.7852
26420	Houston-Sugar Land-Baytown, TX Austin County, TX Brazoria County, TX Chambers County, TX Fort Bend County, TX Galveston County, TX Harris County, TX Liberty County, TX Montgomery County, TX San Jacinto County, TX Waller County, TX	0.9824
26580	Huntington-Ashland, WV-KY-OH Boyd County, KY Greenup County, KY Lawrence County, OH Cabell County, WV Wayne County, WV	0.8953
26620	Huntsville, AL Limestone County, AL Madison County, AL	0.9191
26820	Idaho Falls, ID Bonneville County, ID Jefferson County, ID	0.9663
26900	Indianapolis-Carmel, IN Boone County, IN Brown County, IN Hamilton County, IN Hancock County, IN Hendricks County, IN Johnson County, IN Marion County, IN Morgan County, IN Putnam County, IN Shelby County, IN	0.9672
26980	Iowa City, IA Johnson County, IA Washington County, IA	0.9657
27060	Ithaca, NY Tompkins County, NY	0.9842
27100	Jackson, MI Jackson County, MI	0.9155
27140	Jackson, MS Copiah County, MS Hinds County, MS Madison County, MS Rankin County, MS Simpson County, MS	0.8042
27180	Jackson, TN Chester County, TN Madison County, TN	0.8404
27260	Jacksonville, FL Baker County, FL Clay County, FL Duval County, FL Nassau County, FL St. Johns County, FL	0.8884
27340	Jacksonville, NC Onslow County, NC	0.7807
27500	Janesville, WI Rock County, WI	0.9415
27620	Jefferson City, MO Callaway County, MO Cole County, MO Moniteau County, MO Osage County, MO	0.8434
27740	Johnson City, TN Carter County, TN Unicoi County, TN Washington County, TN	0.8105

CBSA Code	Urban Area (Constituent Counties)	Wage Index
27780	Johnstown, PA Cambria County, PA	0.8090
27860	Jonesboro, AR Craighead County, AR Poinsett County, AR	0.7757
27900	Joplin, MO Jasper County, MO Newton County, MO	0.8214
28020	Kalamazoo-Portage, MI Kalamazoo County, MI Van Buren County, MI	1.0292
28100	Kankakee-Bradley, IL Kankakee County, IL	1.0619
28140	Kansas City, MO-KS Franklin County, KS Johnson County, KS Leavenworth County, KS Linn County, KS Miami County, KS Wyandotte County, KS Bates County, MO Caldwell County, MO Cass County, MO Clay County, MO Clinton County, MO Jackson County, MO Lafayette County, MO Platte County, MO Ray County, MO	0.9652
28420	Kennewick-Pasco-Richland, WA Benton County, WA Franklin County, WA	0.9976
28660	Killeen-Temple-Fort Hood, TX Bell County, TX Coryell County, TX Lampasas County, TX	0.8798
28700	Kingsport-Bristol-Bristol, TN-VA Hawkins County, TN Sullivan County, TN Bristol City, VA Scott County, VA Washington County, VA	0.7588
28740	Kingston, NY Ulster County, NY	0.9075
28940	Knoxville, TN Anderson County, TN Blount County, TN Knox County, TN Loudon County, TN Union County, TN	0.7842
29020	Kokomo, IN Howard County, IN Tipton County, IN	0.9130
29100	La Crosse, WI-MN Houston County, MN La Crosse County, WI	0.9803
29140	Lafayette, IN Benton County, IN Carroll County, IN Tippecanoe County, IN	0.9289
29180	Lafayette, LA Lafayette Parish, LA St. Martin Parish, LA	0.8489
29340	Lake Charles, LA Calcasieu Parish, LA Cameron Parish, LA	0.8196
29404	Lake County-Kenosha County, IL-WI Lake County, IL Kenosha County, WI	1.0781
29420	Lake Havasu City-Kingman, AZ Mohave County, AZ	1.0235
29460	Lakeland-Winter Haven, FL Polk County, FL	0.8447
29540	Lancaster, PA Lancaster County, PA	0.9344
29620	Lansing-East Lansing, MI Clinton County, MI Eaton County, MI Ingham County, MI	1.0298
29700	Laredo, TX Webb County, TX	0.7914
29740	Las Cruces, NM Dona Ana County, NM	0.9296
29820	Las Vegas-Paradise, NV Clark County, NV	1.2099
29940	Lawrence, KS Douglas County, KS	0.8533
30020	Lawton, OK Comanche County, OK	0.8285

CBSA Code	Urban Area (Constituent Counties)	Wage Index
30140	Lebanon, PA Lebanon County, PA	0.7807
30300	Lewiston, ID-WA Nez Perce County, ID Asotin County, WA	0.9358
30340	Lewiston-Auburn, ME Androscoggin County, ME	0.8903
30460	Lexington-Fayette, KY Bourbon County, KY Clark County, KY Fayette County, KY Jessamine County, KY Scott County, KY Woodford County, KY	0.8817
30620	Lima, OH Allen County, OH	0.9271
30700	Lincoln, NE Lancaster County, NE Seward County, NE	0.9617
30780	Little Rock-North Little Rock-Conway, AR Faulkner County, AR Grant County, AR Lonoke County, AR Perry County, AR Pulaski County, AR Saline County, AR	0.8546
30860	Logan, UT-ID Franklin County, ID Cache County, UT	0.8794
30980	Longview, TX Gregg County, TX Rusk County, TX Upshur County, TX	0.8563
31020	Longview, WA Cowlitz County, WA	1.0296
31084	Los Angeles-Long Beach-Glendale, CA Los Angeles County, CA	1.2130
31140	Louisville-Jefferson County, KY-IN Clark County, IN Floyd County, IN Harrison County, IN Washington County, IN Bullitt County, KY Henry County, KY Jefferson County, KY Meade County, KY Nelson County, KY Oldham County, KY Shelby County, KY Spencer County, KY Trimble County, KY	0.8896
31180	Lubbock, TX Crosby County, TX Lubbock County, TX	0.8847
31340	Lynchburg, VA Amherst County, VA Appomattox County, VA Bedford County, VA Campbell County, VA Bedford City, VA Lynchburg City, VA	0.8694
31420	Macon, GA Bibb County, GA Crawford County, GA Jones County, GA Monroe County, GA Twiggs County, GA	0.9202
31460	Madera-Chowchilla, CA Madera County, CA	0.7986
31540	Madison, WI Columbia County, WI Dane County, WI Iowa County, WI	1.1294
31700	Manchester-Nashua, NH Hillsborough County, NH	0.9869
31740	Manhattan, KS Geary County, KS Pottawatomie County, KS Riley County, KS	0.7847
31860	Mankato-North Mankato, MN Blue Earth County, MN Nicollet County, MN	0.9083

CBSA Code	Urban Area (Constituent Counties)	Wage Index
31900	Mansfield, OH Richland County, OH	0.8918
32420	Mayagüez, PR Hormigueros Municipio, PR Mayagüez Municipio, PR	0.3640
32580	McAllen-Edinburg-Mission, TX Hidalgo County, TX	0.8837
32780	Medford, OR Jackson County, OR	1.0061
32820	Memphis, TN-MS-AR Crittenden County, AR DeSoto County, MS Marshall County, MS Tate County, MS Tunica County, MS Fayette County, TN Shelby County, TN Tipton County, TN	0.9268
32900	Merced, CA Merced County, CA	1.2359
33124	Miami-Miami Beach-Kendall, FL Miami-Dade County, FL	1.0128
33140	Michigan City-La Porte, IN LaPorte County, IN	0.9470
33260	Midland, TX Midland County, TX	0.9711
33340	Milwaukee-Waukesha-West Allis, WI Milwaukee County, WI Ozaukee County, WI Washington County, WI Waukesha County, WI	1.0183
33460	Minneapolis-St. Paul-Bloomington, MN-WI Anoka County, MN Carver County, MN Chisago County, MN Dakota County, MN Hennepin County, MN Isanti County, MN Ramsey County, MN Scott County, MN Sherburne County, MN Washington County, MN Wright County, MN Pierce County, WI St. Croix County, WI	1.1143
33540	Missoula, MT Missoula County, MT	0.8921
33660	Mobile, AL Mobile County, AL	0.7960
33700	Modesto, CA Stanislaus County, CA	1.2104
33740	Monroe, LA Ouachita Parish, LA Union Parish, LA	0.7993
33780	Monroe, MI Monroe County, MI	0.8684
33860	Montgomery, AL Autauga County, AL Elmore County, AL Lowndes County, AL Montgomery County, AL	0.8442
34060	Morgantown, WV Monongalia County, WV Preston County, WV	0.8137
34100	Morristown, TN Grainger County, TN Hamblen County, TN Jefferson County, TN	0.7041
34580	Mount Vernon-Anacortes, WA Skagit County, WA	1.0363
34620	Muncie, IN Delaware County, IN	0.8206
34740	Muskegon-Norton Shores, MI Muskegon County, MI	0.9809
34820	Myrtle Beach-North Myrtle Beach-Conway, SC Horry County, SC	0.8738

CBSA Code	Urban Area (Constituent Counties)	Wage Index
34900	Napa, CA Napa County, CA	1.4604
34940	Naples-Marco Island, FL Collier County, FL	0.9698
34980	Nashville-Davidson—Murfreesboro-Franklin, TN Cannon County, TN Cheatham County, TN Davidson County, TN Dickson County, TN Hickman County, TN Macon County, TN Robertson County, TN Rutherford County, TN Smith County, TN Sumner County, TN Trousdale County, TN Williamson County, TN Wilson County, TN	0.9457
35004	Nassau-Suffolk, NY Nassau County, NY Suffolk County, NY	1.2315
35084	Newark-Union, NJ-PA Essex County, NJ Hunterdon County, NJ Morris County, NJ Sussex County, NJ Union County, NJ Pike County, PA	1.1460
35300	New Haven-Milford, CT New Haven County, CT	1.1515
35380	New Orleans-Metairie-Kenner, LA Jefferson Parish, LA Orleans Parish, LA Plaquemines Parish, LA St. Bernard Parish, LA St. Charles Parish, LA St. John the Baptist Parish, LA St. Tammany Parish, LA	0.9070
35644	New York-White Plains-Wayne, NY-NJ Bergen County, NJ Hudson County, NJ Passaic County, NJ Bronx County, NY Kings County, NY New York County, NY Putnam County, NY Queens County, NY Richmond County, NY Rockland County, NY Westchester County, NY	1.2955
35660	Niles-Benton Harbor, MI Berrien County, MI	0.8872
35840	North Port-Bradenton-Sarasota, FL Manatee County, FL Sarasota County, FL	0.9481
35980	Norwich-New London, CT New London County, CT	1.1215
36084	Oakland-Fremont-Hayward, CA Alameda County, CA Contra Costa County, CA	1.6354
36100	Ocala, FL Marion County, FL	0.8468
36140	Ocean City, NJ Cape May County, NJ	1.0879
36220	Odessa, TX Ector County, TX	0.9436
36260	Ogden-Clearfield, UT Davis County, UT Morgan County, UT Weber County, UT	0.9267
36420	Oklahoma City, OK Canadian County, OK Cleveland County, OK Grady County, OK Lincoln County, OK Logan County, OK McClain County, OK Oklahoma County, OK	0.8877
36500	Olympia, WA Thurston County, WA	1.1269

CBSA Code	Urban Area (Constituent Counties)	Wage Index
36540	Omaha-Council Bluffs, NE-IA Harrison County, IA Mills County, IA Pottawattamie County, IA Cass County, NE Douglas County, NE Sarpy County, NE Saunders County, NE Washington County, NE	0.9583
36740	Orlando-Kissimmee-Sanford, FL Lake County, FL Orange County, FL Osceola County, FL Seminole County, FL	0.9163
36780	Oshkosh-Neenah, WI Winnebago County, WI	0.9566
36980	Owensboro, KY Daviess County, KY Hancock County, KY McLean County, KY	0.8370
37100	Oxnard-Thousand Oaks-Ventura, CA Ventura County, CA	1.2377
37340	Palm Bay-Melbourne-Titusville, FL Brevard County, FL	0.9211
37380	Palm Coast, FL Flagler County, FL	0.8405
37460	Panama City-Lynn Haven-Panama City Beach, FL Bay County, FL	0.7954
37620	Parkersburg-Marietta-Vienna, WV-OH Washington County, OH Pleasants County, WV Wirt County, WV Wood County, WV	0.7455
37700	Pascagoula, MS George County, MS Jackson County, MS	0.8299
37764	Peabody, MA Essex County, MA	1.0979
37860	Pensacola-Ferry Pass-Brent, FL Escambia County, FL Santa Rosa County, FL	0.8254
37900	Peoria, IL Marshall County, IL Peoria County, IL Stark County, IL Tazewell County, IL Woodford County, IL	0.9149
37964	Philadelphia, PA Bucks County, PA Chester County, PA Delaware County, PA Montgomery County, PA Philadelphia County, PA	1.0803
38060	Phoenix-Mesa-Glendale, AZ Maricopa County, AZ Pinal County, AZ	1.0642
38220	Pine Bluff, AR Cleveland County, AR Jefferson County, AR Lincoln County, AR	0.8012
38300	Pittsburgh, PA Allegheny County, PA Armstrong County, PA Beaver County, PA Butler County, PA Fayette County, PA Washington County, PA Westmoreland County, PA	0.8605
38340	Pittsfield, MA Berkshire County, MA	1.0371
38540	Pocatello, ID Bannock County, ID Power County, ID	0.9507
38660	Ponce, PR Juana Díaz Municipio, PR Ponce Municipio, PR Villalba Municipio, PR	0.4326
38860	Portland-South Portland-Biddeford, ME Cumberland County, ME Sagadahoc County, ME York County, ME	0.9899

CBSA Code	Urban Area (Constituent Counties)	Wage Index
38900	Portland-Vancouver-Hillsboro, OR-WA Clackamas County, OR Columbia County, OR Multnomah County, OR Washington County, OR Yamhill County, OR Clark County, WA Skamania County, WA	1.1476
38940	Port St. Lucie, FL Martin County, FL St. Lucie County, FL	1.0723
39100	Poughkeepsie-Newburgh-Middletown, NY Dutchess County, NY Orange County, NY	1.1354
39140	Prescott, AZ Yavapai County, AZ	1.2234
39300	Providence-New Bedford-Fall River, RI-MA Bristol County, MA Bristol County, RI Kent County, RI Newport County, RI Providence County, RI Washington County, RI	1.0714
39340	Provo-Orem, UT Juab County, UT Utah County, UT	0.9321
39380	Pueblo, CO Pueblo County, CO	0.8721
39460	Punta Gorda, FL Charlotte County, FL	0.8759
39540	Racine, WI Racine County, WI	1.0580
39580	Raleigh-Cary, NC Franklin County, NC Johnston County, NC Wake County, NC	0.9811
39660	Rapid City, SD Meade County, SD Pennington County, SD	1.0442
39740	Reading, PA Berks County, PA	0.8904
39820	Redding, CA Shasta County, CA	1.4134
39900	Reno-Sparks, NV Storey County, NV Washoe County, NV	1.0419

CBSA Code	Urban Area (Constituent Counties)	Wage Index
40060	Richmond, VA Amelia County, VA Caroline County, VA Charles City County, VA Chesterfield County, VA Cumberland County, VA Dinwiddie County, VA Goochland County, VA Hanover County, VA Henrico County, VA King and Queen County, VA King William County, VA Louisa County, VA New Kent County, VA Powhatan County, VA Prince George County, VA Sussex County, VA Colonial Heights City, VA Hopewell City, VA Petersburg City, VA Richmond City, VA	0.9661
40140	Riverside-San Bernardino-Ontario, CA Riverside County, CA San Bernardino County, CA	1.1570
40220	Roanoke, VA Botetourt County, VA Craig County, VA Franklin County, VA Roanoke County, VA Roanoke City, VA Salem City, VA	0.8827
40340	Rochester, MN Dodge County, MN Olmsted County, MN Wabasha County, MN	1.0942
40380	Rochester, NY Livingston County, NY Monroe County, NY Ontario County, NY Orleans County, NY Wayne County, NY	0.8595
40420	Rockford, IL Boone County, IL Winnebago County, IL	1.0033
40484	Rockingham County-Strafford County, NH Rockingham County, NH	1.0026

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Strafford County, NH	
40580	Rocky Mount, NC Edgecombe County, NC Nash County, NC	0.9034
40660	Rome, GA Floyd County, GA	0.8635
40900	Sacramento--Arden-Arcade--Roseville, CA El Dorado County, CA Placer County, CA Sacramento County, CA Yolo County, CA	1.4053
40980	Saginaw-Saginaw Township North, MI Saginaw County, MI	0.8728
41060	St. Cloud, MN Benton County, MN Stearns County, MN	1.1042
41100	St. George, UT Washington County, UT	0.9133
41140	St. Joseph, MO-KS Doniphan County, KS Andrew County, MO Buchanan County, MO DeKalb County, MO	1.0302
41180	St. Louis, MO-IL Bond County, IL Calhoun County, IL Clinton County, IL Jersey County, IL Macoupin County, IL Madison County, IL Monroe County, IL St. Clair County, IL Crawford County, MO Franklin County, MO Jefferson County, MO Lincoln County, MO St. Charles County, MO St. Louis County, MO Warren County, MO Washington County, MO St. Louis City, MO	0.9090
41420	Salem, OR Marion County, OR Polk County, OR	1.1133
41500	Salinas, CA Monterey County, CA	1.5686
41540	Salisbury, MD Somerset County, MD Wicomico County, MD	0.9005
41620	Salt Lake City, UT Salt Lake County, UT Summit County, UT Tooele County, UT	0.9266
41660	San Angelo, TX Irion County, TX Tom Green County, TX	0.8303
41700	San Antonio-New Braunfels, TX Atascosa County, TX Bandera County, TX Bexar County, TX Comal County, TX Guadalupe County, TX Kendall County, TX Medina County, TX Wilson County, TX	0.8998
41740	San Diego-Carlsbad-San Marcos, CA San Diego County, CA	1.1979
41780	Sandusky, OH Erie County, OH	0.8686
41884	San Francisco-San Mateo-Redwood City, CA Marin County, CA San Francisco County, CA San Mateo County, CA	1.5733
41900	San Germán-Cabo Rojo, PR Cabo Rojo Municipio, PR Lajas Municipio, PR Sabana Grande Municipio, PR San Germán Municipio, PR	0.4560
41940	San Jose-Sunnyvale-Santa Clara, CA San Benito County, CA Santa Clara County, CA	1.6703

CBSA Code	Urban Area (Constituent Counties)	Wage Index
41980	San Juan-Caguas-Guaynabo, PR Aguas Buenas Municipio, PR Aibonito Municipio, PR Arecibo Municipio, PR Barceloneta Municipio, PR Barranquitas Municipio, PR Bayamón Municipio, PR Caguas Municipio, PR Camuy Municipio, PR Canóvanas Municipio, PR Carolina Municipio, PR Cataño Municipio, PR Cayey Municipio, PR Ciales Municipio, PR Cidra Municipio, PR Comerío Municipio, PR Corozal Municipio, PR Dorado Municipio, PR Florida Municipio, PR Guaynabo Municipio, PR Gurabo Municipio, PR Hatillo Municipio, PR Humacao Municipio, PR Juncos Municipio, PR Las Piedras Municipio, PR Loíza Municipio, PR Manatí Municipio, PR Maunabo Municipio, PR Morovis Municipio, PR Naguabo Municipio, PR Naranjito Municipio, PR Orocovis Municipio, PR Quebradillas Municipio, PR Río Grande Municipio, PR San Juan Municipio, PR San Lorenzo Municipio, PR Toa Alta Municipio, PR Toa Baja Municipio, PR Trujillo Alto Municipio, PR Vega Alta Municipio, PR Vega Baja Municipio, PR Yabucoa Municipio, PR	0.4296
42020	San Luis Obispo-Paso Robles, CA San Luis Obispo County, CA	1.2915
42044	Santa Ana-Anaheim-Irvine, CA Orange County, CA	1.2162
42060	Santa Barbara-Santa Maria-Goleta, CA Santa Barbara County, CA	1.1909
42100	Santa Cruz-Watsonville, CA Santa Cruz County, CA	1.6740
42140	Santa Fe, NM Santa Fe County, NM	1.0847
42220	Santa Rosa-Petaluma, CA Sonoma County, CA	1.6143
42340	Savannah, GA Bryan County, GA Chatham County, GA Effingham County, GA	0.8907
42540	Scranton--Wilkes-Barre, PA Lackawanna County, PA Luzerne County, PA Wyoming County, PA	0.8238
42644	Seattle-Bellevue-Everett, WA King County, WA Snohomish County, WA	1.1556
42680	Sebastian-Vero Beach, FL Indian River County, FL	0.9097
43100	Sheboygan, WI Sheboygan County, WI	0.9233
43300	Sherman-Denison, TX Grayson County, TX	0.8279
43340	Shreveport-Bossier City, LA Bossier Parish, LA Caddo Parish, LA De Soto Parish, LA	0.8536
43580	Sioux City, IA-NE-SD Woodbury County, IA Dakota County, NE Dixon County, NE Union County, SD	0.9091
43620	Sioux Falls, SD Lincoln County, SD McCook County, SD Minnehaha County, SD Turner County, SD	0.9299
43780	South Bend-Mishawaka, IN-MI St. Joseph County, IN Cass County, MI	0.9948
43900	Spartanburg, SC Spartanburg County, SC	0.9383
44060	Spokane, WA Spokane County, WA	1.0571

CBSA Code	Urban Area (Constituent Counties)	Wage Index
44100	Springfield, IL Menard County, IL Sangamon County, IL	0.9130
44140	Springfield, MA Franklin County, MA Hampden County, MA Hampshire County, MA	1.0251
44180	Springfield, MO Christian County, MO Dallas County, MO Greene County, MO Polk County, MO Webster County, MO	0.8371
44220	Springfield, OH Clark County, OH	0.9234
44300	State College, PA Centre County, PA	0.8779
44600	Steubenville-Weirton, OH-WV Jefferson County, OH Brooke County, WV Hancock County, WV	0.7315
44700	Stockton, CA San Joaquin County, CA	1.2644
44940	Sumter, SC Sumter County, SC	0.7860
45060	Syracuse, NY Madison County, NY Onondaga County, NY Oswego County, NY	0.9905
45104	Tacoma, WA Pierce County, WA	1.1343
45220	Tallahassee, FL Gadsden County, FL Jefferson County, FL Leon County, FL Wakulla County, FL	0.8806
45300	Tampa-St. Petersburg-Clearwater, FL Hernando County, FL Hillsborough County, FL Pasco County, FL Pinellas County, FL	0.9054
45460	Terre Haute, IN Clay County, IN Sullivan County, IN Vermillion County, IN Vigo County, IN	0.9205
45500	Texarkana, TX-Texarkana, AR Miller County, AR Bowie County, TX	0.7748
45780	Toledo, OH Fulton County, OH Lucas County, OH Ottawa County, OH Wood County, OH	0.9432
45820	Topeka, KS Jackson County, KS Jefferson County, KS Osage County, KS Shawnee County, KS Wabaunsee County, KS	0.8952
45940	Trenton-Ewing, NJ Mercer County, NJ	1.0150
46060	Tucson, AZ Pima County, AZ	0.9480
46140	Tulsa, OK Creek County, OK Okmulgee County, OK Osage County, OK Pawnee County, OK Rogers County, OK Tulsa County, OK Wagoner County, OK	0.8793
46220	Tuscaloosa, AL Greene County, AL Hale County, AL Tuscaloosa County, AL	0.8843
46340	Tyler, TX Smith County, TX	0.8065
46540	Utica-Rome, NY Herkimer County, NY Oneida County, NY	0.8471
46660	Valdosta, GA Brooks County, GA Echols County, GA Lanier County, GA Lowndes County, GA	0.7941

CBSA Code	Urban Area (Constituent Counties)	Wage Index
46700	Vallejo-Fairfield, CA Solano County, CA	1.4931
47020	Victoria, TX Calhoun County, TX Goliad County, TX Victoria County, TX	0.8219
47220	Vineland-Millville-Bridgeton, NJ Cumberland County, NJ	1.0534
47260	Virginia Beach-Norfolk-Newport News, VA-NC Currituck County, NC Gloucester County, VA Isle of Wight County, VA James City County, VA Mathews County, VA Surry County, VA York County, VA Chesapeake City, VA Hampton City, VA Newport News City, VA Norfolk City, VA Poquoson City, VA Portsmouth City, VA Suffolk City, VA Virginia Beach City, VA Williamsburg City, VA	0.8961
47300	Visalia-Porterville, CA Tulare County, CA	1.0738
47380	Waco, TX McLennan County, TX	0.8403
47580	Warner Robins, GA Houston County, GA	0.8028
47644	Warren-Troy-Farmington Hills, MI Lapeer County, MI Livingston County, MI Macomb County, MI Oakland County, MI St. Clair County, MI	0.9648
47894	Washington-Arlington-Alexandria, DC-VA-MD-WV District of Columbia, DC Calvert County, MD Charles County, MD Prince George's County, MD Arlington County, VA Clarke County, VA Fairfax County, VA Fauquier County, VA Loudoun County, VA Prince William County, VA Spotsylvania County, VA Stafford County, VA Warren County, VA Alexandria City, VA Fairfax City, VA Falls Church City, VA Fredericksburg City, VA Manassas City, VA Manassas Park City, VA Jefferson County, WV	1.0723
47940	Waterloo-Cedar Falls, IA Black Hawk County, IA Bremer County, IA Grundy County, IA	0.8462
48140	Wausau, WI Marathon County, WI	0.9563
48300	Wenatchee-East Wenatchee, WA Chelan County, WA Douglas County, WA	0.9615
48424	West Palm Beach-Boca Raton-Boynton Beach, FL Palm Beach County, FL	0.9934
48540	Wheeling, WV-OH Belmont County, OH Marshall County, WV Ohio County, WV	0.6675
48620	Wichita, KS Butler County, KS Harvey County, KS Sedgwick County, KS Sumner County, KS	0.8898
48660	Wichita Falls, TX Archer County, TX Clay County, TX Wichita County, TX	0.9566

CBSA Code	Urban Area (Constituent Counties)	Wage Index
48700	Williamsport, PA Lycoming County, PA	0.7256
48864	Wilmington, DE-MD-NJ New Castle County, DE Cecil County, MD Salem County, NJ	1.0580
48900	Wilmington, NC Brunswick County, NC New Hanover County, NC Pender County, NC	0.9202
49020	Winchester, VA-WV Frederick County, VA Winchester City, VA Hampshire County, WV	1.0002
49180	Winston-Salem, NC Davie County, NC Forsyth County, NC Stokes County, NC Yadkin County, NC	0.8939
49340	Worcester, MA Worcester County, MA	1.1012
49420	Yakima, WA Yakima County, WA	1.0067
49500	Yauco, PR Guánica Municipio, PR Guayanilla Municipio, PR Peñuelas Municipio, PR Yauco Municipio, PR	0.3536
49620	York-Hanover, PA York County, PA	0.9983
49660	Youngstown-Warren-Boardman, OH-PA Mahoning County, OH Trumbull County, OH Mercer County, PA	0.8625
49700	Yuba City, CA Sutter County, CA Yuba County, CA	1.1043
49740	Yuma, AZ Yuma County, AZ	0.9283

[1]At this time, there are no hospitals in these urban areas on which to base a wage index. Therefore, the urban wage index value is based on the average wage index of all urban areas within the State.

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Federal Register

Wednesday,
November 17, 2010

Part III

Securities and Exchange Commission

17 CFR Parts 240 and 249

Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–63237; File No. S7–33–10]

RIN 3235–AK78

Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Proposed rule.

SUMMARY: The Commission is proposing rules and forms to implement Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") entitled "Securities Whistleblower Incentives and Protection" and seeking comment thereon. The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 ("Dodd-Frank"), established a whistleblower program that requires the Commission to pay an award, under regulations prescribed by the Commission and subject to certain limitations, to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the Federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action. Dodd-Frank also prohibits retaliation by employers against individuals that provide the Commission with information about potential securities violations.

DATES: Comments should be submitted on or before December 17, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–33–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–33–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: In the Division of Enforcement: Sarit Klein (202) 551–4577. In the Office of the General Counsel: Brian A. Ochs (202) 551–5067, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

Section 922 of Dodd-Frank added new Section 21F to the Exchange Act, entitled "Securities Whistleblower Incentives and Protection." [1] Section 21F directs that the Commission pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the securities laws that leads to a successful enforcement of an action brought by the Commission that results in monetary sanctions exceeding $1,000,000, and of certain related actions.

We are proposing Regulation 21F to implement Section 21F of the Exchange Act. As described in detail below, the rules contained in proposed Regulation 21F define certain terms critical to the operation of the Whistleblower Program, outline the procedures for applying for awards and the Commission's procedures for making decisions on claims, and generally explain the scope of the whistleblower program to the public and to potential whistleblowers. In this proposal, we have taken several steps to address Congress's suggestion that the Commission's whistleblower rules be clearly defined and user-friendly.[2] First, to the extent possible, we have tried to adopt a plain English approach in writing the rules contained in Regulation 21F. Second, Regulation 21F as proposed would provide a complete and self-contained set of rules relating to the whistleblower program. This means that in some places, we have proposed rules within the Regulation that largely restate key provisions of the statute. Although we recognize that this approach leads to some duplication between the statue and the rules, we believe that overall it will assist potential whistleblowers and add clarity, by providing in one place all the relevant provisions applicable to whistleblower claims.

In fashioning these proposed rules, the Commission has considered and weighed a number of potentially competing interests that are presented in implementing the statute. Among them was the potential for the monetary incentives provided to whistleblowers by Section 21F of the Exchange Act to reduce the effectiveness of a company's existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the Federal securities laws. With this possible tension in mind, we have included provisions in the proposed rules intended not to discourage whistleblowers who work for companies that have robust compliance programs to first report the violation to appropriate company personnel, while at the same time preserving the whistleblower's status as an original source of the information and eligibility for an award. At the same time, the proposed rules would not prohibit a whistleblower in a compliance function from reporting information to the Commission where the company did not provide the information to the Commission within a reasonable time or acted in bad faith.

Another important policy issue raised by the statute is the potential for the monetary incentives provided by Section 21F to invite submissions from attorneys, independent auditors, and compliance personnel who may attempt to use information they obtain through their positions to make whistleblower claims. This exclusion focuses on those groups with established professional obligations that play a critical role in achieving compliance with the Federal securities laws. Our proposed rules include certain exclusions for these professionals and others under the definition of "independent knowledge," and we seek comment on whether the proposed exclusions are appropriate and whether they should be extended to other types of privileged communications or other types of professionals who frequently have

[1] Pub. L. 111–203, § 922(a), 124 Stat 1841 (2010).

[2] *See* Dodd Frank sec. 922(d)(1), which specifies that a study of the whistleblower program by the Inspector General of the Commission shall consider whether the final rules and regulations have made the program "clearly defined and user-friendly."

access to confidential client information.

Finally, we have attempted to maximize the submission of high-quality tips and to enhance the utility of the information reported to the Commission. More frequent reporting of high-quality information promotes greater deterrence by enhancing the efficiency and effectiveness of the Commission's enforcement program. To achieve this goal, the proposed rules would impose certain procedural requirements designed to deter false submissions, including a requirement that the information be submitted under penalty of perjury, and requiring an anonymous whistleblower to be represented by counsel who must certify to the Commission that he or she has verified the whistleblower's identity.

II. Description of the Proposed Rules

A. Proposed Rule 21F–1—General

Proposed Rule 21F–1 provides a general, plain English description of Section 21F of the Exchange Act. It sets forth the purposes of the rules and states that the Commission's Whistleblower Office administers the whistleblower program. In addition, the proposed rule states that, unless expressly provided for in the rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of an award or the amount thereof.

B. Proposed Rule 21F–2—Definition of a Whistleblower

The term "whistleblower" is defined in Section 21F(a)(6) of the Exchange Act.[3] Consistent with this language, Proposed Rule 21F–2(a) would define a whistleblower as an individual who, alone or jointly with others, provides information to the Commission relating to a potential violation of the securities laws. A whistleblower must be a natural person; a company or another entity is not eligible to receive a whistleblower award. This definition tracks the statutory definition of a "whistleblower," except that the proposed rule uses the term "potential violation." Because the statute requires the Commission to afford confidential treatment to information "which could reasonably be expected to reveal the identity of a whistleblower,"[4] it is important to be able to determine whether a person is a "whistleblower" at the time he or she submits information to the Commission. If the term "whistleblower" were defined to include only individuals who provide the Commission with information about actual, proven securities violations, then either the Commission would be required to determine at the time information is submitted whether the alleged conduct constitutes a violation of the securities laws, or the status of the person as a "whistleblower" would be unknown. We do not believe that this is the intended result.

In addition, use of the term "potential violation" makes clear that the whistleblower anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act do not depend on an ultimate adjudication, finding or conclusion that conduct identified by the whistleblower constituted a violation of the securities laws. As noted in the Senate Report accompanying the legislation, "[t]he Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government;"[5] affording broad anti-retaliation protections to whistleblowers furthers this legislative purpose.

Paragraph (b) of Proposed Rule 21F–2 would further make clear that the anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act apply irrespective of whether a whistleblower satisfies all the procedures and conditions to qualify for an award under the Commission's whistleblower program. We believe the statute extends the protections against employment retaliation in Section 21F(h)(1) to any individual who provides information to the Commission about potential violations of the securities laws regardless of whether the whistleblower fails to satisfy all of the requirements for award consideration set forth in the Commission's rules.

Proposed Rule 21F–2(c) makes clear, however, that, in order to be eligible to be considered for an award, a whistleblower must submit original information to the Commission in accordance with all the procedures and conditions described in Proposed Rules 21F–4, 21F–8, and 21F–9.

Request for Comment:

1. In other provisions of these Proposed Rules—*e.g.,* Proposed Rule 21F–15—we propose that whistleblowers not be paid awards based on monetary sanctions arising from their own misconduct, based on the notion that the statue is not intended to reward persons for blowing the whistle on their own misconduct. Consistent with this approach, should we define the term "whistleblower" to expressly state that it is an individual who provides information about potential violations of the securities laws "by another person"?

C. Proposed Rule 21F–3—Payment of Award

Proposed Rule 21F–3 summarizes the general requirements for the payment of awards set forth in Section 21F(b)(1) of the Exchange Act.[6] As set forth in the statute, paragraph (a) states that, subject to the eligibility requirements in the Regulations, the Commission will pay an award or awards to one or more whistleblowers who voluntarily provide the Commission with original information that leads to the successful enforcement by the Commission of a Federal court or administrative action in which the Commission obtains monetary sanctions totaling more than $1,000,000. Paragraph (b) of this proposed rule describes the circumstances under which the Commission will also pay an award to the whistleblower based upon monetary sanctions that are collected from a "related action." Payment based on the "related action" will occur if the whistleblower's original information led the Commission to obtain monetary sanctions totaling more than $1,000,000, the related action is based upon the same original information that led to the successful enforcement of the Commission action, and the related action is brought by the Attorney General of the United States, an appropriate regulatory agency, a self-regulatory organization, or a state attorney general in a criminal case.

Paragraph (c) of Proposed Rule 21F–3 explains that the Commission must determine whether the original information that the whistleblower gave to the Commission also led to the successful enforcement of a related action using the same criteria used to evaluate awards for Commission actions. To help make this determination, the Commission may seek confirmation of the relevant facts regarding the whistleblower's assistance from the authority that brought the related action. However, the proposed rule states that the Commission will deny an award to a whistleblower if the Commission determines that the criteria for an award are not satisfied or if the Commission is unable to obtain sufficient and reliable information about the related action.

Paragraph (d) provides that the Commission will not make an award in a related action if an award already has been granted to the whistleblower by the Commodity Futures Trading Commission ("CFTC") for that same

[3] 15 U.S.C. 78u–6(a)(6).

[4] 15 U.S.C. 78u–6(h)(2).

[5] S. Rep. No. 111–176 at 110 (2010).

[6] 15 U.S.C. 78u–6(b)(1).

action pursuant to its whistleblower award program under section 23 of the Commodity Exchange Act.[7] Rule 21F–3(d) also provides that, if the CFTC has previously denied an award in a related action, the whistleblower will be collaterally estopped from relitigating any issues before the Commission that were necessary to the CFTC's denial.

This provision serves two purposes. First, it would ensure that a whistleblower will not obtain a double recovery on the same related action. For example, if the CFTC makes an award of 10 percent to 30 percent on a criminal action brought by the U.S. Department of Justice, the whistleblower would be precluded from obtaining a second recovery of 10 percent to 30 percent from the SEC on the same action. Any other reading of the interplay of the SEC and CFTC whistleblower award provisions—which were both established by Dodd-Frank and which are substantially identical in their substantive terms—would produce the highly anomalous result of allowing the whistleblower to effectively receive a 20 percent minimum to 60 percent maximum recovery on the same related action. The SEC and CFTC whistleblower provisions, however, embody a clear Congressional determination that a whistleblower award on a successful action should lie within the 10 percent to 30 percent range.

Second, this provision would ensure that once the CFTC decides an issue of fact or law necessary to its determination to deny a whistleblower an award on a related action, the whistleblower will be precluded from relitigating the same issue before the Commission. For example, if the CFTC determines that the whistleblower's information did not lead to the successful enforcement of a related action, the whistleblower may not attempt to circumvent this adverse determination by relitigating the same issue before the Commission. The application of collateral estoppel principles in these circumstances would promote the orderly and consistent resolution of a whistleblower's claims, and would ensure that the subset of whistleblowers who can pursue both SEC and CFTC award claims on a related action are not unfairly afforded "two bites at the apple" relative to the majority of whistleblowers who would not have this dual opportunity.[8]

D. Proposed Rule 21F–4—Other Definitions

Although the statute defines several relevant terms, Proposed Rule 21F–4 would define some additional terms that are important to understanding the scope of the whistleblower award program, in order to provide greater clarity and certainty about the operation and scope of the program.

