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

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 630

RIN 3206–AL91

Absence and Leave; Sick Leave

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management is issuing final regulations on the use of sick leave and advanced sick leave for serious communicable diseases, including pandemic influenza when appropriate. We are also permitting employees to substitute up to 26 weeks of accrued or accumulated sick leave for unpaid Family and Medical Leave Act (FMLA) leave to care for a seriously injured or ill covered servicemember, as authorized under the National Defense Authorization Act for Fiscal Year 2008, including up to 30 days of advanced sick leave for this purpose. Finally, we are reorganizing the existing sick leave regulations to enhance reader understanding and administration of the program.

DATES: *Effective Date:* These regulations are effective on January 3, 2011.

FOR FURTHER INFORMATION CONTACT: Doris Rippey by telephone at (202) 606–2858; by fax at (202) 606–0824; or by e-mail at *pay-performance-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is issuing final regulations to address: (1) The use of sick leave for exposure to a communicable disease, (2) the purposes for and limitations on the use of advanced sick leave, and (3) the substitution of up to 26 weeks of sick leave for unpaid Family and Medical Leave Act (FMLA) leave to care for a seriously injured or ill covered servicemember. These changes are incorporated into 5 CFR part 630, subpart D.

Please note that these final regulations are in response to only a portion of OPM's proposed regulations (74 FR 43064) issued on August 26, 2009, to implement section 585(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110–181, January 28, 2008) that amended the FMLA provisions in 5 U.S.C. 6381–6383 to provide that a Federal employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness is entitled to up to a total of 26 administrative workweeks of unpaid FMLA leave during a single 12-month period to care for the covered servicemember. Comments received on the portion of the proposed rules at 5 CFR part 630, subpart L, will be addressed in a separate publication. The proposed regulations in their entirety are available at *http://edocket.access.gpo.gov/2009/E9-20610.htm.*

Subsequent to the publication of our proposed regulations issued on August 26, 2009, the NDAA for FY 2010 (Pub. L. 111–84, October 28, 2009) made additional amendments to the FMLA provisions in 5 U.S.C. 6381–6383. These amendments: (1) Provide a new entitlement to qualifying exigency leave for Federal employees covered by OPM's FMLA regulations under title II of the FMLA parallel to the entitlement provided to employees covered by the Department of Labor's (DOL's) FMLA regulations under title I of the FMLA, and (2) expand the coverage for the 26-week entitlement for family members to care for a covered servicemember undergoing medical treatment, recuperation, or therapy, for a serious injury or illness by amending the definitions of "covered servicemember" and "serious injury or illness." Incorporating these changes into OPM's FMLA regulations requires consultation with the Department of Defense and the Department of Veterans Affairs. Since 5 U.S.C. 6387 requires OPM to prescribe regulations consistent, to the extent appropriate, with the regulations prescribed by the Secretary of Labor to carry out title I of the FMLA, it will not be possible for OPM to issue regulations implementing the NDAA for FY 2008 and 2010 changes until DOL issues its final FMLA regulations implementing the NDAA for FY 2010 FMLA amendments. Therefore, we have decided to separate the FMLA portion (subpart L) from the sick leave portion (subpart D) of the proposed regulations. This will allow OPM to expedite the final sick leave regulations, providing agencies and employees with additional flexibilities in planning for serious communicable diseases, including pandemic influenza when appropriate, by permitting the use of sick leave and advanced sick leave if the employee or his or her family member is exposed to a serious communicable disease that would jeopardize the health of others.

The 60-day comment period ended on October 26, 2009. A total of 12 comments were received addressing the changes to the sick leave regulations under 5 CFR part 630, subpart D, from five agencies, three labor organizations, two professional organizations, and two individuals. The overall comments were overwhelmingly positive and support the changes recommended to our sick leave regulations. The following responds to the comments received on our proposed regulation.

Use of Sick Leave for Exposure to a Communicable Disease

In our guidance "Human Resources Flexibilities Available to Assist Federal Employees During Emergencies" (CPM 2009–09, May 5, 2009), OPM reminded agencies of the policies and procedures developed in planning for a pandemic influenza and provided references to a substantial amount of information and advice on human resources (HR) rules and flexibilities available on OPM's Web site. *See http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2248.* During a pandemic influenza or other emergency situation, Federal agencies will be expected to achieve two equally important goals: (1) Protect the Federal workforce, and (2) ensure the continuity of operations. OPM's Web site contains significant guidance, developed in consultation with the Centers for Disease Control and Prevention (CDC), on keeping the Federal workforce healthy during a pandemic influenza by employing social distancing interventions (as warranted by the severity of the pandemic) such as telework, alternative work schedules, evacuation, and various leave flexibilities. In particular, supervisors

should encourage telework and alternative work schedules to help prevent the spread of flu in their workplace during a severe pandemic. This will allow employees to continue to work or function while limiting contact with others, help maintain continuity of operations, and help employees manage their health and their family's needs. Before approving a particular leave option, federal supervisors should review applicable policies set forth in collective bargaining agreements and agency-specific human resource guidance. *See http://www.opm.gov/pandemic/.* These final regulations provide another tool for agencies to use for social distancing purposes that will help protect the Federal workforce. The current sick leave regulations allow an employee to use sick leave if health authorities or a health care provider determine that the employee's presence on the job would jeopardize the health of others because of exposure to a communicable disease. The final regulations allow an employee to use sick leave to care for a family member who has been similarly exposed.

Two labor organizations, two professional organizations, and one individual were very supportive of the proposed change made to this portion of the regulations to allow an employee to use sick leave to care for a family member who has been exposed to a communicable disease when it has been determined by the health authorities having jurisdiction or by a health care provider that the family member's presence in the community would jeopardize the health of others because of the family member's exposure to a communicable disease. The two professional organizations strongly approved of the positive steps taken that make Federal sick leave as flexible as possible to deal with the threat of infectious disease. They also supported advancing sick leave to employees and allowing employees to use sick leave to care for family members who have been exposed to a communicable disease. A labor organization noted that these changes will help Federal employees protect themselves, their family members, and their co-workers from contracting and spreading a serious communicable disease.

Definition of Communicable Disease

The use of sick leave due to exposure to a communicable disease would be limited to circumstances where exposure alone would jeopardize the health of others and would only arise in cases of serious communicable diseases, such as communicable diseases where Federal isolation and quarantine are authorized. Isolation means the separation of persons who have a specific infectious illness from those who are healthy and the restriction of their movement to stop the spread of that illness. Quarantine means the separation and restriction of movement of persons who, while not yet ill, have been exposed to an infectious agent and therefore may become infectious. As mentioned in the supplementary information accompanying the proposed regulations, the current consolidated list of communicable diseases for which Federal isolation and quarantine are authorized includes (as determined by the Secretary of Health and Human Services and published in Executive order): Cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, Severe Acute Respiratory Syndrome (SARS), and influenza that causes or has the potential to cause a pandemic. (*See* Executive Order 13295, as amended by Executive Order 13375, consistent with 42 U.S.C. 264(b).) This provides an illustrative, but not exhaustive, list of the types of serious communicable diseases where exposure alone would jeopardize the health of others, thereby allowing the use of sick leave for exposure to a communicable disease.

While the list of serious communicable diseases was not included in the text of the proposed regulations, OPM requested comments on whether additional changes to the regulatory text would help clarify the limited cases in which the situation would meet the threshold of communicable disease. We received responses from three agencies and two professional organizations. Generally, agencies requested that the list of communicable diseases provided in the supplementary information accompanying the proposed regulations be included in the regulations themselves. In contrast however, one labor organization and one professional organization did not believe additional regulatory language was necessary since the narrowness of the term *communicable disease* is evident from the determination that must be made by the health authorities or a health care provider that the employee or family member could jeopardize the health of others because of his or her exposure to a communicable disease. They believe we should maintain flexibility for new and emerging infectious diseases which may not yet be on the current list for which Federal isolation and quarantine are authorized. The labor organization stated that the proposed language would preserve the necessary flexibility to adapt rapidly if new communicable diseases emerge.

While we understand the agencies' request for more information in the regulatory text, the CDC list of communicable diseases where Federal isolation and quarantine are authorized may be updated as vaccinations are developed or when influenza mutates into new strains that have the potential to cause a pandemic. The Administrative Procedures Act establishes rules for the regulatory process, which would mean that, if the list were included in the regulations, OPM would not be able to update the list of communicable diseases in a timeframe that is useful to our customers. For the reasons listed above, OPM is not adding this list to its regulations. As a result, when reviewing a request for sick leave for exposure to a communicable disease, we strongly encourage agencies to refer to CDC's Web site for the current list of communicable diseases for which Federal isolation and quarantine are authorized.