Proposed Rule 21F–4(a)—Voluntary submission of information.

Under Section 21F(b)(1) of the Exchange Act,[9] whistleblowers are eligible for awards only when they provide original information to the Commission "voluntarily." Proposed Rule 21F–4(a)(1) would define a submission as voluntary if a whistleblower provides the Commission with information before receiving any formal or informal request, inquiry, or demand from the Commission, Congress, any other Federal, State or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information in the whistleblower's submission is relevant.

The first step in most Commission enforcement investigations is the opening of an informal inquiry. At this stage, because the staff has not yet been granted the authority to issue subpoenas, information is frequently requested from companies and members of the public on a "voluntary" basis in the sense that there is generally no legal requirement that the recipient of the request provide the information or even respond to the request. After a formal investigation is opened and the staff obtains subpoena authority, the staff retains discretion to seek documents or other information without legal compulsion, and often does so.

Proposed Rule 21F–4(a)(1) would make clear that, in order to have acted "voluntarily" under the statute, a whistleblower must do more than merely provide the Commission with information that is not compelled by subpoena (or by a court order following a Commission action to enforce a subpoena) or by other applicable law.[10] Rather, the whistleblower or his representative (such as an attorney) must come forward with the information *before* receiving any formal or informal request, inquiry, or demand from the Commission staff or from any other authority described in the proposed rule about a matter to which the whistleblower's information is relevant.[11]

A request, inquiry, or demand that is directed to an employer is also considered to be directed to employees who possess the documents or other information that is within the scope of the request to the employer. Accordingly, a subsequent whistleblower submission from any such employee will not be considered "voluntary" for purposes of the rule, and the employee will not be eligible for award consideration, unless the employer fails to provide the employee's documents or information to the requesting authority in a timely manner.[12]

This approach is consistent with the statutory purpose of creating a strong incentive for whistleblowers to come forward early with information about possible violations of the securities laws rather than wait until Government or other official investigators "come knocking on the door."[13] This approach is also consistent with the approach

[7] 7 U.S.C. 26.

[8] *See* Restatement Second of Judgments, Sec. 29 cmt. b (explaining that "[a] party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process" and "there is no good reason for refusing to treat the issue as settled so far as he is concerned" in subsequent actions).

[9] 15 U.S.C. 78u–6(b)(1).

[10] Various books and records provisions of the Federal securities laws and rules generally require regulated entities to furnish records to the Commission upon request. *See, e.g.,* Section 17(a) and Rule 17a–4(j) under the Exchange Act (15 U.S.C. 78q(a) and 17 CFR 240.17a–4(j)).

[11] The list of authorities set forth in the proposed rule does not include an employer's personnel (such as legal counsel, compliance, or audit staff) conducting an internal investigation, compliance review, audit, or similar function. Thus, Proposed Rule 21F–4(a)(1) would credit a whistleblower with "voluntarily" providing information if the individual were to approach the Commission staff after being questioned about possible violations by such persons, unless, as noted, the individual's information is within the scope of a request, inquiry, or demand directed to the employer by one of the designated authorities . The objective of this approach is to implement Section 21F in a way that encourages and permits persons with knowledge of securities violations to come forward to the Commission, other responsible Government authorities, and other bodies of an official nature. We have included other provisions in these proposed rules that are intended to facilitate the operation of company compliance processes, audits, and internal investigations. *See* Proposed Rules 21F–4(b)(4) and (b)(7). Further, because there is no assurance that an employer will ultimately disclose to the Commission potential violations uncovered in the course of an internal investigation or similar process, a rule that precluded employees with knowledge of unlawful conduct from coming forward as whistleblowers merely because they were questioned about the conduct by company personnel could undermine the purposes of Section 21F.

[12] Production of documents or information in a timely manner turns on the production schedule required, or otherwise agreed to, by the requesting authority. Further, employees will not be permitted to thwart the aim of Section 21F by causing an employer to fail to respond to a request in a timely manner, and then claiming that their whistleblower submission was therefore made "voluntarily" within the meaning of the proposed rule.

[13] *See* S. Rep. No. 111–176 at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws * * *.").

Federal courts have taken in determining whether a private plaintiff, suing on behalf of the Government under the qui tam provisions of the False Claims Act, "voluntarily" provided information about the false or fraudulent claims to the Government before filing suit.[14]

Disclosure to the Government should also not be considered voluntary if the individual has a clear duty to report violations of the type at issue.[15] Thus, for example, Section 21F(c)(2) of the statute [16] prohibits awards to members, officers, or employees of an appropriate regulatory agency, the Department of Justice, a self-regulatory organization, the Public Company Accounting Oversight Board, a law enforcement organization, or to persons who obtain their information as a result of an audit of financial statements and who would be subject to the requirements of Section 10A of the Exchange Act. The Commission anticipates that there may be other similarly-situated persons who are under a pre-existing legal duty to report information about violations to the Commission or to any of the other authorities described in subsection (a)(1) of the proposed rule. Proposed Rule 21F–4(a)(2) provides that submissions from such individuals will not be considered voluntary for purposes of Section 21F. For example, a Government contracting officer would not be considered for a whistleblower award if the officer discovered and reported fraud on a Government contract that was material to the contractor's earnings.[17] Depending on the particular regulations or other authorities that governed, a city officer or employee with responsibility for the city's pension fund might have a pre-existing legal duty to report fraud in connection with the fund's management or financial reporting to appropriate city authorities. Proposed Rule 21F–4(a)(2) also includes a similar exclusion for information that the whistleblower is contractually obligated to report to the Commission or to other authorities. This exclusion is intended to preclude awards to persons who provide information pursuant to preexisting agreements that obligate them to assist Commission staff or other investigative authorities.

Request for Comment:

2. Does Proposed Rule 21F–4(a)(1) appropriately define the circumstances when a whistleblower should be considered to have acted "voluntarily" in providing information about securities law violations to the Commission? Are there other circumstances not clearly included that should be in the rule?

3. Should the Commission exclude from the definition of "voluntarily" situations where the information was received from a whistleblower *after* he received a request, inquiry, or demand from a foreign regulatory authority, law enforcement organization or self-regulatory organization? Similarly, should the Commission exclude from the definition of "voluntarily" situations where the information was received from a whistleblower where the individual was under a pre-existing legal duty to report the information to a foreign regulatory authority, law enforcement organization or self-regulatory organization?

4. Is it appropriate for the proposed rule to consider a request or inquiry directed to an employer to be directed at individual employees who possess the documents or other information that is within the scope of the request? Should the class of persons who are covered by this rule be narrowed or expanded? Will the carve-out that permits such an employee to become a whistleblower if the employer fails to disclose the information the employee provided in a timely manner promote compliance with the law and the effective operation of Section 21F?

5. The standard described in Proposed Rule 21F–4(a)(1) would credit an individual with acting "voluntarily" in certain circumstances where the individual was aware of fraudulent conduct for an extended period of time, but chose not to come forward as a whistleblower until after he became aware of a governmental investigation or examination (such as by observing document requests being served on his employer or colleagues, but before he received an inquiry, request, or demand himself, assuming that he was not within the scope of an inquiry directed to his employer). Is this an appropriate result, and, if not, how should the proposed rule be modified to account for it?

6. Is the exclusion set forth in Proposed Rule 21F–4(a)(2) for information provided pursuant to a pre-existing legal or contractual duty to report violations appropriate? Should specific circumstances where there are pre-existing duties to report violations to investigating authorities be set forth in the rule, and if so, what are they? For example, should the rule preclude submissions from all Government employees?

Proposed Rule 21F–4(b)—Original Information.

Paragraph (1) of Proposed Rule 21F–4(b) begins with the definition of "original information" set forth in Section 21F(a)(3) of the Exchange Act.[18] "Original information" means information that is derived from the whistleblower's independent knowledge or analysis; is not already known to the Commission from any other source, unless the whistleblower is the original source of the information; and is not exclusively derived from an allegation made in a judicial or administrative hearing,[19] in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information. Paragraph (1) also requires that "original information" be provided to the Commission for the first time after July 21, 2010 (the date of enactment of Dodd-Frank). Although Dodd-Frank authorizes the Commission to pay whistleblower awards on the basis of original information that is submitted in writing prior to the effective date of final rules implementing Section 21F

[14] *See United States ex rel. Barth* v. *Ridgedale Electric, Inc.,* 44 F.3d 699 (8th Cir. 1994); *United States ex rel. Paranich* v. *Sorgnard,* 396 F.3d 326 (3d Cir. 2005); *United States ex rel. Fine* v. *Chevron, USA, Inc.,* 72 F.3d 740 (9th Cir. 1995), *cert. denied,* 517 U.S.1233 (1996) (rejecting argument that provision of information to the Government is always voluntary unless compelled by subpoena) . The qui tam provisions of the False Claims Act include a "public disclosure bar," which, as recently amended, requires a court to dismiss a private action or claim if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in certain fora, unless the Government opposes dismissal or the plaintiff is an "original source" of the information. 31 U.S.C. 3730(e)(4). An "original source" is further defined, in part, with reference to whether the plaintiff "voluntarily" disclosed the information to the Government before filing suit. *Id.* Because the qui tam provisions of the False Claims Act have played a significant role in the development of whistleblower law generally, and because some of the terminology used by Congress in Section 21F has antecedents in the False Claims Act, precedent under the False Claims Act can provide helpful guidance in the interpretation of Section 21F of the Exchange Act. At the same time, because the False Claims Act and Section 21F serve different purposes are structured differently, and the two statutes may use the same words in different contexts, we do not view False Claims Act precedent as necessarily controlling or authoritative in all circumstances for purposes of Section 21F.

[15] *See United States ex rel. Biddle* v. *Board of Trustees of The Leland Stanford, Jr. University,* 161 F.3d 533 (9th Cir. 1998), *cert. denied,* 526 U.S. 1066 (1999) (government employee whose duties required that he report knowledge of contract fraud to superiors could not "voluntarily" supply information to government for purposes of False Claims Act because employee was obligated to alert superiors to contractor wrongdoing); *United States ex rel. Schwedt* v. *Planning Research Corp.,* 39 F. Supp. 2d 28 (D.D.C. 1999) (same).

[16] 15 U.S.C. 78u–6(c)(2).

[17] *See Biddle,* 161 F.3d 533; *Schwedt,* 39 F. Supp. 2d 28.

[18] 15 U.S.C. 78u–6(a)(3).

[19] We would interpret the term "judicial or administrative hearing" as used in Section 21F(a)(3) to include hearings in arbitration proceedings.

(assuming that all of the other requirements for an award are met), Dodd-Frank does not authorize the Commission to apply Section 21F retroactively to pay awards based upon information submitted before the effective date of the statute.[20]

Paragraphs (2) through (7) of Proposed Rule 21F–4(b) define some of the constituent terms in the definition of "original information," so as to further describe when a whistleblower provides "original information."

Paragraph (2) of Proposed Rule 21F–4(b) defines "independent knowledge" as factual information in the whistleblower's possession that is not obtained from publicly available sources. Publicly available sources may include both sources that are widely disseminated (such as corporate press releases and filings, media reports, and information on the Internet), and sources that, though not widely disseminated, are generally available to the public (such as court filings and documents obtained through Freedom of Information Act requests). Importantly, the proposed definition of "independent knowledge" does not require that a whistleblower have direct, first-hand knowledge of potential violations. Instead, knowledge may be obtained from any of the whistleblower's experiences, observations, or communications (subject to the exclusion for knowledge obtained from public sources). Thus, for example, under Proposed Rule 21F–4(b)(2), a whistleblower would have "independent knowledge" of information even if that knowledge derives from facts or other information that has been conveyed to the whistleblower by third parties.[21]

The Commission preliminarily believes that defining "independent knowledge" in this manner best effectuates the purposes of Section 21F. An individual may learn about potential violations of the securities laws without being personally involved in the conduct. If an individual voluntarily comes forward with such information, and the information leads the Commission to a successful enforcement action (as defined in Proposed Rule 21F–4(c)), that individual should be eligible to receive a whistleblower award.

Under Section 21F(a)(3)(A) of the Exchange Act,[22] the original information provided by a whistleblower can include information that is derived from independent knowledge and also from independent "analysis." Proposed Rule 21F–4(b)(3) would define "independent analysis" to mean the whistleblower's own analysis, whether done alone or in combination with others. The proposed rule thus recognizes that analysis—which may include academic or professional studies—can be the product of collaboration among two or more individuals. "Analysis" would mean the whistleblower's examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public. This definition recognizes that there are circumstances where individuals can review publicly available information, and, through their additional evaluation and analysis, provide vital assistance to the Commission staff in understanding complex schemes and identifying securities violations.

Proposed Rule 21F–4(b)(4) provides that information will not be considered to derive from an individual's "independent knowledge" or "independent analysis" in seven circumstances. The first two exclusions apply to attorneys and to persons such as accountants and experts when they assist attorneys on client matters, because of the prominent role that attorneys play in all aspects of practice before the Commission and the special duties they owe to clients. The first proposed exclusion is for information that was obtained through a communication that is subject to the attorney-client privilege.[23] Compliance with the Federal securities laws is promoted when individuals, corporate officers, and others consult with counsel about potential violations, and the attorney-client privilege furthers such consultation. This important benefit could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about potential securities violations that they learned of through privileged communications.

The exception for information obtained through privileged attorney-client communications would not apply in circumstances where the attorney is permitted to disclose the substance of a communication that would otherwise be privileged. This would include, for example, circumstances where the privilege has been waived, or where disclosure of confidential information to the Commission without the client's consent is permitted pursuant to either 17 CFR 205.3(d)(2) or the applicable state bar ethical rules.[24]

This exclusion is not intended to preclude an individual who has independent knowledge of facts indicating potential securities violations from becoming a whistleblower if that individual chooses to consult with an attorney. Facts in the possession of such an individual do not become privileged simply because he or she consulted with an attorney. Rather, this exclusion from independent knowledge or analysis only means that an attorney cannot make a whistleblower submission on his or her own behalf that is based upon information the attorney obtained through a privileged communication with a client.

The second exclusion applies when a would-be whistleblower obtains information as a result of the legal representation of a client on whose behalf the whistleblower's services, or the services of the whistleblower's employer or firm, have been retained, and the person seeks to make a whistleblower submission for his or her own benefit. The second exclusion would, for example, preclude an attorney from using information obtained in connection with the attorney's representation of a client to make a whistleblower submission for the attorney's own benefit. This exclusion would not be limited to information obtained through privileged

[20] Section 924(b) of Dodd-Frank directs that "Information provided to the Commission in writing by a whistleblower shall not lose the status of original information * * * solely because the whistleblower provided the information prior to the effective date of the regulations, if the information is provided by the whistleblower after the effective date of this subtitle."

[21] Until this year, the "public disclosure bar" provisions of the False Claims Act defined an "original source" of information, in part, as "an individual who [had] direct and independent knowledge of the allegations of the information on which the allegations [were] based * * *." 31 U.S.C. 3130(e)(4) (prior to 2010 amendments). Courts interpreting these terms generally defined "direct knowledge" to mean first-hand knowledge from the relator's own work and experience, with no intervening agency. *E.g., United States ex rel. Fried* v. *West Independent School District,* 527 F.3d 439 (5th Cir. 2008); *United States ex rel. Paranich* v. *Sorgnard,* 396 F.3d 326 (3d Cir. 2005). *See generally* John T. Boese, *Civil False Claims and Qui Tam Actions* sec. 4.02[D][2] (citing cases). Earlier this year, Congress amended the "public disclosure bar" to, among other things, remove the requirement that a relator have "direct and independent knowledge" of information, replacing that standard with one that instead requires only "knowledge that is independent and materially adds to the publicly-disclosed allegations or transactions * * *" 31 U.S.C. 3130(e)(4), Pub. L. 111–148 § 10104(h)(2), 124 Stat. 901 (Mar. 23, 2010). Many practitioners have observed that, with this amendment, the False Claims Act now permits qui tam actions based upon "second-hand knowledge." *E.g.,* Robert T. Rhoad and Matthew T. Fornataro, *Whistling While They Work: Limiting Exposure in the Face of PPACA's Invitation to Employee Whistleblower Lawsuits,* 22 Health Lawyer 19 (Aug. 2010).

[22] 15 U.S.C. 78u–6(a)(3)(A).

[23] *See* Proposed Rule 21F–4(b)(4)(i).

[24] *See* Model Rules of Professional Conduct 1.6(b), 1.13(c).

communications, but would instead extend to any information obtained by the attorney in the course and as a result of representation of the client. For example, under the proposed rule, an attorney who obtained evidence of securities violations through document discovery from an opposing party in litigation could not use that information to make a whistleblower submission on his or her own behalf. However, the attorney could use the information to make a submission on behalf of the client in whose litigation the discovery was obtained. The Commission believes that this limitation is generally consistent with attorneys' ethical obligations,[25] and is a reasonable measure to prevent creating financial incentives for attorneys to take undue advantage of clients. The language of the exclusion is also intended to apply to other members or employees of a firm in which the attorney works, as well as to other persons who are retained, or whose company or firm is retained, to perform services in relation to, or to assist, an attorney's representation of a client (*e.g.,* accountants and experts). As with the previous exclusion, this exclusion would not apply where the attorney is permitted to make a disclosure pursuant to 17 CFR 205.3(d)(2), the applicable state bar ethical rules, or otherwise.

The third proposed exclusion applies to persons who obtain information through the performance of an engagement required under the securities laws by an independent public accountant, if that information relates to a violation by the engagement client or the client's directors, officers or other employees.[26] Section 21F(c)(2)(C) of the Exchange Act excludes from award eligibility "any person who obtained the information provided to the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to the requirements of Section 10A of the Exchange Act."[27] Section 10A requires registered public accounting firms with respect to an audit of the issuer to include audit procedures to detect illegal acts.[28] It also prescribes requirements for the auditor if the auditor detects or otherwise becomes aware of information indicating an illegal act, which in certain circumstances can include reporting directly to the Commission. In addition to these requirements, there are other Commission-required engagements by an independent public accountant, such as audits of broker-dealers[29] and custody exams of investment advisers,[30] that require the external accountant to report instances of noncompliance. Professional standards for independent public accountants also prescribe responsibilities when a possible illegal act is detected.[31]

In light of these pre-existing requirements, and consistent with the role of an independent public accountant, we are proposing to exclude from the definitions of "independent knowledge and "independent analysis" any would-be whistleblowers whose information was gained through the performance of an engagement required under the securities laws by an independent public accountant.[32] This proposed exclusion applies to the employees of the independent public accountant and would not apply to the client's employees who perform an accounting function, even if they were interacting with the company's outside auditor. This proposed exclusion only would apply if the information relates to a violation by the engagement client or the client's directors, officers or other employees. It would not exclude information with respect to the independent public accountant's performance of the engagement itself, such as a violation of the accountant's requirements with respect to the engagement.

The fourth proposed exclusion applies when a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity receives information about potential violations, and the information was communicated to the person with the reasonable expectation that the person would take appropriate steps to cause the entity to respond to the violation.[33] The fifth proposed exclusion is closely related, and applies any other time that information is obtained from or through an entity's legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with applicable law.[34] However, each of these two exclusions ceases to be applicable, with the result that an individual may be deemed to have "independent knowledge," and therefore may become a whistleblower, if the entity does not disclose the information to the Commission within a reasonable time or if the entity proceeds in bad faith.

Compliance with the Federal securities laws is promoted when companies implement effective legal, audit, compliance, and similar functions. The rationale for these proposed exclusions is the concern that Section 21F not be implemented in a way that would create incentives for persons who obtain information through such functions, as well as other responsible persons who are informed of wrongdoing, to circumvent or undermine the proper operation of the entity's internal processes for responding to violations of law. Accordingly, the proposed rule would limit the circumstances in which such persons may use that knowledge to become whistleblowers. This would include officers, directors, employees, and consultants who learn of potential violations as part of their corporate responsibilities in the expectation that they will take steps to address the violations, as well as persons who gain knowledge about misconduct otherwise from or through the various processes that companies employ to identify problems and advance compliance with legal standards. The latter group would include not only persons directly responsible for compliance-related processes, but other persons as well. For

[25] *See* Model Rule of Professional Conduct 1.6, comment 3 ("The confidentiality rule * * * applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.).

[26] Proposed Rule 21F–4(b)(4)(iii).

[27] 15 U.S.C. 78u–6(c)(2)(C).

[28] *See* 15 U.S.C. 78j–1.

[29] *See* 17 CFR 240.17a–5(h)(2).

[30] *See* 17 CFR 275.206(4)–2(a)(3)(ii)(C).

[31] *See* AU Section 317, *Illegal Acts by Clients.*

[32] This would include reviews performed by an independent public accountant of interim financial statements included in quarterly reports on Form 10–Q (17 CFR 249.308(a)) pursuant to Rule 10–01(d) of Regulation S–X (17 CFR 210.10–01(d)). The Commission anticipates this exclusion would also apply to information gained through another engagement by the independent public accountant for the same client, given that the independent public accountant would generally already have an obligation to consider the information gained in the separate engagement in connection with the Commission-required engagement.

[33] Proposed Rule 21F–4(b)(4)(iv). Under the Federal Whistleblower Protection Act, 5 U.S.C. 2302(b)(8), a disclosure to a supervisor who is in a position to remedy the wrongdoing, is treated as a protected disclosure for purposes of the Federal Whistleblower Protection Act, 5 U.S.C. 2302(b)(8). *E.g., Reid* v. *Merit Systems Protection Board,* 508 F.3d 674 (Fed. Cir. 2007); *Hooven-Lewis* v. *Caldera,* 249 F.3d 259 (4th Cir. 2001). Borrowing and building upon this concept, the proposed rule would preclude such supervisors and similarly-situated others from seeking whistleblower awards based upon information they obtain when persons with knowledge of potential wrongdoing come to them in an effort to redress the violations.

[34] Persons excluded under this provision would include those retained to assist in such processes; *e.g.,* forensic accountants retained by outside counsel responsible for conducting an internal investigation.

example, an employee who learns about potential violations only because a compliance officer questions him about the conduct, and not from any other source, would not be considered to have "independent knowledge" for purposes of the proposed rule, and therefore could not become a whistleblower (unless, as is explained below, the company does not disclose the conduct to the Commission within a reasonable time or proceeds in bad faith).[35]

Internal compliance and similar functions, when effective, can constrain the opportunities for unlawful activity. In some cases, an entity's compliance program will fail to lead the entity to respond appropriately to violations. Under the proposed rule, if the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith, these exclusions would no longer apply, thereby making an individual who knows this undisclosed information eligible to become a whistleblower by providing "independent knowledge" of the violations.

This approach is intended to strike a balance between two competing goals. On the one hand, it is designed to facilitate the operation of effective internal compliance programs by not creating incentives for company personnel to seek a personal financial benefit by "front running" internal investigations and similar processes that are important components of effective company compliance programs. On the other hand, it would permit such persons to act as whistleblowers in circumstances where the company knows about material misconduct but has not taken appropriate steps to respond. Accordingly, in determining whether these persons would be considered to have provided "independent knowledge" and would be eligible for whistleblower awards, the proposed rule focuses on whether the entity proceeded in bad faith or did not disclose the information to the Commission within a reasonable time.[36]

In determining whether an entity acted in bad faith, the Commission will, among other things, consider whether the entity or any personnel who were responsible for responding to allegations of misconduct took affirmative steps to hinder the preservation of evidence or a timely and appropriate investigation. For example, an effort by company officials to destroy documents or to interfere with witnesses would constitute bad faith conduct. Similarly, if a company engaged in a sham investigation of allegations, then the company's response would constitute bad faith.

The determination of what is a "reasonable time" in this context will necessarily be a flexible concept that will depend on all of the facts and circumstances of the particular case. In some cases—for example, an ongoing fraud that poses substantial risk of harm to investors—a "reasonable time" for disclosing violations to the Commission may be almost immediate. Nonetheless, given the competing concerns just described, the Commission preliminarily believes that the proposed rule should not define one fixed period that would represent a "reasonable time" in all cases. We anticipate that in evaluating any whistleblower submissions by personnel covered by these exclusions, we will review all of the circumstances of the case after the fact in order to determine whether the company disclosed the misconduct to the Commission within a reasonable time or proceeded in bad faith.

Further, if we determine that the whistleblower played a role in causing the company not to disclose the violations, or to delay in disclosing them, we will take this fact into consideration in our determination of whether to consider the whistleblower eligible for an award. A whistleblower will not be permitted to claim that the company did not disclose information to the Commission in a reasonable time if the whistleblower bears some responsibility for that failure.

The following chart illustrates the fourth and fifth exclusions from "independent knowledge:"

Source of employee's knowledge	Does it qualify as "independent knowledge"?
Employee receives information because he/she is reasonably expected to take appropriate steps to respond to the violation because of his/her legal, compliance, audit or supervisory responsibilities.	Employee will *not* be deemed to have independent knowledge of the information *unless* (1) the entity did not disclose the violation to the Commission within a reasonable period of time, or (2) acts in bad faith.
Employee learns of information through company's legal, compliance, audit or similar functions or processes for identifying or addressing potential non-compliance with laws.	Same as above.
Employee otherwise lawfully learns of information through his/her work-related functions.	Employee will generally be deemed to have independent knowledge of the information [NOTE: if employee elects to report internally first, he/she will receive the benefit of a "90-day look-back" for subsequent submission of information to SEC (*See* Proposed Rule 21F–4(b)(7))].

The sixth exclusion from "independent knowledge" is for information that was obtained by a means or in a manner that violates applicable Federal or state criminal law. The policy rationale for this proposed exclusion is that a whistleblower should not be rewarded for violating a Federal or State criminal law. While Congress clearly intended through Section 21F to provide greater incentives for whistleblowers to come forward with information about wrongdoing, we think it is questionable that Congress intended to encourage whistleblower assistance to a law enforcement authority where the assistance itself is undertaken in violation of Federal or State criminal law.

Finally. in order to prevent evasion of the rules, the seventh proposed exclusion would apply to anyone who obtained their information from persons subject to the first six exclusions.

Request for Comment:

7. Is it appropriate to include knowledge that is not direct, first-hand knowledge, but is instead learned from others, as "independent knowledge," subject only to an exclusion for knowledge learned from publicly-available sources?

[35] This proposed exclusion would not, however, apply to individuals with knowledge of potential violations who report their knowledge to supervisors, compliance or legal personnel. In fact, as is further explained below, such individuals would be given a 90-day grace period after reporting their information internally to make a whistleblower submission to the Commission and have their submission deemed effective as of the date of their internal report.

[36] This provision does not impose new reporting requirements in addition to those already existing under the Federal securities laws.

8. Is there a different or more specific definition of "analysis" that would better effectuate the purposes of Section 21F?

9. Is it appropriate to exclude from the definition of "independent knowledge" or "independent analysis" information that is obtained through a communication that is protected by the attorney-client privilege? Are there other ways these rules should address privileged communications? For example, should other specific privileges be identified (spousal privilege, physician-patient privilege, clergy-congregant privilege, or others)? Should the exclusion apply broadly to information that is obtained through communications that are subject to any common law evidentiary privileges recognized under the laws of any state?

10. Is it appropriate to exclude from the definition of independent knowledge" or "independent analysis" information that is obtained through the performance of an engagement required under the securities laws by an independent public accountant, if that information relates to a violation by the engagement client or the client's directors, officers or other employees? Are there other ways that our rules should address the roles of accountants and auditors?

11. Should the exclusion for "independent knowledge" or "independent analysis" go beyond attorneys and auditors, and include other professionals who may obtain information about potential securities violations in the course of their work for clients? If so, are there appropriate ways to limit the nature or extent of the exclusion so that any recognition of relationships of professional trust does not undermine the purposes of Section 21F?

12. Apart from persons who obtain information through privileged communications, and professionals who have access to client information, are there still other categories of persons who should not be considered for whistleblower awards based upon their professional duties or the manner in which they may acquire information about potential securities violations? If such exclusions are appropriate, what limits, if any, should be placed on them in order not to undermine the purposes of Section 21F? Is the exclusion for knowledge obtained through violations of criminal law appropriate?

13. Do the proposed exclusions for information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity under an expectation that the person would cause the entity to take steps to respond to the violation, and for information otherwise obtained from or through an entity's legal, compliance, audit, or similar functions strike the proper balance? Will the carve-out for situations where the entity does not disclose the information within a reasonable time promote effective self-policing functions and compliance with the law without undermining the operation of Section 21F? Should a "reasonable time" be defined in the rule and, if so, what period should be specified (*e.g.,* three months, six months, one year)? Does this provide sufficient incentives for people to continue to utilize internal compliance processes? Are there alternative or additional provisions the Commission should consider that would promote effective self-policing and self-reporting while still being consistent with the goals and text of Section 21F?

14. Is the proposed exclusion for information obtained by a violation of Federal or State criminal law appropriate? Should the exclusion extend to violations of the criminal laws of foreign countries? What would be the policy reasons for either extending the exclusion to violations of foreign criminal law or not? Are there any other types of criminal violations that should be included? If so, on what basis?

15. How should our rules treat information that may be provided to us in violation of judicial or administrative orders such as protective orders in private litigation? Should we exclude from whistleblower awards persons who provide information in violation of such orders? What would be the policy reason for this proposed exclusion?

Under the statutory definition of "original information," a whistleblower who provides information that the Commission already knows from another source has not provided original information, unless the whistleblower is the "original source" of that information. Paragraphs (5) and (6) of Proposed Rule 21F–4(b) describe how the Commission proposes to interpret and apply the term "original source" as used in the definition of "original information." Under the proposed rule, a whistleblower is an "original source" of the same information that the Commission obtains from another source if the other source obtained the information from the whistleblower or his representative. The whistleblower bears the burden of establishing that he is the original source of information.

In Commission investigations, one way that this situation may arise is if the staff receives a referral from another authority such as the Department of Justice, a self-regulatory organization, or another organization that is identified in the proposed rule. In these circumstances, the proposed rule would credit the whistleblower with being the "original source" of information on which the referral was based as long as the whistleblower "voluntarily" provided the information to the other authority within the meaning of these rules; *i.e.,* the whistleblower or his representative must have come forward and given the other authority the information before receiving any request, inquiry, or demand to which the information was relevant. If a whistleblower claims to be the original source of information provided to the Commission by one of these authorities or another entity such as the whistleblower's employer, the Commission may seek assistance and confirmation from the other authority or entity in determining whether the whistleblower is the original source of the information.

Paragraph (6) of Proposed Rule 21F–4(b) addresses circumstances where the Commission already possesses some information about a matter at the time that a whistleblower provides additional information about the same matter. The whistleblower will be considered the "original source" of any information that is derived from his independent knowledge or independent analysis and that materially adds to the information that the Commission already possesses. The standard is modeled after the definition of "original source" that Congress included in the False Claims Act through amendments earlier this year.[37]

As is described elsewhere in these proposed rules, a whistleblower will need to submit his information as well as a Form WB–DEC in order to start the process and establish the whistleblower's eligibility for award consideration.[38] A whistleblower who provides information to another authority first will need to follow these same procedures and submit the necessary forms to the Commission in order to perfect his status as a whistleblower under the Commission's whistleblower program. However, under paragraph (7) of Proposed Rule 21F–4(b), as long as the whistleblower submits the necessary forms to the Commission within 90 days after he provided the same information to the other authority, the Commission will consider the whistleblower's submission to be effective as of that earlier date. As noted above, the

[37] 31 U.S.C. 3730(e)(4)(B), Pub. L. 111–148 sec. 10104(h)(2), 124 Stat. 901 (Mar. 23. 2010).

[38] *See* Proposed Rule 21F–9.

whistleblower must establish that he is the original source of the information provided to the other authority as well as the date of his submission, but the Commission may seek confirmation from the other authority in making this determination. The objective of this procedure is to provide further incentive for persons with knowledge of securities violations to come forward (consistent with the purposes of Section 21F) by assuring potential whistleblowers that they can provide information to appropriate Government or regulatory authorities, and their "place in line" will be protected in the event that other whistleblowers later provide the same information directly to the Commission.

For similar reasons, proposed rule 21F–4(b)(7) extends the same protection to whistleblowers who provide information about potential violations to the persons specified in Rules 21F–4(b)(4)(iv) and (v) (*i.e.,* personnel involved in compliance or similar functions, or who are informed about potential violations with the expectation that they will take steps to address them), and who, within 90 days, submit the necessary whistleblower forms to the Commission. Compliance with the Federal securities laws is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct by company officers or employees. The objective of this provision is to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about potential violations to appropriate company officials first while still preserving their rights under the Commission's whistleblower program. This objective is also important because internal compliance and reporting systems are essential sources of information for companies about misconduct that may not be securities-related (*e.g.,* employment discrimination or harassment complaints), as well as for securities-related complaints. The Commission does not intend for its rules to undermine effective company processes for receiving reports on potential violations that may be outside of the Commission's enforcement interest, but are nonetheless important for companies to address.

Given the policy interest in fostering robust corporate compliance programs, we considered the possible approach of requiring potential whistleblowers to utilize in-house complaint and reporting procedures, thereby giving employers an opportunity to address misconduct, before they make a whistleblower submission to the Commission. Among our concerns was the fact that, while many employers have compliance processes that are well-documented, thorough, and robust, and offer whistleblowers appropriate assurances of confidentiality, others lack such established procedures and protections.

We emphasize, however, that our proposal not to require a whistleblower to utilize internal compliance processes does not mean that our receipt of a whistleblower complaint will lead to internal processes being bypassed. We expect that in appropriate cases, consistent with the public interest and our obligation to preserve the confidentiality of a whistleblower, our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back. The company's actions in these circumstances will be considered in accordance with the Commission's Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions.[39] This has been the approach of the Enforcement staff in the past, and the Commission expects that it will continue in the future. Thus, in this respect, we do not expect our receipt of whistleblower complaints to minimize the importance of effective company processes for addressing allegations of wrongful conduct.[40]

The Commission's primary goal, consistent with the congressional intent behind Section 21F, is to encourage the submission of high-quality information to facilitate the effectiveness and efficiency of the Commission's enforcement program. At the same time, we also want to implement Section 21F in a way that encourages strong company compliance programs. Therefore, we request comment on all aspects of the intersection between Section 21F and established internal systems for the receipt, handling, and response to complaints about potential violations of law. We particularly seek recommendations on structures, processes, and incentives that we should consider implementing in order to strike the right balance between the Commission's need for a strong and effective whistleblower awards program, and the importance of preserving robust corporate structures for self-policing and self-reporting.

Request for Comment. The Commission requests comment on all aspects of the definition of "original source" set forth in Proposed Rule 21F–4(b)(4) and (5).

16. Is the provision that would credit individuals with providing original information to the Commission as of the date of their submission to another Governmental or regulatory authority, or to company legal, compliance, or audit personnel, appropriate? In particular, does the provision regarding the providing of information to a company's legal, compliance, or audit personnel appropriately accommodate the internal compliance process?

17. Is the 90-day deadline for submitting Forms TCR and WB–DEC to the Commission (after initially providing information about violations or potential violations to another authority or the employer's legal, compliance, or audit personnel) the appropriate timeframe? Should a longer time period apply in instances where a whistleblower believes that the company has or will proceed in bad faith? Would a 90-day deadline for submitting the TCR and WB–DEC also be appropriate in circumstances where an individual provides information to an SEC staff member? Would a shorter time frame be appropriate? Should there be different time frames for disclosures to other authorities and disclosures to an employer's legal, compliance or audit personnel?

18. Should the Commission consider other ways to promote continued robust corporate compliance processes consistent with the requirements of Section 21F? If so, what alternative requirements should be adopted? Should the Commission consider a rule that, in some fashion, would require whistleblowers to utilize employer-sponsored complaint and reporting procedures? What would be the appropriate contours of such a rule, and how could it be implemented without undermining the purposes of Section 21F? Are there other incentives or processes the Commission could adopt that would promote the purposes of Section 21F while still preserving a critical role for corporate self-policing and self-reporting?

19. Would the proposed rules frustrate internal compliance structures and systems that many companies have established in response to Section 10A(m) of the Exchange Act, as added by Section 301 of the Sarbanes-Oxley

[39] Exchange Act Release No. 44969 (October 23, 2001).

[40] *See* Rule 21F–6. In addition, as discussed below, in order to encourage whistleblowers to utilize internal reporting processes, we expect to give credit in the calculation of award amounts to whistleblowers who utilize established internal procedures for the receipt and consideration of complaints about misconduct.

Act of 2002, and related exchange listing standards? If so, consistent with Section 21F, how can the potential negative impact on compliance programs be minimized?

Proposed Rule 21F–4(c)—Information that Leads to Successful Enforcement. Under Section 21F, a whistleblower's eligibility for an award depends in part on whether the whistleblower's original information "led to the successful enforcement" of the Commission's action or a related action. Proposed Rule 21F–4(c) defines when original information "led to successful enforcement."

The Commission's enforcement practice generally proceeds in several stages. First, the staff opens an investigation based upon some indication of potential violations of the Federal securities laws. Second, the staff conducts its investigation to gather additional facts in order to determine whether there is sufficient basis to recommend enforcement action. If so, the staff may recommend, and the Commission may authorize, the filing of an action. The definition in Proposed Rule 21F–4(c) would consider the significance of the whistleblower's information to both the decision to open an investigation and the success of any resulting enforcement action. The proposed rule would distinguish between situations where the whistleblower's information causes the staff to begin an investigation, and situations where the whistleblower provides information about conduct that is already under investigation. In the latter case, awards would be limited to the rare circumstances where the whistleblower provided essential information that the staff would not have otherwise obtained in the normal course of the investigation. Paragraphs (1) and (2) of Proposed Rule 21F–4(c) reflect these considerations.