Determinations of Communicable Disease—Pandemic Influenza

Determinations of communicable disease are made by the CDC. While influenza that causes or has the potential to cause a pandemic may be on the list of serious communicable diseases for which Federal isolation and quarantine are authorized, influenza will not automatically meet the criteria of a communicable disease for sick leave purposes. Influenza that has the potential to cause a pandemic is very broad and can encompass many variations of the flu. However, to highlight the limited circumstances in which this new sick leave provision would apply, pandemic influenza would not meet the threshold of a serious communicable disease until the CDC has declared that exposure alone is enough to jeopardize the health of others. During a potential pandemic influenza, the CDC will assess the risk factors of the influenza, provide guidance to health authorities and health care providers on pandemic status, and recommend appropriate guidelines to prevent the spread of the influenza. OPM will work with the CDC to provide agencies and employees with ongoing information regarding the impact of the pandemic influenza on the health of the Federal workforce and the appropriate use of HR flexibilities to keep employees safe. While agencies have the discretion to administer their sick leave programs, they should await specific guidance from the appropriate

officials (*e.g.,* CDC, OPM) to determine whether the use of sick leave is appropriate for exposure to a communicable disease. The use of sick leave for exposure to a communicable disease should be used only in very limited circumstances, and agencies should not grant sick leave for this purpose until they receive guidance from the appropriate officials.

For example, for the 2009–2010 H1N1 influenza season, the CDC has provided ongoing guidance designed to prevent the spread of the influenza in the workplace. Because there was no determination that exposure alone would jeopardize the health of others, the CDC advised that an employee could continue to go to work if a member of the employee's household had contracted 2009–2010 H1N1 influenza. OPM also issued workplace guidance entitled "Pandemic Influenza 2009: Additional Guidance" (CPM 2009–14, July 31, 2009) and collaborated with the CDC in issuing "Preparing for the Flu—A Communication Toolkit for the Federal Workforce." *See* documents at *http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2452* and *http://www.flu.gov/professional/federal/workplace/federal toolkit.pdf,* respectively. Following CDC guidance that exposure to 2009–2010 H1N1 influenza would not jeopardize the health of others, agencies should not have granted any employee exposed to H1N1 influenza sick leave for exposure to communicable disease. Should an influenza become more serious and require quarantine of exposed individuals, the CDC would issue guidance on the procedures to be followed. Based on that information, OPM would issue appropriate guidance to keep Federal employees safe while maintaining continuity of operations.

Determinations of Communicable Disease—Non-Pandemic

For examples of non-pandemic diseases that automatically meet the criteria of a serious communicable disease for sick leave purposes, agencies should refer to the CDC list of communicable diseases for which Federal isolation and quarantine are authorized. Excluding influenza that causes or has the potential to cause pandemic, for the reasons cited previously, the CDC has already determined that an individual's exposure to any of the other listed diseases would jeopardize the health of others. A health authority or health care provider can then advise that an employee or his or her family member has been exposed to a communicable disease that would jeopardize the health of others. If the disease is not on the CDC list of communicable diseases for which Federal isolation and quarantine are authorized, and a health authority or health care provider has concerns that an employee's or employee's family member has been exposed to a communicable disease that could jeopardize the health of others at the workplace or in the community, the health authority or health care provider should contact CDC for evaluation of the risk factors and further recommendations.

Health Authority or Health Care Provider

One agency asked OPM to emphasize that a relevant health authority or health care provider must make a determination that the family member's presence in the community could put others' health at risk. We believe the proposed regulations at 5 CFR 630.401(a)(3)(iii) stating that sick leave is authorized when an employee "provides care for a family member * * * (iii) who would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease" already addressed this issue. Therefore, we are making no changes in the final regulations.

Another agency asked for a definition of "health authorities." We do not believe adding a definition of health authorities to the regulations would be helpful. Communicable diseases can cover widespread geographic areas, but may also be localized in scattered outbreaks. The health authorities having jurisdiction may be different, depending on the area affected by the communicable disease. Guidance on a widespread communicable disease would be issued by the CDC. Scattered outbreaks of a communicable disease would be handled by Federal, State or local health authorities.

Requirement for Medical Documentation

One agency and one professional organization questioned the type of medical certification required to support a request for sick leave due to exposure to communicable disease, if any. Another agency asked if exposure to a communicable disease is to be treated as a serious health condition for purposes of medical documentation requirements. Another agency asked whether "one's personal physician stating the person is contagious" is all that is required to grant sick leave to care for a family member who has been exposed to a communicable disease.

In a memorandum to Chief Human Capital Officers on January 29, 2010, (CPM–2010–02) at *http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalId=2831,* OPM noted that if influenza becomes widespread in a given geographic area, the demands on medical providers and facilities would be great, and employees may have difficulty obtaining timely documentation to support their requests for use of sick leave. If that occurs, agencies should consider relaxing sick leave documentation requirements. OPM's regulations do not require medical certification when granting sick leave. *See* § 630.403 of the current regulations (redesignated as § 630.405 in these final regulations). Agencies have both the flexibility and the specific authority to administer their programs as circumstances dictate. Accordingly, OPM recommends relaxing any agency-imposed medical certification requirements for sickness or exposure to influenza during a pandemic influenza, and an employee should not be required to seek medical examination for the purpose of obtaining medical documentation for sick leave—agencies should monitor official announcements by Federal, State, or local public health authorities, and/or tribal governments related to exposure to pandemic influenza. OPM does recognize, however, that medical certification may remain necessary for employees on leave restriction. For exposure to a communicable disease other than pandemic influenza, agencies may follow their established sick leave policies.

One professional organization recommended that, during an outbreak of pandemic influenza or other communicable disease, agencies should be able to verify employees' conditions through call centers or other contingent operations that may be developed during a severe pandemic. OPM would consider this an acceptable form of communication that could be adopted by agencies.

Requirement To Actively Provide Care for Family Member

One labor organization questioned OPM's intent in specifying that an employee must be actively providing care for a family member when taking sick leave to care for a family member who has been exposed to a communicable disease. The organization wanted to know whether OPM intended to require that an

employee be the sole provider of care. In the example we cited in the Supplementary Information that accompanied the proposed regulations, the employee is providing care for a minor child who is not exhibiting any symptoms, but a determination has been made by the relevant health authorities or the health care provider that the child's presence at daycare or at school could jeopardize the health of others because of the child's exposure to that communicable disease. Since the employee would not be providing care for a sick family member, but one who is asymptomatic, the employee may request sick leave only if the exposed family member could not otherwise care for himself or herself (*e.g.,* a minor child, or elderly relative). Although the employee does not need to be the sole provider of care, the employee must be providing care actively to the family member in order to invoke sick leave to care for the family member exposed to a communicable disease. In contrast, it would not be appropriate for the employee to invoke sick leave to care for an able-bodied spouse who has been exposed to a communicable disease, but is not exhibiting any symptoms, since the employee would not need to provide care actively to the spouse. If the exposed family member contracts the communicable disease and becomes ill, the employee is entitled to use up to 13 days of sick leave for general family care or up to 12 weeks for care of a family member with a serious health condition, depending on the severity of the illness.

Definition of Family Member

OPM received two requests to expand the definition of *family member* used for sick leave purposes. One labor organization mentioned that family units have evolved in modern times. A professional organization requested the inclusion of a primary guardian. Although these requests are outside the scope of these regulatory changes, we note that since the publication of these proposed regulations, the definition of *family member* for sick leave purposes found at § 630.201 has been expanded. On June 14, 2010, OPM issued final regulations (75 FR 33491) amending the definition of *family member* for sick leave purposes to now cover grandparents and grandchildren, same-sex and opposite domestic partners, step parents, step children, foster, guardianship, and other relationships. The final regulations are available at *http://www.gpo.gov/fdsys/pkg/FR-2010-06-14/pdf/2010-14252.pdf.*

Employee's Return to Work

One agency asked if an employee who has been exposed to a communicable disease will have to provide a release from a health care provider declaring the employee is healthy enough to return to work. Agencies cannot require a medical release form from the employee's physician unless the employee's position has specific medical standards or physical requirements, or unless it is covered by a medical evaluation program under § 339.301(b)(3). Most positions do not have established physical or medical requirements. If the employee's position requires a medical examination and the employee refuses the exam, he or she may be disciplined, up to and including removal from Federal service. However, since the current regulations at § 630.403(a) (redesignated as § 630.405(a) in these final regulations) provide that an agency may request administratively acceptable documentation to support an employee's request for sick leave, even for an employee whose position does not have an established physical or medical requirement, an agency could ask that the documentation include a date on which the employee's presence on the job would no longer jeopardize the health of others, *i.e.,* the date on which the employee would be considered no longer contagious. Similar documentation could be required to support an employee's use of sick leave to care for a family member who has been exposed to a communicable disease showing the date on which the family member's presence in the community would no longer jeopardize the health of others.