Paragraph (1) of Proposed Rule 21F–4(c) applies to situations where the staff is not already reviewing the conduct in question, and establishes a two-part test for determining whether original information voluntarily provided by a whistleblower led to successful enforcement of a Commission action. First, the information must have caused the staff to commence an examination, open an investigation, reopen an investigation that had been closed, or to inquire concerning new and different conduct as part of an open examination or investigation.[41] This does not necessarily contemplate that the whistleblower's information will be the only information that the staff obtains before deciding to proceed. However, the proposed rule would apply when the whistleblower gave the staff information about conduct that the staff is not already investigating or examining, and that information was a principal motivating factor behind the staff's decision to begin looking into the whistleblower's allegations.

Second, if the whistleblower's information caused the Commission staff to start looking at the conduct for the first time, the proposed rule would require that the information "significantly contributed" to the success of an enforcement action filed by the Commission. The proposed rule includes this requirement because the Commission believes that it is not the intent of Section 21F to authorize whistleblower awards for any and all tips about conduct that led to the opening of an investigation if the resulting investigation concludes in a successful enforcement action. Rather, implicit in the requirement that a whistleblower's information "led to * * * successful enforcement" is the further expectation that the information, because of its high quality, reliability, and specificity, had a meaningful connection to the Commission's ability to *successfully* complete its investigation and to either obtain a settlement or prevail in a litigated proceeding.

Ultimately, successful enforcement of a judicial or administrative action depends on the staff's ability to establish unlawful conduct by a preponderance of evidence. Thus, in order to "lead to successful enforcement," the "original information" provided by a whistleblower should be connected to evidence that plays a significant role in successfully establishing the Commission's claim. For example, the "led to" standard of Proposed Rule 21F–4(c)(1) would be met if a whistleblower were to provide the Commission staff with strong, direct evidence of violations that supported one or more claims in a successful enforcement action. To give another example, a whistleblower whose information did not provide this degree of evidence in itself, but who played a critical role in advancing the investigation by leading the staff directly to evidence that provided important support for one or more of the Commission's claims could also receive an award, in particular if the evidence the whistleblower pointed to might have otherwise been difficult to obtain. A whistleblower who only provided vague information, or an unsupported tip, or evidence that was tangential and did not significantly help the Commission successfully establish its claims, would not meet the standard of this proposed rule.

If information that a whistleblower provides to the Commission consists of "independent analysis" rather than "independent knowledge," the evaluation of whether this analysis "led to successful enforcement" similarly would turn on whether it significantly contributed to the success of the action. This would involve, for example, considering the degree to which the analysis, by itself and without further investigation, indicated a high likelihood of unlawful conduct that was the basis, or was substantially the basis, for one or more claims in the Commission's enforcement action. The purpose of this provision is to ensure that the analysis provided to the Commission results in the efficiency and effectiveness benefits to the enforcement program that were intended by Congress.

Paragraph (2) of Proposed Rule 21F–4(c) sets forth a separate, higher standard for cases in which a whistleblower provides original information to the Commission about conduct that is already under examination or investigation by the Commission, Congress, any other Federal, state, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board. In this situation, the information will be considered to have led to the successful enforcement of a judicial or administrative action if the information would not have otherwise been obtained and was essential to the success of the action.[42] Although the Commission believes that awards under Section 21F generally should be limited to cases where whistleblowers provide original information about violations that are not already under investigation,[43] there may

[41] The proposed rule includes examinations within its scope in recognition of the fact that, in some cases involving regulated entities, tips about potentially unlawful conduct are directed in the first instance to staff of the Commission's Office of Compliance Inspections and Examinations, and after some additional consideration by examination staff may then lead to an investigation.

[42] The proposed rule also makes clear that paragraph (2) of Proposed Rule 21F–4(c) does not apply when a whistleblower provides information to the Commission about a matter that is already under investigation by another authority if the whistleblower is the "original source" for that investigation under Proposed Rule 21F–4(b)(4). In those circumstances, paragraph (1) of Proposed Rule 21F–4(c) would govern the Commission's analysis.

[43] *See Lacy* v. *United States,* 221 Ct. Cl. 526 (1979); *cf. United States ex rel. Merena* v. *Smith-Kline Beecham Corp.,* 205 F.3d 97 (3d Cir 2000).

be rare circumstances where information received from a whistleblower in relation to an ongoing investigation is so significant to the success of a Commission action that a whistleblower award should be considered. For example, a whistleblower who has not been questioned by the staff in an investigation, but who nonetheless has access to, and comes forward with a document that had been concealed from the staff, and that establishes proof of wrongdoing that is critical to the Commission's ability to sustain its burden of proof, provides the type of assistance that should be considered for an award without regard to whether the staff was already investigating the conduct at the time the document was provided. We anticipate applying Proposed Rule 21F–4(c)(2) in a strict fashion, however, such that awards under this standard would be rare.

In considering the relationship between information obtained from a whistleblower and the success of an enforcement action, the Commission will apply the same standards in both settled and litigated actions. Specifically, in a litigated action the whistleblower's information must significantly contribute, or, in the case of conduct that is already under investigation, be essential, to the success of a claim on which the Commission prevails in litigation. For example, if a court finds in favor of the Commission on a number of claims in an enforcement action, but rejects the claims that are based upon the information the whistleblower provided, the whistleblower would not be considered eligible to receive an award.[44] Similarly, in a settled action the Commission would consider whether the whistleblower's information significantly contributed, or was essential, to allegations included in the Commission's Federal court complaint, or to factual findings in the Commission's administrative order.

Request for Comment:

20. Is the proposed standard for when original information voluntarily provided by a whistleblower "led to" successful enforcement action appropriate?

21. In cases where the original information provided by the whistleblower caused the staff to begin looking at conduct for the first time, should the standard also require that the whistleblower's information "significantly contributed" to a successful enforcement action?

a. If not, what standards should be used in the evaluation?

b. If yes, should the proposed rule define with greater specificity when information "significantly contributed" to enforcement action? In what way should the phrase be defined?

22. Is the proposal in Paragraph (c)(2), which would consider that a whistleblower's information "led to" successful enforcement even in cases where the whistleblower gave the Commission original information about conduct that was already under investigation, appropriate? Should the Commission's evaluation turn on whether the whistleblower's information would not otherwise have been obtained and was essential to the success of the action? If not, what other standard(s) should apply?

Proposed Rule 21F–4(d)—Action

Proposed Rule 21F–4(d) defines the term "action." For purposes of calculating whether monetary sanctions in a Commission action exceed the $1,000,000 threshold required for an award payment pursuant to Section 21F of the Exchange Act, as well as determining the monetary sanctions on which awards are based,[45] the Commission proposes to interpret the term "action" to mean a single captioned civil or administrative proceeding. This approach to determining the scope of an "action" is consistent with the most common meaning of the term,[46] and is driven by the plain text of Section 21F. Section 21F(a)(1) defines a "covered judicial or administrative action" as "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000."[47] When the conditions for an award are satisfied in connection with a "covered judicial or administrative action," the Commission must pay an award or awards in an aggregate amount equal to not less than 10 percent and not more than 30 percent "in total, of what has been collected of the monetary sanctions imposed in the action * * *."[48]

Two implications follow from this interpretation. First, the "action" would include all defendants or respondents, and all claims, that are brought within that proceeding without regard to which specific defendants or respondents, or which specific claims, were included in the action as a result of the information that the whistleblower provided. For example, if a whistleblower provided information concerning insider trading by a single individual, and, after an investigation, the Commission brought an action against that individual and others in a single captioned proceeding in Federal court, then the sanctions collected from all the defendants in the action would be added up to determine whether the $1,000,000 threshold has been met. Similarly, if a corporate accounting employee provided the Commission with information about a fraudulent accounting practice, and, after investigation, the Commission brought an action that also included unrelated claims discovered during the investigation, the $1,000,000 threshold amount for an award would be determined based upon the total monetary sanctions obtained in the action. This approach would effectuate the purposes of Section 21F by enhancing the incentives for individuals to come forward and report potential securities law violations to the Commission,[49] and would avoid the challenges associated with attempting to allocate monetary sanctions involving multiple individuals and claims based upon the select individuals and claims reported by whistleblowers.

Second, this proposed approach to interpreting the term "action" also would mean that the Commission would not aggregate sanctions that are imposed in separate judicial or administrative actions for purposes of determining whether the $1,000,000 threshold is satisfied, even if the actions arise out of a single investigation. For example, if a whistleblower's submission leads to two separate enforcement actions, each with total sanctions of $600,000, then no whistleblower award would be authorized because no single action will have obtained sanctions exceeding $1,000,000.

Request for Comment:

[44] As discussed below, however, if the Commission prevails on a claim that is based upon the information the whistleblower provided, and if all the conditions for an award are otherwise satisfied, the award to the whistleblower would be based upon all of the monetary sanctions obtained as a result of the action. *See* Proposed Rule 21F–4(d).

[45] *See* Proposed Rule 21F–5.

[46] *E.g., SEC* v. *McCarthy,* 322 F.3d 650, 656 (9th Cir. 2003) ("An 'action' is defined as 'a civil or criminal judicial proceeding.'").

[47] 15 U.S.C. 78u–6(a)(1).

[48] 15 U.S.C. 78u–6(b).

[49] This approach offers enhanced potential incentives for whistleblowers when compared to other similar programs because those programs have typically limited awards to successful claims that the whistleblower actually identified. *See Rockwell International Corp.* v. *United States,* 549 U.S. 457 (2007) (False Claims Act); *John Doe* v. *United States,* 65 Fed. Cl. 184 (2005) (Customs moiety statute, 19 U.S.C. 1619); Internal Revenue Manual 25.2.2.2.8.A (under IRS whistleblower program, collected proceeds only include proceeds from the single issue identified by the whistleblower, or substantially similar improper activity).

23. The Commission requests comment on the proposed definition of the word "action." Are there other ways to define an "action" that are consistent with the text of Section 21F and that will better effectuate the purposes of the statute?

Proposed Rules 21F–4(e)—Monetary Sanctions. Proposed Rule 21F–4(e) defines "monetary sanctions" to mean any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 as a result of a Commission action or a related action. This definition tracks the definition of the same term found in Section 21F of the Exchange Act.[50] The Commission interprets the reference in the statute to "penalties, disgorgement, and interest" to be examples of monetary sanctions, and not exclusive. Thus, regardless of how designated, the Commission will consider all amounts that are "ordered to be paid" in an action as "monetary sanctions" for purposes of Section 21F.

Proposed Rule 21F–4(f)—Appropriate Regulatory Agency.

Section 3(a)(34) of the Exchange Act[51] designates the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision as "appropriate regulatory agencies" for specified entities and functions.[52] For example, when a national bank is a municipal securities dealer, the Comptroller of the Currency is designated as the appropriate regulatory agency; when a state member bank of the Federal Reserve System is a municipal securities dealer, the Federal Reserve Board is designated as the appropriate regulatory agency.

Proposed Rule 21F–4(f) would make clear that the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision (as well as any other agencies that may be added to Section 3(a)(34) of the Exchange Act by future amendment) are deemed to be "appropriate regulatory agencies" for all purposes under Section 21F of the Exchange Act.[53] This means, in particular, that the Commission would consider a member, officer, or employee of one of the designated agencies to be ineligible to receive a whistleblower award under any circumstances, even if the information that the person possesses is unrelated to the agency's regulatory function. This interpretation would place members, officers, and employees of appropriate regulatory agencies on equal footing with those of other organizations, such as the Public Company Accounting Oversight Board and law enforcement organizations, who are also statutorily ineligible to receive whistleblower awards.[54]

Request for Comment:

24. Is the proposed definition of "appropriate regulatory agency" appropriate? Are there other definitions that that should be adopted instead?

Proposed Rule 21F–4(g)—Self-Regulatory Organization. Section 3(a)(26) of the Exchange Act[55] designates national securities exchanges, registered securities associations, and registered clearing agencies as self-regulatory organizations, and the Municipal Securities Rulemaking Board as a self-regulatory organization solely for purposes of Sections 19(b) and (c) of the Exchange Act (relating to rulemaking).[56] Consistent with the approach taken with regard to the definition of "appropriate regulatory agency" (*see* discussion above), Proposed Rule 21F–4(g) would make clear that the Municipal Securities Rulemaking Board is considered to be a "self-regulatory organization" for all purposes under Section 21F.

Request for Comment:

25. Is the proposed definition of "self-regulatory organization" appropriate? Are there other definitions that that should be adopted instead?

E. Proposed Rule 21F–5—Amount of Award

Proposed Rule 21F–5 states that, if all conditions are met, the Commission will pay an award of at least 10 percent and no more than 30 percent of the total monetary sanctions collected in successful Commission and related actions. This range is specified in Section 21F(b)(1) of the Exchange Act. Where multiple whistleblowers are entitled to an award, paragraph (b) states that the Commission will independently determine the appropriate award percentage for each whistleblower, but total award payments, in the aggregate, will equal between 10 and 30 percent of the monetary sanctions collected in the Commission's action and the related action. Thus, for example, one whistleblower could receive an award of 25 percent of the collected sanctions, and another could receive an award of 5 percent, but they could not each receive an award of 30 percent. Since the Commission anticipates that the timing of award determinations and the value of a whistleblower's contribution could be different for the Commission's action and for related actions, the proposed rule would provide that the percentage awarded in connection with a Commission action may differ from the percentage awarded in related actions.

Request for Comment:

24. Is the provision stating that the percentage amount of an award in a Commission action may differ from the percentage awarded in a related action appropriate?

F. Proposed Rule 21F–6—Criteria for Determining Amount of Award

Assuming that all of the conditions for making an award to a whistleblower have been satisfied, Proposed Rule 21F–6 sets forth the criteria that the Commission would take into consideration in determining the amount of the award. Paragraphs (a) through (c) of the proposed rule recite three criteria that Section 21F of the Exchange Act requires the Commission to consider, and paragraph (d) adds a fourth criterion.

Paragraph (a) requires the Commission to consider the significance of the information provided by a whistleblower to the success of the Commission action or related action. Paragraph (b) requires the Commission to consider the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. Paragraph (c) requires the Commission to consider its programmatic interest in deterring violations of the securities laws by making awards to whistleblowers that provide information that leads to successful enforcement actions. Paragraph (d) would permit the Commission to consider whether an award otherwise enhances its ability to enforce the Federal securities laws, protect investors, and encourage the

[50] 15 U.S.C. 78u–6(a)(4).

[51] 15 U.S.C. 78c(a)(34).

[52] Title III of Dodd-Frank abolishes the Office of Thrift Supervision and transfers its functions to other agencies one year after the date of enactment, unless the transfer date is extended.

[53] Section 21F alternately uses the terms "appropriate regulatory agency" and "appropriate regulatory authority." *Compare* Section 21F(c)(2)(A)(i) (15 U.S.C. 78u–6(c)(2)(A)(i)) *with* Section 21F(h)(2)(D)(i)((II) (15 U.S.C. 78u–6(h)(2)(D)(i)((II)). Because we do not believe that Congress intended this differing terminology to reflect substantive distinctions, the proposed rules use the term "appropriate regulatory agency" in all instances.

[54] *See* Section 21F(c)(2)(A), 15 U.S.C. 78u–6(c)(2)(A).

[55] 15 U.S.C. 78c(a)(26).

[56] 15 U.S.C. 78s(b) and (c).

submission of high quality information from whistleblowers.

The Commission anticipates that the determination of awards amounts pursuant to paragraphs (a)–(d) will involve highly individualized review of the circumstances surrounding each award. To allow for this, the Commission preliminarily believes that the four criteria afford the Commission broad discretion to weigh a multitude of considerations in determining the amount of any particular award. Depending upon the facts and circumstances of each case, some of the considerations may not be applicable or may deserve greater weight than others.

The permissible considerations include, but are not limited to, those set forth below. These considerations are not listed in order of importance nor are they intended to be all-inclusive or to require a specific determination in any particular case:

- The character of the enforcement action, including whether its subject matter is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, the type and severity of the securities violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations;
- The dangers to investors or others presented by the underlying violations involved in the enforcement action, including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed;
- The timeliness, degree, reliability, and effectiveness of the whistleblower's assistance;
- The time and resources conserved as a result of the whistleblower's assistance;
- Whether the whistleblower encouraged or authorized others to assist the staff who might otherwise not have participated in the investigation or related action;
- Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action;
- The degree to which the whistleblower took steps to prevent the violations from occurring or continuing;
- The efforts undertaken by the whistleblower to remediate the harm caused by the violations, including assisting the authorities in the recovery of the fruits and instrumentalities of the violations;
- Whether the information provided by the whistleblower related to only a portion of the successful claims brought in the Commission or related action;[57]
- The culpability of the whistleblower including whether the whistleblower acted with scienter, both generally and in relation to others who participated in the misconduct; and
- Whether, and the extent to which, a whistleblower reported the potential violation through effective internal whistleblower, legal or compliance procedures before reporting the violation to the Commission.

This last consideration is not a requirement for an award above the 10 percent statutory minimum and whistleblowers will not be penalized if they do not avail themselves of this opportunity for fear of retaliation or other legitimate reasons. The Commission will consider higher percentage awards for whistleblowers who first report violations through their compliance programs. Corporate compliance programs play a role in preventing and detecting securities violations that could harm investors. If these programs are not utilized or working, our system of securities regulation will be less effective. Accordingly, the Commission believes that encouraging whistleblowers to report securities violations to their corporate compliance programs is consistent with the Commission's investor protection mission.

Request for Comment:

27. Should the Commission identify, by rule, additional criteria that it will consider in determining the amount of an award? If so, what criteria should be included? Should we include as a criterion the consideration of whether, and the extent to which, a whistleblower reported the potential violation through effective internal whistleblower, legal or compliance procedures before reporting the violation to the Commission? Should we include any of the other considerations described above?

28. Should we include the role and culpability of the whistleblower in the unlawful conduct as an express criterion that would result in reducing the amount of an award within the statutorily-required range? Should culpable whistleblowers be excluded from eligibility for awards? Would such an exclusion be consistent with the purposes of Section 21F?

G. Proposed Rule 21F–7—Confidentiality of Submissions

Proposed Rule 21F–7 reflects the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act[58] with respect to information that could reasonably be expected to reveal the identity of a whistleblower. As a general matter, it is the Commission's policy and practice to treat all information obtained during its investigations as confidential and nonpublic. Disclosures of enforcement-related information to any person outside the Commission may only be made as authorized by the Commission and in accordance with applicable laws and regulations. Consistent with Section 21F(h)(2), the proposed rule explains that the Commission will not reveal the identity of a whistleblower or disclose other information that could reasonably be expected to reveal the identity of a whistleblower, except under circumstances described in the statute and the rule.[59] As is further explained below, there may be circumstances in which disclosure of information that identifies a whistleblower will be legally required or will be necessary for the protection of investors.

Paragraph (a)(1) of the proposed rule would authorize disclosure of information that could reasonably be expected to reveal the identity of a whistleblower when disclosure is required to a defendant or respondent in a Federal court or administrative action that the Commission files or in another public action or proceeding filed by an authority to which the Commission may provide the information. For example, in a related action brought as a criminal prosecution by the Department of Justice, disclosure of a whistleblower's identity may be required, in light of the requirement of the Sixth Amendment of the Constitution that a criminal defendant have the right to be confronted with witnesses against him.[60] Paragraph (a)(2) would authorize disclosure to the Department of Justice, an appropriate regulatory agency, a self regulatory organization, a state attorney

[57] As described elsewhere in these rules, if the information provided by a whistleblower relates to only a portion of a successful enforcement action, the Commission proposes to look to the entirety of the action (including all defendants or respondents, all claims, and all monetary sanctions obtained) in determining whether the action is eligible for an award (because it meets the $1,000,000 threshold) and the total dollar amount of sanctions on which the whistleblower's award will be based. However, under paragraph (a) of Proposed Rule 21F–6, the fact that the whistleblower's information related to only a portion of the overall action would be a factor in determining the amount of the whistleblower's award. Thus, if the whistleblower's information supported only a small part of a larger case, that would be a reason for making an award based upon a smaller percentage amount than otherwise would have been awarded.

[58] 15 U.S.C. 78u–6(h)(2).

[59] Under Section 21F(h)(2), whistleblower-identifying information is also expressly exempted from the provisions of the Freedom of Information Act, 5 U.S.C. 552.

[60] *See* U.S. Const. Amend. VI.

general in connection with a criminal investigation, any appropriate state regulatory authority, the Public Company Accounting Oversight Board, or foreign securities and law enforcement authorities when it is necessary to achieve the purposes of the Exchange Act and to protect investors. With the exception of foreign securities and law enforcement authorities, each of these entities is subject to the confidentiality requirements set forth in Section 21F(h) of the Exchange Act. Since foreign securities and law enforcement authorities are not bound by these confidentiality requirements, the proposed rule states that the Commission may determine what assurances of confidentiality are appropriate prior to disclosing such information. Paragraph (a)(3) would authorize disclosure in accordance with the Privacy Act of 1974.

Because many whistleblowers may wish to provide information anonymously, paragraph (b) of the proposed rule states that anonymous submissions are permitted with certain specified conditions. Paragraph (b)(1) would require that anonymous whistleblowers be represented by an attorney and that the attorney's contact information be provided to the Commission at the time of the whistleblower's initial submission. The purpose of this requirement is to prevent fraudulent submissions and to facilitate communication and assistance between the whistleblower and the Commission's staff. Any whistleblower may be represented by counsel—whether submitting information anonymously or not.[61] Paragraph (b)(2) would require that anonymous whistleblowers and their counsel follow the required procedures outlined in Proposed Rule 21F–9. Paragraph (b)(3) would require that anonymous whistleblowers disclose their identity, pursuant to the procedures outlined in Proposed Rule 21F–10, before the Commission will pay any award. We emphasize that anonymous whistleblowers have the same rights and responsibilities as other whistleblowers under Section 21F of the Exchange Act and these proposed rules, unless expressly exempted.

Pursuant to Rule 102(e) of the Commission's Rules of Practice,[62] the Commission may deny the privilege of practicing before the Commission to any person who, after notice and opportunity for hearing, is found not to possess the requisite qualifications to represent others, to be lacking in character or integrity, to have engaged in unethical or improper professional conduct, or to have willfully violated or willfully aided and abetted the violation of any provision of the Federal securities laws or rules. Practice before the Commission is defined to include transacting any business with the Commission.[63] The Commission cautions attorneys that representation of whistleblowers will constitute practice before the Commission. Accordingly, misconduct by an attorney representing a whistleblower can result in the attorney being subject to disciplinary sanctions under any of the conditions set forth in Rule 102(e).

Request for Comment:

29. Because representation of whistleblowers constitutes practice before the Commission by an attorney, should the Commission consider adopting rules governing conduct by attorneys engaged in this type of practice? In some contexts, courts have disallowed excessive fee requests to attorneys for whistleblowers.[64] Should we adopt a rule regarding fees in the representation of whistleblower clients? Would such a rule encourage or discourage whistleblower submissions?

H. Proposed Rule 21F–8—Eligibility

Paragraph (a) of Proposed Rule 21F–8 makes clear that providing information in the form and manner required by these rules is a fundamental criterion of eligibility for a whistleblower award.[65] However, in order to prevent undue hardship, the Commission, in its sole discretion, may waive any of these procedural requirements based upon a showing of extraordinary circumstances.

The specific procedures required for submitting original information and making a claim for a whistleblower award are described in Proposed Rules 21F–9 through 21F–11. Proposed Rule 21F–8(b) contains several additional procedural requirements, which are designed to assist the Commission in evaluating and using the information provided. These include that the whistleblower, upon request, agree to provide explanations and other assistance including, but not limited to, providing all additional information in the whistleblower's possession that is related to the subject matter of his submission. In order to accommodate whistleblowers who elect to submit information anonymously, the staff will have discretion to make special arrangements to meet these procedural requirements.

Paragraph (b) of the proposed rule also would require whistleblowers, if requested by the staff, to provide testimony or other acceptable evidence relating to whether they are eligible for or otherwise satisfy any of the conditions for an award. Because Section 21F(c)(2) of the Exchange Act statutorily excludes certain persons from receiving whistleblower awards,[66] and Section 21F further conditions the grant of an award on factors that are unique to each individual whistleblower (*e.g.,* that the individual act "voluntarily" and provide information that meets all the criteria of "original information"), this provision is designed to ensure that the staff has authority to confirm that whistleblowers meet all of the necessary eligibility criteria and conditions. It is anticipated that the staff may seek such confirming evidence at any point after a whistleblower files Form WB–DEC (as set forth in Proposed Rule 21F–9), including, without limitation, in connection with the claims review process described in Proposed Rules 21F–10 and 21F–11.

Finally, paragraph (b) of proposed rule 21F–8 would authorize the staff to require that a whistleblower enter into a confidentiality agreement in a form acceptable to the Whistleblower Office, including a provision that a violation may result in the whistleblower being ineligible for an award.[67] In some cases, a confidentiality agreement may be required if it becomes necessary or advisable for the staff to share non-public information with a whistleblower either during the course of the investigation (for example, to obtain the whistleblower's assistance in interpreting documents), or as part of

[61] *See* Section 21F(d)(1), 15 U.S.C. 78u–6(d)(1). Under the statute, however, an anonymous whistleblower seeking an award is required to be represented by counsel. Section 21F(d)(2), 15 U.S.C. 78u–6(d)(2).

[62] 17 CFR 201.102(e).

[63] 17 CFR 102(f).

[64] *United States* v. *Overseas Shipholding Group, Inc.,* 2010 WL 4104663 at *7 (1st Cir. 2010) (limitations on fees "are particularly appropriate in situations such as this where awarding an excessive fee to the attorney would itself undermine the objectives of the Federal statutory scheme. The whole purpose of the discretionary award to whistleblowers under this statute is to create incentives for the whistleblower to take risks that may disadvantage the whistleblower in his relationship to his employer. The amount of the fee that will be siphoned off by the lawyer significantly affects the size of that award and the power of the incentive. The court in administering this statute is obligated to ensure his excessive legal fees will not diminish the statutory incentive.").

[65] *See* Section 21F(c)(2)(D), which prohibits the Commission from paying an award to any whistleblower "who fails to submit information to the Commission in such form as the Commission may, by rule, require. 15 U.S.C. 78u–6(c)(2)(D).

[66] 15 U.S.C. 78u–6(c)(2).

[67] Section 21F(e) of the Exchange Act authorizes the Commission to require that a whistleblower enter into a contract. 15 U.S.C. 78u–6(e).

the claims process set forth in Proposed Rules 21F–10 and 21F–11.

Paragraph (c) of Proposed Rule 21F–8 recites the categories of individuals who are ineligible for an award, many of which are set forth in Section 21F(c)(2). These include persons who are, or were at the time they acquired the original information, a member, officer, or employee of the Department of Justice, an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board, or any law enforcement organization; anyone who is convicted of a criminal violation that is related to the Commission action or to a related action for which the person otherwise could receive an award; any person who obtained the information provided to the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to the requirements of Section 10A of the Exchange Act, 15 U.S.C. 78j–1);[68] and any person who in his whistleblower submission, his other dealings with the Commission, or his dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry. Paragraph (c)(2) of Proposed Rule 21F–8 also would make foreign officials ineligible to receive a whistleblower award. The payment of awards to foreign officials could have negative repercussions for United States foreign relations, including creating a perception that the United States is interfering with foreign sovereignty, potentially undermining foreign government cooperation under existing treaties (including multilateral and bilateral mutual legal assistance treaties),[69] encouraging corruption, and raising concerns about protection of foreign officials who become whistleblowers. In order to prevent evasion of these exclusions, paragraph (c)(5) of the proposed rule also provides that persons who acquire information from ineligible individuals are ineligible for an award. In addition, paragraph (c)(6) would make any person ineligible who is the spouse, parent, child, or sibling of a member or employee of the Commission, or who resides in the same household as a member or employee of the Commission, in order to prevent the appearance of improper conduct by Commission employees.

Paragraph (d) of Proposed Rule 21F–8 reiterates that a determination that a whistleblower is ineligible to receive an award for any reason does not deprive the individual of the anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act.[70]

Request for Comment.

30. We request comment on the manner of submission requirements set forth in Proposed Rule 21F–8(b). Are these requirements appropriate? Should there be different or additional requirements to supplement the submission of information as set forth in Proposed Rule 21F–9?

31. We also request comment on the ineligibility criteria set forth in Proposed Rule 21F–8(c). Are there other statuses or activities that should render an individual ineligible for a whistleblower award?

I. Proposed Rule 21F–9—Procedures for Submitting Original Information

The Commission proposes a two-step process for the submission of original information under the whistleblower award program. In general, the first step would require the submission of information either on a standard form or through the Commission's online database for receiving tips, complaints and referrals. The second step would require the whistleblower to complete a Whistleblower Office form, signed under penalties of perjury, in which the whistleblower would be required to make certain representations concerning the veracity of the information provided and the whistleblower's eligibility for a potential award. The use of standardized forms and the electronic database will greatly assist the Commission in managing and tracking the thousands of tips that it receives annually. This will also better enable the Commission to connect tips to each other so as to make better use of the information provided, and to connect tips to requests for payment under the whistleblower provisions. The purpose of requiring a sworn declaration is to help deter the submission of false and misleading tips and the resulting inefficient use of the Commission's resources. The requirement should also mitigate the potential harm to companies and individuals that may be caused by false or spurious allegations of wrongdoing.

1. Form TCR and Instructions

Paragraph (a) of Proposed Rule 21F–9 requires the submission of information in one of two ways. A whistleblower may submit the information electronically through the Commission's Electronic Data Collection System available on the Commission's Web site or by completing and submitting proposed Form TCR—*Tip, Complaint or Referral.*[71] Form TCR, and the instructions thereto, are designed to capture basic identifying information about a complainant and to elicit sufficient information to determine whether the conduct alleged suggests a violation of the Federal securities laws. Proposed items A1 through A3 of Form TCR would request the whistleblower's name and contact information, including a physical address, email address and telephone number. Proposed item A4 would ask the whistleblower to indicate his occupation. In instances where a whistleblower submits information anonymously, the identifying information for the whistleblower would not be required, but proposed Items B1 through B4 of the form would require the name and contact information of the whistleblower's attorney. This information may also be included in the case of whistleblowers whose identities are known and who are represented by counsel in the matter. Proposed Items C1 through C4 would request basic identifying information for

[68] As noted above, Section 10A of the Exchange Act requires that a registered public accounting firm engaged in an audit of financial statements of an issuer required under the Exchange Act take certain steps if the auditor detects or otherwise becomes aware of information indicating an illegal act, which in certain circumstances can include reporting directly to the Commission. The Commission interprets the exclusion in Section 21F(c)(2)(C) to apply to persons who obtain information through the performance of an audit that is subject to the requirements of Section 10A, whether or not the audit results in the accounting firm making a report to the Commission. In addition to this statutory exclusion, the Commission is proposing, through the definition of "original information," a broader exclusion for persons who obtain information through the performance of an engagement required under the securities laws by an independent public accountant. *See* Proposed Rule 21F–4(b)(4)(iii).

[69] For example, Article 8(4) of the United Nations Convention Against Corruption requires that party states consider establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

[70] *See* Proposed Rule 21F–2.

[71] The Commission anticipates that, by the time final rules are adopted to implement Section 21F, potential whistleblowers will be able to submit information to the Commission online through the Electronic Data Collection System, an interactive, web-based database for submission of tips, complaints and referrals. Whistleblowers who wish to submit their information in paper format would be required to use proposed Form TCR. Both methods of submission are designed to elicit substantially similar information concerning the individual submitting the information and the violation alleged. For purposes of these rules, the Commission is only discussing proposed Form TCR. The Commission will be separately submitting a request to the Office of Management and Budget for Paperwork Reduction Act approval of the Electronic Data Collection System.

the individual(s) or entity(ies) to which the complaint relates. Proposed Items D1 through D9 are designed to elicit details concerning the alleged securities violation. Proposed Items D1 and D2 would ask the whistleblower to provide the date of the occurrence and describe the nature of the complaint. Proposed Items D3 and D4 would ask whether the complaint relates to an entity of which the whistleblower is or was an officer, director, employee, consultant or contractor and, if so, whether the whistleblower has taken any prior action regarding the complaint, what actions were taken and the date on which the action(s) were taken. Proposed Item D5 would ask about the type of security or investment involved, the name of the issuer and the ticker symbol or CUSIP number, if applicable. Proposed Item D6 would ask the whistleblower to state in detail all facts pertinent to the alleged violation. Proposed Item D7 would ask for a description of all supporting materials in the whistleblower's possession and the availability and location of any additional supporting materials not in the whistleblower's possession. Item D8 would ask for an explanation of how the whistleblower obtained the information that supports the claim. Proposed Item D9 would provide the whistleblower with an opportunity to provide any additional information the whistleblower thinks may be relevant to his submission. The questions posed on proposed Form TCR are designed to elicit the minimum information required for the Commission to make a preliminary assessment concerning the likelihood that the alleged conduct suggests a violation of the securities laws. Moreover, the proposed instructions to Form TCR are designed to assist the whistleblower and facilitate the completion of the form.

2. Form WB–DEC and Instructions

In addition to submitting information in the form and manner required by paragraph (a), the Commission proposes in paragraph (b) of Proposed Rule 21F–9 to require that whistleblowers who wish to be considered for an award in connection with the information they provide to the Commission also complete and provide the Commission with proposed Form WB–DEC, *Declaration Concerning Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934.* Proposed Form WB–DEC would require a whistleblower to answer certain threshold questions concerning the whistleblower's eligibility to receive an award. The form also would contain a statement from the whistleblower acknowledging that the information contained in the Form WB–DEC, as well as all information contained in the whistleblower's submission, is true, correct and complete to the best of the whistleblower's knowledge, information and belief. Moreover, the statement would acknowledge the whistleblower's understanding that the whistleblower may be subject to prosecution and ineligible for an award if, in the whistleblower's submission of information, other dealings with the Commission, or dealings with another authority in connection with a related action, the whistleblower knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or uses any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

In instances where information is provided by an anonymous whistleblower, proposed paragraph (c) of Proposed Rule 21F–9 would require the attorney representing the whistleblower to provide the Commission with a separate Form WB–DEC certifying that the attorney has verified the identity of the whistleblower, and will retain the whistleblower's original, signed Form WB–DEC in the attorney's files. The proposed certification from counsel is an important element of the whistleblower program to help ensure that the Commission is working with whistleblowers whose identities have been verified by their counsel. The proposed certification process also would provide a mechanism for anonymous whistleblowers to be advised by their counsel regarding their preliminary eligibility for an award.

Proposed Items A1 through A3 of Form WB–DEC would request the whistleblower's name and contact information. In the case of submissions by an anonymous whistleblower, the form would require the name and contact information of the whistleblower's attorney instead of the whistleblower's identifying information in proposed Items B1 though B4. This section could also be completed in cases where a whistleblower's identity is known but the whistleblower is represented by an attorney in the matter. Proposed Items C1 through C3 would request information concerning the information submitted by the whistleblower to the SEC. Item C1 would require the whistleblower to indicate the manner in which the information was submitted to the Commission. Proposed Item C2 would ask for the Tip, Complaint or Referral ("TCR") number assigned to the whistleblower's submission. The Commission expects that the TCR number would be generated automatically in cases where the whistleblower submits his information online through the Commission's Electronic Data Collection System or, in the case of hard copy submissions, would be provided to the whistleblower in a written confirmation sent by the Commission staff. In instances where a whistleblower submits both forms in hard copy and thus does not have access to the TCR number at the time of submission, the forms would be linked together by virtue of having been included in the same mailing. Proposed Items C3 would ask a whistleblower to identify any communications the whistleblower or his counsel may have had with the Commission concerning the matter since submitting the information. Proposed Item C4 asks whether the whistleblower has provided the same information being provided to the Commission to any other agency or organization and, if so, requests details concerning the submission, including the name and contact information for the point of contact at the agency or organization, if known. Proposed Items D1 through D9 would require the whistleblower to make certain representations concerning the whistleblower's eligibility for an award. Finally, the form would require the sworn declarations from the whistleblower and the whistleblower's counsel discussed above. In proposed Item E, the whistleblower would be required to declare under penalty of perjury that the information contained on Form WB–DEC, and all information submitted to the SEC is true, correct and complete to the best of the whistleblower's knowledge, information and belief. In addition, the whistleblower would acknowledge his understanding that he may be subject to prosecution and ineligible for a whistleblower award if, in the whistleblower's submission of information, other dealings with the SEC, or dealings with another authority in connection with a related action, the whistleblower knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or uses any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

The counsel certification in proposed Item F would require an attorney for an anonymous whistleblower to certify that the attorney has verified the identity of the whistleblower who completed Form

WB–DEC in connection with the information submitted to the SEC by viewing the whistleblower's valid, unexpired government issued identification, that the attorney has reviewed the whistleblower's Form WB–DEC for completeness and accuracy, and that the attorney will retain an original, signed copy of the Form WB–DEC completed by the whistleblower in his or her records.

As explained above, the Commission proposes to allow two alternative methods of submission of a whistleblower's information. A whistleblower would have the option of submitting the information electronically through the Commission's Electronic Data Collection System or by sending or faxing Form TCR to the Whistleblower Office.

Form WB–DEC could be submitted electronically, in accordance with instructions set forth on the Commission's Web site or, alternatively, by mailing or faxing the form to the Whistleblower Office.