Request for Additional Sick Leave for Communicable Disease

One individual, who supports the new rule, would like the Federal Government to provide up to 40 hours of additional paid sick leave to employees with "serious infectious illnesses." The commenter argues this new category of sick leave would be particularly helpful to employees who have no sick leave due to prior serious illness or maternity leave. This request is outside the scope of OPM's regulatory authority. A statutory change would be required to create such a new entitlement. However, under current authorities, employees without sick leave may invoke their FMLA entitlement (a serious infectious illness would likely qualify as a serious health condition) and may be granted annual leave, advanced sick leave, advanced annual leave, or leave without pay. If they have exhausted their available paid leave, they could request donated leave under the voluntary leave transfer and/or leave bank programs.

Federal Contractors

Two professional organizations would like OPM to require that all Federal contractors be provided sick leave during public health emergencies. One of the organizations noted that OPM's proposed rules are intended to protect Federal workers, maintain continuity of operations, and minimize the cost and risk from an infectious disease outbreak, and that the same goals are true for contractors assigned to work in Federal agencies. The other stated that the public health and the health of Federal workers will not be protected by the proposed regulatory changes if the contract worker in the cubicle next to the Federal employee lacks paid sick time and is either forced to come to work sick or is forced to send a sick child to school. The professional organization further stated that, since the Federal Government contracts with outside businesses to run daycare centers in Federal Government buildings, workers at these centers should have access to paid sick time as Federal employees do—otherwise the health of the children in these centers may suffer. Dictating pay and leave policies for Federal contractors is outside the scope of OPM's authority. As contractors are increasingly relied upon to perform many essential functions of some agencies, agencies are encouraged to contact their acquisition professionals for advice and guidance on dealing with human resources management issues associated with contractors and contract workers.

Privacy Concerns

One labor organization requested that OPM consider the privacy of employees and the role of confidentiality in medical procedures for H1N1 influenza. OPM has always held that agencies must maintain strict privacy controls in handling medical certification for H1N1 influenza or any other sick leave request. Requirements for confidentiality of medical records are addressed through the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, at 45 CFR part 160 and subparts A and E of part 164, and are not addressed in the sick leave regulations.

School Closures

One professional organization would like to allow the use of accrued or advanced sick leave by an employee whose child's school is closed due to

communicable disease even when the child has not been exposed to the disease. OPM disagrees. There is no authority that would permit an employee to use sick leave to care for a child who is healthy or is kept at home to prevent exposure to a communicable disease. Leave requests due to school closures should be handled the way they would in non-pandemic influenza situations.

The fact that schools have closed due to a pandemic influenza or other serious communicable disease should not be the sole factor in determining the type of leave an employee may use. For example, when the school is closed and—

- The *child is healthy* and has not been exposed to a communicable disease, the employee may not take sick leave.
- The *child has been exposed* to a communicable disease *but is not sick,* the final regulations allow the employee to take up to 13 days of sick leave only if it has been determined that the child's presence in the community would jeopardize the health of others.
- The *child is sick,* due to a communicable disease or otherwise, the employee may use up to 13 days of sick leave to care for that child. If the child's illness rises to the level of a serious health condition, the employee may use up to 12 weeks of sick leave and may also invoke FMLA, which would provide up to an additional 12 weeks of unpaid leave (with substitution of annual or sick leave, according to the appropriate regulations).

In summary, an employee is not necessarily entitled to use sick leave just because the child's school has been closed to prevent exposure to a communicable disease (a commonly-used tool for social distancing) or for sanitation of the school building. In order for the employee to qualify to use sick leave to care for that child, there must be a determination that the child's exposure to the communicable disease would jeopardize the health of others. The Federal Government has other workplace flexibilities to assist an employee in situations where sick leave is not appropriate, including use of annual leave, telework, alternative work schedules, compensatory time off, advanced annual leave, or leave without pay.

Contracting a Communicable Disease at Work

One professional organization expressed concern that Federal employees who acquire a communicable disease during the course of their work should not be required to use their own leave for their recovery and requested that OPM provide this flexibility and communicate this to Federal health care workers. They cited the hypothetical example of an employee of a Veterans Affairs hospital or of a workplace-based clinic who might become ill as a result of exposure to a patient or employee with the H1N1 virus. A new leave flexibility is not appropriate because a provision already exists for this situation. If an employee believes his or her illness resulted from a work-related incident, the employee can file a workers' compensation claim. Workers' compensation claims are administered by the U.S. Department of Labor, and each claim will be judged on its own merit.

Opposition to Provision of Additional Leave

One individual stated he was opposed to giving Federal employees additional leave, thereby expanding their benefits. The individual believed that, in addition to employees' existing leave benefits, OPM was proposing to "pay Federal employees for 30 days of sick time and also advance them 30 days if they get the flu." We can assure the commenter that these regulations provide no additional paid leave; they merely explain the circumstances under which employees can use their own accumulated and accrued sick leave. If an employee is advanced sick leave for any purpose cited in the regulations, it must be repaid. If the employee separates from Federal service with a negative leave balance, he or she will be required to refund the amount of indebtedness in accordance with § 630.209.

Advanced Sick Leave

Advanced sick leave is not an entitlement, but may be granted at the agency's discretion. In many cases, it may not have been an agency's practice to provide advanced sick leave for some of the purposes stated in the final regulations. These final regulations are intended to provide consistency throughout agencies as to the purposes and limitations of advanced sick leave. Overall, many commenters were supportive of the proposed changes made to this portion of the regulations that outline the amount of sick leave that may be advanced for various purposes. One labor organization strongly supported stating the amount of sick leave that may be advanced for various circumstances, especially welcoming the use of advanced sick leave to provide general care for a family member or to make arrangements necessitated by the death of a family member, or to attend the funeral of a family member. Another labor organization noted that the proposed changes would help minimize situations where employees without available sick leave had to exhaust their annual leave balances or were forced to choose between coming to work sick or facing economic uncertainty. One agency approved of the reorganization of the regulatory text and specifically mentioned that the creation of the new section on advancing sick leave (redesignated "Advanced Sick Leave" in these final regulations) makes it easier to find this information in the regulations.

OPM did receive a few objections on both sides of the spectrum—some commenters objected to expanding the purposes for which advanced sick leave may be used, and some objected to limiting them. Two agencies opposed allowing any advanced sick leave unless the employee had a serious disability or ailment as stated in 5 U.S.C. 6307(d). They also questioned both OPM's interpretation of the law and our longstanding practice of permitting up to 13 days of advanced sick leave for general family care and bereavement purposes. The two agencies do not currently authorize advanced sick leave for these purposes. Another agency objected to placing any limitation on the amount of sick leave that may be advanced to an employee for his or her own medical, dental, or optical examination or treatment.

OPM's Authority To Regulate Advanced Sick Leave

Two agencies opposed allowing advanced sick leave unless the employee had a serious disability or ailment, and questioned whether permitting use of up to 13 days of advanced sick leave for general family care and bereavement purposes is permitted under the law. Section 6311 gives OPM the authority to prescribe regulations necessary for the administration of annual and sick leave programs, and OPM has the authority to regulate and provide guidelines on when it is appropriate to advance sick leave in accordance with 5 U.S.C. 6311. OPM has used its regulatory authority to administer the sick leave provisions on many occasions to define appropriate purposes and limitations for the use of sick leave (*e.g.,* establishing 12 weeks of sick leave to care for a family member with a serious health condition, establishing 13 days of sick leave for general family care and bereavement, and permitting an agency to advance sick leave for general family care and bereavement). Enacted in 1994, the

Federal Employees Family Friendly Leave Act (Pub. L. 103–388, October 22, 1994) (FEFFLA) amended the law to provide for a 3-year trial period to expand the purposes for which sick leave may be used by an employee, and these purposes included family care and bereavement. The provisions of the FEFFLA expired on December 21, 1997. However, OPM used its broad regulatory authority under 5 U.S.C. 6311 to prescribe regulations permitting agencies to provide sick leave for the purposes of general family care and bereavement, and those regulations continued to be in effect after expiration of the FEFFLA. (See the memorandum to Directors of Personnel, CPM 97–13, on the "Use of Sick Leave for Family Care or Bereavement Purposes" at *http://www.opm.gov/oca/compmemo/1997_1996/cpm97-13.asp*). Thus, OPM used its permanent regulatory authority to issue regulations to permit an employee to use sick leave to make arrangements for or attend the funeral of a family member. The scope of OPM's regulatory authority also encompasses advancement of sick leave for these purposes.

We further note that this authority was also discussed in OPM's August 17, 2006, final sick leave regulations removing the requirement that an employee maintain an 80-hour sick leave balance in order to use the maximum amount of sick leave for general family care and bereavement purposes. (*See* 71 FR 47694, August 17, 2006.) In the supplementary information accompanying that final rule, OPM addressed an agency's request for information on the amounts of sick leave an agency may advance to an employee for general family care and bereavement purposes or to provide care for a family member with a serious health condition. In response, we added § 630.401(f) to clarify that an agency may advance a maximum of 30 days of sick leave when required by the exigencies of the situation for a serious disability or ailment of the employee or a family member or for purposes related to the adoption of a child. While our intent to allow an agency also to advance sick leave for general family care and bereavement purposes was expressed in the supplementary information accompanying those final regulations, the change was not reflected in the regulatory text. We are therefore addressing that oversight in these regulations.

One agency believed it is too generous to allow up to 104 hours (13 days) of advanced sick leave for an employee's own medical, dental or optical examination or treatment; to care for an incapacitated family member or a family member receiving medical, dental or optical examination or treatment; to care for a family member exposed to a communicable disease; or to make arrangements necessitated by the death of a family member or to attend the funeral of a family member. The agency challenged OPM's rationale that allowing up to 104 hours of advanced sick leave for general family care and bereavement purposes "reinstates a longstanding practice," saying this has not been the practice at that agency. OPM reasserts that the final regulations are consistent with OPM's broad authority to regulate and provide guidelines on when it is appropriate to advance sick leave in accordance with 5 U.S.C. 6311. Within the guidelines established by OPM, an agency has the discretion to grant advanced sick leave. An agency is not required to grant advanced sick leave for general family care and bereavement or any other purpose under § 630.402 of this final rule, but is provided this flexibility to use for new employees and employees who have experienced personal hardships.

104-Hour Limitation on Advanced Sick Leave

One agency objected to placing any limitation on the amount of sick leave that may be advanced to an employee for his or her own medical, dental, or optical examination or treatment. The agency pointed out that the current regulations do not limit the amount of sick leave that an employee may use for his or her own medical, dental, or optical examination or treatment, and that it has been a longstanding practice that the amount of sick leave that could be advanced for these purposes was left to the discretion of the agency. The agency was concerned that limiting the amount of advanced sick leave for an employee's own medical, dental, or optical examination or treatment to 104 hours may have an adverse impact on a new employee, an employee with a chronic medical condition, or an employee experiencing a medical emergency that would require ongoing medical treatment.

While we agree that the amount of sick leave an agency may advance is within the discretion of the agency, we disagree that an agency should authorize more than 104 hours for an employee's routine medical care or appointments that are not related to a serious health condition. A full-time employee accrues 13 days of sick leave (104 hours) during the leave year. We believe that this is a sufficient amount of leave both for the employee's own medical, dental, or optical examination or treatment and for providing general care for a family member. If the employee needs more than 104 hours of advanced sick leave because a condition requires treatment beyond routine care, the agency may grant up to a maximum of 240 hours of advanced sick leave for a serious health condition.

For example, an agency may authorize up to 13 days of advanced sick leave for an employee to actively provide care for a family member exposed to a communicable disease that may jeopardize the health of others. If the family member contracts the communicable disease and the employee requires more paid time off, the agency has the discretion to advance additional sick leave (up to 240 hours) for the employee to care for a family member with a serious health condition. Another example would be an employee who goes for routine dental examination and, as a result, is required to undergo extensive dental work that extends beyond the 13 days authorized for an employee's own dental examination or treatment. Because the employee experiences complications beyond routine care, likely rising to the level of a serious health condition, the agency may provide the employee with additional advanced sick leave of up to 240 hours because of incapacitation due to physical illness or because of the employee's own serious health condition.

Negative Leave Balance at Time of Separation

One agency believed that advanced sick leave would essentially provide an additional sick leave benefit, without any restrictions or limits for paying the leave back, other than not exceeding a negative 240-hour leave balance at any given time. To avoid having an employee separate from Federal service with a negative leave balance, supervisors must use their judgment in reviewing a request for advanced sick leave and may deny the request if not supported by administratively acceptable evidence or if the employee is unlikely to return to Federal service. Advanced sick leave is not an employee entitlement and is not a substitute for temporary or permanent disability retirement. An employee who has a medical emergency and has exhausted his or her available paid leave can also apply for donated annual leave under the voluntary leave transfer and/or leave bank programs. The donated annual leave can help an employee liquidate any indebtedness of advanced annual or sick leave prior to separation from Federal service.

Medical Documentation for Advanced Sick Leave

One agency and one professional organization commented that there is no mention of medical documentation requirements for advanced sick leave. A request for advanced sick leave is essentially a request for sick leave, therefore, the medical documentation standards for granting of sick leave at current § 630.403 (redesignated as § 630.405 in these final regulations) apply. We are not making changes in the final regulations.

One labor organization mentioned that the regulations at § 630.401(a)(3)(i) and (ii) provide two circumstances under which advanced sick leave may be granted to care for a family member who is sick (the first for a family member incapacitated by a medical or mental condition, and the second for a family member with a serious health condition), but the amount of advanced sick leave authorized is different in the two cases. The organization suggested that the difference between the two cases should be made clearer and that the ending phrase should read, "with a serious health condition as defined in § 630.1202." Such a reference is not necessary, since *serious health condition* is already defined at § 630.201 and refers to the definition in § 630.1202.

Recourse for Denial of Advanced Sick Leave

One professional organization requested an expedited mechanism for challenging the denial of advanced sick leave to care for a family member who has been exposed to or has contracted a communicable disease and that the employee should be allowed to use sick leave pending the outcome of the review. This process is handled through an agency's internal grievance procedures and is beyond the scope of our regulations. It is also important to remember that, although use of sick leave is an entitlement, by law, the advancement of sick leave is always at the discretion of the agency.

Substitution of Sick Leave for Unpaid FMLA Leave To Care for a Covered Servicemember

This portion of the final regulations is in response to the portion of OPM's proposed regulations (74 FR 43064) issued on August 26, 2009, to implement section 585(b) of the NDAA for FY 2008 (Pub. L. 110–181, January 28, 2008). That law permits the substitution of up to 26 weeks of sick leave during a single 12-month period when an employee invokes the FMLA to provide care for a spouse, son, daughter, parent, or next of kin who is a covered servicemember with a serious injury or illness. *See* 5 U.S.C. 6382(d). Since the NDAA for FY 2008 went into effect on the date of enactment, and since nothing in section 565(b) of the NDAA for FY 2010, which also amends parts of the FMLA for Federal employees, changes the provisions regarding substitution of annual or sick leave for unpaid FMLA leave, we believe it is useful for OPM to address this portion of the NDAA for FY 2008 in these final regulations. Additional guidance on the NDAAs for FY 2008 and FY 2010 can be found on OPM's Web site in CPM 2008–04, February 1, 2008, at *http://www.opm.gov/oca/compmemo/2008/2008-04.asp,* CPM 2009–26, December 29, 2009, at *http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2703,* and CPM 2010–06 at *http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2884*.

Interaction Between the Sick Leave and FMLA Entitlements

In the comments received on the proposed regulations, one agency asked how sick leave which is substituted for unpaid FMLA leave to care for a covered servicemember will be categorized. The agency asked whether such leave will be considered regular sick leave or family-friendly sick leave (13 days of sick leave for general family care and bereavement or 12 weeks of sick leave for care of a family member with a serious health condition) and, if considered family-friendly sick leave, how an employee's use of the 26 administrative workweeks of sick leave is affected by the limitations on family-friendly sick leave for general purposes or serious health conditions. The statutes authorizing the two entitlements are quite complex, and the response below is accordingly quite detailed in order to give agencies and employees as much guidance as practicable in administering and using the various paid and unpaid leave entitlements for treatment of illnesses or injuries of employees and the individuals for whom they may provide care.

Sick leave and FMLA leave are authorized under two separate sets of statutes, each with different entitlements and conditions, such as the categories of individuals for whom an employee may take leave to care, number of hours or weeks of leave allowed, and the rules on the substitution of paid leave for unpaid leave. An employee is entitled to use 13 days (104 hours) of sick leave for general family care and bereavement in accordance with § 630.401(a)(3)(i) and (4), and 12 weeks of sick leave to care for a family member with a serious health condition in accordance with § 630.401(a)(3)(ii). The basic 12-week FMLA entitlement to care for a family member with a serious health condition is found at 5 U.S.C. 6382(a)(1)(C) and § 630.1203(a)(3), and the 26-week FMLA entitlement to care for a covered servicemember is found at 5 U.S.C. 6382(a)(3).

Table 1 outlines the various sick leave and FMLA flexibilities available to an employee for purposes of caring for a family member and/or for a covered servicemember. To know which leave options are available, an employee must first determine the type of leave to which he or she is entitled based on the person for whom the leave is being taken. Table 1 provides useful information to help agencies and/or employees determine appropriate leave options.