3. Perfecting Whistleblower Status for Submissions Made Before Effectiveness of the Rules

As previously discussed, Section 924(b) of Dodd-Frank states that information provided to the Commission in writing by a whistleblower after the date of enactment but before the effective date of these proposed rules retains the status of original information. The Commission has already received numerous tips from potential whistleblowers after the date of enactment of Dodd-Frank. Proposed Rule 21F–9(d) would provide a mechanism by which whistleblowers who fall into this category could perfect their status as whistleblowers under the Commission's award program once final rules are adopted. Paragraph (d)(1) requires a whistleblower who provided original information to the Commission in a format or manner other than that required by paragraph (a) of Rule 21F–9 to either submit the information electronically through the Commission's Electronic Data Collection System or to submit a completed Form TCR within one hundred twenty (120) days of the effective date of the proposed rules and to otherwise follow the procedures set forth in paragraph (b) of Proposed Rule 21F–9. If the whistleblower provided the original information to the Commission in the format or manner required by paragraph (a) of Rule 21F–9, paragraph (d)(2) would require the whistleblower to submit Form WB–DEC within one hundred twenty (120) days of the effective date of the proposed rules in the manner set forth in paragraph (b) of Proposed Rule 21F–9.

Request for Comment:

32. Although the Commission is proposing alternative methods of submission, we expect that electronic submissions would dramatically reduce our administrative costs, enhance our ability to evaluate tips (generally and using automated tools), and improve our efficiency in processing whistleblower submissions. Accordingly, we solicit comment on whether it would be appropriate to eliminate the fax and mail option and require that all submissions be made electronically. Would the elimination of submissions by fax and mail create an undue burden for some potential whistleblowers?

33. Is there other information that the Commission should elicit from whistleblowers on Proposed Forms TCR and WB–DEC? Are there categories of information included on these forms that are unnecessary, or should be modified?

34. Is the requirement that an attorney for an anonymous whistleblower certify that the attorney has verified the whistleblower's identity and eligibility for an award appropriate? Is there an alternative process the Commission should consider that would accomplish its goal of ensuring that it is communicating with a legitimate whistleblower?

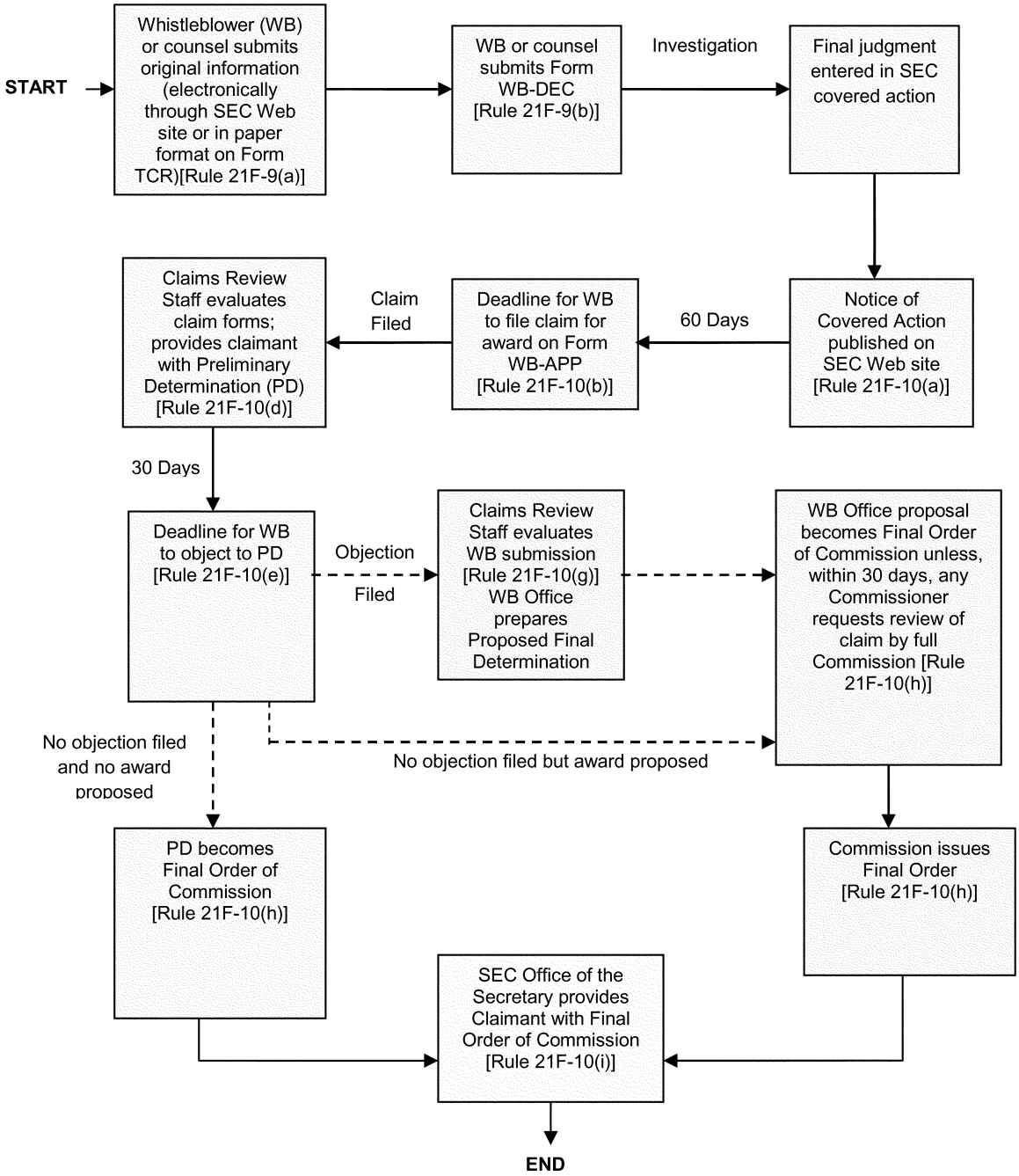
35. Is the Commission's proposed process for allowing whistleblowers 120 days to perfect their status in cases where the whistleblower provided original information to the Commission in writing after the date of enactment of Dodd-Frank but before adoption of the proposed rules reasonable? Should the period be made shorter (*e.g.,* 30 or 60 days) or longer (*e.g.,* 180 days)?

36. Are there any ways we can streamline and make the required procedures more user-friendly?

J. Proposed Rule 21F–10—Procedures for Making a Claim for a Whistleblower Award in SEC Actions That Result in Monetary Sanctions in Excess of $1,000,000

Proposed Rule 21F–10 describes the steps a whistleblower would be required to follow in order to make a claim for an award in relation to a Commission action. In addition, the rule describes the Commission's proposed claims review process, which includes the proposed administrative appeals process.

The following flow chart represents a general overview of the proposed process:



The proposed process would begin with the publication of a "Notice of a Covered Action" ("Notice") on the Commission's Web site. Whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000, the Whistleblower Office will cause this Notice to be published on the Commission's Web site subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold. If the monetary sanctions are obtained without a judgment or order—as in the case of a contribution made pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002—the Notice would be published within thirty (30) days of the deposit of monetary sanctions into a disgorgement or other fund pursuant to Section 308(b) that causes total monetary sanctions in the action to exceed $1,000,000. The Commission's proposed rule requires claimants to file their claim for an award within sixty (60) days of the date of the Notice.[72] A claimant's failure to timely file a request for a whistleblower award would bar that individual later seeking a recovery.[73] The Commission anticipates that, at the time a Notice of Covered Action is posted, the staff will also attempt to contact persons who have filed a Form WB DEC in relation to the case, in order to give them additional notice of the opportunity to submit a claim for award.

Paragraph (b) of Proposed Rule 21F–10 describes the procedure for making a

[72] All references to "days" refer to calendar days.

[73] *See, e.g., Yuen* v. *U.S.,* 825 F.2d 244 (9th Cir. 1987) (taxpayer barred from recovery due to failure to timely file a written request for refund).

claim for an award. Specifically, a claimant would be required to submit a claim for an award on proposed Form WB–APP, *Application for Award for Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934.* Proposed Form WB–APP, and the instructions thereto, will elicit information concerning a whistleblower's eligibility to receive an award at the time the whistleblower files his claim. The purpose of the form is, among other things, to provide an opportunity for the whistleblower to "make his case" for why he is entitled to an award by describing the information and assistance he has provided and its significance to the Commission's successful action. Proposed Items A1 through A3 require the claimant to provide basic identifying information, including first and last name and contact information. Proposed Items B1 through B4 would request the name and contact information for the whistleblower's attorney, if applicable. Proposed Items C1 and C2 would request information concerning the original tip or complaint underlying the claim, including the TCR number, the date the information was submitted and the subject of the tip, complaint or referral. Proposed Items D1 through D3 would request information concerning the Notice of Covered Action to which the claim relates, including the date of the notice, notice number, and the name and case number of the matter to which the notice relates. Proposed Items E1 through E3 would request information concerning related actions. A whistleblower would be required to complete Section D in cases where the whistleblower's claim was submitted in connection with information submitted to another agency or organization in a related action (the questions pertaining to related actions are explained in the discussion of proposed Rule 21F–11, below). Proposed Items F1 through F9 would require the claimant to make certain representations concerning the claimant's eligibility to receive an award at the time the claim is made. In Item G, a claimant may set forth the grounds for the claimant's belief that he is entitled to an award in connection with the information submitted to the Commission, or to another agency or organization in a related action. Finally, item H would contain a declaration, to be signed by the claimant, certifying that the information contained on the form is true, correct and complete to the best of the claimant's knowledge, information and belief. The declaration would further acknowledge the claimant's understanding that he may be subject to prosecution and ineligible for a whistleblower award for knowingly and willfully making any false, fictitious, or fraudulent statements or representations in his or her submission or dealings with the SEC or other authority.

Paragraph (b) of Proposed Rule 21F–10 provides that a claim on Form WB–APP, including any attachments, must be received by the Whistleblower Office within sixty (60) days of the date of the Notice of Covered Action in order to be considered for an award.

Paragraph (c) requires a whistleblower who submitted information to the Commission anonymously to disclose his identity to the Commission on proposed Form WB–APP and to verify his identity in a form and manner that is acceptable to the Whistleblower Office prior to the payment of an award. This requirement is derived from Subsection 21F(d)(2)(B) of the Exchange Act.[74]

Paragraph (d) of Proposed Rule 21F–10 describes the Commission's claims review process. The claims review process would begin once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded.

Under the proposed process, the Whistleblower Office and designated Commission staff (defined in Proposed Rule 21F–10 as the "Claims Review Staff") [75] would evaluate all timely whistleblower award claims submitted on Form WB–APP. In connection with this process, the Whistleblower Office could require that claimants provide additional information relating to their eligibility for an award or satisfaction of any of the conditions for an award, as set forth in Proposed Rule 21F–8(b).[76] Following that evaluation, the Whistleblower Office would send any claimant a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

The proposed rule would allow a claimant the opportunity to contest the Preliminary Determination made by the Claims Review Staff. Under paragraph (e) of Proposed Rule 21F–10, the claimant could take any of the following steps:

- Within thirty (30) days of the date of the Preliminary Determination, the claimant may request that the Whistleblower Office make available for the claimant's review the materials that formed the basis of the Claims Review Staff's Preliminary Determination. The Whistleblower Office would make these materials available to the claimant subject to any redactions necessary to comply with any statutory restrictions or protect the Commission's law enforcement and regulatory functions. The Whistleblower Office also could require the claimant to sign a confidentiality agreement (as described in Rule 21F–8) prior to providing these materials.
- Within thirty (30) days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (1) above, then within thirty (30) days of the Whistleblower Office making those materials available for the claimant's review, a claimant may submit a written response to the Whistleblower Office setting forth the grounds for the claimant's objection to either the denial of an award or the proposed amount of an award. The claimant may also include documentation or other evidentiary support for the grounds advanced in his response.
- Within thirty (30) days of the date of the Preliminary Determination, the claimant may request a meeting with the Whistleblower Office. However, such meetings are not required and the Whistleblower Office may in its sole discretion decline the request.

Paragraph (f) of Proposed Rule 21F–10 makes clear that if a claimant fails to submit a timely response pursuant to paragraph (e), then the Preliminary Determination of the Claims Review Staff would be deemed the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination, which would make it subject to review by the Commission under paragraph (h). In addition, a claimant's failure to submit a timely response to a Preliminary Determination where the determination was to deny an award would constitute a failure to exhaust the claimant's administrative remedies, and the claimant would be prohibited from pursuing a judicial appeal.[77]

[74] 15 U.S.C. 78u–6(d)(2)(B).

[75] Designated staff would likely include, but need not be limited to, Commission staff members who were responsible for investigating and prosecuting the covered action.

[76] This is not intended to limit the authority of the staff to require confirmation of eligibility or the satisfaction of other conditions at any earlier time. *See* discussion of Proposed Rule 21F–8(d).

[77] *See, e.g., Benoit* v. *U.S. Dept. of Agriculture,* 608 F.3d 17, 21–24 (DC Cir. 2010) (dismissing appeal because petitioners failed to exhaust

Paragraph (g) of Proposed Rule 21F–10 describes the procedure in cases where a claimant submits a timely response pursuant to Paragraph (f). In such cases, the Claims Review Staff would consider the issues and grounds advanced in the claimant's response, along with any supporting documentation provided by the claimant, and would prepare a Proposed Final Determination. Paragraph (h) provides that the Whistleblower Office would notify the Commission of the Proposed Final Determination, but would not make the Proposed Final Determination public. Within thirty (30) days thereafter, any Commissioner would be able to request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination would become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission would review the record that the staff relied upon in making its determination, including the claimant's previous submissions to the Whistleblower Office. On the basis of its review of the record, the Commission would issue its Final Order, which the Commission's Secretary will provide to the claimant.

The objective of this administrative appeals process is to provide a transparent award determination process and provide whistleblowers full opportunity to make a written statement to the Commission for its consideration when it makes eligibility and award determinations. The proposed administrative process would enable a whistleblower to appeal to the Commission a preliminary determination by the Whistleblower Office concerning the percentage amount of an award; however, this process would in no way limit the Commission's discretion to make a determination with respect to the amount of an award. Under Section 21F(f) of the Exchange Act, determinations of the amount of an award are not appealable to the courts when the Commission has followed the statutory requirement to award between 10 and 30 percent of the monetary sanctions collected.

K. Proposed Rule 21F–11—Procedures for Determining Awards Based Upon a Related Action

Proposed Rule 21F–3(b) discussed above explains that the Commission is required to pay an award on amounts collected in certain related actions. Proposed Rule 21F–11 sets forth the procedures for determining awards based upon related actions. Paragraph (a) informs a whistleblower who is eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000 that the whistleblower may also be eligible to receive an award based on the monetary sanctions that are collected from a related action.

Paragraph (b) of Proposed Rule 21F–11 describes the procedures for making a claim for an award in a related action. The process essentially mirrors the procedure for making a claim in connection with a Commission action and requires the claimant to submit the claim on Form WB–APP. In addition to the questions previously described in our discussion of proposed Rule 21F–10, the claimant in a related action would be required to complete Section D of proposed form WB–APP. Proposed Items D1 through D4 request the name of the agency or organization to which the whistleblower provided the information and the date the information was provided, the name and telephone number for a contact at the agency or organization, if available, and the case name, action number and date the related action was filed.

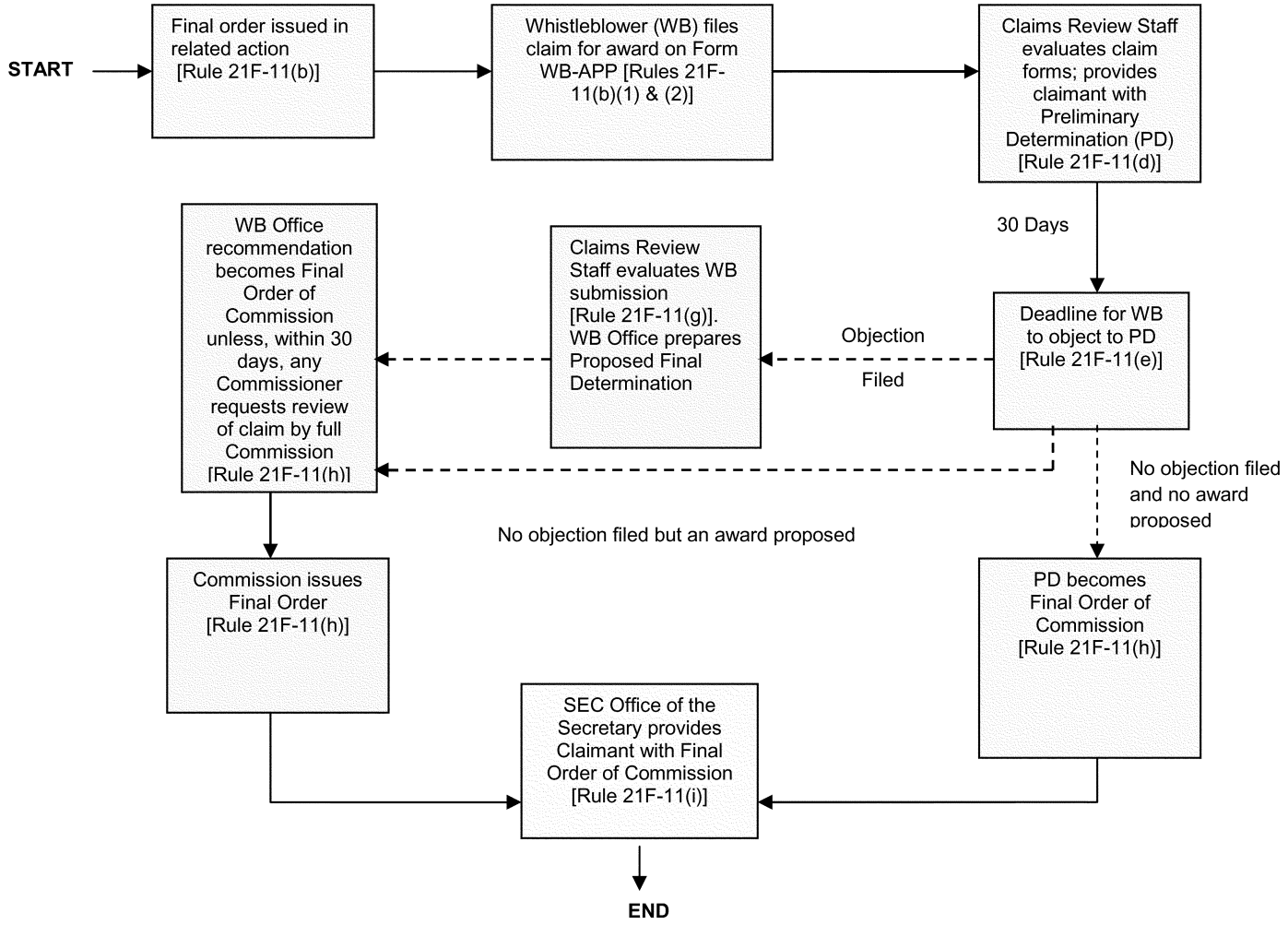
Paragraph (b) of Proposed Rule 21F–11 sets forth the deadline by which a claimant must file his or her Form WB–APP in a related action. Specifically, under proposed paragraph (b)(1), if a final order imposing monetary sanctions has been entered in a related action at the time the claimant submits the claim for an award in connection with a Commission action, the claimant would be required to submit the claim for an award in that related action on the same Form WB–APP used for the Commission action. Under proposed paragraph (b)(2), if a final order imposing monetary sanctions in a related action has not been entered at the time the claimant submits a claim for an award in connection with a Commission action, then the claimant would be required to submit the claim on Form WB–APP within sixty (60) days of the issuance of a final order imposing sanctions in the related action.

The Whistleblower Office may request additional information from the claimant in connection with the claim for an award in a related action to demonstrate that the claimant directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization the same original information that led to the Commission's successful covered action, and that this information led to the successful enforcement of the related action. In addition, the Whistleblower Office may, in its discretion, seek assistance and confirmation from the other agency in making this determination.

Paragraphs (d) through (i) of Proposed Rule 21F–11 describe the Commission's claims review process in related actions. The Commission proposes to utilize the same claims review process in related actions that it will utilize in connection with claims submitted in connection with a covered Commission action.

The following represents an overview of the proposed process:

administrative remedies with respect to their monetary claims against the government).



L. Proposed Rule 21F–12—Appeals

Section 21F of the Exchange Act provides for certain rights of appeal of orders of the Commission with respect to whistleblower awards.[78] Paragraph (a) of Proposed Rule 21F–12 tracks this provision and describes claimants' appeal rights. A decision of the Commission regarding the amount of an award is not appealable when the Commission has followed the statutory mandate to award between 10 and 30 percent of the monetary sanctions collected. A decision regarding whether or to whom to make an award may be appealed to an appropriate court of appeals within 30 days after the Commission issues its final decision. Under Section 25(a)(1) of the Exchange Act,[79] appeals of final orders of the Commission entered pursuant to the Exchange Act may be made to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the aggrieved person resides or has his principal place of business.

Paragraph (b) of Proposed Rule 21F–12 designates the materials that shall be included in the record on any appeal. They include the Whistleblower Office's Preliminary Determination, any materials submitted by the claimant or claimants (including the claimant's Forms TCR, WB–DEC, WB–APP, and materials filed in response to the Preliminary Determination), and any other materials that supported the Final Order of the Commission, with the exception of any internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim, such as the staff's Proposed Final Determination in the event it does not become the Final Order.

M. Proposed Rule 21F–13—Procedures Applicable to Payment of Awards

Proposed Rule 21F–13 (a) addresses the timing for payment of an award to a whistleblower. Any award made pursuant to the rules would be paid from the Securities and Exchange Commission Investor Protection Fund (the "Fund") established by Section 21F(g) of the Exchange Act.[80] Paragraph (b) provides that a recipient of a whistleblower award would be entitled to payment on the award only to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based. This requirement is derived from Section 21F(b)(1) of the Exchange Act,[81] which provides that an award is based upon the monetary sanctions collected in the Commission action or related action.

Paragraph (c) states that any payment of an award for a monetary sanction collected in a Commission action would be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the Notice of Covered Action for that action, or the date on which the monetary sanction is collected. Likewise, the payment of an award for a monetary sanction collected in a

[78] 15 U.S.C. 78u–6(f).
[79] 15 U.S.C. 78y(a)(1).
[80] 15 U.S.C. 78u–6(g).
[81] 15 U.S.C. 78u–6(b)(1).

related action would be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the related action, or the date on which the monetary sanction is collected. This provision is intended to cover situations where a single action results in multiple whistleblowers claims. Under this scenario, if one whistleblower appeals a Final Determination of the Commission denying the whistleblower's claim for an award, the Commission would not pay any awards in the action until that whistleblower's appeal has been concluded, because the disposition of that appeal could require the Commission to reconsider its determination and thereby could affect all payments for that action.

Paragraph (d) of Proposed Rule 21F–13 describes how the Commission would address situations where there are insufficient amounts available in the Fund to pay an award to a whistleblower or whistleblowers within a reasonable period of time of when payment should otherwise be made. In this situation, the whistleblower or whistleblowers would be paid when amounts become available in the Fund, subject to the terms set forth in proposed paragraphs (d)(1) and (d)(2). Under proposed paragraph (d)(1), where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action or related action, priority in making payment on these awards would be determined based upon the date that the collections for which the whistleblowers are owed payments occurred. If two or more of these collections occur on the same date, those whistleblowers owed payments based on these collections would be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments. Under proposed paragraph (d)(2), where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action or related action, they would share the same payment priority and would be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

As noted above, whistleblower awards will be paid solely from the Fund. Section 21F(g)(3) of the Exchange Act establishes the mechanism for funding the Fund. In most circumstances, the Fund will be funded with monetary sanctions that are collected by the Commission in its judicial and administrative actions and that are not distributed to victims of a violation of the securities laws underlying such actions. However, if the balance of the Fund is not sufficient to satisfy a whistleblower award, the law requires that there be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the Commission action on which the award is based. Therefore, it is possible for there to be circumstances in which monies that otherwise might have been distributed to victims pursuant to a Commission action could be required to be deposited into or credited to the Fund to pay a whistleblower award. In this situation, there would be a tension between the competing interests of paying an award to a whistleblower (as provided for in Section 21F) and compensating victims with monies collected from wrongdoers (as recognized in Section 308 of the Sarbanes-Oxley Act).

Request for Comment:

37. We request comment on the significance of the tension between the interests of whistleblowers and victims in this circumstance, the likelihood that this situation would arise, and whether there is anything that the Commission can or should do to mitigate this tension.

N. Proposed Rule 21F–14—No Amnesty

Proposed Rule 21F–14 provides notice that the provisions of Section 21F of the Exchange Act do not provide amnesty to individuals who provide information to the Commission relating to a violation of the securities laws. Whistleblowers who have not participated in misconduct will of course not need amnesty. However, some whistleblowers who provide original information that significantly aids in detecting and prosecuting sophisticated securities fraud schemes may themselves be participants in the scheme who could be subject to Commission enforcement actions. These individuals will not be immune from prosecution. Rather, the Commission will analyze the unique facts and circumstances of each case in accordance with its Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, 17 CFR 202.12, to determine whether, how much, and in what manner to credit cooperation by whistleblowers who have participated in misconduct. This Policy Statement provides an incentive to report information to the Commission notwithstanding that the whistleblower program does not provide amnesty.

O. Proposed Rule 21F–15—Awards to Whistleblowers Who Engage in Culpable Conduct

Proposed Rule 21F–15 states that in determining whether the required $1,000,000 threshold has been satisfied for purposes of making an award to a whistleblower, the Commission will not count any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated. The Commission also will not add those amounts to the total monetary sanctions collected in the action for purposes of calculating any payment to the culpable individual. The rationale for this limitation is to prevent wrongdoers from financially benefiting by, in essence, blowing the whistle on their own misconduct. Because the common understanding of a whistleblower is one who reports misconduct by another person, we are preliminarily of the view that it would not be consistent with the purposes of the statute to pay awards to persons based on monetary sanctions arising from their own misconduct. A logical corollary to this principle is that a whistleblower also should not be paid an award based on monetary sanctions paid by an entity whose liability resulted from the whistleblower's conduct.

Request for Comment: We request comment on whether the limitations provided in Proposed Rule 21F–15 are appropriate.

38. For example, in determining whether the $1,000,000 threshold for a covered action has been met, should we exclude monetary sanctions ordered against an entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated? Should we exclude those amounts from monetary sanctions collected for purposes of making payments to whistleblowers?

39. Is the proposed exclusion of monetary sanctions ordered against an entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated appropriate? Is the proposed exclusion sufficient to permit the Commission to deny awards in cases where the payment of an award would be against public policy? Should we instead exclude any wrongdoer from being eligible to receive an award categorically, or in particular circumstances? Should an individual's level of culpability be considered as a factor in determining whether the person is eligible for an award? Are

there other ways in which we should limit the payment of awards to culpable individuals?

P. Proposed Rule 21F–16—Staff Communications With Whistleblowers

Proposed Rule 21F–16(a) provides that no person may take any action to impede a whistleblower from communicating directly with the Commission staff about a potential securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F–4(b)(4)(i) & (ii) of this chapter related to the legal representation of a client) with respect to such communications. As noted, the Congressional purpose underlying Section 21F of the Exchange Act is to encourage whistleblowers to report potential violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees. Efforts to impede a whistleblower's direct communications with Commission staff about a potential securities law violation, however, would appear to conflict with this purpose. For example, an attempt to enforce a confidentiality agreement against a whistleblower to prevent his or her communications with Commission staff about a potential securities law violation could inhibit those communications even when such an agreement would be legally unenforceable,[82] and would undermine the effectiveness of the countervailing incentives that Congress established to encourage whistleblowers to disclose potential violations to the Commission. Proposed Rule 21F–16(a) is designed to prevent this result. The proposed rule would not, however, address the effectiveness or enforceability of confidentiality agreements in situations other than communications with the Commission about potential securities law violations. Proposed Rule 21F–16(a) is not intended to prevent a professional or religious organization from responding to a breach of a recognized common-law or statutory privilege (*e.g.,* psychiatrist-patient, priest-penitent) by one of its members.

Proposed Rule 21F–16(b) would clarify the staff's authority to communicate directly with whistleblowers who are directors, officers, members, agents, or employees of an entity that has counsel, and who have initiated communication with the Commission related to a potential securities law violation. The proposed rule would make clear that the staff is authorized to communicate directly with these individuals without first seeking the consent of the entity's counsel. The objective of proposed Rule 21F–16 is to implement several important policies inherent in Section 21F in a manner consistent with the state bar ethics rules governing the professional responsibilities of lawyers.

Every jurisdiction that regulates the professional responsibility of lawyers has adopted some variation of ABA Model Rule 4.2, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." [83]

In the context of organizational entities represented by lawyers,[84] a difficulty in applying the various state versions of ABA Model Rule 4.2 is identifying those actors within the entity—such as directors or officers—that are the embodiment of the represented entity such that the proscription against contact applies.[85] This is so in part because the various state bar ethics rules have differing definitions of which organizational constituents are covered by Rule 4.2.[86]

As explained above, however, Section 21F of the Exchange Act evinces a Congressional purpose to facilitate the disclosure of information to the Commission relating to potential securities law violations and to preserve the confidentiality of those who do so.[87] This Congressional policy would be significantly impaired were the Commission required to seek the consent of an entity's counsel before speaking with a whistleblower who contacts us and who is a director, officer, member, agent, or employee of the entity. Similarly, whistleblowers falling within these categories could be less inclined to report possible securities law violations if they believed there was a risk that the Commission staff might be required to request consent of the entity's counsel—thus disclosing the whistleblower's identity—before speaking to him or her.

For this reason, Section 21F necessarily authorizes the Commission to communicate directly with these individuals without first obtaining the consent of the entity's counsel. Proposed Rule 21F–16(b) would clarify this authority by providing that, in the context of whistleblower-initiated contacts with the Commission, all discussions with a director, officer, member, agent, or employee of an entity that has counsel are "authorized by law" [88] and, will therefore not require consent of the entity's counsel as might otherwise be required by rules of professional conduct.[89]

Request for Comment: We request comment on whether the provisions dealing with whistleblowers' communications with the Commission

[82] *See, e.g., In re JDS Uniphase Corp. Sec. Litig.,* 238 F.Supp.2d 1127, 1137 (N.D.Cal.2002) ("To the extent that [the confidentiality] agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with public policy in favor of allowing even current employees to assist in securities fraud investigations."); *Chambers* v. *Capital Cities/ABC,* 159 F.R.D. 441, 444 (S.D.N.Y.1995) (holding that "it is against public policy for parties to agree not to reveal * * * facts relating to alleged or potential violations of [Federal] law").

[83] Model Rules of Prof'l Conduct R. 4.2. The primary purpose of ABA Model Rule 4.2 is to protect the attorney-client relationship and to protect represented persons, in the absence of their lawyers, from being taken advantage of by lawyers who are not representing their interests.

[84] *See generally Upjohn Co.* v. *United States,* 449 U.S. 383 (1981).

[85] Comment 7 to ABA Model Rule 4.2 addresses this issue:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

[86] Comment 5 to the ABA Model Rule 4.2 specifically carves out a potential exception for "investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." The commentary, and most state professional responsibility rules, do not specify which governmental investigative activities are exempt.

[87] *See, e.g.,* Exchange Act Section 21F (b)–(d) and (h), 15 U.S.C. 78u–6 (b)–(d) and (h).

[88] As noted, ABA Model Rule 4.2 allows for contacts with represented persons without the consent of the person's lawyer if such contacts are "authorized by law." Every state bar ethics rules, in accordance with ABA Model Rule 4.2, has some variation of an authorized by law exception. Thus, in the context of communications initiated by a whistleblower who is also the director, officer, member, agent, or employee of an entity that has counsel, the proposed rule would make clear that contacts and communications between these individuals and the staff are "authorized by law."

[89] The proposed rule is not intended, and will not be used, to obtain otherwise privileged information about the entity. *See* SEC Division of Enforcement Manual sec. 3.3.1.

staff provided in Proposed Rule 21F–16 are appropriate.

40. Should these provisions be narrowed and, if so, why and in what manner? Would these provisions encourage whistleblowers to provide information to the Commission regarding potential securities law violations? Are there additional measures that the Commission could consider to encourage and facilitate whistleblowers' communications with Commission staff?

41. Should the Commission consider rules to address other potential issues that may arise from state bar professional responsibility rules when the Commission staff receives information about potential securities law violations from whistleblowers? For example, are there circumstances where the staff's receipt of information from whistleblowers potentially conflicts with the state bar professional responsibility rules that are modeled on ABA Model Rules of Professional Responsibility 4.4(a) and 8.4(a)? If so, should the Commission consider promulgating rules to address these potential conflicts?

III. General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our Proposed Rules. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

In addition, the Commission is seeking comment on whether it should promulgate rules regarding the interpretation or implementation of the anti-retaliation provisions of Section 21(h) of the Exchange Act. If so, what specific rules should the Commission consider promulgating?

42. Should the anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act be applied broadly to any person who provides information to the Commission concerning a potential violation of the securities laws, or should they be limited by the various procedural or substantive prerequisites to consideration for a whistleblower award? Should the application of the anti-retaliation provisions be limited or broadened in any other ways? For example, should the Commission consider promulgating a rule to exclude frivolous or bad faith whistleblower claims from the protections afforded by the anti-retaliation provisions? If so, what rules should be adopted to address these problems?

43. Are there rule proposals that the Commission should consider promulgating to ensure that the anti-retaliation provisions are not used to protect employees from otherwise appropriate employment actions (*i.e.,* employment actions that are not based on reporting potential securities law violations)?

IV. Paperwork Reduction Act

Certain provisions of the proposed rule contain "collection of information" requirements within the meaning of the Paperwork Reduction Act ("PRA") of 1995.[90] An agency may not sponsor, conduct, or require a response to an information collection unless a currently valid Office of Management and Budget ("OMB") control number is displayed. The Commission is submitting the proposed collections of information to OMB for review in accordance with the PRA.[91] The titles for the collections of information are: (1) Form TCR (Tip, Complaint or Referral), (2) Form WB–DEC (Declaration Concerning Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934), and (3) Form WB–APP (Application for Award for Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934). Under Proposed Rules 21F–9, 10, and 11, all three proposed forms would be necessary to implement Section 21F of the Exchange Act; the forms allow a whistleblower to provide information to the Commission and its staff regarding (i) potential violations of the securities laws and (ii) the whistleblower's eligibility for and entitlement to an award.

A. Summary of Collection of Information

Proposed Form TCR, submitted pursuant to Proposed Rule 21F–9, would request the following information:

(1) Background information regarding the person submitting the TCR, including the person's name contact information, and occupation;

(2) If the person is represented by an attorney, the name and contact information for the person's attorney (in cases of anonymous submissions the person must be represented by an attorney);

(3) Information regarding the person or entity that is the subject of the tip, complaint or referral, including contact information;

(4) Information regarding the tip, complaint or referral, including the date of occurrence of the event being described, whether the person is complaining about an entity with which he is or was associated as an officer, director, employee, consultant or contractor, whether the person has taken any prior actions regarding his complaint, facts in support of the allegations, any additional relevant information, a description of all supporting materials, an explanation of why the allegations described constitute a violation of the Federal securities laws, and, if relevant, the name of the issuer, and the name and type of security or investment involved;

(5) A description of how the person submitting the original information learned about and/or obtained the information submitted and, if any information was obtained from a public source, a description of such source.

Proposed Form WB–DEC, submitted pursuant to Proposed Rule 21F–9, would require the following information:

(1) Background information regarding the person submitting the TCR, including the person's name and contact information;

(2) If the person is represented by an attorney, the name and contact information for the attorney (in cases of anonymous submissions the person must be represented by an attorney);

(3) Details concerning the tip or complaint, including (A) the manner in which the information was submitted to the SEC, (B) the TCR number (required if the person submitted his information through the SEC Web site) and date submitted to the SEC, (C) the individual or entity to which the tip, complaint or referral relates, (D) whether the person or his counsel has had communications with the SEC concerning his matter, (E) the relevant SEC staff member with whom they communicated, and (F) if the person or his counsel provided the information to another agency or organization, the details of that communication, and the name and contact information for the point of contact at the agency or organization, if known;

(4) A certification that the person submitting the original information: (A) Is not, or was not at the time the person acquired the original information submitted to the Commission, a member, officer or employee of (i) the Securities and Exchange Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit

[90] 44 U.S.C. 3501 *et seq.*

[91] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Insurance Corporation, the Office of Thrift Supervision; (ii) the Department of Justice; (iii) the Public Company Accounting Oversight Board; (iv) any law enforcement organization; (v) any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board; or (vi) a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Exchange Act of 1934, 15 U.S.C. 78c(a)(52); (B) did not gain the information through the performance of an engagement required under the securities by an independent public accountant; (C) did not provided the information pursuant to a cooperation agreement with the SEC or another agency or organization; (D) is not a spouse, parent, child, or sibling of a member or employee of the Commission, and does not reside in the same household as a member or employee of the Commission; (E) did not acquire the information from any person described in Subsection (4)(A) through (D) above; (F) is not currently a subject or target of a criminal investigation, or has not been convicted of a criminal violation in connection with the information upon which the application for the award is based; and (G) provided the information before he (or anyone representing him) received any request, inquiry or demand from the SEC, Congress, or any other Federal, State or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board;

(5) A declaration, signed under penalty of perjury under the laws of the United States, that the information provided to the Commission pursuant to Proposed Rule 21F–9 of this Subpart is true, correct and complete to the best of the person's knowledge, information and belief; and

(6) A counsel certification, certifying that the attorney has verified the identity of the whistleblower who completed Form WB–DEC by viewing the whistleblower's valid, unexpired government issued identification, reviewed the whistleblower's Form WB–DEC for completeness and accuracy, and will retain for his records an original, signed copy of the Form WB–DEC completed by the whistleblower.