TABLE 1—LEAVE FLEXIBILITIES AVAILABLE TO CARE FOR A FAMILY MEMBER AND/OR A COVERED SERVICEMEMBER

Entitlement	Amount and purpose	Individuals for whom leave may be taken
Sick Leave for General Family Care and Bereavement (5 CFR 630.401(a)(3)(i) and (4)).	13 days (104 hours) to: • Provide care for a family member who is incapacitated by a medical or mental condition; • Attend to a family member receiving medical, dental, or optical examination or treatment; or • Make arrangements necessitated by the death of a family member or attend the funeral of a family member.	May be taken for a family member.* "Family member" means the following relatives of the employee: (1) Spouse, and parents thereof; (2) Sons and daughters, and spouses thereof; (3) Parents, and spouses thereof; (4) Brothers and sisters, and spouses thereof; (5) Grandparents and grandchildren, and spouses thereof; (6) Domestic partner and parents thereof, including domestic partners of any individual in paragraphs (2) through (5) of this definition; and (7) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.
Sick Leave for Serious Health Condition of Family Member (5 CFR 630.401(a)(3)(ii)).	12 weeks (480 hours) to care for a family member with a serious health condition.	* See definition of family member at 5 CFR 630.201(b) in the final regulations on Definitions of Family Member, Immediate Relative, and Related Terms (75 FR 33491, June 14, 2010), at *http://www.gpo.gov/fdsys/pkg/FR-2010-06-14/pdf/2010-14252.pdf)*.
Advanced Sick Leave (5 U.S.C. 6307(d))	Up to 30 days (240 hours) of paid sick leave to care for a family member with a serious disability or ailment. (Agency discretion.)	
FMLA (Basic) to care for spouse, son, daughter, or parent with a serious health condition (5 U.S.C. 6382(a)(1)(C) and 5 CFR 630.1203(a)(3)).	12 weeks (480 hours) of unpaid leave during any 12-month period to care for a spouse, son, daughter, or parent with a serious health condition.	For the care of a SPOUSE, SON, DAUGHTER, OR PARENT of the employee, if such spouse, son, daughter, or parent has a serious health condition. (**Note:** Son or daughter must be under 18, or over 18 but incapable of self-care because of a mental or physical disability.) (*See* 5 CFR 630.1203(a)(3) and 630.1202).
FMLA to care for a covered servicemember (5 U.S.C. 6382(a)(3)).	26 weeks (1,040 hours) of unpaid leave during a single 12-month period to care for a covered servicemember with a serious injury or illness.	Available to an employee who is the SPOUSE, SON, DAUGHTER, PARENT, OR NEXT OF KIN OF A COVERED SERVICEMEMBER. NEXT OF KIN MEANS THE NEAREST BLOOD RELATIVE of that individual.

Explanatory Information:

1. Leave To Care for Different Individuals Varies by Entitlement:

An employee may take leave to care for different individuals, depending on the applicable entitlement. For example, the definition of *family member* under the sick leave regulations is very broad and includes many more categories of individuals than the nuclear family. In contrast, the FMLA statute and regulations do not use the term "family member" at all; rather they specify specific individuals for whose care an employee may take FMLA leave. The individuals for whom an employee may take FMLA leave to provide care are slightly different depending on whether the leave is the basic 12-week entitlement for the eligible relatives shown in the second-to-last entry above, or the 26-week entitlement to care for a covered servicemember, as shown in the last entry above.

2. Sick Leave:

Under 5 U.S.C. 6307, an employee accrues 4 hours of paid sick leave per full biweekly pay period that may be accumulated without limitation. An employee has an entitlement to use his or her accumulated sick leave for self, family care or bereavement, and care of a family member with a serious health condition. No more than a combined total of 12 weeks of sick leave may be used by a full-time employee on a regular tour of duty for general family care, bereavement, or care of a family member with a serious health condition within a leave year. *See* 5 CFR 630.401(c). Because sick leave is a separate entitlement, an employee does not need to invoke FMLA to use the sick leave entitlement for general family care. Under 5 U.S.C. 6307(d), sick leave may be advanced up to 30 days for a serious disability or ailment, including for care of a family member with a serious disability or ailment. The advancement of sick leave is at the agency's sole discretion, based upon the exigencies of the situation.

3. Basic FMLA Leave (12 Weeks of Unpaid Leave):

TABLE 1—LEAVE FLEXIBILITIES AVAILABLE TO CARE FOR A FAMILY MEMBER AND/OR A COVERED SERVICEMEMBER—Continued

Entitlement	Amount and purpose	Individuals for whom leave may be taken
The Family and Medical Leave Act (FMLA) provisions are found at 5 U.S.C. 6381–6387 and provide a total of either 12 or 26 weeks of unpaid leave, as well as permit an employee to elect to substitute annual leave and/or sick leave, as appropriate, for the unpaid leave. Under the 12-week basic FMLA entitlement (for the birth of a son or daughter of the employee and in order to care for such son or daughter; for the placement of a son or daughter with the employee for adoption or foster care; for the employee to care for his or her spouse, son, daughter, or parent with a serious health condition; for a serious health condition that makes the employee unable to perform the functions of his or her position; for a qualifying exigency arising out of the fact that the spouse, son, daughter, or parent of the employee is on covered active duty or has been notified of an impending call or order to covered active duty in the Armed Forces), an employee can substitute annual or sick leave consistent with the laws and regulations for using annual and sick leave. Therefore, the employee can substitute only as much accumulated and accrued sick leave so that the cumulative amount of sick leave usage does not exceed 12 weeks of sick leave in a leave year.		
4. FMLA Leave To Care for a Covered Servicemember (26 Weeks of Unpaid Leave):		
In contrast to basic FMLA leave, there are no limitations on the amount of sick leave that may be substituted for unpaid FMLA leave to care for a covered servicemember, since the FMLA statute at 5 U.S.C. 6382(d) states that an employee may substitute "any of the employee's accrued or accumulated annual or sick leave" for any part of the 26-week period of unpaid FMLA leave. Since the statute provides the authority to substitute any of the employee's accrued or accumulated sick leave for any part of the 26-week period of unpaid FMLA leave, there are no limits to the amount of sick leave that can be substituted for unpaid FMLA leave to care for a covered servicemember.		

Examples of the Interaction Between Sick Leave and FMLA Leave

Example I: Interaction of 13 Days of Sick Leave for General Family Care and 12 Weeks of Sick Leave for a Serious Health Condition. Under the authority for sick leave in §§ 630.401(a)(3)(i), 630.401(a)(4), and 630.401(b), an employee can use 13 days of sick leave each leave year for general family care or bereavement. Under § 630.401(a)(3)(ii) and (c), most Federal employees may use a total of up to 12 administrative workweeks of sick leave each leave year to care for a family member with a serious health condition. Under § 630.401(d), if an employee previously has used any portion of the 13 days of sick leave for general family care or bereavement purposes in a leave year, that amount must be subtracted from the 12-week entitlement. If an employee has already used 12 weeks of sick leave to care for a family member with a serious health condition, he or she cannot use an additional 13 days in the same leave year for general family care or bereavement.

Example II: Interaction of Sick Leave With Basic FMLA Leave. As referenced above, sick leave and FMLA are two separate entitlements. An employee has an entitlement to use his or her accrued and accumulated sick leave in addition to invoking FMLA. For example, if an employee takes 12 weeks of sick leave to care for a parent with a serious health condition and then invokes FMLA, the employee has exhausted his entitlement to sick leave to care for a family member with a serious health condition and cannot substitute any sick leave (but may substitute annual leave) for the 12 weeks of unpaid leave under FMLA. In summary, the employee providing care for a family member is eligible to use a total of 12 weeks of sick leave and then 12 weeks of unpaid leave under FMLA, and may substitute any annual leave for the unpaid FMLA leave.

Example III: Interaction of Sick Leave With FMLA Leave To Care for a Covered Servicemember. In contrast to the amount of sick leave which may be substituted for unpaid FMLA leave for the 12-week basic FMLA entitlement, the legislation that authorized the 26 weeks of FMLA leave to care for a covered servicemember includes different provisions regarding the amount of paid leave which can be substituted for unpaid FMLA leave. Under 5 U.S.C. 6382(d), an employee may substitute any of the employee's accrued or accumulated annual or sick leave for any part of the 26-week period of unpaid FMLA leave to care for a covered servicemember. There are no limitations on the substitution of sick leave as there are for basic FMLA leave. For example, an employee can use 12 weeks of sick leave to care for her son who has been injured in combat and then invoke FMLA leave to care for a covered servicemember and substitute another 26 weeks of sick leave for unpaid FMLA leave. The employee may also substitute annual leave, or request donated annual leave, advanced sick leave or advanced annual leave. In summary, an eligible employee who has the accumulated leave and meets the entitlement requirements for sick leave and FMLA leave to care for the covered servicemember can potentially take leave for up to 38 weeks (12 weeks of sick leave to care for a family member with a serious health condition and 26 weeks of leave to care for a covered servicemember).

Example IV: Interaction of Basic FMLA Leave and FMLA Leave To Care for a Covered Servicemember. In our proposed changes to 5 CFR part 630, subpart L (74 FR at 43069, August 26, 2009), we clarified in proposed § 630.1205(b)(1), consistent with DOL regulations, that any leave used under an employee's 12-week basic FMLA entitlement prior to the first use of leave to care for a covered servicemember does not count towards the "single 12-month period" under § 630.1203(b). For example, on February 25, 2008, an employee invokes her entitlement to basic FMLA leave for the birth of her child. On April 17, 2008, in her 8th week of FMLA leave, she receives word that her husband was seriously injured in the line of duty while on active duty. On April 18, 2008, the employee invokes her entitlement to 26 weeks of FMLA leave to care for a covered servicemember to care for her husband. She is entitled to use up to 26 weeks of FMLA leave during a single 12-month period for this purpose, from April 18, 2008, to April 17, 2009. The time period during which she used basic FMLA leave, from February 25, 2008, to April 17, 2008, does not count toward her 26-week FMLA entitlement to care for a covered servicemember. We note that the employee is not required to invoke her 26-week FMLA leave entitlement immediately. She may delay invoking the 26-week FMLA entitlement until such time as she is needed to provide care for her husband. Once the employee invokes her 26-week FMLA entitlement and begins to care for her husband, the single 12-month period begins. In this example, the employee may choose to first exhaust her full 12-week basic FMLA entitlement for the

birth of a child, and then invoke the 26-week FMLA entitlement to care for a covered servicemember after her husband is released from the hospital and returns home.

Example V: Importance of the Employee's Relationship With the "Person for Whom Leave May Be Taken." Since an employee may take leave to care for different individuals depending on the applicable entitlement, it is important to pay close attention to the person for whom the employee is taking leave to care. If the person for whom the employee wishes to care does not meet the criteria set out in statute and regulation, the employee will not have the option of using this type of leave. For example, an employee's fiancé is seriously injured by a roadside bomb. The employing agency may decide, at its discretion, that the fiancé meets the definition of family member for sick leave purposes (based on the clause "any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship"); therefore, the employee is eligible to use up to 12 weeks of sick leave to care for her fiancé who has a serious health condition. However, this employee does not meet the FMLA definition of an individual who can use the 26-week entitlement to care for a covered servicemember, because coverage is limited to an employee who is the spouse, son, daughter, parent, or next of kin of the covered servicemember. In contrast, if the employee were married to the covered servicemember, she would be entitled to both sick leave and FMLA leave to care for a covered servicemember, as shown in table 1.

Employee Must Invoke FMLA Leave To Care for a Covered Servicemember To Use the Maximum Amount of Sick Leave

An agency wanted to know why, under proposed § 630.402(a)(1)(v), agencies may not advance sick leave to care for a covered service member unless the employee has invoked his or her FMLA entitlement to leave to care for a covered servicemember. The agency pointed out that an employee is not required to invoke his or her FMLA entitlement before using sick leave to care for a family member with a serious health condition, and it questioned why an employee is required to invoke his or her FMLA entitlement to care for a covered servicemember.

The proposed regulations do not require an employee to invoke the FMLA entitlement to be advanced sick leave. The proposed regulations at § 630.402(a)(1)(i)–(v) provide that an agency may grant advanced sick leave in the amount of up to 240 hours to a full-time employee (i) who is incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth; (ii) for a serious health condition of the employee or a family member; (iii) when the employee would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease; (iv) for purposes relating to the adoption of a child; or (v) for the care of a covered servicemember with a serious injury or illness, provided the employee is exercising his or her entitlement under 5 U.S.C. 6382(a)(3). Although the care of a covered servicemember is only one circumstance that qualifies for the advancement of sick leave, it is the authority that will provide the greatest benefit to the employee.

As referenced in the leave flexibilities table, sick leave is limited to 12 weeks for an employee to care for a family member with a serious health condition. In order for the employee to use additional sick leave, he or she must invoke FMLA to care for a covered servicemember. For example, an employee uses 12 weeks of sick leave to care for her son who has been injured in the line of duty while on active duty and requests additional sick leave to continue to care for her son. At this point, the employee must invoke her FMLA entitlement to care for a covered servicemember to use additional sick leave. By invoking the entitlement, the employee may substitute up to 26 additional weeks of sick leave for unpaid leave under FMLA. If the employee has accumulated and accrued sick leave to cover only a part of the 26-week period, because she has invoked her FMLA entitlement to care for a covered servicemember, she can request advanced sick leave for up to 30 days.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

List of Subjects in 5 CFR Part 630

Government employees.

U.S. Office of Personnel Management.

John Berry,

Director.

■ Accordingly, OPM is amending 5 CFR part 630 as follows:

PART 630—ABSENCE AND LEAVE

■ 1. The authority citation for part 630 continues to read as follows:

Authority: 5 U.S.C. 6311; 630.205 also issued under Pub. L. 108–411, 118 Stat 2312; 630.301 also issued under Pub. L. 103–356, 108 Stat. 3410 and Pub. L. 108–411, 118 Stat 2312; 630.303 also issued under 5 U.S.C. 6133(a); 630.306 and 630.308 also issued under 5 U.S.C. 6304(d)(3), Pub. L. 102–484, 106 Stat. 2722, and Pub. L. 103–337, 108 Stat. 2663; subpart D also issued under Pub. L. 103–329, 108 Stat. 2423; 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H also issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332, Pub. L. 100–566, 102 Stat. 2834, and Pub. L. 103–103, 107 Stat. 1022; subpart J also issued under 5 U.S.C. 6362, Pub. L. 100–566, and Pub. L. 103–103; subpart K also issued under Pub. L. 105–18, 111 Stat. 158; subpart L also issued under 5 U.S.C. 6387 and Pub. L. 103–3, 107 Stat. 23; and subpart M also issued under 5 U.S.C. 6391 and Pub. L. 102–25, 105 Stat. 92.

Subpart D—Sick Leave

■ 2. In § 630.401, remove paragraph (f) and revise paragraphs (a)(3) and (b) to read as follows:

§ 630.401 Granting sick leave.

(a) * * *

(3) Provides care for a family member—

(i) Who is incapacitated by a medical or mental condition or attends to a family member receiving medical, dental, or optical examination or treatment;

(ii) With a serious health condition; or

(iii) Who would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease;

* * * * *

(b) The amount of sick leave granted to an employee during any leave year for the purposes described in paragraphs (a)(3)(i), (a)(3)(iii), and (a)(4) of this section may not exceed a total of 104 hours (or, for a part-time employee or an employee with an uncommon tour of duty, the number of hours of sick leave he or she normally accrues during a leave year).

* * * * *

§§ 630.402 through 630.406 [Redesignated as §§ 630.404 through 630.408].

■ 3a. Redesignate §§ 630.402 through 630.406 as §§ 630.404 through 630.408, respectively.

■ 3b. Add new § 630.402 to read as follows:

§ 630.402 Advanced sick leave.

(a) At the beginning of a leave year or at any time thereafter when required by the exigencies of the situation, an agency may grant advanced sick leave in the amount of:

(1) Up to 240 hours to a full-time employee—

(i) Who is incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth;

(ii) For a serious health condition of the employee or a family member;

(iii) When the employee would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease;

(iv) For purposes relating to the adoption of a child; or

(v) For the care of a covered servicemember with a serious injury or illness, provided the employee is exercising his or her entitlement under 5 U.S.C. 6382(a)(3).

(2) Up to 104 hours to a full-time employee—

(i) When he or she receives medical, dental or optical examination or treatment;

(ii) To provide care for a family member who is incapacitated by a medical or mental condition or to attend to a family member receiving medical, dental, or optical examination or treatment;

(iii) To provide care for a family member who would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease; or

(iv) To make arrangements necessitated by the death of a family member or to attend the funeral of a family member.

(b) Two hundred forty hours is the maximum amount of advanced sick leave an employee may have to his or her credit at any one time. For a part-time employee (or an employee on an uncommon tour of duty), the maximum amount of sick leave an agency may advance must be prorated according to the number of hours in the employee's regularly scheduled administrative workweek.

■ 3c. Add new § 630.403 to read as follows:

§ 630.403 Substitution of sick leave for unpaid family and medical leave to care for a covered servicemember.