Proposed Form WB–APP, submitted pursuant to Proposed Rule 21F–10, would require the following information:

(1) The applicant's name, address and contact information;

(2) The applicant's social security number, if any;

(3) If the person is represented by an attorney, the name and contact information for the attorney (in cases of anonymous submissions the person must be represented by an attorney);

(4) Details concerning the tip or complaint, including (A) the manner in which the information was submitted to the SEC, (B) the subject of the tip, complaint or referral, (C) the TCR number, and (D) the date the TCR was submitted to the SEC;

(5) Information concerning the Notice of Covered Action to which the claim relates, including (A) the date of the Notice, (B) the Notice number, and (C) the Case name and number;

(6) For related actions, (A) the name and contact information for the agency or organization to which the person provided the original information; (B) the date the person provided his information, (C) the date the agency or organization filed the related action, (D) the case name and number of the related action, and (E) the name and contact information for the point of contact at the agency or organization, if known;

(7) A certification of the person's eligibility to receive an award as described in Subsection (4) concerning Form WB–DEC above;

(8) An explanation of the reasons that the person believes he is entitled to an award in connection with his submission of information to the Commission, or to another agency in a related action including any additional information and supporting documents that may be relevant in light of the criteria for determining the amount of an award set forth in Proposed Rule 21F–6 of this subpart, and any supporting documents; and

(9) A declaration under penalty of perjury under the laws of the United States that the information provided in Form WB–APP is true, correct and complete to the best of the person's knowledge, information and belief.

B. Proposed Use of Information

The collection of information on proposed Forms TCR, WB–DEC and WB–APP would be used to permit the Commission and its staff to collect information from whistleblowers regarding alleged violations of the Federal securities laws and to determine claims for whistleblower awards.

C. Respondents

The likely respondents to proposed Forms TCR and WB–DEC would be those individuals who alone, or jointly with others, have provided the Commission staff with information relating to a potential violation of the securities laws, and those who wish to be eligible for whistleblower awards under this Subpart, respectively.

The likely respondents to proposed Form WB–APP would be those individuals who have provided the Commission staff with information relating to a potential violation of the securities laws by filing Forms TCR and WB–DEC signed under penalty of perjury, and who believe they are entitled to an award under this Subpart.

D. Total Annual Reporting and Recordkeeping Burden

i. Proposed Form TCR

The Commission estimates that it would receive approximately 30,000 completed Forms TCR and electronic submissions through the Electronic Data Collection System each year.[92] Of those 30,000 submissions, the Commission estimates that it would receive approximately 3,000 Forms TCR each year.[93] Each respondent would submit only one Form TCR and would not have a recurring obligation. The Commission also estimates that it will take a whistleblower, on average, one hour to complete Form TCR. The completion time will depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of the allegations. As a result, the Commission estimates that the estimated annual PRA burden of Form TCR is 3,000 hours.

ii. Proposed Form WB–DEC

Each whistleblower who has completed a Form TCR or made an electronic submission of information

[92] This number is a staff estimate based upon the volume of tips, complaints or referrals received by the Commission on a monthly basis during the past year. The staff believes that the volume of tips, complaints and referrals the Commission has received more recently, and particularly in the months since the passage of Dodd-Frank, provides a more accurate basis for estimating future volumes.

[93] This number is a staff estimate based upon the expectation that roughly 10 percent of all tips received by the Commission would be submitted in hard copy on proposed Form TCR. The staff anticipates that most whistleblowers would elect to submit their information electronically. The electronic submission of information would provide whistleblowers with increased ease of use and will allow whistleblowers to submit more detailed information in roughly the same amount of time it would take them to complete a hard copy Form TCR. Moreover, the Commission should be able to use the information submitted electronically more effectively and efficiently. For example, the Commission will be able to conduct electronic searches of information without first having to convert the data into an electronic format.

through the Electronic Data Collection System and wishes to be eligible for an award under the Program would be required to provide a Form WB–DEC to the Commission. The Commission estimates that it would receive a Form WB–DEC in roughly 50 percent of the cases in which the Commission receives a Form TCR or an electronic submission of information.[94] As noted above, the Commission estimates that it would receive approximately 30,000 combined electronic submissions and submission on Form TCR each year. Thus, the Commission estimates that it would receive approximately 15,000 Forms WB–DEC each year. Each respondent would submit only one Form WB–DEC and would not have a recurring obligation. The Commission also estimates that it would take a whistleblower, on average, 0.5 hours to complete Form WB–DEC. As a result, the Commission estimates that the annual PRA burden of Form WB–DEC is 7,500 hours.

iii. Proposed Form WB–APP

Each whistleblower who believes that he is entitled to an award because he provided original information to the Commission that led to successful enforcement of a covered judicial or administrative action, or a related action, would be required to submit a Form WB–APP to be considered for an award. A whistleblower could only submit a Form WB–APP after there has been a "Notice of Covered Action" published on the Commission's Web site pursuant to Proposed Rule 21F–10. The Commission estimates that it would post approximately 130 such Notices each year.[95] The Commission then estimates that it would receive approximately 117 Forms WB–APP each year.[96] The Commission also estimates that it would take a whistleblower, on average, two hours to complete Form WB–APP. The completion time would depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of his application for an award. As a result, the Commission estimates that the annual PRA burden of Form WB–APP is 234 hours.

iv. Involvement and Cost of Attorneys

Under the Proposed Rules, a whistleblower who discloses his identity may elect, and an anonymous whistleblower is required, to retain counsel to represent the whistleblower in the Whistleblower Program. The Commission expects that in most of those instances the whistleblower's counsel will complete, or assist in the completion, of some or all of the required forms on behalf of the whistleblower. The Commission also expects that in the vast majority of cases in which a whistleblower is represented by counsel, the whistleblower will enter into a contingency fee arrangement with counsel, providing that counsel will be paid for the representation through a fixed percentage of any recovery by the whistleblower under the Program. Thus, most whistleblowers will not incur any direct, quantifiable expenses for attorneys' fees for the completion of the required forms.

The Commission anticipates that a small number of whistleblowers (no more than five percent of all whistleblowers) will enter into hourly fee arrangements with counsel.[97] In those cases, a whistleblower will incur direct expenses for attorneys' fees for the completion of the required forms. To estimate those expenses, the Commission makes the following assumptions:

(i) The Commission will receive approximately 3,000 Forms TCR, 15,000 Forms WB–DEC, and 117 Forms WB–APP annually;[98]

(ii) Whistleblowers will pay hourly fees to counsel for the submission of approximately 150 Forms TCR, 750 Forms WB–DEC, and 6 Forms WB–APP annually;[99]

(iii) Counsel retained by whistleblowers pursuant to an hourly fee arrangement will charge on average $400 per hour;[100] and

(iv) Counsel will bill on average: (i) 2 hours to complete a Form TCR, (ii) .5 hours to complete a Form WB–DEC, and (iii) 10 hours to complete a Form WB–APP.[101]

Based on those assumptions, the Commission estimates that each year whistleblowers will incur the following total amounts of attorneys' fees for completion of the Whistleblower Program forms: (i) $120,000 for the completion of Form TCR; (ii) $150,000 for the completion of Form WB–DEC; and (iii) $24,000 for the completion of Form WB–APP.

E. Mandatory Collection of Information

A whistleblower would be required to complete either a Form TCR or submit his information electronically and to complete both Forms WB–DEC and WB–APP to qualify for a whistleblower award.

F. Confidentiality

As explained above, the statute provides that the Commission must maintain the confidentiality of the identity of each whistleblower, subject to certain exceptions. Section 21F(h)(2) states that, except as expressly provided:

- [T]he Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission [or certain specific entities listed in paragraph (C) of Section 21F(h)(2)].

[94] This number is a staff estimate. Because this is a new program, the staff does not have prior relevant data on which it can base its estimate.

[95] This number is a staff estimate based upon the average number of actions during the past five years in which the Commission recovered monetary amounts, including penalties, disgorgement or prejudgment interest, in excess of $1,000,000 and the assumption that there should be an increase (roughly 30 percent) in the number of such actions as a result of the whistleblower program.

[96] This number is a staff estimate based upon several expectations: first, that the Commission would receive Forms WB–APP in approximately 30 percent of cases in which it posts a Notice of Covered Action because we expect that we will continue to bring a substantial number of enforcement cases that are not based on whistleblower information; and second, that we will receive approximately 3 Forms WB–APP in each of those cases. Because this is a new program, the staff does not have prior relevant data on which it can base these estimates.

[97] This estimate is based, in part, on the Commission's belief that most whistleblowers likely will not retain counsel to assist them in preparing the forms.

[98] The bases for these assumed amounts are explained in Sections V.D.i., V.D.ii. and V.D.iii. above.

[99] These amounts are based on the assumption, as noted above, that no more than 5 percent of all whistleblowers will be represented by counsel pursuant to an hourly fee arrangement. The estimate of the number of Forms TCR submitted by attorneys on behalf of whistleblowers may turn out to be high because it is likely that most attorneys will submit tips electronically, rather than use the hard-copy Form TCR. However, in the absence of any historical data to rely upon, the Commission assumes that attorneys will submit hard-copy Forms TCR in the same percentages as all whistleblowers.

[100] The Commission uses this hourly rate for estimating the billing rates of securities lawyers for purposes of other rules. Absent historical data for the Commission to rely upon in connection with the whistleblower program, the Commission believes that this billing rate estimate is appropriate, recognizing that some attorneys representing whistleblowers may not be securities lawyers and may charge different average hourly rates.

[101] The Commission expects that counsel will likely charge a whistleblower for additional time required to gather from the whistleblower or other sources relevant information needed to complete Forms TCR and WB–APP. Accordingly, the Commission estimates that on average counsel will bill a whistleblower two hours for the completion of Form TCR and ten hours for completion of Form WB–APP (even though the Commission estimates that a whistleblower will be able to complete Form TCR in one hour and Form WB–APP it two hours).

Section 21F(h)(2) also allows the Commission to share information received from whistleblowers with certain domestic and foreign regulatory and law enforcement agencies. However, the statute requires the domestic entities to maintain such information as confidential, and requires foreign entities to maintain such information in accordance with such assurances of confidentiality as the Commission deems appropriate.

In addition, Section 21F(d)(2) provides that a whistleblower may submit information to the Commission anonymously, so long as the whistleblower is represented by counsel. However, the statute also provides that a whistleblower must disclose his or her identity prior to receiving payment of an award.

Request for Comment: Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comments to:

- 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 Commission's estimate of burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and
- Evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

The Commission requests comment and supporting empirical data on the burden and cost estimates for the proposed rule, including the costs that potential whistleblowers may incur.

Persons wishing to submit comments on the collection of information requirements of the proposed rule should direct them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503 and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–33–10. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–33–10, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication.

V. Cost-Benefit Analysis

A. Introduction

The Commission is proposing rulemaking to implement the provisions of new Section 21F of the Exchange Act, added by Section 922 of Dodd-Frank to provide additional incentives and protections to whistleblowers who provide information relating to violations of the securities laws. Before Dodd-Frank, the Commission regularly received tips, complaints and referrals concerning securities law violations. Tips have provided, and continue to provide, the Commission with valuable information regarding potential violations of the Federal securities laws, as well as information about new market trends, products or practices that may help the agency in support of its mission.

In establishing the new whistleblower program in Section 21F, Congress sought to create and enhance incentives and protections for whistleblowers providing information leading to successful Commission enforcement actions.[102] Although whistleblowers can be motivated by other factors,[103] the statute creates new and substantial financial incentives for individuals to provide the Commission with information regarding potential violations of the Federal securities laws. The statutory requirements for an award—that whistleblowers are entitled to an award only if they voluntarily provide original information, and then only if that information leads to a successful enforcement action—are designed to encourage whistleblowers to provide high-quality tips and continuing cooperation. Moreover, the statutory provisions permitting anonymous submissions and prohibiting retaliation against whistleblowers should encourage submissions from employees of companies possibly engaged in misconduct.[104] Overall, enhanced whistleblower incentives should likely result in more frequent reporting of misconduct, which will result in greater deterrence of securities law violations and more effective and efficient enforcement on the part of the Commission.[105]

The incentives created by the statute also present some significant challenges. First, the statute could provide financial incentives for attorneys and others to breach the attorney-client privilege in order to seek an award. This would interfere with the ability of companies and individuals to share information with an attorney while seeking legal advice. Second, the statute could provide financial incentives for employees to report violations to the Commission rather than follow their employers' internal compliance procedures. This could undermine the effectiveness of internal compliance programs. Third, the statute could result in an increase in spurious allegations, forcing innocent companies and individuals to incur substantial cost to investigate into and defend against the false allegations. Finally, the statute could result in award payments to individuals who have violated the Federal securities laws. This could result in perverse incentives by potentially encouraging violations of the law.

Although many of the requirements of the whistleblower award program are established by the statute, Congress required the Commission to issue rules and regulations necessary or appropriate to implement the Program. In that regard, the Commission has exercised its discretion in this rulemaking to propose rules that contain several key definitional or interpretive provisions that help define the scope of the program, and procedures that whistleblowers will be required to follow to submit information to the

[102] *See* S. Rep. No. 111–176 at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws * * *").

[103] The incentives to whistleblowers include not only the monetary award, but also a desire to cleanse the conscience or prevent harm to others. *See* Anthony Heyes and Sandeep Kapur, An Economic Model of Whistleblower Policy, 25 J.L. ECON. & ORG. 157 at 159, 164, 171.

[104] Specifically, Dodd-Frank makes it unlawful for any employer to "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment." The statute also provides that any individual who alleges retaliation under the Act may bring an action in the appropriate Federal district court. Moreover, the statute allows any individual to submit information anonymously through a lawyer. As a result, in many cases, employers will be unaware when their employees submit tips to the Commission.

[105] *See* Alexander Dyck *et al.,* "Who Blows the Whistle on Corporate Fraud?" working paper (2009) (reporting that "having access to * * * monetary rewards has a significant impact on the probability a stakeholder becomes a whistleblower."), available at *http://faculty.chicagobooth.edu/luigi.zingales/research/papers/whistle.pdf.*

Commission and to apply for awards under the Program, as described below.

Proposed Rule 21F–4 defines three terms—(i) "Voluntary Submission of Information," (ii) "Independent Knowledge," and (iii) "Information that Leads to Successful Enforcement"—that together play a significant role in determining whether a whistleblower is eligible for an award. Proposed Rule 21F–4(a) defines "Voluntary Submission of Information" to state that a whistleblower must provide information to the Commission prior to receiving a request from the Commission or other relevant authority. The proposed definition also provides that a whistleblower "will be considered to have received a request, inquiry or demand if documents or information from [the whistleblower] are within the scope of a request, inquiry, or demand that [the whistleblower's] employer receives unless, after receiving the documents or information from [the whistleblower, the] employer fails to provide [the whistleblower's] documents or information to the requesting authority in a timely manner." This proposed definition requires that, to be eligible for an award, a whistleblower or his representative provide his information regarding a potential violation before he or his company receives a request, inquiry or demand from the Commission or other investigatory authority.

Proposed Rule 21F–4(b)(4) states that a whistleblower will not be considered to have provided "independent knowledge" if "[the whistleblower] obtained the knowledge or the information upon which [his] analysis is based: (i) Through a communication that was subject to the attorney-client privilege, unless the disclosure of that information is otherwise permitted by § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise; (ii) as a result of the legal representation of a client on whose behalf [the whistleblower's] services, or the services of [the whistleblower's] employer or firm, have been retained, and [the whistleblower] seek[s] to use the information to make a whistleblower submission for [his] own benefit unless disclosure is authorized by § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise; (iii) through the performance of an engagement required under the securities laws by an independent public accountant, if that information relates to a violation by the engagement client or the client's directors, officers or other employees; (iv) because [the whistleblower was] a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity, and the information was communicated to [the whistleblower] with the reasonable expectation that [he] would take steps to cause the entity to respond appropriately to the violation, unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith; or (v) otherwise from or through an entity's legal, compliance, audit or other similar functions or processes for identifying, reporting and addressing potential non-compliance with law, unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith; (vi) [b]y a means or in a manner that violates applicable Federal or State criminal law."

Proposed Rule 21F–4(c) defines "Information that Leads to Successful Enforcement" such that a whistleblower is only entitled to an award if (i) the whistleblower provides information that causes the staff "to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning new or different conduct as part of a current examination or investigation" and the information "significantly contributed to the success of the action" or (ii) the whistleblower provides information regarding "conduct that was already under examination or investigation" and the information "would not otherwise have been obtained and was essential to the success of the action."

Proposed Rule 21F–6 sets forth the criteria for determining the amount of the award to be made to a whistleblower. Three of the stated criteria are derived from the statute, but the proposed rule also includes a fourth factor: whether the award otherwise enhances the Commission's ability to enforce the Federal securities laws, protect investors, and encourage the submission of high quality information from whistleblowers.

Proposed Rule 21F–8 states additional criteria for eligibility for an award. A number of these are derived from the statute, but the proposed rule also provides that a whistleblower may be required to provide various types of cooperation to the staff or enter a confidentiality agreement. In addition to certain statutory exclusions from eligibility, the proposed rule also excludes any person who is, or was at the time of acquiring information, a member, officer, or employee of a foreign government or certain other foreign entities.

Proposed rules 21F–9, 10, and 11 set forth the procedures for submitting original information and making a claim for an award. First, pursuant to Proposed Rule 21F–9(a), a whistleblower must complete either Form TCR or submit information electronically through the Electronic Data Collection System. Second, pursuant to Proposed Rule 21F–9(b), a whistleblower must complete and submit Form WB–DEC, sworn under penalty of perjury. A whistleblower wishing to submit a hard-copy Form TCR would be required to submit Form WB–DEC at the same time as he or she submits a Form TCR. A whistleblower wishing to submit information electronically could submit Form WB–DEC electronically or in hard copy within 30 days of the Commission's receipt of the whistleblower's electronic submission of information.

The proposed rules also require potential whistleblowers to complete a third form in the claims phase to establish potential eligibility for an award under the Program. Pursuant to Proposed Rules 21F–10 and 21F–11, a whistleblower must complete Form WB–APP to apply for an award for a covered judicial or administrative action by the Commission or a related action.

Proposed Rule 21F–15 would provide, that "[i]n determining whether the required $1,000,000 threshold has been satisfied * * * for purposes of making any award [to a whistleblower], the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay." Likewise, Proposed Rule 21F–15 would provide that the Commission will not take into account any monetary sanctions "that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated." Proposed Rule 21F–15 further would provide that "if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments [to the whistleblower]."

Proposed Rule 21F–16(b) states that if a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel has initiated communications with the Commission relating to a potential securities law violation, the staff is authorized to communicate directly with the whistleblower regarding the subject of the communication without seeking the consent of the entity's counsel.

We are sensitive to the costs and benefits of our rules. As discussed

above, many of the key elements of the whistleblower program have been established by the statute, and our proposed rules implementing the statute in some respects largely track statutory provisions. The cost-benefit analysis that follows focuses on the benefits and costs related to those rules on which we exercised discretion, and not on the overall benefits and costs of the statutory regime for whistleblower incentives and protections.

B. Benefits

We have sought to structure the definitions in Proposed Rule 21F–4 so as to encourage whistleblowers to provide the Commission with high-quality information—tips indicating a high likelihood of a substantial securities violation—that we might not otherwise have received in a timely manner.

We have also sought to strike the right balance in defining terms so as not to be overly restrictive or overly broad. Overly restrictive definitions could render the program ineffective as only a small fraction of potential tippers and complainants would qualify for monetary rewards. By contrast, overly broad definitions could result in inefficient use of the Investor Protection Fund—especially in cases in which the Commission already possesses information sufficient to bring a successful enforcement action. From an economic perspective of enforcement, the primary value of the Whistleblower Program is reduced economic cost of collecting necessary information early on and before the Commission can obtain the information on its own. The primary economic cost of the Program includes the out-of-pocket costs as well as opportunity costs, which include losses due to fraud and costs of enforcement. Consequently, the proposed definitions together should provide benefits in that they create strong incentives, in the form of eligibility for a monetary award, for whistleblowers to provide information to the Commission or other authorities and to provide the information early, rather than waiting to receive a request or inquiry from a relevant authority.[106] This may be a particular result of the definition of "voluntary submission of information" in Proposed Rule 21F–4; that rule would deny eligibility for an award to a whistleblower who has valuable information regarding potential violations of the Federal securities laws if he has received a subpoena or other request relating to the alleged violations in question—even if the subpoena or request does not call for the production of the valuable information.

The definition of "information that leads to successful enforcement" in Proposed Rule 21F–4(c) may also have the benefit of encouraging submission of high-quality information that is particularly useful to successful enforcement actions. By requiring that the whistleblower provide information that either "significantly contributed" to the success of an action (if the whistleblower has provided information that has led the Commission to begin investigating that matter), or that "would not otherwise have been obtained and was essential to the success of the action" (if the information related to a matter already under examination or investigation), this proposed definition should help to screen out less significant tips from eligibility for awards, and as a result, lead to a more efficient use of Commission resources and the Investor Protection Fund. Further, by requiring this level of connection to the success of an action, the proposed rule may have the benefit of encouraging whistleblowers to provide more and better information. Similarly, the criterion contained in Proposed Rule 21F–6(d), which allows the Commission to consider its ability to enforce the securities laws, protect investors and encourage high quality information as a criterion in determining the amount of an award to be paid, may have the benefit of encouraging better quality information, thus furthering effective enforcement and investor protection.

As noted, the Commission recognizes that whistleblower awards, as provided for by the statute, could potentially create incentives for employees of companies to submit information regarding potential violations to the Commission rather than to compliance personnel or through compliance procedures.[107] This in turn could undermine the effectiveness of internal company compliance processes. We have sought to address and mitigate that concern, in part, through the proposed definition of "Independent Knowledge" in Proposed Rule 21F–4(b)(2). While the restrictions in this definition would limit the pool of eligible whistleblowers and thereby reduce the number of potentially useful informants, the definition could have the benefit of limiting potential interference with the integrity of corporate compliance programs of companies, which could reduce the overall efficiency of day-to-day compliance operations.

As with the proposed definition of "Independent Knowledge" addressed above, the Commission believes that the procedures relating to the timing of the submission of "original information" could mitigate costs that the Whistleblower Program might impose on companies and their compliance programs and procedures. Importantly, the proposed procedures will allow a potential whistleblower to provide information to legal or compliance personnel within his or her company, and wait for up to 90 days, without compromising his or her eligibility for an award under the Program. This would also allow a company a reasonable period of time to investigate and respond to potential securities laws violations (or at least begin an investigation) prior to reporting them to the Commission or an appropriate regulator. Therefore, this approach is consistent with the Commission's efforts to encourage companies to create and implement strong corporate compliance programs.

One economic benefit of providing this grace period is that the individual could be mistaken about securities laws, and the compliance personnel would likely be better informed about whether certain conduct constitutes a violation of securities laws. Without this grace period, individuals, regardless of whether their judgments regarding certain violations were correct, could be motivated to report a suspicious finding as soon as possible. The overall effect could be an overflow of noisy signals—that is, a large number of tips of varying quality—causing the Commission to incur costs to process and validate the information. Allowing for this proposed grace period, we believe, provides a mechanism by which some of those erroneous cases may be eliminated before reaching the Commission, without otherwise adversely affecting the incentives on the part of potential whistleblowers.

The Commission also recognizes that whistleblower awards could create incentives for attorneys or others to breach the attorney-client privilege by submitting tips disclosing privileged communications. The Commission has attempted to address this concern through the proposed definition of "Independent Knowledge," which excludes information obtained through communications protected by the

[106] As also noted above, the proposed definitions are consistent with the legislative intent behind the Act. *See* S. Rep. No. 111–176 at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws * * *").

[107] *See* Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy, Robert Howse and Ronald J. Daniels, University of Pennsylvania Departmental Papers (School of Law), 1995, page 527.

attorney-client privilege. Thus, a whistleblower who submits such information would not have provided the Commission with "Original Information" and thus would not be eligible for an award. The benefit of this proposed definition is that it helps preserve and protect the integrity of the attorney-client privilege and removes financial incentive encouraging individuals to breach the privilege.

Proposed Rule 21F–8 may have the benefit of encouraging cooperation by whistleblowers, which should help the effectiveness and efficiency of Commission enforcement. Similarly, we believe that Proposed Rule 21F–15, on balance, will have the same result. We recognize that there is a cost associated with providing monetary awards to individuals who have engaged in securities violations. Yet, these individuals frequently have the most significant and relevant information that will aid in detecting and prosecuting sophisticated securities fraud schemes. By excluding from the award calculation any monetary sanctions that the whistleblower is ordered to pay or that are ordered against the entity whose liability is substantially derived from the whistleblower's conduct, the proposed rules limit the awards to highly culpable whistleblowers more than the awards to less culpable whistleblowers.

Likewise, Proposed Rule 21F–16(b), by authorizing communications between the Commission staff and a whistleblower without seeking consent of the counsel of an entity with whom the whistleblower is employed, is intended to have the benefit of encouraging whistleblowers to communicate with the Commission without the fear that their communications will lead to disclosure of their identity to their employer.

The procedures contained in the Proposed Rules should result in certain benefits. The Commission's objective in proposing these rules is to devise an efficient mechanism to implement the statutory whistleblower program that will allow the Commission to receive high-quality information regarding securities law violation in a timely, organized, useful manner. As an initial matter, the proposed procedures regarding the submission of information and the required Forms are designed to elicit from whistleblowers critical information regarding the potential violations at issue. The proposed Forms that would be required to provide clear and uniform guidance to whistleblowers regarding the information that the Commission deems necessary to investigate the potential violations and to determine eligibility for awards under the program.

In addition, the proposed requirement that whistleblowers must complete Form WB–DEC, under penalty of perjury, will encourage whistleblowers who wish to participate in the Whistleblower Program to submit truthful information and discourage them from submitting false information. As such, this procedure will allow the Commission to place greater reliance on the accuracy of information it receives from whistleblowers, which should allow the Commission to prioritize the review and investigation of that information more effectively and efficiently. The requirement should also mitigate the potential harm to companies and individuals that may be caused by false or spurious allegations of wrongdoing. In addition, the requirement that Form WB–DEC be submitted within 30 days of submission of the Form TCR is designed to provide staff with the opportunity to better evaluate the TCR in light of the fact that it is joined by a sworn statement regarding its accuracy. Accordingly, the Proposed Rules should result in a decrease in the amount of Commission resources devoted to false or unsubstantiated leads.[108]

Moreover, proposed Form WB–APP requires the submission of information that is necessary for the Commission to determine award eligibility. While requiring an additional form imposes a cost on potential whistleblowers, determining the appropriate level of award for each instance of qualified whistleblower is critical to successful implementation of the whistleblower rule. The Commission needs to collect pertinent information from the whistleblower to determine the strength of his case. This information will need to be evaluated in conjunction with the Commission's enforcement action to determine the significance of the whistleblower's contribution.

In addition, the Commission has included procedural elements in the proposed rules to provide a fair process for consideration of whistleblower award claims, and, given the possibility of judicial review, to provide a clearly defined record on appeal. These procedures should also encourage greater participation in the program. While a monetary reward is typically not the sole motivation for potential whistleblowers, having a robust clearly described process for determining grants of monetary rewards should help incentivize those individuals who seek to benefit economically from providing information to the Commission.

C. Costs

The Proposed Rules may impose certain costs on prospective whistleblowers. As an initial matter, the procedures would require potential whistleblowers to complete certain forms to establish eligibility for an award under the Program. As noted above, the Commission recognizes that it will take time and effort on the part of whistleblowers to complete and submit the proposed forms. In addition, any whistleblower wishing to submit one of the required forms in hard copy would need to arrange for delivery and pay the postage or other delivery costs.

It is also possible that the proposed procedures could discourage some whistleblowers with valuable information from submitting their information to the Commission. Some prospective whistleblowers could find the procedures burdensome or confusing, and as a result, they might elect not to provide information to the Commission. In these Proposed Rules, the Commission has attempted to mitigate the potential for burden or confusion in the procedures, but such costs cannot be eliminated.

The 30-day time limit proposed for submitting a Form WB–DEC also imposes costs on whistleblowers in that it would require them to act within a certain period of time if they wish to be eligible for an award under the Program. The Commission has proposed the 30-day time limit based on a balance of those costs against the need to have the WB–DEC submitted close enough in time with the submission through the Electronic Data Collection System so that: (i) The Commission can track and tie together each submission through the electronic system with the related Form WB–DEC and (ii) the Commission will receive notice that a submission through the electronic system is a submission under the whistleblower program.

The proposed 90-day limit on submission of Form WB–DEC also would impose costs on whistleblowers in that it requires them to act within a certain period of time if they wish certain benefits under the Program. The Commission has proposed the 90-day time limit based on a balance of those costs against the concern that companies investigating allegations of potential securities law violations will

[108] Dyck *et al.* (2009). The staff reviews and evaluates all TCRs, regardless of whether they are accompanied by a whistleblower declaration. However, because the declaration would aid in assessing reliability, the staff may consider whether a whistleblower has submitted a declaration in prioritizing the investigation of TCRs and the allocation of the Division of Enforcement's limited resources.

view the time limit as the time they may wait before reporting violations to the Commission. To be clear, the Commission does not intend any time period in these Proposed Rules to inform companies on time limits for reporting violations to the Commission.

In addition, the definitional and scope provisions described above may also result in costs if they discourage potential whistleblowers from coming forward. As discussed above, the proposed definitions of "voluntary submission of information," "independent knowledge," and "information that leads to successful enforcement" together would result in heightening the standards for eligibility for an award. It is possible that restrictions from eligibility could in some cases discourage some whistleblowers from submitting potentially useful information.

In particular, the proposed definition of "voluntary submission of information" excludes from eligibility any whistleblower who has a legal obligation to provide the information regarding potential violations to the Commission. This element of the definition could result in instances in which the Commission does not receive important information regarding potential violations from a potential whistleblower—that is, situations where a potential whistleblower has a legal obligation to provide the information and does not, but he would have if eligible for an award.

Similarly, other types of ineligibility created by our proposed rules—for example, the provisions in Proposed Rule 21F–8 that exclude from eligibility certain foreign officials or individuals who obtain information from other categories of ineligible persons—may also cause those persons not to come forward with information in their possession about securities law violations. Although we have attempted to craft these rules to strike a balance that is consistent with the purposes of the statute, these provisions may result in some foregone opportunities for effective enforcement action.

Request for Comments: We request comments and empirical data on all aspects of this cost-benefit analysis, including identification and quantification of any additional costs or benefits of, or suggested alternatives to, the proposed rule.

VI. Consideration of Burden on Competition and Promotion of Competition and Capital Formation

Section 23(a)(2) [109] of the Securities Exchange Act of 1934 requires the Commission, in promulgating rules under the Exchange Act, to consider the impact that any rule may have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Further, Section 3(f) of the Exchange Act [110] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

As with the cost-benefit analysis, we focus our consideration of burden on competition and promotion of competition and capital formation to the areas of these Proposed Rules over which the Commission has exercised discretion and do not consider the elements of the Whistleblower Program established by Congress.

In considering the impact on capital formation of our proposed rules, we consider the extent to which they affect allocation of capital and secondarily how they affect investors' choices of investments and portfolio allocations. For issuers, this includes considering the extent to which the rules foster an information environment and market structures that lead to securities prices based upon efficient allocation of capital. From this perspective, one of the issues that may affect capital formation in the economy is investor confidence in the sense of investors trusting in the fairness of financial markets, of which their perception of the effectiveness and comprehensiveness of the regulatory regime is an important part. If investors fear theft, fraud, manipulation, insider trading, or conflicted investment advice, their trust in the markets will be low, both in the primary market for issuance or in the secondary market for trading. This would increase the cost of raising capital, which would impair capital formation—in the sense that it will be less than it would or should be if rules against such abuses were in effect and properly enforced and obeyed.

For reasons stated in the cost-benefit analysis, we believe the Proposed Rules would result in an efficient and effective implementation of the statutory whistleblower program. As such, we believe the Proposed Rules would serve to reduce potential securities law violations. As a result, investor reliance on the veracity of issuer filings with the Commission may increase incrementally, which would contribute to lowering the cost of raising capital generally. Those provisions in the Proposed Rules that are designed to promote and protect the use of corporate compliance programs would further the requirements of the Sarbanes-Oxley Act of 2002 and other statutory provisions that encourage or mandate such programs. Thus, we believe that we have structured the Proposed Rules so as to improve investor confidence in the market and therefore expect that the impact of the Proposed Rules on the efficiency of capital formation will be positive.

The Commission does not believe the elements of the proposed rules over which the Commission exercised discretion would impose any undue burdens on competition. The relevant market for competition analysis here is the market for securities issuers competing to raise capital from investors. Because the proposed rules are expected to further deterrence of financial fraud, there may be a general improvement in the fairness of competition for capital from investors—and consequently improvement in the ability of companies that abide by the law to compete with companies that do not. To the extent that the Proposed Rules impose costs on companies, many of these follow from the statutory mandate to implement the Whistleblower Program generally and are imposed on all companies. The Commission believes any costs associated with compliance with the proposed rules, as structured, would be limited and, therefore, would not impose undue burden on competition.

Furthermore, the Proposed Rules are structured to encourage the submission of high quality information regarding securities law violations in a manner that is effective and efficient. As a result of expected improvement in competition and expected increase in capital formation, we believe the Proposed Rules should generally increase the efficiency of the economy. In addition, the proposed rules should increase the efficiency by which the Commission's Enforcement program obtains information about potential securities law violations.

We request comment (including empirical data and other factual support) on whether the Proposed

[109] 15 U.S.C. 78w(a)(2).

[110] 15 U.S.C. 78c(f).

Rules, if adopted, would affect efficiency, competition, and capital formation.

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[111] the Commission solicits data to determine whether the proposed rule constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Commentators should provide empirical data on (a) the potential annual effect on the economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

VIII. Regulatory Flexibility Act Certification

Section 603(a) of the Regulatory Flexibility Act[112] requires the Commission to undertake an initial regulatory flexibility analysis of the proposed rule on small entities unless the Commission certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.[113]

Small entity is defined in 5 U.S.C. 601(6) to mean "small business," "small organization," and "small governmental jurisdiction" as defined in 5 U.S.C. 601(3)—(5). The definition of "small entity" does not include individuals. The Proposed Rules apply only to an individual, or individuals acting jointly, who provide information to the Commission relating to the violation of the securities laws. Companies and other entities are not eligible to participate in the Program as whistleblowers. Consequently, the persons that would be subject to the proposed rule are not "small entities" for purposes of the Regulatory Flexibility Act.

For the reasons stated above, the Commission certifies, pursuant to 5 U.S.C. 605(b), that the proposed rules and forms to implement the whistleblower provisions of Section 21F of the Exchange Act would not have a significant economic impact on a substantial number of small entities.

IX. Statutory Authority

The Commission proposes the new rules and forms contained in this document under the authority set forth in Sections 3(b), 21F and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Parts 240 and 249

Securities.

Text of the Proposed Rules

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations, is proposed to be amended as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78–i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78o, 78o–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

Section 240.21F is also issued under Pub. L. 111–203, § 922(a), 124 Stat. 1841 (2010).

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2. Add §§ 240.21F–1 through 240.21F–16 to read as follows:

Sec.

* * * * *

240.21F 1–General.
240.21F 2–Definition of a Whistleblower.
240.21F 3–Payment of awards.
240.21F 4–Other Definitions.
240.21F 5–Amount of award.
240.21F 6–Criteria for determining amount of award.
240.21F 7–Confidentiality of submissions.
240.21F 8–Eligibility.
240.21F 9–Procedures for submitting original information.
240.21F 10–Procedures for making a claim for a whistleblower award in SEC actions that result in monetary sanctions in excess of $1,000,000.
240.21F 11–Procedures for determining awards based upon a related action.
240.21F 12–Appeals.
240.21F 13–Procedures applicable to the payment of awards.
240.21F 14–No amnesty.
240.21F 15–Awards to whistleblowers who engage in culpable conduct.
240.21F 16–Staff communications with whistleblowers.

* * * * *

§ 240.21F–1 General.

Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78u-6), entitled "Securities Whistleblower Incentives and Protection," requires the Securities and Exchange Commission ("Commission") to pay awards, subject to certain limitations and conditions, to whistleblowers who provide the Commission with original information about violations of the Federal securities laws. These rules describe the whistleblower program that the Commission has established to implement the provisions of Section 21F, and explain the procedures you will need to follow in order to be eligible for an award. You should read these procedures carefully because the failure to take certain required steps within the time frames described in these rules may disqualify you from receiving an award for which you otherwise may be eligible. Unless expressly provided for in these rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any award or the amount thereof. The Securities and Exchange Commission's Whistleblower Office administers our whistleblower program. Questions about the program or these rules should be directed to the SEC Whistleblower Office, 100 F Street, NE., Washington, DC 20549.

§ 240.21F–2 Definition of a Whistleblower.

(a) You are a whistleblower if, alone or jointly with others, you provide the Commission with information relating to a potential violation of the securities laws. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.

(b) The retaliation protections afforded to whistleblowers by the provisions of paragraph (h)(1) of Section 21F of the Exchange Act (15 U.S.C. 78u–6(h)(1)) apply irrespective of whether a whistleblower satisfies the procedures and conditions to qualify for an award. Moreover, for purposes of the anti-retaliation provision of paragraph (h)(1)(A)(i) of Section 21F, 15 U.S.C. 78u–6(h)(1)(A)(i), the requirement that a whistleblower provide "information to the Commission in accordance" with Section 21F (15 U.S.C. 78u–6) is satisfied if an individual provides information to the Commission that relates to a potential violation of the securities laws.

(c) To be eligible for an award, however, a whistleblower must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F–4,

[111] Pub. L. 104–121, tit.II, 110 Stat. 857 (1996).
[112] 5 U.S.C. 603(a).
[113] 5 U.S.C. 605(b).