The amount of accumulated and accrued sick leave an employee may substitute for unpaid family and medical leave under 5 U.S.C. 6382(a)(3) for leave to care for a covered servicemember may not exceed a total of 26 administrative workweeks in a single 12-month period (or, for a part-time employee or an employee with an uncommon tour of duty, an amount of sick leave equal to 26 times the average number of hours in his or her scheduled tour of duty each week).

■ 4. Revise paragraphs (b) and (c) of § 630.502 to read as follows:

§ 630.502 Sick leave recredit.

* * * * *

(b) Except as provided in § 630.407 and in paragraph (c) of this section, an employee who has had a break in service is entitled to a recredit of sick leave (without regard to the date of his or her separation), if he or she returns to Federal employment on or after December 2, 1994, unless the sick leave was forfeited upon reemployment in the Federal Government before December 2, 1994.

(c) Except as provided in § 630.407, an employee of the government of the District of Columbia who was first employed by the government of the District of Columbia before October 1, 1987, and who has had a break in service is entitled to a recredit of sick leave (without regard to the date of his or her separation) if he or she returns to Federal employment on or after December 2, 1994, unless the sick leave was forfeited upon reemployment in the Federal Government before December 2, 1994.

* * * * *

[FR Doc. 2010–30371 Filed 12–2–10; 8:45 am]

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DEPARTMENT OF ENERGY

10 CFR Part 1010

RIN 1990–AA31

Conduct of Employees and Former Employees; Exemption From Post-Employment Restrictions for Communications Furnishing Scientific or Technological Information

AGENCY: Office of the General Counsel, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) today publishes a final rule to establish procedures under which a former employee of the executive branch may obtain approval from DOE to make communications to DOE solely for the purpose of furnishing scientific or technological information during the period the former employee is subject to post-employment restrictions set forth in 18 U.S.C. 207(a), (c), and (d). The final rule also provides a definition of the term "scientific or technological information" that is consistent with the definition provided by the Office of Government Ethics (OGE) in its regulations and for which an exemption is provided by 18 U.S.C. 207(j)(5).

DATES: This rule is effective *January 3, 2011.*

FOR FURTHER INFORMATION CONTACT: Sue E. Wadel, Deputy Assistant General Counsel for General Law, U.S. Department of Energy, Office of the General Counsel, Mailstop GC–77, Room 6A–211, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586–1522 or *Sue.Wadel@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Summary of Rule and Changes to Proposed Rule
III. Regulatory Review

I. Background

On December 1, 2008, the Department of Energy published for comment a proposed rule revising 10 CFR Part 1010 to establish in a new subpart B procedures under which a former employee of the executive branch may obtain approval to make communications to DOE solely for the purpose of furnishing scientific or technological information during the period the former employee is subject to post-employment restrictions set forth in 18 U.S.C. 207(a), (c), and (d). The proposed rule also defined the term "scientific or technological information" used in 18 U.S.C. 207(j)(5) to provide former employees with guidance on the types of communications that would qualify for the exemption from otherwise applicable post-employment restrictions. *See* 73 FR 72748–72751 (December 1, 2008).

Pursuant to 18 U.S.C. 207(j)(5), former employees of the executive branch of the United States may make communications with an executive branch agency "solely for the purpose of furnishing scientific or technological information," notwithstanding the post-employment restrictions at 18 U.S.C.

207(a), (c), and (d). Section 207(j)(5) provides that such communications must be made under procedures acceptable to the agency to which the communication is directed, or the head of such agency must consult with the Director of the Office of Government Ethics (OGE) and certify in the **Federal Register** that the former employee meets certain requirements to make such communications.

As explained in the preamble, the purpose of the proposed rule was to (1) establish the procedures acceptable to DOE for former executive branch employees making scientific or technological communications; and (2) provide, in a definition of the term "scientific or technological information," the criteria for the types of communications of scientific or technological information that former executive branch employees may make to DOE pursuant to 18 U.S.C. 207(j)(5). The proposed rule further defined scientific and technological information as that which is of a scientific or technological character, such as technical or engineering information relating to the natural sciences. The proposed definition did not extend to information associated solely with a nontechnical discipline such as law, economics, or political science.

The proposed rule provided a 30-day comment period. No comments were received during this period.

II. Summary of Rule and Changes to Proposed Rule

In today's final rule, section 10 CFR 1010.202, defines the statutory term "scientific or technological information" and provides criteria for program officials and the Designated Agency Ethics Official (DAEO) to use when evaluating requests from former employees for approval to communicate such information to DOE offices and officials. DOE consulted with OGE in developing this rule. As a result of that consultation, DOE adopted verbatim the definition of "scientific and technological information" contained in OGE's regulations (5 CFR 2641.301(e)(2)), in lieu of the definition in the proposed rule. DOE views this as a non-substantive change, and one that may avoid potential confusion by the public regarding the meaning of this term. The program office official and DAEO shall consider the former executive branch employee's qualifications, the information to be conveyed, the former executive branch employee's Federal position, the extent of the former executive branch employee's participation in the same particular matter, and whether DOE's interest would be served by allowing such communications. Section 1010.202 also defines the term "authorized communication" as the transmission of scientific or technological information that has been approved by DOE under the procedures that will be established by this rulemaking.

Final section 10 CFR 1010.203, sets forth the procedures under which a former employee of the executive branch may obtain approval for communicating scientific or technological information to DOE offices or officials. A former employee of the executive branch must contact the program office to which he or she wishes to make such communications. The agency designee in the program office, in consultation with the DAEO, shall advise the former executive branch employee in writing whether he or she may make such communications. The agency designee is an individual serving in the office with cognizance over the matter and in a position requiring appointment by the President of the United States with the advice and consent of the Senate. The final rule clarifies that the agency designee cannot delegate this authority, unless the authority is delegated to another individual serving in a position in DOE requiring appointment by the President of the United States with the advice and consent of the Senate.

The final rule does not apply to testimony as an expert in an adversarial proceeding in which the United States is a party or has an interest. Restrictions on testimony, and exceptions thereof, are prescribed in 18 U.S.C. 207(j)(6).

III. Regulatory Review

A. Executive Order 12866

This final rule has been determined not to be a significant regulatory action under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. National Environmental Policy Act

DOE has determined that this final rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.5 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to rulemakings interpreting or amending an existing rule that do not change the environmental effect thereof. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

C. Regulatory Flexibility Act

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

DOE has reviewed this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The final rule will only affect individuals who were formerly employed by the executive branch of the Federal government if they want to communicate with DOE on scientific or technological matters. On the basis of the foregoing, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

D. Paperwork Reduction Act

No new record keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.,* are imposed by this final rule.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a

voluntary federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or on the private sector, of $100 million or more in any one year (adjusted annually for inflation). 2 U.S.C. 1532(a) and (b). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

This final rule will apply only to former executive branch employees who want to communicate with DOE on scientific or technological matters. The rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

F. Treasury and General Government Appropriations Act, 1999

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

G. Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this final rule and has determined that it will not preempt State law and 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. No further action is required by Executive Order 13132.

H. Executive Order 12988

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

I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Executive Order 13211

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

K. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 801(2).

IV. Approval of the Office of the Secretary

The Secretary of Energy has approved the issuance of this final rule.

List of Subjects in 10 CFR Part 1010

Conduct standards, Conflicts of interest, Ethical conduct, Government employees.

Issued in Washington, DC, on November 29, 2010.

Scott Blake Harris,

General Counsel.

■ For the reasons stated in the preamble, DOE is amending chapter X of Title 10 of the Code of Federal Regulations as set forth below:

PART 1010—CONDUCT OF EMPLOYEES AND FORMER EMPLOYEES

■ 1. The authority citation for part 1010 is revised to read as follows:

Authority: 5 U.S.C. 301, 303, 7301; 5 U.S.C. App. (Ethics in Government Act); 5 U.S.C. App. (Inspector General Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105; 18 U.S.C. 207, 208.

■ 2. The heading to Part 1010 is revised as set forth above.

■ 3. Sections 1010.101 through 1010.104 are designated as Subpart A and the heading is added to read as set forth below:

Subpart A—Conduct of Employees

* * * * *

§ 1010.101 [Amended]

■ 4. Section 1010.101 is amended by removing the word "part," and adding the word "subpart" in its place.

■ 5. A new Subpart B is added to Part 1010 to read as follows:

Subpart B—Procedures for Exemption of Scientific and Technological Information Communications From Post-Employment Restrictions

Sec.
1010.201 Purpose and scope.
1010.202 Definitions.
1010.203 Procedures for review and approval of requests.

§ 1010.201 Purpose and scope.