240.21F–8, and 240.21F–9 of this chapter.

§ 240.21F–3 Payment of awards.

(a) Subject to the eligibility requirements described in §§ 240.21F–2 and 240.21F–8 of this chapter, and to § 240.21F–14 of this chapter, the Commission will pay an award or awards to one or more whistleblowers who:

(1) Voluntarily provide the Commission

(2) With original information

(3) That leads to the successful enforcement by the Commission of a Federal court or administrative action

(4) In which the Commission obtains monetary sanctions totaling more than $1,000,000.

Note to paragraph (a): The terms *voluntarily, original information, leads to successful enforcement, action*, and *monetary sanctions* are defined in § 240.21F–4 of this chapter.

(b) The Commission will also pay an award based on amounts collected in certain "related actions." A *related action* is a judicial or administrative action that is brought by:

(1) The Attorney General of the United States;

(2) An appropriate regulatory agency;

(3) A self-regulatory organization; or

(4) A state attorney general in a criminal case, and is based on the same original information that the whistleblower voluntarily provided to the Commission, and that led the Commission to obtain monetary sanctions totaling more than $1,000,000. The terms *appropriate regulatory agency* and *self-regulatory organization* are defined in § 240.21F–4 of this chapter.

(c) In order for the Commission to make an award in connection with a related action, the Commission must determine that the same original information that the whistleblower gave to the Commission also led to the successful enforcement of the related action under the same criteria described in these rules for awards made in connection with Commission actions. The Commission may seek assistance and confirmation from the authority bringing the related action in making this determination. If the Commission determines that the criteria for an award are not satisfied, or if the Commission is unable to obtain sufficient and reliable information about the related action to make a conclusive determination, the Commission will deny an award in connection with the related action. Additional procedures apply to the payment of awards in related actions. These are described in § 240.21F–11 and § 240.21F–13.

(d) The Commission will not make an award to you for a related action if you have already been granted an award by the Commodity Futures Trading Commission ("CFTC") for that same action pursuant to its whistleblower award program under section 23 of the Commodity Exchange Act, 7 U.S.C. 26. Similarly, if the CFTC has previously denied an award to you in a related action, you will be collaterally estopped from relitigating any issues before the Commission that were necessary to the CFTC's denial.

§ 240.21F–4 Other Definitions.

(a) *Voluntary submission of information.* (1) Your submission of information is made *voluntarily* within the meaning of § 240.21F of this chapter if you provide the Commission with the information before you or anyone representing you (such as an attorney) receives any request, inquiry, or demand from the Commission, the Congress, any other Federal, State, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information in your submission is relevant. If the Commission or any of these other authorities make a request, inquiry, or demand to you or your representative first, your submission will not be considered voluntary, and you will not be eligible for an award, even if your response is not compelled by subpoena or other applicable law.

(2) For purposes of this paragraph, you will be considered to have received a request, inquiry or demand if documents or information from you are within the scope of a request, inquiry, or demand that your employer receives unless, after receiving the documents or information from you, your employer fails to provide your documents or information to the requesting authority in a timely manner.

(3) In addition, your submission will not be considered voluntary if you are under a pre-existing legal or contractual duty to report the securities violations that are the subject of your original information to the Commission or to any of the other authorities described in paragraph (1) of this section.

(b) *Original information.* (1) In order for your whistleblower submission to be considered *original information,* it must be:

(i) Derived from your independent knowledge or independent analysis;

(ii) Not already known to the Commission from any other source, unless you are the original source of the information;

(iii) Not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless you are a source of the information; and

(iv) Provided to the Commission for the first time after July 21, 2010 (the date of enactment of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*).

(2) *Independent knowledge* means factual information in your possession that is not derived from publicly available sources. You may gain independent knowledge from your experiences, communications and observations in your business or social interactions.

(3) *Independent analysis* means your own analysis, whether done alone or in combination with others. *Analysis* means your examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public.

(4) The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based:

(i) Through a communication that was subject to the attorney-client privilege, unless disclosure of that information is otherwise permitted by § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise;

(ii) As a result of the legal representation of a client on whose behalf your services, or the services of your employer or firm, have been retained, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure is authorized by § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise;

(iii) Through the performance of an engagement required under the securities laws by an independent public accountant, if that information relates to a violation by the engagement client or the client's directors, officers or other employees;

(iv) Because you were a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity, and the information was communicated to you with the reasonable expectation that you would take steps to cause the entity to respond appropriately to the violation, unless the entity did not disclose the information to the Commission within a

reasonable time or proceeded in bad faith; or

(v) Otherwise from or through an entity's legal, compliance, audit or other similar functions or processes for identifying, reporting and addressing potential non-compliance with law, unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith;

(vi) By a means or in a manner that violates applicable Federal or State criminal law; or

(vii) From any of the individuals described in paragraphs (b)(4)(i)–(vi) of this section.

(5) The Commission will consider you to be an *original source* of the same information that we obtain from another source if the information satisfies the definition of original information and the other source obtained the information from you or your representative. In order to be considered an original source of information that the Commission receives from Congress, any other Federal, State, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board, you must have voluntarily given such authorities the information within the meaning of these rules. You must establish your status as the original source of information to the Commission's satisfaction. In determining whether you are the original source of information, the Commission may seek assistance and confirmation, from one of the other authorities described above, or from another entity (including your employer), in the event that you claim to be the original source of information that an authority or another entity provided to the Commission.

(6) If the Commission already knows some information about a matter from other sources at the time you make your submission, and you are not an original source of that information under paragraph (b)(5) of this section, the Commission will consider you an original source of any information you provide that is derived from your independent knowledge or analysis and that materially adds to the information that the Commission already possesses.

(7) If you provide information to Congress, any other Federal, State, or local authority, any self-regulatory organization, the Public Company Accounting Oversight Board, or to any of the persons described in paragraphs (b)(4)(iv) and (v) of this section, and you, within 90 days, submit the same information to the Commission pursuant to § 240.21F–9 of this chapter, as you must do in order for you to be eligible to be considered for an award, then, for purposes of evaluating your claim to an award under §§ 240.21F–10 and 240.21F–11 of this chapter, the Commission will consider that you provided information as of the date of your original disclosure, report or submission to one of these other authorities or persons. You must establish the effective date of any prior disclosure, report, or submission, to the Commission's satisfaction. The Commission may seek assistance and confirmation from the other authority or person in making this determination.

(c) *Information that leads to successful enforcement.* The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action in the following circumstances:

(1) If you gave the Commission original information that caused the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning new or different conduct as part of a current examination or investigation, and your information significantly contributed to the success of the action; or

(2) If you gave the Commission original information about conduct that was already under examination or investigation by the Commission, Congress, any other Federal, State, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board (except in cases where you were an original source of this information as defined in paragraph (b)(4) of this section), and your information would not otherwise have been obtained and was essential to the success of the action.

(d) *Action* means a single captioned judicial or administrative proceeding.

(e) *Monetary sanctions* means any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7246(b), as a result of a Commission action or a related action.

(f) *Appropriate regulatory agency* means the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and any other agencies that may be defined as appropriate regulatory agencies under Section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)).

(g) *Self-regulatory organization* means any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board, and any other organizations that may be defined as self-regulatory organizations under Section 3(a)(26) of the Exchange Act (15 U.S.C. 78c(a)(26)).

§ 240.21F–5 Amount of award.

(a) If all of the conditions are met for a whistleblower award in connection with a Commission action or a related action, the Commission will then decide the amount of the award pursuant to the procedures set forth in §§ 240.21F–10 and 240.21F–11 of this chapter. The amount will be at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are able to collect. The percentage awarded in connection with a Commission action may differ from the percentage awarded in connection with a related action.

(b) If the Commission makes awards to more than one whistleblower in connection with the same action or related action, the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers as a group be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.

§ 240.21F–6 Criteria for determining amount of award.

In determining the amount of an award, the Commission will take into consideration:

(a) The significance of the information provided by a whistleblower to the success of the Commission action or related action;

(b) The degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action;

(c) The programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and

(d) Whether the award otherwise enhances the Commission's ability to enforce the Federal securities laws, protect investors, and encourage the submission of high quality information from whistleblowers.

§ 240.21F–7 Confidentiality of submissions.

(a) The law requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower,

except that the Commission may disclose such information in the following circumstances:

(1) When disclosure is required to a defendant or respondent in connection with a Federal court or administrative action that the Commission files or in another public action or proceeding that is filed by an authority to which we provide the information, as described below;

(2) When the Commission determines that it is necessary to accomplish the purposes of the Exchange Act and to protect investors, it may provide your information to the Department of Justice, an appropriate regulatory agency, a self regulatory organization, a state attorney general in connection with a criminal investigation, any appropriate state regulatory authority, the Public Company Accounting Oversight Board, or foreign securities and law enforcement authorities. Each of these entities other than foreign securities and law enforcement authorities is subject to the confidentiality requirements set forth in Section 21F(h) of the Exchange Act, 15 U.S.C. 78u–6(h). The Commission may determine what assurances of confidentiality it deems appropriate in providing such information to foreign securities and law enforcement authorities.

(3) The Commission may make disclosures in accordance with the Privacy Act of 1974 (5 U.S.C. 552a).

(b) You may submit information to the Commission anonymously. If you do so, however, you must also do the following:

(1) You must have an attorney represent you in connection with both your submission of information and your claim for an award, and your attorney's name and contact information must be provided to the Commission at the time you submit your information;

(2) You and your attorney must follow the procedures set forth in § 240.21F–9 of this chapter for submitting original information anonymously; and

(3) Before the Commission will pay any award to you, you must disclose your identity and your identity must be verified as set forth in § 240.21F–10 of this chapter.

§ 240.21F–8 Eligibility.

(a) To be eligible for a whistleblower award, you must give the Commission information in the form and manner that the Commission requires. The procedures for submitting information and making a claim for an award are described in § 240.21F–9 to § 240.21F–11 of this chapter. You should read these procedures carefully because you need to follow them in order to be eligible for an award, except that the Commission may, in its sole discretion, waive any of these procedures based upon a showing of extraordinary circumstances.

(b) In addition to any forms required by these rules, the Commission may also require that you provide certain additional information. If requested by Commission staff, you may be required to:

(1) Provide explanations and other assistance in order that the staff may evaluate and use the information that you submitted;

(2) Provide all additional information in your possession that is related to the subject matter of your submission in a complete and truthful manner, through follow-up meetings, or in other forms that our staff may agree to;

(3) Provide testimony or other evidence acceptable to the staff relating to whether you are eligible, or otherwise satisfy any of the conditions, for an award; and

(4) Enter into a confidentiality agreement in a form acceptable to the Whistleblower Office, including a provision that a violation may lead to your ineligibility to receive an award.

(c) You are not eligible to be considered for an award if you do not satisfy the requirements of paragraphs (a) and (b) of this section. In addition, you are not eligible if:

(1) You are, or were at the time you acquired original information, a member, officer, or employee of the Department of Justice, an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board, or any law enforcement organization;

(2) You are, or were at the time you acquired original information, a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Exchange Act (15 U.S.C. 78c(a)(52));

(3) You are convicted of a criminal violation that is related to the Commission action or to a related action (as defined in § 240.21F–4 of this chapter) for which you otherwise could receive an award;

(4) You obtained the information that you gave the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to the requirements of Section 10A of the Exchange Act (15 U.S,C. 78j–1)); or

(5) You acquired the information you gave the Commission from any of the individuals described in paragraphs (c)(1), (2), (3), or (4) of this section;

(6) You are the spouse, parent, child, or sibling of a member or employee of the Commission, or you reside in the same household as a member or employee of the Commission; or

(7) In your whistleblower submission, your other dealings with the Commission, or your dealings with another authority in connection with a related action, you knowingly and willfully make any false, fictitious, or fraudulent statement or representation, or use any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry.

§ 240.21F–9 Procedures for submitting original information.

The submission of original information to the Commission is a two-step process:

(a) First, you will need to submit your information to us. You may submit your information:

(1) Online, through the Commission's Electronic Data Collection System, or;

(2) By completing Form TCR (*Tip, Complaint or Referral*) (referenced in § 249.1800 of this chapter) and mailing or faxing the form to the SEC Whistleblower Office, 100 F Street, NE., Washington, DC 20549–XXXX, Fax (202) XXX–XXXX.

(b) Second, in addition to submitting your information pursuant to paragraph (a) of this section, you will also need to complete and provide to the Commission a *Form WB–DEC, Declaration Concerning Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934,* signed under penalty of perjury. Your Form WB–DEC must be submitted as follows:

(1) If you submit your information online, your FORM WB–DEC (referenced in § 249.1801 of this chapter) must be submitted either:

(i) Electronically (in accordance with the instructions set forth on the Commission's Web site); or

(ii) By mailing or faxing the signed form to the SEC Whistleblower Office. Your Form WB–DEC (referenced in § 249.1801 of this chapter) must be received within thirty (30) days of the Commission's receipt of your information in the Electronic Data Collection System.

(2) If you submit a Form TCR (referenced in § 249.1800 of this chapter), your Form WB–DEC (referenced in § 249.1801 of this

chapter) must be submitted by mail or fax at the same time as the Form TCR.

(c) Notwithstanding paragraph (b) of this section, if you submitted your original information to the Commission anonymously, then you must provide your attorney with the completed and signed Form WB–DEC (referenced in § 249.1801 of this chapter). In addition, your attorney must also provide the Commission with a separate Form WB–DEC certifying that he or she has verified your identity, has reviewed the form for completeness and accuracy, and will retain the signed original of your Form WB–DEC in his or her records. Such certification must be submitted in the manner described in paragraph (b) of this section.

(d) If you submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act) but before the effective date of these rules, you will be eligible for an award only if:

(1) In the event that you provided the original information to the Commission in a format or manner other than that described in paragraph (a) of this section, you either submit your information online through the Commission's Electronic Data Collection System or complete Form TCR (referenced in § 249.1800 of this chapter) within one hundred twenty (120) days of the effective date of these rules and otherwise follow the procedures set forth in paragraph (b) of this section; or

(2) In the event that you provided the original information to the Commission in the format or manner described in paragraph (a) of this section you submit a Form WB–DEC (referenced in § 249.1801 of this chapter) within one hundred twenty (120) days of the effective date of this section in the manner set forth in paragraph (b) of this section.

§ 240.21F–10 Procedures for making a claim for a whistleblower award in SEC actions that result in monetary sanctions in excess of $1,000,000.

(a) Whenever a Commission action results in monetary sanctions totaling more than $1,000,000, the Whistleblower Office will cause to be published on the Commission's Web site a "Notice of Covered Action." Such Notice will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission action, exceeds $1,000,000; or, in the absence of such judgment or order, within thirty (30) days of the deposit of monetary sanctions exceeding $1,000,000 into a disgorgement or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002. A claimant will have sixty (60) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred.

(b) To file a claim for a whistleblower award, you must file Form WB–APP, *Application for Award for Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934* (referenced in § 249.1802 of this chapter). You must sign this form as the claimant and submit it to the Whistleblower Office by mail or fax. All claim forms, including any attachments, must be received by the Whistleblower Office within sixty (60) calendar days of the date of the Notice of Covered Action in order to be considered for an award.

(c) If you provided your original information to the Commission anonymously, you must disclose your identity on the Form WB–APP (referenced in § 249.1802 of this chapter), and your identity must be verified in a form and manner that is acceptable to the Whistleblower Office prior to the payment of any award.

(d) Once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded, the Whistleblower Office and designated staff ("Claims Review Staff") will evaluate all timely whistleblower award claims submitted on Form WB–APP (referenced in § 249.1802 of this chapter) in accordance with the criteria set forth in these rules. In connection with this process, the Whistleblower Office may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 240.21F–(8)(b) of this chapter. Following that evaluation, the Whistleblower Office will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Whistleblower Office setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. You may also include documentation or other evidentiary support for the grounds advanced in your response.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Whistleblower Office make available for your review the materials that formed the basis of the Claims Review Staff's Preliminary Determination. The Whistleblower Office will make these materials available to you subject to any redactions necessary to comply with any statutory restrictions or protect the Commission's law enforcement and regulatory functions. The Whistleblower Office may also require you to sign a confidentiality agreement, as set forth in § 240.21F–(8)(b) of this chapter, prior to providing these materials.

(ii) Within thirty (30) calendar days of the date of the Preliminary Determination, request a meeting with the Whistleblower Office; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within thirty (30) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1) of this section, then within thirty (30) calendar days of the Whistleblower Office making those materials available for your review.

(f) If you fail to submit a timely response pursuant to paragraph (e) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (h) of this section). Your failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to § 240.21F–12 of this chapter.

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination.

(h) The Whistleblower Office will then notify the Commission of each Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the

Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the staff relied upon in making its determinations, including your previous submissions to the Whistleblower Office, and issue its Final Order.

(i) The Office of the Secretary of the SEC will provide you with the Final Order of the Commission.

§ 240.21F–11 Procedures for determining awards based upon a related action.

(a) If you are eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000, you also may be eligible to receive an award based on the monetary sanctions that are collected from a related action (as defined in § 240.21F–3 of this chapter).

(b) You must also use Form WB–APP (referenced in § 249.1802 of this chapter) to submit a claim for an award in a related action. You must sign this form as the claimant and submit it to the Whistleblower Office by mail or fax as follows:

(1) If a final order imposing monetary sanctions has been entered in a related action at the time you submit your claim for an award in connection with a Commission action, you must submit your claim for an award in that related action on the same Form WB–APP (referenced in § 249.1802 of this chapter) that you use for the Commission action.

(2) If a final order imposing monetary sanctions in a related action has not been entered at the time you submit your claim for an award in connection with a Commission action, you must submit your claim on Form WB–APP (referenced in § 249.1802 of this chapter) within sixty (60) days of the issuance of a final order imposing sanctions in the related action.

(c) The Whistleblower Office may request additional information from you in connection with your claim for an award in a related action to demonstrate that you directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization the same original information that led to the Commission's successful covered action, and that this information led to the successful enforcement of the related action. The Whistleblower Office may, in its discretion, seek assistance and confirmation from the other agency in making this determination.

(d) Once the time for filing any appeals of the final judgment or order in a related action has expired, or if an appeal has been filed, after all appeals in the action have been concluded, the Claims Review Staff will evaluate all timely whistleblower award claims submitted on Form WB–APP (referenced in § 249.1802 of this chapter) in connection with the related action. The evaluation will be undertaken pursuant to the criteria set forth in these rules. In connection with this process, the Whistleblower Office may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 240.21F–(8)(b) of this chapter. Following this evaluation, the Whistleblower Office will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Whistleblower Office setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. You may also include documentation or other evidentiary support for the grounds advanced in your response.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Whistleblower Office make available for your review the materials that formed the basis of the Claims Review Staff's Preliminary Determination. The Whistleblower Office will make these materials available to you subject to any redactions necessary to comply with any statutory restrictions or protect the Commission's law enforcement and regulatory functions. The Whistleblower Office may also require you to sign a confidentiality agreement, as set forth in § 240.21F–(8)(b) of this chapter, prior to providing these materials.

(ii) Within thirty (30) calendar days of the date of the Preliminary Determination, request a meeting with the Whistleblower Office; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within thirty (30) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1)(i) of this section, then within thirty (30) calendar days of the Whistleblower Office making those materials available for your review.

(f) If you fail to submit a timely response pursuant to paragraph (e) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (h) of this section). Your failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to § 240.21F–12 of this chapter.

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds that you advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination.

(h) The Whistleblower Office will then notify the Commission of each Proposed Final Determination. Within thirty (30) days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the staff relied upon in making its determinations, including your previous submissions to the Whistleblower Office, and issue its Final Order.

(i) The Office of the Secretary of the SEC will provide you with the Final Order of the Commission.

§ 240.21F–12 Appeals.

(a) Section 21F of the Exchange Act, 15 U.S.C. 78u–6, commits determinations of whether, to whom, and in what amount to make awards to the Commission's discretion. A determination of whether or to whom to make an award may be appealed within 30 days after the Commission issues its final decision to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the aggrieved person resides or has his

principal place of business. Where the Commission followed the statutory mandate that it award not less than 10 percent and not more than 30 percent of the monetary sanctions collected in the Commission or related action, the Commission's determination regarding the amount of an award (including the allocation of an award as between multiple whistleblowers) is not appealable.

(b) The record on appeal shall consist of the Whistleblower Office's Preliminary Determination, any materials submitted by the claimant or claimants (including the claimant's Form TCR (referenced in § 249.1800 of this chapter) or any electronic submission made by the whistleblower, the Forms WB–DEC (referenced in § 249.1801 of this chapter) and WB–APP (referenced in § 249.1802 of this chapter), and materials filed in response to the Preliminary Determination), and any other materials that supported the Final Order of the Commission, with the exception of internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim (including the staff's Draft Final Determination in the event that the Commissioners reviewed the claim and issued the Final Order).

§ 240.21F–13 Procedures applicable to the payment of awards.

(a) Any award made pursuant to these rules will be paid from the Securities and Exchange Commission Investor Protection Fund (the "Fund").

(b) A recipient of a whistleblower award is entitled to payment on the award only to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based.

(c) Payment of a whistleblower award for a monetary sanction collected in a Commission action or related action shall be made following the later of:

(1) The date on which the monetary sanction is collected; or

(2) The completion of the appeals process for all whistleblower award claims arising from:

(i) The Notice of Covered Action, in the case of any payment of an award for a monetary sanction collected in a Commission action; or

(ii) The related action, in the case of any payment of an award for a monetary sanction collected in a related action.

(d) If there are insufficient amounts available in the Fund to pay the entire amount of an award payment within a reasonable period of time from the time for payment specified by paragraph (c) of this section, then subject to the following terms, the balance of the payment shall be paid when amounts become available in the Fund, as follows:

(1) Where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action (or related action), priority in making these payments will be determined based upon the date that the collections for which the whistleblowers are owed payments occurred. If two or more of these collections occur on the same date, those whistleblowers owed payments based on these collections will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

(2) Where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action (or related action), they will share the same payment priority and will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

§ 240.21F–14 No amnesty.

The Securities Whistleblower Incentives and Protection provisions do not provide amnesty to individuals who provide information to the Commission. The fact that you may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against you based upon your own conduct in connection with violations of the Federal securities laws. If such an action is determined to be appropriate, however, the Commission will take your cooperation into consideration in accordance with its Policy Statement Concerning Cooperation by Individuals in [SEC] Investigations and Related Enforcement Actions (17 CFR 202.12).

§ 240.21F–15 Awards to whistleblowers who engage in culpable conduct.

In determining whether the required $1,000,000 threshold has been satisfied (this threshold is further explained in § 240.21F–10 of this chapter) for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments.

§ 240.21F–16 Staff communications with whistleblowers.

(a) No person may take any action to impede a whistleblower from communicating directly with the Commission staff about a potential securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F–4(b)(4)(i) and (ii) of this chapter related to the legal representation of a client) with respect to such communications.

(b) If you are a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel, and you have initiated communication with the Commission relating to a potential securities law violation, the staff is authorized to communicate directly with you regarding the subject of your communication without seeking the consent of the entity's counsel.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 249 is amended by adding the following citations in numerical order to read as follows:

Authority: 15 U.S.C. 78a, *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 249.1800 is also issued under Pub. L. 111.203, § 922(a), 124 Stat 1841 (2010).

Section 249.1801 is also issued under Pub. L. 111.203, § 922(a), 124 Stat 1841 (2010).

Section 249.1802 is also issued under Pub. L. 111.203, § 922(a), 124 Stat 1841 (2010).

* * * * *

4. Add Subpart S to read as follows:

Subpart S—Whistleblower Forms

Sec.

249.1800 Form TCR, Tip, Complaint or Referral

249.1801 Form WB–DEC, Declaration of Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934

249.1802 Form WB–APP, Application for Award for Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934.

§ 249.1800 Form TCR, Tip, Complaint or Referral.

This form may be used by anyone wishing to provide the SEC with information concerning a violation of the Federal securities laws. The information provided may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing

the Federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act, 15 U.S.C. 78u–6(h)(2), and § 240.21F–7 of this chapter.

§ 249.1801 Form WB–DEC, Declaration of Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934.

This form must be used by persons who provide the SEC with information concerning a violation of the Federal securities laws and who wish to be considered for a whistleblower award pursuant to the SEC's whistleblower program. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. 78u–6. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the Federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act, 15 U.S.C. 78u–6(h)(2), and § 240.21F–7 of this chapter. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

§ 249.1802 Form WB–APP, Application for Award for Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934.

This form must be used by persons making a claim for a whistleblower award in connection with information provided to the SEC or to another agency in a related action. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. 78u–6. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the Federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act, 15 U.S.C. 78u–6(h)(2) and § 240.21F–7 of this chapter. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

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

BILLING CODE 8011–01–P

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM TCR
TIP, COMPLAINT OR REFERRAL

A. INFORMATION ABOUT YOU			
1. Last Name		First	M.I.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	E-mail Address	Preferred method of communication:
4. Your Occupation			

B. ATTORNEY'S INFORMATION (If Applicable - See Instructions)			
1. Attorney's Name			
2. Firm Name			
3. Street Address			
City	State/ Province	ZIP/ Postal Code	Country
4. Telephone	Fax	E-mail Address	

C. TELL US ABOUT THE INDIVIDUAL OR ENTITY YOU HAVE A COMPLAINT AGAINST			
Individual/Entity 1: 1. Type: ☐ Individual ☐ Entity	If an individual, specify profession: If an entity, specify type:		
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
4. Phone	E-mail Address	Internet address	

Individual/Entity 2: 1. Type: ☐ Individual ☐ Entity	If an individual, specify profession: If an entity, specify type:		
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
4. Phone	E-mail Address	Internet Address	

D. TELL US ABOUT YOUR COMPLAINT

1. Occurrence Date (mm/dd/yyyy): / /	2. Nature of complaint:

3. Are you complaining about an entity of which you are or were an officer, director, employee, consultant or contractor? YES ☐ NO ☐

4a. Have you taken any prior action regarding your complaint? YES ☐ NO ☐

4b. If you answered "yes" to question 4a, please provide details. Use additional sheets if necessary.

4c. Date on which you took the action(s) described in question 4b (mm/dd/yyyy): / /

5a. Type of security or investment, if relevant

5b. Name of issuer or security, if relevant	5c. Security/ Ticker Symbol or CUSIP no.

6. State in detail all facts pertinent to the alleged violation. Explain why you believe the acts described constitute a violation of the federal securities laws. Use additional sheets if necessary.

7. Describe all supporting materials in your possession and the availability and location of any additional supporting materials not in your possession. Use additional sheets, if necessary.
8. Describe how you obtained the information that supports this claim. If any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets if necessary.
9. Provide any additional information you think may be relevant.

Privacy Act Statement

This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Securities and Exchange Commission (SEC) inform individuals of the following when asking for information. This form may be used by anyone wishing to provide the SEC with information concerning a violation of the federal securities laws. If you are submitting information for the SEC's whistleblower award program pursuant to Section 21F of the Securities Exchange Act of 1934 (Exchange Act), the information provided will enable the Commission to determine your eligibility for payment of an award. The information provided may be disclosed to federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act and Rule 21F-7 thereunder.
If you are submitting information for the SEC's whistleblower award program anonymously, you must be represented by an attorney and you must provide the information requested about your attorney on this form. Otherwise, furnishing the information requested herein is voluntary.

Questions concerning this form may be directed to the SEC Whistleblower Office, 100 F Street, NE, Washington, D.C. 20549-XXXX, Tel. (800) XXX-XXXX, Fax (202) XXX-XXXX

Submission Procedures

- After manually completing this Form TCR, please send it by mail or delivery to the SEC Whistleblower Office, 100 F. Street, NE, Washington, D.C. 20549-XXXX, or by facsimile to (202) XXX-XXXX.

- You have the right to submit information anonymously. If you are submitting anonymously and you want to be considered for a whistleblower award, however, you *must* be represented by an attorney in this matter and Section B of this form must be completed. Otherwise, you may, but are not required, to have an attorney. If you are not represented by an attorney in this matter, you may leave Section B blank.

- **If you are submitting information for the SEC's whistleblower award program, you *must* submit your information either using this Form TCR or electronically through the SEC's**

Electronic Data Collection System, available on the SEC web site at [insert link]. In addition to submitting your information by either of these methods, you must also submit a declaration on Form WB-DEC. The Form WB-DEC can be printed out from our web site or obtained from the SEC Whistleblower Office, and it must be manually signed by you under penalty of perjury. To learn more about this program and its special requirements, please visit the Whistleblower Office's website at [INSERT LINK].

Instructions for Completing Form TCR:

Section A: Information about You

Questions 1-3: Please provide the following information about yourself:

- Last name, first name, and middle initial
- Complete address, including city, state and zip code
- Telephone number and, if available, an alternate number where you can be reached
- Your e-mail address (to facilitate communications, we strongly encourage you to provide your email address), and
- Your preferred method of communication.

Question 4: State which of the following best describes your occupation:

- accountant, attorney, auditor, broker-dealer, compliance officer, financial representative, foreign officer, fund manager, investment advisor, investor, other company officer or senior manager, registered representative, trader, transfer agent, underwriter, government official (federal, state, or local), law enforcement personnel (federal, state, or local), or other (specify).

Section B: Information about Your Attorney. Complete this section only if you are represented by an attorney in this matter. You must be represented by an attorney, and this section must be

completed, if you are submitting your information anonymously and you want to be considered for the SEC's whistleblower award program.

Questions 1-4: Provide the following information about the attorney representing you in this matter:

- Attorney's name
- Firm name
- Complete address, including city, state and zip code
- Telephone number and fax number, and
- E-mail address

Section C: Tell Us about the Individual and/or Entity You Have a Complaint Against. If your complaint relates to more than two individuals and/or entities, you may attach additional sheets.

Question 1: Choose one of the following that best describes the individual or entity to which your complaint relates:

- **For Individuals**: accountant, analyst, attorney, auditor, broker, compliance officer, employee, executive officer or director, financial planner, fund manager, investment advisor, stock promoter, trustee, unknown, or other (specify).
- **For Entity**: bank, broker-dealer, clearing agency, day trading firm, exchange, Financial Industry Regulatory Authority, insurance company, investment company, Individual Retirement Account or 401(k) custodian/administrator, market maker, municipal securities dealers, mutual fund, newsletter company/investment publication companies, on-line trading firm, private fund company (including hedge fund, private equity fund, venture capital fund, or real estate fund), private/closely held company, SEC or other federal agency, transfer agent/paying agent/registrar, underwriter, unknown, or other (specify).

Questions 2-4: For each subject, provide the following information, if known:

- Full name

- Complete address, including city, state and zip code
- Telephone number,
- E-mail address, and
- Internet address, if applicable

Section D: Tell Us about Your Complaint

Question 1: State the date (mm/dd/yyyy) that the alleged conduct began.

Question 2: Choose the option that you believe best describes the nature of your complaint. If you are alleging more than one violation, please list all that you believe may apply. Use additional sheets if necessary.

- Theft/misappropriation (advance fee fraud; lost or stolen securities; hacking of account)
- Misrepresentation/omission (false/misleading marketing/sales literature; inaccurate, misleading or non-disclosure by Broker-Dealer, Investment Adviser and Associated Person; false/material misstatements in firm research that were basis of transaction)
- Offering fraud (Ponzi/pyramid scheme; other offering fraud)
- Registration violations (unregistered securities offering)
- Trading (after hours trading; algorithmic trading; front-running; insider trading, manipulation of securities/prices; market timing; inaccurate quotes/pricing information; program trading; short selling; trading suspensions; volatility)
- Fees/mark-ups/commissions (excessive or unnecessary administrative fees; excessive commissions or sales fees; failure to disclose fees; insufficient notice of change in fees; negotiated fee problems; excessive mark-ups/markdowns; excessive or otherwise improper spreads)
- Corporate disclosure/reporting/other issuer matter (audit; corporate governance; conflicts of interest by management; executive compensation; failure to notify shareholders of corporate events; false/misleading financial statements, offering documents, press releases, proxy materials; failure to file reports; financial fraud; Foreign Corrupt Practices Act violations; going private transactions; mergers and acquisitions; restrictive legends,

including 144 issues; reverse stock splits; selective disclosure – Regulation FD, 17 CFR 243; shareholder proposals; stock options for employees; stock splits; tender offers)

- Sales and advisory practices (background information on past violations/integrity; breach of fiduciary duty/responsibility (IA); failure to disclose breakpoints; churning/excessive trading; cold calling; conflict of interest; abuse of authority in discretionary trading; failure to respond to investor; guarantee against loss/promise to buy back shares; high pressure sales techniques; instructions by client not followed; investment objectives not followed; margin; poor investment advice; Regulation E (Electronic Transfer Act); Regulation S-P, 17 CFR 248, (privacy issues); solicitation methods (non-cold calling; seminars); suitability; unauthorized transactions)
- Operational (bond call; bond default; difficulty buying/selling securities; confirmations/statements; proxy materials/prospectus; delivery of funds/proceeds; dividend and interest problems; exchanges/switches of mutual funds with fund family; margin (illegal extension of margin credit, Regulation T restrictions, unauthorized margin transactions); online issues (trading system operation); settlement (including T+1 or T=3 concerns); stock certificates; spam; tax reporting problems; titling securities (difficulty titling ownership); trade execution.
- Customer accounts (abandoned or inactive accounts; account administration and processing; identity theft affecting account; IPOs: problems with IPO allocation or eligibility; inaccurate valuation of Net Asset Value; transfer of account)
- Comments/complaints about SEC, Self-Regulatory Organization, and Securities Investor Protection Corporation processes & programs (arbitration: bias by arbitrators/forum, failure to pay/comply with award, mandatory arbitration requirements, procedural problems or delays; SEC: complaints about enforcement actions, complaints about rulemaking, failure to act; Self-Regulatory Organization: failure to act; Investor Protection: inadequacy of laws or rules; SIPC: customer protection, proceedings and Broker-Dealer liquidations;

- Other (analyst complaints; market maker activities; employer/employee disputes; specify other).

Question 3: Indicate whether you were in the past, or are currently, an officer, director, employee, consultant, or contractor of the entity to which your complaint relates.

Question 4a: Indicate whether you have taken any prior action regarding your complaint, including whether you reported the violation to the entity, including the compliance office, whistleblower hotline or ombudsman; complained to the SEC, another regulator, a law enforcement agency, or any other agency or organization; initiated legal action, mediation or arbitration, or initiated any other action.

Question 4b: If you answered "yes" to question 4a, provide details, including the date on which you took the action(s) described, the name of the person or entity to whom you directed any report or complaint and contact information for the person or entity, if known, and the complete case name, case number, and forum of any legal action you have taken. Use additional sheets if necessary.

Question 5a: Choose from the following the option that you believe best describes the type of security or investment at issue, if applicable:

- 1031 exchanges
- 529 plans
- American Depositary Receipts
- Annuities (equity-indexed annuities, fixed annuities, variable annuities)
- Asset-backed securities
- Auction rate securities
- Banking products (including credit cards)
- Certificates of deposit (CDs)
- Closed-end funds
- Coins and precious metals (gold, silver, etc.)
- Collateralized mortgage obligations (CMOs)
- Commercial paper

- Commodities (currency transactions, futures, stock index options)
- Convertible securities
- Debt (corporate, lower-rated or “junk”, municipal)
- Equities (exchange-traded, foreign, Over-the-Counter, unregistered, linked notes)
- Exchange Traded Funds
- Franchises or business ventures
- Hedge funds
- Insurance contracts (not annuities)
- Money-market funds
- Mortgage-backed securities (mortgages, reverse mortgages)
- Mutual funds
- Options (commodity options, index options)
- Partnerships
- Preferred shares
- Prime bank securities/high yield programs
- Promissory notes
- Real estate (real estate investment trusts (REITs))
- Retirement plans (401(k), IRAs)
- Rights and warrants
- Structured note products
- Subprime issues
- Treasury securities
- U.S. government agency securities
- Unit investment trusts (UIT)
- Viaticals and life settlements
- Wrap accounts
- Separately Managed Accounts (SMAs)
- Unknown

- Other (specify)

Question 5b: Provide the name of the issuer or security, if applicable.

Question 5c: Provide the ticker symbol or CUSIP number of the security, if applicable.

Question 6: State in detail all the facts pertinent to the alleged violation. Explain why you believe the facts described constitute a violation of the federal securities laws. Attach additional sheets if necessary.

Question 7: Describe all supporting materials in your possession and the availability and location of additional supporting materials not in your possession. Attach additional sheets if necessary.

Question 8: Describe how you obtained the information that supports your allegation. If any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets if necessary.

Question 9: Please provide any additional information you think may be relevant.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM WB-DEC

DECLARATION OF ORIGINAL INFORMATION SUBMITTED PURSUANT TO SECTION 21F OF THE SECURITIES EXCHANGE ACT OF 1934

A. SUBMITTER'S INFORMATION

1. Last Name		First	M.I.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP Code	Country
3. Telephone	Alt. Phone	E-mail Address	

B. ATTORNEY INFORMATION (If Applicable - See Instructions)

1. Attorney's name			
2. Firm Name			
3. Street Address			
City	State/ Province	ZIP Code	Country
4. Telephone	Fax	E-mail Address	

C. TIP/COMPLAINT DETAILS

1. Manner in which information was submitted to SEC: SEC website ☐ Mail ☐ Fax ☐ Other ☐ _____

2a. Tip, Complaint or Referral (TCR) number:
(Required if you submitted your information through SEC website)

2b. Date TCR referenced in 2a submitted to SEC / /

2c. Individual or entity to which Tip, Complaint or Referral relates:

3a. Has the submitter or counsel had any communication(s) with the SEC concerning this matter? YES ☐ NO ☐

3b. If the answer to 3a is "Yes," name of SEC staff member with whom the submitter or counsel communicated

4a. Has the submitter or counsel provided the information to any other agency or organization? YES ☐ NO ☐

4b. If the answer to 4a is "Yes," please provide details. Use additional sheets if necessary

4c. Name and contact information for point of contact at agency or organization, if known

D. ELIGIBILITY REQUIREMENTS

1. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of the Department of Justice, the Securities and Exchange Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board? YES ☐ NO ☐

2. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(52))? YES ☐ NO ☐

3. Did you obtain the information you are providing to us through the performance of an engagement required under the federal securities laws by an independent public accountant ? YES ☐ NO ☐

4. Did you provide the information identified in Section C above pursuant to a cooperation agreement with the SEC or another agency or organization? YES ☐ NO ☐

5. Are you a spouse, parent, child, or sibling of a member or employee of the Commission, or do you reside in the same household as a member or employee of the Commission? YES ☐ NO ☐

6. Did you acquire the information you are providing to us from any person described in questions D1 through D5? YES ☐ NO ☐

7. If you answered "yes" to any of questions 1 through 6 above, please provide details. Use additional sheets if necessary.

8a. Did you provide the information identified in Section C above before you (or anyone representing you) received any request, inquiry or demand from the SEC, Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information your submission was relevant? YES ☐ NO ☐

8b. If you answered "no" to question 8a, please provide details. Use additional sheets if necessary.

9a. Are you currently a subject or target of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information upon which your application for an award is based? YES ☐ NO ☐

9b. If you answered "Yes" to question 9a, please provide details. Use additional sheets if necessary.

E. DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein, and all information submitted to the SEC – either in the TCR referenced in Section C of this form or in the Form TCR accompanying this Form WB-DEC - is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the SEC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Signature	Date

F. COUNSEL CERTIFICATION

I certify that I have verified the identity of the whistleblower who completed Form WB-DEC in connection with the information referenced in Section C of this form by viewing the whistleblower's valid, unexpired government issued identification (e.g., driver's license, passport), that I have reviewed the whistleblower's Form WB-DEC for completeness and accuracy, and that I will retain an original, signed copy of the Form WB-DEC completed by the whistleblower in my records.

Signature	Date

Privacy Act Statement

This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Securities and Exchange Commission (SEC) inform individuals of the following when asking for information. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 21F of the Securities Exchange Act of 1934. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act and 21F-7 of this chapter. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

Questions concerning this form may be directed to the SEC Whistleblower Office, 100 F Street, NE, Washington, D.C. 20549-XXXX, Tel. (800) XXX-XXXX, Fax (202) XXX-XXXX.

General Information

- Submitting information for the SEC's whistleblower award program is a two-step process. First, you must provide us with your information, which you may do in either of two ways. You may submit information electronically through the SEC's Electronic Data Collection System available on the SEC web site at [insert link]. Utilizing the SEC's online database is quick and easy and will enable you to print and retain a date and time-stamped confirmation of the information you provided to us. If you prefer, you may compete Form TCR ("Tip, Complaint, or Referral") manually, and mail or deliver it to us in hard copy following the instructions set forth on the form.

- **Submitting your information to us is the first step. If you want to be considered for a whistleblower award, you must also submit this Form WB-DEC and it must be manually signed under penalty of perjury.**

- ***If you submitted your information electronically through our web site, we must receive your completed Form WB-DEC within 30 days of your submission. If you did not submit your information electronically but instead are submitting your information on Form TCR,***

you must submit your declaration on Form WB-DEC at the same time that you submit your Form TCR. Follow the instructions set forth below for submitting this Form WB-DEC.

- If you follow these steps, and the information you submit leads to the successful enforcement of an SEC judicial or administrative action, or a related action, you will have an opportunity at a later date to submit a claim for an award. That is a separate process and is described in our whistleblower rules, which are available at [insert link for WBO website].

- You have the right to submit information anonymously. If you are doing so, please skip Part I of these instructions and proceed directly to Part II. Otherwise, please begin by following the instructions in Part I.

Part I: Instructions for filers who are disclosing their identity

- You are required to complete Sections A, C, D, and E of this form. If you are represented by an attorney in this matter, you must also complete Section B. Specific instructions for answering these questions can be found in Part IV below.

- If you previously submitted your complaint electronically through the SEC's web site, you may submit this Form WB-DEC to us in any of the following ways:
    - By mailing or delivering the signed form to the SEC Whistleblower Office, 100 F Street NE, Washington, D.C. 20549-XXXX; or
    - By faxing the signed form to (202) XXX-XXXX; or
    - By scanning and emailing the form in PDF format to [insert email address].

  Please note that we must receive your Form WB-DEC within thirty (30) days of when you submitted your information to us through our web site.

- If you did *not* previously submit your complaint electronically through the SEC's web site, but instead intend to send us a Form TCR, then you must submit your completed Form TCR and your declaration on this Form WB-DEC together. You may do so in one of two ways:

- By mailing or delivering the form TCR and the signed form WB-DEC to the SEC Whistleblower Office, 100 F Street NE, Washington, D.C. 20549-XXXX; or
- By faxing the form TCR and the signed form WB-DEC form to (202) XXX-XXXX.

Part II: Instructions for anonymous filers

- If you are submitting information anonymously, you *must* be represented by an attorney in this matter.
- If you previously submitted your complaint anonymously through the SEC's web site, make sure your attorney knows this.
- If you or your attorney did *not* previously submit your complaint electronically through the SEC's web site, but instead sent a Form TCR to us, then complete your Form TCR and give it to your attorney.
- You are also required to complete Sections B, C, D, and E of this form, and give the signed original to your attorney. Specific instructions for answering these questions can be found in Part IV below.
- In order for you to be eligible for a whistleblower award, your attorney must retain your signed original of Form WB-DEC in his or her records, and submit both your Form TCR (if you filled one out instead of submitting your complaint to us electronically) and an attorney declaration to us. You are encouraged to confirm that your attorney followed these steps.

Part III: Instructions for attorneys representing anonymous whistleblowers

- Obtain a completed and signed original of Form WB-DEC from your client. You must retain this signed original in your records because it may be required at a later date if your client files a claim for a whistleblower award.
- You must prepare your own Form WB-DEC, completing only Sections B, C and F. Specific instructions for answering these questions can be found in Part IV below.
- If your client previously submitted his or her complaint electronically through the SEC's web site, you may submit your attorney Form WB-DEC to us in any of the following ways:
  - By mailing or delivering the signed form to the SEC Whistleblower Office, 100 F Street NE, Washington, D.C. 20549-XXXX; or
  - By faxing the signed form to (202) XXX-XXXX; or

- By scanning and emailing the form in PDF format to [insert email address].

Please note that we must receive your Form WB-DEC within thirty (30) days of when your client submitted the information to us through our web site.

- If your client did *not* previously submit his or her complaint electronically through the SEC's web site, but instead intends to submit a Form TCR to us, then you must submit your client's complaint on Form TCR and your attorney declaration on this Form WB-DEC together. You may do so in one of two ways*:*
  - By mailing or delivering the Form TCR and the signed Form WB-DEC to the SEC Whistleblower Office, 100 F Street NE, Washington, D.C. 20549-XXXX; or
  - By faxing the Form TCR and the signed Form WB-DEC to (202) XXX-XXXX.

Part IV: Instructions for Completing Form WB-DEC:

Section A: Submitter's Information

Questions 1-3: Provide the following information about yourself:

- First and last name, and middle initial
- Complete address, including city, state and zip code
- Telephone number and, if available, an alternate number where you can be reached
- E-mail address

Section B: Information about Your Attorney. Complete this section only if you are represented by an attorney in this matter. You must be represented by an attorney, and this section must be completed, if you submitted your information anonymously.

Questions 1-4: Provide the following information about the attorney representing you in this matter:

- Attorney's name
- Firm name
- Complete address, including city, state and zip code
- Telephone number and fax number, and

- E-mail address

Section C: Tip/Complaint Details

Question 1: Indicate the manner in which the information was submitted to the SEC.

Question 2a: Include the TCR (Tip, Complaint or Referral) number, if available. **THE TCR NUMBER MUST BE INCLUDED ON FORM WB-DEC IN CASES WHERE THE ORIGINAL INFORMATION WAS SUBMITTED THROUGH THE SEC WEBSITE**

Question 2b: Provide the date on which the TCR referenced in 2a was submitted to the SEC.

Question 2c: Provide the name of the individual or entity to which your complaint relates.

Question 3a: Indicate whether the submitter or counsel have had any communication(s) with the SEC concerning this manner.

Question 3b: If you answered "yes" to question 3a, provide the name of the SEC staff member with whom the submitter or counsel communicated.

Question 4a: Indicate whether the submitted or counsel have provided the information being submitted to the SEC to any other agency or organization.

Question 4b: If you answered "yes" to question 4a, provide details, including the name of the agency or organization, the date on which you provided your information to the agency or organization and any other relevant details.

Question 4c: Provide a name and contact information for your point of contact at the other agency or organization, if known.

Section D: Eligibility Requirements

Question 1: State whether you are currently, or were at the time you acquired the original information that you submitted to the SEC a member, officer, or employee of the Department of Justice; the Securities and Exchange Commission; the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision; the Public Company Accounting

Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board

Question 2: State whether you are, or were you at the time you acquired the original information you submitted to the SEC, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934.

- Section 3(a)(52) of the Exchange Act (15 U.S.C. §78c(a)(52)) currently defines ''foreign financial regulatory authority'' as "any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above."

Question 3: Indicate whether you acquired the information you provided to the SEC through the performance of an engagement required under the securities laws by an independent public accountant.

Question 4: State whether you provided the information submitted to the SEC pursuant to a cooperation agreement with the SEC or with any other agency or organization.

Question 5: State whether you are a spouse, parent, child or sibling of a member or employee of the Commission, or whether you reside in the same household as a member or employee of the Commission.

Question 6: State whether you acquired the information you are providing to the SEC from any individual described in Question 1 through 5 of this Section.

Question 7: If you answered "yes" to questions 1 though 6, please provide details.

Question 8a: State whether you provided the information identified submitted to the SEC before you (or anyone representing you) received any request, inquiry or demand from the SEC, Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information your submission was relevant.

Question 8b: If you answered "no" to questions 8a, please provide details. Use additional sheets if necessary.

Question 9a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information upon which your application for award is based.

Question 9b: If you answered "yes" to question 7a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary.

Section E: Declaration

To be completed and signed by person submitting the information

Section F: Counsel Certification

To be completed and signed by attorney for an anonymous person submitting information

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM WB-APP

APPLICATION FOR AWARD FOR ORIGINAL INFORMATION SUBMITTED PURSUANT TO SECTION 21F OF THE SECURITIES EXCHANGE ACT OF 1934

A. APPLICANT'S INFORMATION (REQUIRED FOR ALL SUBMISSIONS)			
1. Last Name	First	M.I.	Social Security No.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP Code	Country
3. Telephone	Alt. Phone	E-mail Address	

B. ATTORNEY'S INFORMATION (IF APPLICABLE – SEE INSTRUCTIONS)			
1. Attorney's name			
2. Firm Name			
3. Street Address			
City	State/ Province	ZIP Code	Country
4. Telephone	Fax	E-mail Address	

C. TIP/COMPLAINT DETAILS	
1. Manner in which original information was submitted to SEC: SEC website ☐ Mail ☐ Fax ☐ Other ☐ _____	
2a. Tip, Complaint or Referral number	2b. Date TCR referred to in 2a submitted to SEC / /
2c. Subject(s) of the Tip, Complaint or Referral:	

D. NOTICE OF COVERED ACTION	
1. Date of Notice of Covered Action to which claim relates: / /	2. Notice Number:
3a. Case Name	3b. Case Number

E. CLAIMS PERTAINING TO RELATED ACTIONS	
1. Name of agency or organization to which you provided your information	
2. Name and contact information for point of contact at agency or organization, if known.	
3a. Date you provided your information / /	3b. Date action filed by agency/organization / /
4a. Case Name	4b. Case number

F. ELIGIBILITY REQUIREMENTS
1. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of the Department of Justice, the Securities and Exchange Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board? YES ☐ NO ☐

2. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(52))? YES ☐ NO ☐

3. Did you obtain the information you are providing to us through the performance of an engagement required under the federal securities laws by an independent public accountant? YES ☐ NO ☐

4. Did you provide the information identified in Section C above pursuant to a cooperation agreement with the SEC or another agency or organization? YES ☐ NO ☐

5. Are you a spouse, parent, child, or sibling of a member or employee of the Commission, or do you reside in the same household as a member or employee of the Commission? YES ☐ NO ☐

6. Did you acquire the information you are providing to us from any person described in questions F1 through F5? YES ☐ NO ☐

7. If you answered "yes" to any of questions 1 through 6 above, please provide details. Use additional sheets if necessary.

8a. Did you provide the information identified in Section C above before you (or anyone representing you) received any request, inquiry or demand from the SEC, Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information your submission was relevant? YES ☐ NO ☐

8b. If you answered "yes" to question 8a, please provide details. Use additional sheets if necessary.

9a. Are you currently a subject or target of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information upon which your application for an award is based? YES ☐ NO ☐

9b. If you answered "Yes" to question 9a, please provide details. Use additional sheets if necessary.

G. ENTITLEMENT TO AWARD

Explain the basis for your belief that you are entitled to an award in connection with your submission of information to us, or to another agency in a related action. Provide any additional information you think may be relevant in light of the criteria for determining the amount of an award set forth in Rule 21F-6 under the Securities Exchange Act of 1934. Include any supporting documents in your possession or control, and attach additional sheets, if necessary.

H. DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the SEC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Signature	Date

Privacy Act Statement

This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Securities and Exchange Commission (SEC) inform individuals of the following when asking for information. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 21F of the Securities Exchange Act of 1934. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act and Rule 21F-7 thereunder. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

Questions concerning this form may be directed to the SEC Whistleblower Office, 100 F Street, NE, Washington, D.C. 20549-XXXX, Tel. (800) XXX-XXXX, Fax (202) XXX-XXXX.

General

- This form should be used by persons making a claim for a whistleblower award in connection with information provided to the SEC or to another agency in a related action. In order to be deemed eligible for an award, you must meet all the requirements set forth in Section 21F of the Securities Exchange Act of 1934 and the rules thereunder.

- You must sign the Form WB-APP as the claimant. If you provided your information to the SEC anonymously, you must now disclose your identity on this form and your identity must be verified in a form and manner that is acceptable to the Whistleblower Office prior to the payment of any award.

    - If you are filing your claim in connection with information that you provided to the SEC, then your Form WB-APP, and any attachments thereto, **must be received by the SEC Whistleblower Office within sixty (60) days of the date of the Notice of Covered Action to which the claim relates.**

- If you are filing your claim in connection with information you provided to another agency in a related action, then your Form WB-APP, and any attachments there to, must be received by the SEC Whistleblower Office as follows:
  - If a final order imposing monetary sanctions has been entered in a related action at the time you submit your claim for an award in connection with a Commission action, **you must submit your claim for an award in that related action on the same Form WB-APP that you use for the Commission action.**
  - If a final order imposing monetary sanctions in a related action has not been entered at the time you submit your claim for an award in connection with a Commission action, **you must submit your claim on Form WB-APP within sixty (60) days of the issuance of a final order imposing sanctions in the related action.**

- You must submit your Form WB-APP to us in one of the following two ways:
  - By mailing or delivering the signed form to the SEC Whistleblower Office, 100 F Street NE, Washington, D.C. 20549-XXXX; or
  - By faxing the signed form to (202) XXX-XXXX.

Instructions for Completing Form WB-APP

Section A: Applicant's Information

Questions 1-3: Provide the following information about yourself:

- First and last name, and middle initial
- Complete address, including city, state and zip code
- Telephone number and, if available, an alternate number where you can be reached
- E-mail address

Section B: Attorney's Information. If you are represented by an attorney in this matter, provide the information requested. If you are not representing an attorney in this matter, leave this Section blank.

Questions 1-4: Provide the following information about the attorney representing you in this matter:

- Attorney's name
- Firm name
- Complete address, including city, state and zip code
- Telephone number and fax number, and
- E-mail address.

Section C: Tip/Complaint Details

Question 1: Indicate the manner in which your original information was submitted to the SEC.

Question 2a: Include the TCR (Tip, Complaint or Referral) number to which this claim relates.

Question 2b: Provide the date on which you submitted your information to the SEC.

Question 2c: Provide the name of the individual(s) or entity(s) to which your complaint related.

Section D: Notice of Covered Action

The process for making a claim for a whistleblower award begins with the publication of a "Notice of a Covered Action" on the Commission's website. This notice is published whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000. The Notice is published on the Commission's website subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold.

Question 1: Provide the date of the Notice of Covered Action to which this claim relates.

Question 2: Provide the notice number of the Notice of Covered Action.

Question 3a: Provide the case name referenced in Notice of Covered Action.

Question 3b: Provide the case number referenced in Notice of Covered Action.

Section E: Claims Pertaining to Related Actions

Question 1: Provide the name of the agency or organization to which you provided your information.

Question 2: Provide the name and contact information for your point of contact at the agency or organization, if known.

Question 3a: Provide the date on which that you provided your information to the agency or organization referenced in question E1.

Question 3b: Provide the date on which the agency or organization referenced in question E1 filed the related action that was based upon the information you provided.

Question 4a: Provide the case name of the related action.

Question 4b: Provide the case number of the related action.

Section F: Eligibility Requirements

Question 1: State whether you are currently, or were at the time you acquired the original information that you submitted to the SEC a member, officer, or employee of the Department of Justice; the Securities and Exchange Commission; the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board

Question 2: State whether you are, or were you at the time you acquired the original information you submitted to the SEC, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934.

- Section 3(a)(52) of the Exchange Act (15 U.S.C. §78c(a)(52)) currently defines ''foreign financial regulatory authority'' as "any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above."

Question 3: Indicate whether you acquired the information you provided to the SEC through the performance of an engagement required under the securities laws by an independent public accountant.

Question 4: State whether you provided the information submitted to the SEC pursuant to a cooperation agreement with the SEC or with any other agency or organization.

Question 5: State whether you are a spouse, parent, child or sibling of a member or employee of the Commission, or whether you reside in the same household as a member or employee of the Commission.

Question 6: State whether you acquired the information you are providing to the SEC from any individual described in Question 1 through 5 of this Section.

Question 7: If you answered "yes" to questions 1 though 6, please provide details.

Question 8a: State whether you provided the information identified submitted to the SEC before you (or anyone representing you) received any request, inquiry or demand from the SEC, Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information your submission was relevant.

Question 8b: If you answered "no" to questions 8a, please provide details. Use additional sheets if necessary.

Question 9a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information upon which your application for award is based.

Question 9b: If you answered "yes" to question 9a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary. If you previously provided this information on Form WB-DEC, you may leave this question blank, unless your response has changed since the time you submitted your Form WB-DEC.

Section G: Entitlement to Award

Use this section to explain the basis for your belief that you are entitled to an award in connection with your submission of information to us or to another agency in connection with a related action. Specifically address how you believe you voluntarily provided the Commission with original information that led to the successful enforcement of a judicial or administrative action filed by the Commission, or a related action. Refer to Rules 21F-3 and 21F-4 under the Exchange Act for further information concerning the relevant award criteria. You may attach additional sheets, if necessary.

Rule 21F-6 under the Exchange Act provides that in determining the amount of an award, the Commission will evaluate the following factors: (a) the significance of the information provided by a whistleblower to the success of the Commission action or related action; (b) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action; (c) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and (d) whether the award otherwise enhances the Commission's ability to enforce the federal securities laws, protect investors, and encourage

the submission of high quality information from whistleblowers. Address these factors in your response as well.

Additional information about the criteria the Commission may consider in determining the amount of an award is available on the Commission's website at [insert WBO web page address]

Section G: Declaration

This section must be signed by the claimant.

By the Commission.

Dated: November 3, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–28186 Filed 11–16–10; 8:45 am]

BILLING CODE 8011–01–C

Federal Register

Wednesday,
November 17, 2010

Part IV

Environmental Protection Agency

Endocrine Disruptor Screening Program; Draft Policies and Procedures for Screening Safe Drinking Water Act Chemicals, Second List of Chemicals for Tier 1 Screening, Agency Information Collection Activities; Proposed Collection; Comment Request; Addendum for the Second List of Chemicals; Tier 1 Screening of Certain Chemicals; Notices

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2007–1080; FRL–8848–9]

Endocrine Disruptor Screening Program; Draft Policies and Procedures for Screening Safe Drinking Water Act Chemicals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document describes EPA's draft policies and procedures for requiring Tier 1 screening under the Endocrine Disruptor Screening Program (EDSP) of substances for which EPA may issue testing orders pursuant to section 1457 of the Safe Drinking Water Act (SDWA) and section 408(p) of the Federal Food, Drug, and Cosmetic Act (FFDCA). FFDCA section 408(p) directed EPA to develop a chemical screening program using appropriate validated test systems and other scientifically relevant information to determine whether certain substances may have hormonal effects. These draft policies and procedures are intended to supplement the existing EDSP policies and procedures that were published in the **Federal Register** on April 15, 2009 (74 FR 17560); however, this document was drafted with the intent of explaining the policies and procedures relevant to EDSP Safe Drinking Water Act chemicals.

DATES: Comments must be received on or before January 18, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2007–1080, 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 Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2007–1080. 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–2007–1080. 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 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 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket 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:* Susan Sharkey, Chemical Control Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8789; e-mail address: *sharkey.susan@epa.gov,* or Bill Wooge, Office of Science Coordination and Policy, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8476; e-mail address: *wooge.william@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. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture or import chemical substances (including pesticide chemicals) that may be found in sources of drinking water; if you manufacture or import chemical substances that degrade to chemical substances found in sources of drinking water; or if you are, or may otherwise be, involved in the testing of chemical substances for potential endocrine effects. Potentially affected entities may include, but are not limited to:

- Chemical manufacturers, importers and processors (NAICS code 325), *e.g.,* persons who manufacture, import or process chemical substances.
- Pesticide, fertilizer, and other agricultural chemical manufacturing (NAICS code 3253), *e.g.,* persons who manufacture, import or process pesticide, fertilizer and agricultural chemicals.
- Scientific research and development services (NAICS code 5417), *e.g.,* persons who conduct testing of chemical substances for endocrine effects.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining

whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in Unit III.C. of this document, and examine the Federal Food Drug and Cosmetic Act (FFDCA) section 408(p). If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What action Is the agency taking?

The Agency is proposing, and seeking public comment on, a number of draft policies and procedures for issuing EDSP test orders for substances based on the Agency's authority under the Safe Drinking Water Act (SDWA) section 1457 (*i.e.,* "SDWA chemicals"). SDWA authorizes EPA to issue EDSP test orders to manufacturers and importers of substances that may be found in sources of drinking water and to which a substantial population may be exposed (42 U.S.C. 300j–17). SDWA chemicals encompass a wide variety of substances, including industrial and pesticide chemicals, ingredients in pharmaceuticals and personal care products, and degradates.

These draft policies and procedures are intended to supplement the existing EDSP policies and procedures that were published in the **Federal Register** on April 15, 2009 (74 FR 17560) (FRL–8399–9) (FIFRA/FFDCA policies and procedures) (Ref. 1). The policies discussed in the April 15, 2009, document were developed based primarily on considerations applicable to the issuance of EDSP test orders on pesticide active and inert ingredients, which were the chemicals comprising the first EDSP chemical list. It is important to note that chemicals on the first EDSP list may also fit the criteria to be considered a SDWA chemical and, therefore, these draft policies and procedures also may apply to those chemicals. Consequently, some of the existing policies and procedures reflect issues uniquely associated with the pesticide market and the specific regulatory context under which EPA regulates pesticide chemicals, *i.e.,* FIFRA. In this document, EPA describes the policies and procedures associated with Tier 1 screening of SDWA chemicals, including certain modifications to those original policies and procedures that are intended to address issues that are unique to SDWA chemicals, or to address the circumstances where other competing considerations for SDWA chemicals warrant a modification of those earlier policies.

This document discusses the policy considerations for SDWA chemicals and the procedural modifications and clarifications the Agency is considering for the following areas:

- Who would receive EDSP test orders on SDWA chemicals? [Unit V.A.]
- How will recipients of orders on SDWA chemicals be notified? [Unit V.B.]
- How will the public know who has received a test order on a SDWA chemical or who has supplied the needed data? [Unit V.C.]
- How will the Agency minimize duplicative testing? [Unit V.D.]
- What are the potential responses to test orders on SDWA chemicals? [Unit V.E.]
- How can order responses and data be submitted electronically? [Unit V.F.]
- How will EPA facilitate joint data development and cost sharing for SDWA chemicals? [Unit V.G.]
- What procedures can EPA apply for handling CBI for SDWA chemicals? [Unit V.H.]
- What is the process for contesting a test order or consequences for failure to respond or comply with a test order? [Unit V.I.]
- What is the informal administrative review procedure? [Unit V.J.]
- What are the adverse effects reporting requirements? [Unit V.K.]

The FIFRA/FFDCA policies and procedures remain relevant to recipients of FIFRA chemical test orders. SDWA chemical test order recipients should refer to this document and any subsequent revised document for policies and procedure guidelines. In addition, a new draft order template for issuance of orders under SDWA section 1457 and FFDCA section 408(p)(5) is available in the docket for this **Federal Register** notice (Ref. 2).

EPA has also published two related documents elsewhere in today's **Federal Register**. One announces the second list of EDSP chemicals, which includes both SDWA chemicals and pesticide active ingredients (PAIs). Some of the listed chemicals may be both SDWA chemicals and PAIs. The other requests public comment on a draft supplemental Information Collection Request (ICR), which describes the estimated paperwork burden and costs associated with the second list of EDSP chemicals.

B. What are the statutory authorities for the policies discussed in this document?

SDWA is the primary Federal law that ensures the quality of Americans' drinking water. Under SDWA, EPA sets standards for drinking water and works closely with states, localities, and water suppliers to implement these standards. SDWA authorizes EPA to set national standards for drinking water to protect against both naturally occurring and man-made contaminants that may be found in drinking water (42 U.S.C. 300g–1).

Section 1457 of SDWA authorizes EPA to require testing, under FFDCA section 408(p) (21 U.S.C. 346(a)(p)), of

any substance that may be found in sources of drinking water, based on a determination that a substantial population may be exposed to such a substance. (42 U.S.C. 300j–17).

Section 408(p)(1) of FFDCA requires EPA "to develop a screening program, using appropriate validated test systems and other scientifically relevant information, to determine whether certain substances may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other effects as [EPA] may designate." (21 U.S.C. 346a(p)(1)).

Section 408(p)(3) of FFDCA expressly requires that EPA "shall provide for the testing of all pesticide chemicals." (21 U.S.C. 346a(p)(3)). Section 201 of FFDCA defines "pesticide chemical" as "any substance that is a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), including all active and pesticide inert ingredients of such pesticide." (21 U.S.C. 231(q)(1)).

Section 408(p)(5)(A) of FFDCA provides that the Administrator "shall issue an order to a registrant of a substance for which testing is required [under FFDCA section 408(p)], or to a person who manufactures or imports a substance for which testing is required [under FFDCA section 408(p)], to conduct testing in accordance with the screening program, and submit information obtained from the testing to the Administrator within a reasonable time period" that the Agency determines is sufficient for the generation of the information. Based on the statutes discussed in this subsection, EPA has the discretion to require testing of a pesticide chemical under FFDCA solely, FIFRA/FFDCA, SDWA/FFDCA or FIFRA/SDWA/FFDCA.

Section 408(p)(5)(B) of FFDCA requires that, "to the extent practicable, the Administrator shall minimize duplicative testing of the same substance for the same endocrine effect, develop, as appropriate, procedures for fair and equitable sharing of test costs, and develop, as necessary, procedures for handling of confidential business information. * * *" (21 U.S.C. 346a(p)(5)(B)).

Section 408(p)(5)(D) of FFDCA provides that any person (other than a registrant) who fails to comply with a FFDCA section 408(p)(5) test order shall be liable for the same penalties and sanctions as are provided for under section 16 of the Toxic Substances Control Act (TSCA). (21 U.S.C. 346a(p)(5)(D)). Such penalties and sanctions shall be assessed and imposed in the same manner as provided in TSCA section 16. Under TSCA section 16, civil penalties may be assessed, after notice and an administrative hearing held on the record in accordance with section 554 of the Administrative Procedure Act (APA). (15 U.S.C. 2615(a)(1)–(2)(A)).

C. Does this document contain binding requirements?

While the requirements in the statutes and in any test orders ultimately issued under FFDCA section 408(p) are binding, the policies outlined in this notice are not. The policies outlined in this notice merely represent the general procedures and statutory interpretations on which EPA may rely to implement the existing goals of the statutory program. These policies and procedures may be modified at any time by EPA and the Agency may depart from these policies and procedures where circumstances warrant and without prior notice.

III. Background on the EDSP

A. What is the EDSP?

EPA developed the EDSP in response to a Congressional mandate in FFDCA "to determine whether certain substances may have an effect in humans that is similar to an effect produced by naturally occurring estrogen, or such effects as [EPA] may designate" (21 U.S.C. 346a(p)). As part of the EDSP, EPA issues orders to collect certain test data on selected chemical substances. In general, EPA intends to use the data collected under the EDSP, along with other information, to determine if a pesticide chemical, or other substances, may pose a risk to human health or the environment due to disruption of the endocrine system. The determination that a chemical does or is not likely to have the potential to interact with the endocrine system will be made on a weight of evidence basis taking into account data from the Tier 1 assays and/or other scientifically relevant information. Chemicals that go through Tier 1 screening and are found to have the potential to interact with the estrogen, androgen, or thyroid hormone systems will proceed to the next stage of EDSP where EPA will determine which, if any, of the Tier 2 tests are necessary based on the available data. Tier 2 testing is designed to identify any adverse endocrine-related effects caused by the substance, and establish a quantitative relationship between the dose and that endocrine effect. Further information regarding the EDSP and requirements for Tier 1 and Tier 2 can be found on the Agency's EDSP Web site, at *http://www.epa.gov/endo/* (Ref. 3). EPA is aware of no issue specific to the chemicals in the second list of screening that would warrant any modification to the existing testing scheme, and is not proposing to adopt any.

B. Why is EPA publishing a second edsp policies and procedures used to require the submission of test data?

As stated in the April 15, 2009, document (Ref. 1), EPA generally developed EDSP policies and procedures that could be used in subsequent data collection efforts, including those under SDWA, but indicated that EPA may make modifications as appropriate. The Agency believes that some significant modifications are needed because the existing policies were designed to address screening of pesticide chemicals which are regulated under FIFRA, a statute that does not apply to non-pesticides. For example, much of the data that would be generated in response to an EDSP test order (particularly for pesticide active ingredients) would be entitled to the data compensation protections available under FIFRA (7 U.S.C. 136a(c)(1)(F); FFDCA 21 U.S.C. 346a(i)). Additionally, FIFRA section 10 prohibits EPA from releasing study data on pesticide chemicals unless the person seeking access to the information certifies that he is not an agent or employee of any multinational pesticide company (7 U.S.C. 136h(g)). Because FFDCA section 408(p) did not authorize EPA to modify these FIFRA requirements, EPA needed to ensure that the procedures adopted to implement section 408(p) would operate in a manner that would be compatible with EPA's implementation of the existing FIFRA mandates. Moreover, the fact that a long-standing FIFRA mechanism was already effectively minimizing duplicative testing and promoting cost sharing among order recipients meant that EPA could rely on the existing mechanisms as a uniquely relevant model for screening of pesticides under the EDSP. By contrast, the SDWA chemicals that may be subject to EDSP screening include pesticide chemicals, industrial (non-pesticide) chemicals, as well as ingredients in pharmaceuticals and personal care products, among others.

EPA has also drafted these new policies and procedures to address issues specific to SDWA chemicals beyond those associated with the applicability of FIFRA. The rationale and statutory authority for listing SDWA chemicals, the sources of SDWA chemicals and EPA's ability to identify manufacturers and importers, and other considerations unique to SDWA

chemicals create a need for policies and procedures specific to EDSP screening under SDWA/FFDCA authority. For example, some registered pesticide ingredients have additional uses that account for a much larger percentage of total manufacture and import. In such cases, the Agency seeks to be able to identify, and issue orders to, all relevant manufacturers and importers in a manner that creates a fair and level playing field for complying with the order. In addition, many of the companies likely to receive SDWA/FFDCA test orders may be unfamiliar with the initial policies and procedures because those companies are not associated with the pesticide market, were unaffected by that earlier proposal, and consequently had no interest in commenting. EPA also believes it would be inappropriate to publish this document in a manner identifying only the changes to the existing policies and procedures because the procedures are inherently complex and would require numerous cross referencing by parties unfamiliar with the referenced regulation.

C. When do these policies and procedures apply?

These policies and procedures apply to all SDWA chemicals listed for screening under the EDSP. EPA has the discretion to issue EDSP test orders under the authorities of SDWA section 1457 and FFDCA section 408(p) for all SDWA chemicals, including PAIs. As described in this document, EPA generally intends to use SDWA authority (1) to require testing of SDWA chemicals that are not PAIs, and (2) to require testing of SDWA chemicals that are also PAIs if the initial FIFRA/FFDCA orders to technical registrants did not generate the required data. Note that, in the event that FIFRA/FFDCA order recipients exercise the option to exit the pesticide market and the Agency subsequently sends such recipients a SDWA/FFDCA order, the recipient would be required to submit data or otherwise respond to the SDWA/FFDCA test order, even if they previously responded to an earlier FIFRA/FFDCA order.

For a variety of reasons, EPA generally intends to issue FIFRA/FFDCA orders to manufacturers and registrants of PAIs. For such order recipients, the policies discussed in the April 15, 2009, document would be applicable, rather than the policies discussed in this document. EPA believes that this will minimize administrative burdens and ultimately be less confusing to order recipients. Burdens and confusion should be reduced because many of the policies for these chemicals were driven by existing statutory requirements applicable to the test order recipients for these chemicals, such as the requirements for data compensation and confidentiality established by FIFRA sections 3(c)(1)(F) and 12, as well as FFDCA section 408(i). These requirements would remain applicable, whether or not the test orders are issued for SDWA chemicals, and EPA lacks the authority to modify them. Thus, EPA believes that continuing to issue FIFRA/FFDCA orders to the manufacturers and registrants of these chemicals would generally be appropriate, to avoid any confusion, and to simplify Agency policies, even though EPA has determined that these chemicals meet the standards laid out in SDWA section 1457.

IV. EDSP Policy Considerations for SDWA Chemicals

The Agency used the following policy considerations to guide development of procedures for issuing EDSP Tier 1 screening test orders on SDWA chemicals:

- A core part of EPA's mission is to promote public understanding of the potential risks posed by chemicals in commerce.
- The basis for an order with respect to SDWA chemicals is that a substance may be found in sources of drinking water and a determination that a substantial population may be exposed to such substance. Thus, SDWA procedures should not be unnecessarily tied to the use of the chemical in any given market and should instead focus on obtaining data from companies that might be expected to contribute to a chemical's presence in drinking water.
- For simplicity, procedures for SDWA chemicals should be consistent with existing EDSP procedures unless there is a reason for modifying them (*e.g.,* different statutory requirements), though for the sake of clarity EPA has written these draft policies and procedures as a complete, stand alone document.
- Procedures for EDSP testing of SDWA chemicals should strive to minimize duplicative testing and promote fair and equitable sharing of test costs, as described in section 408(p)(5)(B) of FFDCA.
- The Agency expects to issue SDWA/FFDCA orders for pesticide inert ingredients that are listed for EDSP screening with a SDWA section 1457 finding; it has also been the Agency's experience that pesticide inerts generally have a much larger market than solely as ingredients in pesticide formulations. For these reasons EPA believes it is reasonable and equitable to initially issue SDWA/FFDCA orders on all SDWA chemicals that are not PAIs.
- EPA intends, where appropriate, to rely on FIFRA and FFDCA when issuing orders to technical registrants of a pesticide chemical. If, however, recipients of such test orders fail to provide the required information, EPA may choose to reissue test orders under SDWA/FFDCA authority based on the SDWA criteria. EPA would then rely on the policies and procedures established in this document.

V. Proposed Procedures for Requiring Testing Under the EDSP Pursuant to SDWA

For purposes of discussing the EDSP procedures in this document, SDWA chemicals can be described as either currently registered PAIs (SDWA PAIs) or Other SDWA Chemicals (including currently registered pesticide inert ingredients). As previously noted, EPA generally intends to issue FIFRA/FFDCA orders to manufacturers and registrants of PAIs. EPA would retain, however, the discretion to issue an SDWA/FFDCA order to any substance that meets the statutory criteria in SDWA section 1457. Consequently, in the event that no FIFRA/FFDCA test order recipient generates the required data, either because all registrations containing the PAI or inert ingredient has been cancelled, or because all manufacturers decide to "opt out" of the pesticide market, EPA may determine to issue testing orders based on the SDWA authority in order to obtain the data. In such instances, the policies outlined in this document would be applicable.

By contrast, for SDWA chemicals that are not PAIs (*i.e.,* "Other SDWA Chemicals"), EPA may determine to issue test orders relying on both SDWA section 1457 and FFDCA section 408(p)(5). For readers associated with the pesticide community, EPA notes that in several respects, the Other SDWA Chemicals are similar to the non-food use inert ingredients discussed in EPA's April 15, 2009 policies; the similarities are reflected in the policies that EPA is proposing in this document. Subsections A–K of this unit describes the policies and procedures that relate to EDSP test orders issued under SDWA/FFDCA authority.

A. Who would receive EDSP test orders on SDWA chemicals?

Under FFDCA section 408(p)(5)(A), EPA "shall issue" EDSP test orders "to a registrant of a substance for which testing is required * * * or to a person who manufactures or imports a

substance for which testing is required * * *" (21 U.S.C. 346(a)(p)(5)(A)). The process for issuing test orders for SDWA chemicals depends on whether the chemical is a SDWA PAI or an Other SDWA Chemical. A chart depicting the process for issuing test orders on SDWA chemicals is included in the docket (Ref. 4).

As noted for SDWA PAIs, the Agency is not proposing to modify the FIFRA policies and procedures. Readers potentially affected by FIFRA/FFDCA test orders should review the April 15, 2009, document. As described in that document, EPA intends to use internal databases—principally the Office of Pesticide Program's Information Network (OPPIN)—to identify technical registrants with a current pesticide registration containing a SDWA chemical as the active ingredient, and anticipates issuing a FIFRA/FFDCA test order to all identified technical registrants.

For Other SDWA Chemicals, EPA intends to issue SDWA/FFDCA test orders following the polices and procedures proposed in this document. Generally, EPA intends to rely primarily on information reported to the Agency under the TSCA Inventory Update Reporting (IUR) Rule (Ref. 5) to identify the initial SDWA/FFDCA test order recipients. The IUR Rule requires manufacturers and importers of certain chemical substances included on the TSCA Inventory to report site and manufacturing information for chemicals manufactured (including imported) in amounts of 25,000 lb. or more at a single site. The Agency believes that the IUR information is an appropriate source for identifying test order recipients for four primary reasons:

(1) It has been EPA's experience that relying on companies that have reported to the IUR is the most reliable mechanism for identifying manufacturers and importers of (non-pesticide) industrial chemicals. Such manufacturers and importers are required, by regulation, to report under the IUR rule.

(2) Companies that report under the IUR Rule generally account for most of a chemical in commerce; therefore these companies can be expected to account for most of a chemical when it is found in drinking water, which is the basis for listing a chemical under SDWA authority (see Unit II.B.). As relatively large manufacturers and importers, EPA also believes that companies reporting under IUR comprise the majority of the volume associated with the chemical; these companies are more likely to be able to afford the cost of EDSP testing than companies manufacturing volumes below the IUR reporting threshold. EPA believes that, in general, these manufacturers are analogous to the technical registrants, who received orders in the first round of EDSP screening.

(3) Using the IUR information to identify order recipients will facilitate joint data development as reporters for these chemicals are generally publicly known and not numerous.

(4) EPA anticipates that initially sending orders on Other SDWA Chemicals to all potential manufacturers and importers may lead to unnecessary administrative costs to the regulated industry and EPA. EPA's experience in the first round of EDSP screening identified that, to date, for the nine inert pesticide chemicals, only 10 of the 524 orders issued have resulted in an initial response of entering a consortia or otherwise providing the data. The remaining 514 responses have been either no response, returned to the Agency as undeliverable, or a response indicating not subject to the order, discontinued manufacture or import, or will not sell for a pesticide use. Should EPA send a SDWA/FFDCA order to these recipients as a follow-up, the Agency anticipates that the 115 responses of "will not sell for a pesticide use" are manufacturers or importers which would need to provide data under the SDWA/FFDCA order. (Ref. 6) A *de minimis* exemption for very low volume producers is discussed later in this subsection.

If there are no companies reporting in response to the IUR rule for a given chemical, EPA intends to use other publicly-available databases, such as the Toxic Release Inventory (TRI), to identify possible test order recipients. For Other SDWA Chemicals that are also regulated or tracked by another agency (*e.g.,* pharmaceuticals by the Food and Drug Administration), EPA may also consult with that agency as appropriate to identify main manufacturers and importers. EPA is interested in finding other sources of information for reliably identifying test order recipients and requests comment on other means of identifying potential test order recipients.

In addition to using IUR, TRI, and other Federal Agency data, EPA intends to issue orders to manufacturers and importers who are subsequently identified as such. In the interest of equity and shared test cost burden, EPA believes it is important to identify and issue orders to all significant manufacturers and importers of a listed chemical; the Agency will follow up on any new information it receives to this effect and issue orders accordingly. Of particular interest to the Agency are companies whose production or import of a listed chemical fluctuates year-by-year or who can otherwise be considered current manufacturers or importers even though they did not report under the most recent IUR. Information submitted that identifies potential test order recipients not listed on the most recent IUR should pertain to those companies who manufacturer or import the chemical in relevant quantities. That is, EPA does not intend to issue orders to companies who manufacture or import a chemical for research and development purposes only, or who otherwise manufacture or import quantities of a chemical that are more appropriately measured in grams (as opposed to thousands of pounds). The rationale for this *de minimis* exemption is also based on the authority for listing an Other SDWA Chemical for EDSP screening (*see* Unit II.B.).

The Agency is also considering issuing catch-up orders for manufacturers or importers who are identified as beginning manufacture or import within five years of the issuance of the SDWA/FFDCA test order. The catch-up order process would be similar to the catch-up order process described in the April 15, 2009, document, except EPA intends to rely on the public to identify such manufacturers. A recipient of such catch-up orders would be expected to participate in the cost sharing if it relies on data developed or submitted by another recipient or consortia to satisfy its test order obligation.

If, after going through this process, all test order recipients have ceased to manufacture a SDWA chemical and the Agency has not received the required data, the SDWA chemical would be considered an "orphan." The Agency seeks comment on the value of EDSP testing on orphan chemicals and the strategy EPA should use to obtain EDSP data on orphan chemicals.

B. How will recipients of orders on SDWA chemicals be notified?

Order recipients would receive a test order in one of two ways: By registered mail or electronically, once a process has been established. In addition to the test order, EPA will send each recipient a packet that contains the instructions, background materials, and forms needed to comply with the order or will provide directions as to the location of such materials.

EPA is moving toward electronic exchange of information in many of its programs. For instance, reporting for the IUR Rule is anticipated to be fully

electronic sometime in 2011. The Agency seeks comment as to whether companies who already have a Central Data Exchange (CDX) (Ref. 7) account would prefer to receive the notification electronically, either as a standard procedure or upon request. EPA requests that commenters include some discussion of the mechanisms by which EPA can ensure that accurate records documenting that the individual has received the order, as well as the date of receipt of the test order, can be obtained through the use of electronic reporting mechanisms.

C. How will the public know who has received a test order on a SDWA chemical or who has supplied data?

EPA intends to publish the list of all test order recipients on the Agency's public Web site, *https://www.epa.gov/endo.* EPA invites the submission of information (with proper substantiation) identifying additional entities—including entities who manufacture for export only—who should have received a test order. Commenters could either identify themselves or another person as additional candidates for the receipt of an order.

D. How will the agency minimize duplicative testing?

The Agency also intends to post the status of the test orders, including recipients' responses, on the EPA Web site so that both order recipients and the public can determine the status of responses. EPA is making such information available to enable test order recipients to identify and join other order recipients to develop the data in response to the order, thereby helping to achieve EPA's goals of minimizing duplicative testing and promoting fair and equitable sharing of test costs.

E. What are the potential responses to test orders on SDWA chemicals?

The options for responding to a SDWA/FFDCA test order are similar to those established in the existing policies and procedures except that the option of exiting the pesticide market will not be available. The basis for a SDWA/FFDCA order is that a chemical may be found in sources of drinking water to which substantial populations may be exposed. Exiting any given market (*e.g.,* the pesticide market) is not sufficient if the SDWA chemical is manufactured or imported for other uses because the chemical may still be found in sources of drinking water. Accordingly, if sufficient data on a SDWA chemical is not generated in response to a FIFRA/FFDCA order (*e.g.,* all FIFRA/FFDCA order recipients exit the market or otherwise indicate that they are not providing data), a subsequent SDWA/FFDCA order may be issued.

Order recipients provide their initial responses on an "Initial Response Form for Individual Order Recipients" (Ref. 8). Response options that EPA anticipates including in SDWA/FFDCA test orders are as follows:

Option 1: *Recipient indicates that it intends to generate data.* The test order recipient may decide to generate new data for each test specified in the order, and would then comply with the procedures prescribed in the test order. In general, this option would be identical to the option discussed in the original policies and procedures. EPA is not proposing to make any changes for SDWA chemicals. Data generated and submitted would need to comply with Good Laboratory Practices (GLP). Good Practices have been set out both in FIFRA for pesticides in 40 CFR part 160 and for TSCA chemicals in 40 CFR part 792. Test order recipients would need to follow appropriate GLPs, protocol requirements identified in the order, and procedures described in test order for submitting the data.

Option 2: *Recipient indicates that it is submitting or citing existing data or other scientifically relevant information (OSRI).* The recipient would choose this option to indicate that it is submitting or citing existing data (including citing data previously submitted to the Agency) that it believes is relevant to one or more of the requests in the test order. The recipient's initial response would include either the data or a reference to the data for each assay specified in the order. In submitting or citing existing data, the order recipient or other party should follow, as appropriate, relevant format guidelines described in the test order and provide an explanation of the relevance of the data to the order, including, where appropriate, a cogent and complete rationale for why it believes the information is or is not sufficient to satisfy part or all of the Tier 1 order.

Data compensation procedures may apply to data previously submitted to the Agency. If the data cited or submitted are from a study that was not conducted exactly as specified in the protocols referenced in the test order or in accordance with accepted scientific methodology or protocol, including but not limited to those presented in EPA's harmonized test guideline compendium (*see http://www.epa.gov/ocspp/pubs/frs/home/guidelin.htm*) (Ref. 9), the recipient would also identify the deviations from the applicable protocol(s), along with an explanation for the deviations, including an explanation as to why, notwithstanding the deviations, the protocol used for developing the cited or submitted data should still be considered as providing an accepted scientific methodology or protocol, and any other information relevant to a decision to accept the data as satisfaction of the order.

EPA would review any existing relevant information submitted or cited (including other scientifically relevant information) to determine whether the information is acceptable *i.e.,* the study was not rejected by the Agency for any reason related to completeness or quality) and satisfies the order. Decisions about whether the information satisfies part or all of the Tier 1 order will be based on the weight-of-evidence from all relevant information available. The Agency would notify the recipient in writing of its determination.

If the Agency determines that the information cited or submitted as part of the initial response received from an order recipient can be used to satisfy the Tier 1 order, which will be based on the weight-of-evidence from all relevant information available to the Agency, the Initial Response Form is the only response required.

If, however, EPA determines that the information cited or submitted as part of the initial response is insufficient to satisfy the Tier 1 order, although it may satisfy part of the order, the recipient would still need to satisfy the remainder of the order.

As indicated previously, EPA intends to use a weight-of-evidence basis, taking into account data from the Tier 1 assays and any other scientifically relevant information available, to determine whether the chemical has the potential to interact with the endocrine system. Chemicals that go through Tier 1 screening and are found to have the potential to interact with the estrogen, androgen, or thyroid hormone systems will proceed to the next stage of the EDSP where EPA will determine which, if any, of the Tier 2 tests are necessary based on the available data. Tier 2 testing is designed to identify any adverse endocrine-related effects caused by the substance, and establish a quantitative relationship between the dose and that endocrine effect.

EPA is not currently able to provide definitive examples of the specific circumstances in which a chemical would be able to go directly to Tier 2 testing; however, if an order recipient chooses to make such a request, EPA will consider it, along with any justification provided. In general, it may in some cases be possible to determine

that a particular chemical has the potential to interact with the endocrine system and therefore could proceed to Tier 2 even if Tier 1 data are limited. However, if only some of the Tier 1 data are available, there may not be sufficient information to determine that some of the Tier 2 data are not necessary. These determinations will be made in a weight-of-evidence judgment on a case-by-case basis and made publicly available for consideration by others with the same or similar circumstances.

Option 3: *Recipient indicates that it intends to enter (or offer to enter) into an agreement to form a consortium to provide the data.* The recipient may choose to form a consortium to share in the cost of producing the required data. All participants of the consortium must submit their own "Initial Response Form for Individual Order Recipients," providing the name of the party who will be submitting the data on the recipient's behalf.

The designated lead for the consortium would need to complete the "Initial Response Form for Consortium" to provide the primary contact for the consortium, the list of participants, and an indication of the consortium's planned response for each assay, along with documentation of its formation (such as a copy of the joint agreement or a written statement by all the parties that an agreement exists). The joint agreement to produce the data would not need to specify all of the terms of the final arrangement between the parties or the mechanism to resolve the terms. The designated lead for the consortium would need to follow the mailing instructions on the order to submit the consortium's initial response and accompanying information to EPA by the due date for the consortium's response, which would be indicated in the test order.

Once the consortium submits the data and EPA has completed its initial review, EPA would provide written notification to the contact of the consortium indicating whether the order has been satisfied. If satisfied, such an action would satisfy test order obligations for each of the consortium participants.

If the consortium fails to submit the data or meet the requirements of the order in a timely and adequate manner, each recipient would be subject to penalties, unless it were to commit to submit, and then did submit, the required data by the dates specified in the order. The Agency would generally not grant time extensions for the submission of data.

The Agency intends to provide to every test order recipient a list of the other manufacturers and/or importers (to the extent permitted by confidentiality requirements) that have also received an EDSP order for the specified SDWA chemical. This list would be intended to help order recipients identify other companies with whom they could form agreements to develop data jointly, or otherwise collaborate on a response to satisfy the requirements in the order. If the identity of a company subject to the SDWA/FFDCA test order is claimed as CBI, EPA intends to offer the company an opportunity to identify an agent who would act on their behalf in all matters relating to the EDSP program. For any company that chooses to designate an agent, the Agency intends to make the name of the agent (instead of the company) public by including it on the list of recipients of SDWA/FFDCA test orders. This name use would be similar to the process used for FIFRA/FFDCA test orders and presented in the April 15, 2009, document. If the identity of a company subject to the test order is claimed as CBI, and yet the company does not name an agent, that company's ability to obtain data compensation from other parties (or rely on compensable data submitted by other parties) would likely be affected. EPA generally intends to publish the list of order recipients in the **Federal Register** and post it on the Agency's Web site. EPA intends to update the list with subsequent publication(s) and posting(s) as appropriate. For example, the Agency intends to post the status of the test orders, including the recipient's response, on the Agency Web site so that both order recipients and the public can check on the status of responses to the orders. This public listing is intended to also facilitate the formation of consortia to develop data jointly since recipients would know all other entities required to generate the same data.

Option 4: *Recipient claims that it is not subject to the test order.* Under this option, a recipient would claim that it is not subject to the order because it does not manufacture or import the chemical identified for testing, or because it believes the order was otherwise erroneously sent. An explanation of the basis for the claim, along with appropriate information to substantiate the claim, would accompany the Initial Response. The Agency intends to evaluate the claim and respond to any request in writing within 90 days of receipt. If EPA was unable to verify the claim, the original requirements and deadlines in the order would be expected to remain. If EPA could verify the claim, such a response would satisfy the order and no further response would be necessary. This option would be similar to the option discussed in the original policies and procedures for manufacturers of inert ingredients. EPA is not proposing to make any changes for SDWA chemicals.

Option 5: *Recipient intends to discontinue the manufacture or import of the chemical.* Under this option, the recipient would indicate it has or is in the process of discontinuing all manufacture and import of the chemical. As noted previously, manufacture would also include manufacture for the purposes of export only. The recipient's "Initial Response Form" would need to include an explanation and documentation supporting its claim, which EPA could verify. If EPA verifies the claim, the initial response is all that would be required to satisfy the order. If EPA could not verify the claim, the recipient's obligation to comply with the test order would remain.

Unlike the existing policies and procedures, which enable a manufacturer or importer of a pesticide chemical to comply with the FIFRA/FFDCA test order by discontinuing the sale of the chemical into the pesticide market, SDWA/FFDCA test orders cannot be satisfied in this manner. A chemical manufacturer or importer that receives a SDWA/FFDCA test order would need to cease all manufacture and import of that chemical. Simply exiting the pesticide market would not necessarily address the chemical's potential presence in "sources of drinking water to which a substantial population may be exposed" and it would therefore be inappropriate to allow companies to satisfy a test order with such a response.

Option 6: *Recipient responds according to one of three other response options.* As part of the Initial Response, a recipient may also ask EPA to reconsider some or all of the testing specified in the order if:

6a. The recipient can demonstrate (supported by appropriate data) that the chemical is an endocrine disruptor and that additional EDSP Tier 1 screening is unnecessary.

6b. The recipient can demonstrate (supported by appropriate data) that the chemical meets the standard for an exemption under FFDCA section 408(p)(4) (*i.e.,* "that the substance is not anticipated to produce any effect in humans similar to an effect produced by a naturally occurring estrogen").

6c. The chemical was used by EPA as a "positive control" to validate one or more of the screening assays. EPA generally expects that if the chemical

was used by EPA as a "positive control" to validate one or more of the screening assays, only the data submitted related to those assays for which the chemical was used to complete the testing as part of the validation effort would be sufficient to satisfy the Tier 1 Order.

The Agency intends to make a determination on any claim and respond to the recipient in writing within 90 days of receipt. If EPA cannot verify the claim, the original requirements and deadlines in the order would remain. If EPA could verify the claim, EPA would consider the response to fully satisfy the order and no further response would be required.

F. How can order responses and data be submitted electronically?

EPA is developing a new electronic submission system for data submitted in response to SDWA/FFDCA test orders following the general process established for TSCA Section 5 Premanufacture Notices and under development for other TSCA reporting, including TSCA Section 8 IUR. The order electronic reporting system will take advantage of the Agency's CDX to allow order recipients to respond to an order and to submit test data via the Internet. See *http://www.epa.gov/cdx* for additional information about CDX. (Ref. 7) Recipients, if not already registered with CDX, will need to complete a simple registration process, thereby establishing a secure log-on to CDX. Specific requirements associated with these orders will be provided directly to the order recipients, and are expected to include:

- Registration with CDX, resulting in the establishment of an electronic signature usable for electronically submitting test order responses;
- Access to a web-based response form, including the ability to attach PDF files;
- Encrypted submission to EPA via CDX.

Each test order would contain specific, updated information regarding the most current process to use to respond to the order. If the CDX registration process and/or web-based response form are not fully established at the time of your response, EPA intends to provide an alternate methodology in each order which may be one or more of the following:

- Fillable-PDF response form available from the Agency's Web site, which can be completed, printed, signed, and mailed or delivered to EPA with attachments included as PDF files on a CD;
- Form provided along with the order which can be completed, signed, and mailed or delivered to EPA with attachments included as PDF files on a CD.

Specific instructions for mailing or delivering the response package to the Agency would be provided on the Order Response Form.

G. How will EPA facilitate joint data development and cost sharing for SDWA chemicals?

As described in the existing policies and procedures (74 FR 17560), the Agency has concluded that FFDCA section 408(p)(5) does not provide the authority to create requirements for joint data development, including a requirement to use binding arbitration to resolve disputes, as does FIFRA section 3. In EPA's view, FFDCA section 408(p)(5)(B) merely establishes a qualified direction that the Agency "[t]o the extent practicable * * * minimize duplicative testing * * *." This, standing alone, does not create new authority to compel companies to use arbitration to resolve disputes arising from an effort to develop data jointly, nor does it even authorize EPA to impose a requirement for joint data development. Rather, EPA believes that this provision directs the Agency to create procedures that operate within the confines of existing statutory authorities. While FFDCA section 408(p) does not allow EPA to impose requirements identical to those authorized by FIFRA section 3, EPA has the authority under FFDCA section 408(p) to develop Agency procedures that would facilitate joint data generation. Specifically, the Agency has discretion to determine what actions constitute compliance with a FFDCA section 408(p) test order, and EPA intends to apply this discretion in a manner that creates strong incentives for companies to voluntarily develop data jointly. Section 408(p) of FFDCA confers adequate discretion for EPA to consider whether a recipient has fulfilled its obligation to provide data when the recipient individually or jointly submits results from the required studies, or when EPA judges that it would be equitable to allow the recipient to rely on, or cite, results of studies submitted by another person.

At the same time, however, each recipient of an order under FFDCA section 408(p) has a separate obligation to satisfy the Tier I order that it received. EPA thinks that FFDCA section 408(p) confers adequate discretion to consider that a recipient has fulfilled its obligation to provide data when:

- The recipient individually or jointly submits results from the required assays.
- EPA judges that it would be equitable to allow the recipient to rely on, or cite, results of studies submitted by another person.

The determination of whether it would be equitable to allow citation to another recipient's data will be necessarily based on a case-by-case review of the specifics of the individual circumstances. However, the Agency believes that it would generally be equitable to allow a recipient of a FFDCA section 408(p) test order to rely on the results of studies submitted by another person where:

- The data generator has given permission to the recipient to cite the results, or
- Within a reasonable period after receiving the FFDCA section 408(p) test order, the recipient has made an offer to commence negotiations regarding the amount and terms of paying a reasonable share of the cost of testing; has included an offer to resolve any dispute over the recipients' shares of the test costs by submitting the dispute to a neutral third party with authority to bind the parties (*e.g.* through binding arbitration); and, if arbitration is requested, participates in the arbitration proceeding and complies with the terms of any arbitration award.

The Agency believes this approach to minimizing duplicative testing, which parallels that used under FIFRA section 3(c)(2)(B), provides all recipients of FFDCA section 408(p) test orders adequate incentives to develop data jointly. In the first instance, where the data generator had granted permission for another party to cite its data, the equities are clear, and EPA has no reason for refusing to allow it. In the second instance, where the data generator received an offer to commence negotiations regarding the amount and terms of compensation and to go to a neutral decisionmaker with authority to bind the parties failing successful negotiations, EPA believes that the company has demonstrated a good faith effort to develop data jointly, and consequently would typically consider that the order recipient had complied with the order. Based on EPA's experience under FIFRA, there would be little or no reason for a data generator to decline such an offer. Moreover, if EPA did not adopt such an approach, the end result would effectively confer the sort of "exclusive use" property rights established under FIFRA section 3(c)(1)(F), on a broad category of data, and EPA does not believe that FFDCA section 408(p)(5) creates such rights, or

provides EPA with the authority to create such rights. These conditions would also apply to recipients of any "catch up" FFDCA 408(p) orders, who enter the market after the data have been submitted.

H. What procedures can EPA apply for handling CBI for SDWA chemicals?

As stated in the April 15, 2009, document, FFDCA does not authorize EPA to either create new rights or to modify existing rights to confidentiality, but directs the Agency to create procedures that operate within the existing confines of FIFRA, the Freedom of Information Act (FOIA), and the Trade Secret Act (TSA). SDWA has no provisions that authorize EPA to extend protections for handling CBI beyond those established by TSA. Thus data submitted in response to SDWA/FFDCA orders would only be subject to the protections under FOIA and TSA, with the notable possible exception of data for pesticide food-use inert chemicals. Registrants of a food-use inert ingredient that is also identified as a SDWA chemical should expect to receive SDWA/FFDCA test orders; however, all CBI and data compensation provisions established in FIFRA would still apply. Test order recipients with a current registration for the food-use inert, or a pesticide with a food tolerance or exemption, should consult the April 15, 2009, document for a more detailed explanation of the FIFRA provisions that apply.

For chemicals on the non-confidential TSCA Inventory (*i.e.,* the chemical identity of the chemical substance is publicly known), health and safety data may not be claimed as CBI when it is submitted to EPA. Because the chemical identity is public for all SDWA chemicals on the second EDSP chemical list, EPA expects that there would be no need to claim submitted information as confidential. EPA also believes that it would be particularly difficult to substantiate such a claim, given that the information would already be publicly available.

As described in Unit V.E. under Option 3, when the identity of a company subject to the SDWA/FFDCA test order is claimed as CBI, EPA intends to offer the company an opportunity to identify an agent who would act on their behalf in all matters relating to the EDSP program. For any company that chooses to designate an agent, the Agency intends to make the name of the agent (instead of the company) public by including it on the list of recipients of SDWA/FFDCA test orders.

I. What is the process for contesting a test order or consequences for failure to respond or comply with a test order?

Section 408(p) of FFDCA [21 U.S.C. 34a] does not explicitly address the process for contesting a test order. EPA's interpretation is that a test order is final agency action subject to review by all order recipients, including non-registrants. (EPA believes this is an appropriate conclusion because the provisions in FFDCA section 408(p)(5)(A) describing "Collection of Information" for a test order does not distinguish between FIFRA registrants and other test order recipients.)

If anyone potentially subject to an order wishes to challenge the validity of the factual predicate for issuance of the Order, specifically the EPA determination that the chemical or substance for which testing is required by the order is a "substance that may occur in sources of drinking water" and/or that "a substantial population may be exposed to such substance," that person would only be able to do so under SDWA section 1448 [42 U.S.C. 300j–7(a)] by filing a petition for review in the United States Court of Appeals for the circuit in which the recipient resides or transacts business within 45 days of the date of the SDWA determination, plus 14 days provided under 40 CFR 23.7. EPA interprets the date of the determination to be the date that EPA publishes the finalized EDSP list along with the Schedule for Issuance of Orders.

If the order recipient wishes to challenge the validity of any other the provisions of the order, including the requirement to conduct any test or use the specific test protocols required by the order, it must submit to the Agency a detailed explanation of the basis for its challenge that provides sufficient information for the Agency to evaluate the issue. While EPA is considering the submission, the original deadline would remain. The Agency intends to respond to a request in writing within 90 days of receipt. If EPA does not grant the recipient's request, the original deadline remains.

FFDCA does specify procedures available to non-registrants who fail to comply with a test order (see FFDCA section 408(p)(5)(D)). Non-registrants who fail to comply with a test order shall be liable for the same penalties and sanctions as are provided for under TSCA section 16. [15 U.S.C. 2615(a) (1), (2)(A)]. Section 16 provides that after notice and an administrative hearing held on the record in accordance with APA section 554, civil penalties may be assessed. Additionally, for EDSP test orders issued under the authorities of FIFRA/FFDCA or SDWA/FFDCA, the enforcement response described in the FIFRA policies and procedures apply (Ref. 1).

J. What is the informal administrative review procedure?

As described in the April 15, 2009, document, EPA generally intends to include a provision in test orders issued under FFDCA section 408(p) by which recipients could raise any questions or challenges concerning the issuance of the order. EPA expects order recipients who file a challenge to present their objections with sufficient specificity and detail to allow the Agency to effectively evaluate the issue(s) presented. The filing of a challenge or objection does not extend the test order timeline, and EPA recommends that order recipients who respond with a challenge do so in a timely manner, and with adequate detail. EPA would review the objections and respond in writing. The Agency understands the appropriateness of responding to such objections with sufficient time for an aggrieved order recipient to comply with the orders, or to pursue judicial review.

K. What are the adverse effects reporting requirements?

Adverse effects reporting requirements for pesticide chemicals in registered products are established in FIFRA section 6(a)(2) and can be found in the existing policies and procedures (74 FR 17560). In addition to requirements under FIFRA, TSCA section 8(c) allows EPA to request that companies record, retain and/or report "allegation of significant adverse reactions" to a chemical substance or mixture that the company produces, imports, processes or distributes (15 U.S.C. 2607(c)). Additional information can be found in 40 CFR part 717. Chemical substance is defined in TSCA (15 U.S.C. 2602(2)).

Under TSCA section 8(e), U.S. chemical manufacturers, importers, processors, and distributors are required to notify EPA within 30 days of new unpublished information regarding their chemical substance if the information may lead to a conclusion that the chemical substance poses substantial risk to human health or the environment (15 U.S.C. 2607(e)). "Substantial risk" information is information that offers reasonable support for a conclusion that the subject chemical substance or mixture poses a substantial risk of injury to health or the environment. The information need not, and typically

does not, establish conclusively that a substantial risk exists.

Any information that has been previously submitted under FIFRA section 6(a)(2), TSCA section 8(c), or TSCA section 8(e), to the extent the test order recipient believes that it is responsive to the test order, need not be resubmitted to satisfy the FFDCA section 408(p) test orders. The test order recipient need only cite the previously submitted information in lieu of re-submission.

VI. Request for Comment

A. Response Option To Cease Manufacture

EPA seeks comment on the option for test order recipients of a SDWA/FFDCA order to comply with the order by ceasing to manufacture or import the chemical. Under SDWA, EPA issues a test order based upon a finding that a chemical "may be found in sources of drinking water" and "that a substantial population may be exposed." The chemical's current presence in sources of drinking water and the corresponding potential for public exposure is not altered by the fact that a particular company may subsequently choose to no longer manufacture or import the chemical in response to the order. The potential for continued exposure to the chemical exists despite any potential decrease that might be caused by the exit of one or more test order recipients. Moreover, given that past actions contributed to the source of the current exposure, the company should remain responsible for generating the data to allow the Agency to characterize the significance of that exposure. On the other hand, if test order recipient stops manufacturing and importing a chemical, it will lead to less exposure to the chemical in sources of drinking water. (The decline will happen at different rates, depending on the chemical and whether the chemical is found in surface water or ground water.) Moreover, an order recipient who ceases to manufacture or import a chemical that is subject to EDSP screening will no longer receive any economic benefit from the sale of the chemical with which to defray the cost of testing. Finally, requiring a company to provide EDSP data on a chemical, even if it ceases manufacture and import of the chemical, removes a major incentive for companies to stop producing chemicals for which test orders are issued. Consequently, EPA seeks comment on whether it is generally inappropriate to allow companies to comply with an order by agreeing to cease manufacture or import of a SDWA chemical.

B. Persistence

EPA seeks comment on whether and how to factor a chemical's persistence in the environment into EDSP policies and procedures. As discussed previously, the Agency generally intends FFDCA section 408(p) as giving the Agency authority to issue orders to current registrants, manufacturers, and importers of a chemical. For persistent chemicals, past registrants, manufacturers, and importers (as well as processors and users) are likely to have contributed to current and ongoing contamination. EPA requests comment on the ways in which this could be taken into account. For example, one option would be for EPA to issue orders to such manufacturers, to ensure that they share in the costs of generating the data. Another option would be for EPA to issue orders to such parties only where the chemical is no longer manufactured or imported in the United States.

C. Catch-Up Orders and Data Compensation

EPA seeks comment on whether 5 years is the appropriate length of time that the Agency should continue to issue SDWA/FFDCA catch-up orders as a means to ensure equitable sharing of test costs. Under FIFRA, new pesticide registrants who did not generate data on an EDSP pesticide chemical are required to pay data compensation to the registrant who sponsored the testing. Test data are compensable for a 15 year period (7 U.S.C. 136a(c)(1)(F)(ii)–(iii)). For this reason, EPA stated in the existing policies and procedures that it intends to issue catch-up orders for 15 years after the initial data were submitted. Requirements in FIFRA ensure that any new manufacturer of a pesticide chemical registers with the EPA, thus enabling EPA to identify test order recipients and issue orders accordingly. Neither SDWA nor FFDCA enable EPA to identify manufacturers or importers of SDWA chemicals so readily, and EPA would bear a substantial burden if it were to issue SDWA catch-up orders on every chemical for 15 years following issuance of the first order(s) (or receipt of the data), simply based on the effort required to identify new manufacturers and importers. Data compensation requirements are also established in TSCA for data generated in response to section 4 test rules. The reimbursement period for TSCA test data ends "after an amount of time equal to that which had been required to develop data or after five years, whichever is later." (40 CFR part 790). The Agency seeks comment in regards to the appropriate amount of time to require data compensation for EDSP data generated in response to SDWA/FFDCA orders. This data will be made public after the EPA has received it, and data compensation measures exist solely to maintain fair and equitable sharing of test costs. EPA also notes that a five-year window for issuing catch-up orders would include the next IUR collection.

D. Orphan Chemicals

As stated in Unit V.A. the Agency seeks comment on the value of testing orphan chemicals (those for which test orders do not generate the necessary data). EPA is interested in strategies for obtaining the data or sources of funding to conduct EDSP screening.

E. Electronic Notification

As stated in Unit V.B. The Agency seeks comment as to whether companies who already have a Central Data Exchange (CDX) account would prefer to receive the notification electronically, either as a standard procedure or upon request. EPA requests that commenters include some discussion of the mechanisms by which EPA can ensure that accurate records documenting that the individual has received the order, as well as the date of receipt of the test order, can be obtained through the use of electronic reporting mechanisms.

VII. References

1. EPA. Endocrine Disruptor Screening Program; Polices and Procedures for Initial Screening: Notice. **Federal Register** (74 FR 17560, April 15, 2009) (FRL–8399–9).

2. EPA. FFDCA section 408(p) Order Template for Manufacturers/Importers of SDWA Chemicals. Draft. September 22, 2010.

3. EPA. OCSPP. Endocrine Disruptor Screening Program. Available online at *http://www.epa.gov/endo/*.

4. EPA. OCSPP. Process for Issuing EDSP Second List Test Orders. September 20, 2010.

5. EPA. OCSPP. Inventory Update Reporting (IUR). Available online at *http://www.epa.gov/iur.*

6. EPA. Status of EDSP Orders/DCIs as of Thursday, September 16, 2010 (Next update September 23, 2010). Updated tables available online at *http://www.epa.gov/endo/.*

7. EPA. Central Data Exchange. Available online at *http://www.epa.gov/cdx.*

8. EPA. [DRAFT] FFDCA section 408(p) Order for SDWA Chemicals—Initial Response Form for Individual Order Recipients (EPA Form No. tba). September 20, 2010.

9. EPA. Harmonized Test Guidelines. Available online at *http://www.epa.gov/ocspp/pubs/frs/home/guidelin.htm.*

List of Subjects

Environmental protection, Chemicals, Endocrine disruptors, Pesticides and pests, Safe drinking water, Reporting and recordkeeping.

Dated: September 28, 2010.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2010–28812 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2007–1081; FRL–8849–3]

Agency Information Collection Activities; Proposed Collection; Comment Request; Addendum for the Second List of Chemicals; Tier 1 Screening of Certain Chemicals Under the Endocrine Disruptor Screening Program (EDSP); EPA ICR No. 2249.02, OMB Control No. 2070–0176

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 an addendum to an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This addendum simply covers the burden for a new list of chemicals to receive and respond to EDSP Orders. The activities articulated in the original ICR are not changing. This ICR addendum, entitled "Addendum for the Second List of Chemicals; Tier 1 Screening of Certain Chemicals Under the Endocrine Disruptor Screening Program (EDSP)" and identified by EPA ICR No. 2249.02 and OMB Control No. 2070–0106. 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 January 18, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2007–1081, 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–2007–1081. 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–2007–1081. 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 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 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: William Wooge, (7201M), Office of Science Coordination and Policy (OSCP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8476; fax number: (202) 564–8482; e-mail address: *wooge.william@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What should I consider when I prepare my comments for EPA?

A. Considerations Under the Paperwork Reduction Act (PRA)

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.

B. Tips for Preparing Your Comments

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.

C. Submitting CBI

Do not submit CBI to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

III. What information collection activity or ICR does this action apply to?

Affected Entities: Entities potentially affected by this ICR are those individuals and companies that receive an EDSP test order issued by the Agency. Under FFDCA § 408(p)(5)(A), EPA "shall issue" EDSP test orders "to a registrant of a substance for which testing is required * * * or to a person who manufactures or imports a substance for which testing is required." Using the North American Industrial Classification System (NAICS) codes, the Agency has determined that potential respondents to this ICR may include, but is not limited to: Chemical Manufacturers and Processors (NAICS code 325), and Pesticide, Fertilizer, and Other Agricultural Chemical Manufacturing (NAICS code 3253), Producers & Formulators of Pesticide Products (NAICS code 32532); Producers of Antifouling Paints (NAICS code 32551); Producers of Antimicrobial Pesticides (NAICS code 32561); Producers of Nitrogen Stabilizers (NAICS code 32531); and Producers of Wood Preservatives (NAICS code 32519).

Title: Addendum for the Second List of Chemicals; Tier 1 Screening of Certain Chemicals Under the Endocrine Disruptor Screening Program (EDSP).

ICR numbers: EPA ICR No. 2249.02, OMB Control No. 2070–0176.

ICR status: This is an ICR addendum to an approved information collection activity. 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 number for this ICR will be displayed by publication in the **Federal Register** and by inclusion of a Paperwork Reduction Notice on the related collection instrument, *i.e.,* test orders, forms, *etc.*

Abstract: This ICR addendum covers the information collection activities associated with Tier 1 screening of the second group of chemicals under the EDSP. The EDSP is established under section 408(p) of the Federal Food, Drug, and Cosmetic Act (FFDCA), which requires endocrine screening of all pesticide chemicals and was established in response to growing scientific evidence that humans, domestic animals, and fish and wildlife species have exhibited adverse health consequences from exposure to environmental chemicals that interact with their endocrine systems.

The EDSP, which was established in 1998, consists of a two-tiered approach to screen all pesticide chemicals for potential endocrine disrupting effects. The purpose of Tier 1 screening (referred to as "screening") is to identify substances that have the potential to interact with the estrogen, androgen, or thyroid hormone systems using a battery of assays. The purpose of Tier 2 testing (referred to as "testing"), therefore, is to identify and establish a dose-response relationship for any adverse effects that might result from the interactions identified through the Tier 1 assays. Additional information about the EDSP is available through the Agency's Web site at *http://www.epa.gov/scipoly/oscpendo/index.htm.*

EPA is submitting a request for an addendum to an approved ICR, EPA ICR No. 2249.01 and OMB Control No. 2070–0176 to OMB. This addendum simply covers the burden for a new list of chemicals to receive and respond to EDSP Orders. The activities articulated in the original ICR are not changing.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1002.7 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of this estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 1,840.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: Two or three responses per chemical: An initial response, a consortium response, and the final data submission. All respondents will provide an initial response, and some respondents may provide a second response if they lead a consortium only those that generates the data will complete the final data submission.

Estimated total annual burden hours: 232,600 hours.

Estimated total annual costs: $17,056,342.82.

IV. 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 28, 2010.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2010–28815 Filed 11–16–10; 8:45 am]

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