(a) This subpart sets forth criteria for the types of communications on scientific or technological matters permitted under 18 U.S.C. 207(j)(5) by defining the term "scientific or technological information." This subpart also establishes the procedures for receiving and approving requests from former employees of the executive branch to make such communications to DOE.

(b) This subpart applies to any former employee of the executive branch subject to the post-employment conflict of interest restrictions in 18 U.S.C. 207(a), (c), and (d), who wishes to communicate with DOE under the exemption in 18 U.S.C. 207(j)(5) for the purpose of furnishing scientific or technological information to DOE offices or officials.

(c) This subpart does not apply to a former DOE employee's testimony as an expert in an adversarial proceeding in which the United States is a party or has a direct and substantial interest.

§ 1010.202 Definitions.

For purposes of this subpart:

(a) *Agency designee* means an individual serving in a position in DOE requiring appointment by the President of the United States with the advice and consent of the Senate.

(b) *Authorized communication* means any transmission of scientific or technological information to any DOE office or official that is approved by DOE under § 1010.203 of this subpart.

(c) *DOE* means the U.S. Department of Energy.

(d) *Scientific or technological information* means: Information of a scientific or technological character, such as technical or engineering information relating to the natural sciences. The exception does not extend to information associated with a nontechnical discipline such as law, economics, or political science.

(e) *Incidental references or remarks.* Provided the former employee's communication primarily conveys information of a scientific or technological character, the entirety of the communication will be deemed made solely for the purpose of furnishing such information notwithstanding an incidental reference or remark:

(1) Unrelated to the matter to which the post-employment restriction applies;

(2) Concerning feasibility, risk, cost, speed of implementation, or other considerations when necessary to appreciate the practical significance of the basic scientific or technological information provided; or

(3) Intended to facilitate the furnishing of scientific or technological information, such as those references or remarks necessary to determine the kind and form of information required or the adequacy of information already supplied.

§ 1010.203 Procedures for review and approval of requests.

(a) Any former employee of the executive branch subject to the constraints of the post-employment restrictions of 18 U.S.C. 207(a), (c), and (d) who wishes to communicate scientific or technological information to DOE must contact the DOE office with which the former employee wishes to communicate and request authorization to make such communication. This request must be in writing and address, in detail, information regarding each of the factors set forth in paragraphs (c)(1) through (c)(6) and (c)(8) of this section.

(b) In consultation with the Designated Agency Ethics Official (DAEO), the agency designee in the office with cognizance over the matter must advise the former employee in writing whether the proposed communication is an authorized communication. This authority cannot be delegated, except to another individual serving in a position in DOE requiring appointment by the President of the United States with the advice and consent of the Senate.

(c) In deciding whether a proposed communication is an authorized communication, the agency designee receiving the request and the DAEO must consider the following factors:

(1) Whether the former employee has relevant scientific or technical qualifications;

(2) Whether the former employee has qualifications that are otherwise unavailable to both the former employee's current employer and DOE;

(3) The nature of the scientific or technological information to be conveyed;

(4) The former employee's position prior to termination;

(5) The extent of the former employee's involvement in the matter at issue during his or her employment, including:

(i) The former employee's involvement in the same particular matter involving specific parties;

(ii) The time elapsed since the former employee's participation in such matter; and

(iii) The offices within the Federal department or agency involved in the matter both during the former employee's period of employment in the executive branch and at the time the request is being made;

(6) The existence of pending or anticipated matters before the Federal government from which the former employee or his or her current employer may financially benefit, including contract modifications, grant applications, and proposals; and

(7) Whether DOE's interests would be served by allowing the proposed communication; and

(8) Any other relevant information.

[FR Doc. 2010–30398 Filed 12–2–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

12 CFR Part 1807

RIN 1559–AA00

Capital Magnet Fund

AGENCY: Community Development Financial Institutions Fund, Department of the Treasury.

ACTION: Interim rule with request for public comment.

SUMMARY: The Department of the Treasury is issuing this interim rule

implementing the Capital Magnet Fund (CMF), administered by the Community Development Financial Institutions Fund (CDFI Fund), U.S. Department of the Treasury. The mission of the CDFI Fund is to increase the capacity of financial institutions to provide capital, credit and financial services in underserved markets. Its long-term vision is an America in which all people have access to affordable credit, capital and financial services. The CMF was established through the Housing and Economic Recovery Act of 2008, which added section 1339 to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

DATES: Interim rule effective December 3, 2010. Comment due date: Comments on this interim rule must be received in the offices of the CDFI Fund on or before February 1, 2011.

ADDRESSES: All comments concerning this interim rule should be addressed to the Capital Magnet Fund Manager, Community Development Financial Institutions Fund, Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005; by e-mail to *cdfihelp@cdfi.treas.gov;* or by facsimile at (202) 622–7754. Comments will be made available for public review on the CDFI Fund's Web site at *http://www.cdfifund.gov.*

Comments may be also be submitted and viewed through the Federal e-Rulemaking Portal, *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jeffrey C. Berg, Legal Counsel, Community Development Financial Institutions Fund, at (202) 622–8662 (This is not a toll free number). Information regarding the CDFI Fund and the CMF may be downloaded from the CDFI Fund's Web site at *http://www.cdfifund.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Capital Magnet Fund (CMF) was established through the Housing and Economic Recovery Act of 2008 (the Act), Public Law 110–289, section 1131, as a trust fund whose appropriation will be used to carry out a competitive grant program administered by the CDFI Fund. Through the CMF, the CDFI Fund is authorized to make financial assistance grants to certified Community Development Financial Institutions (CDFIs) and Nonprofit Organizations (if one of their principal purposes is the Development or management of Affordable Housing). CMF grants must be used to attract financing for and increase investment in: (i) The Development, Preservation, Rehabilitation, and Purchase of Affordable Housing for primarily Extremely Low-, Very Low-, and Low-Income Families; and (ii) Economic Development Activities or Community Service Facilities (such as day care centers, workforce development centers, and health care clinics) which In Conjunction With Affordable Housing Activities will implement a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area. This interim rule creates the requirements and parameters for CMF implementation and administration including, among others, application eligibility, application review, award selection, Assistance Agreements, eligible uses of award dollars and related funds, Awardee reporting, and compliance monitoring.

On March 15, 2010, the CDFI Fund published in the **Federal Register** a Notice of Proposed Rulemaking, 75 FR 12408, seeking responses to specific questions regarding CMF design, implementation, and administration. The CDFI Fund seeks public comment on this entire interim rule. All capitalized terms are defined in the definition section of the interim rule, as set forth in 12 CFR 1807.104.

II. Comments on the Proposed Rule and Summary of Changes

The interim rule contained in this document is based on the Notice of Proposed Rulemaking (the proposed rule) published on March 15, 2010. The comment period for the proposed rule ended on May 14, 2010. The CDFI Fund received a total of 5 written submissions. The submissions were from three community development financial institutions (CDFIs), an affordable housing trade association and a lender. All comments received by the end of the comment period were posted on the CDFI Fund's Web site for public view.

Below are the CDFI Fund's responses to the public comments on the proposed rule and answers to the specific five italicized questions asked in the proposed rule. The following includes a discussion of the significant issues, as well as clarifying information.

A. Eligibility

The eligibility requirements for Applicants are set forth in 12 CFR 1807.200. The CDFI Fund asked whether an eligibility requirement that 33 percent of the Applicant's resources (measured by staff time and/or budget) be dedicated to Affordable Housing is appropriate (12 CFR 1807.200(a)(2)(iii)). If not, what is the appropriate percentage of activities, and how should this be measured?

Commentators supported the 33 percent of resources eligibility requirement. Two commentators recommended that the CDFI Fund allow consortiums to apply as a single Applicant, suggesting that a consortium consisting of smaller CDFIs could collaborate to serve a number of adjacent or related markets more effectively. One commentator suggested that permitting consortiums to apply would allow an established nonprofit organization, with a track record of success, to partner with a new entity in order to address a particular and immediate affordable housing need. Thus, the three year existence requirement should apply only to non-consortium applicants, thus allowing new entities to apply, as long as they can demonstrate they have raised sufficient money to operate for a specific amount of time and have applied for their 501(c)(3) status.

Another commentator suggested the CDFI Fund divide CMF awards into two applicant pools delineated by applicant size, similar to the practice under the CDFI Program. The commentator suggested that national organizations typically cannot serve smaller more remote markets and that two applicant pools would ensure that the CMF awards are distributed to urban, suburban and rural areas fairly. The commentator also suggested reducing the maximum award amount to ensure the distribution of awards to more areas throughout the country.

The CDFI Fund's response: The eligibility requirement that 33 percent of an applicant's resources must be dedicated to Affordable Housing remains as set forth in 12 CFR 1807.200(a)(2)(iii). In response to comments advocating for two CMF applicant pools, consortium applicants, and a variation on the time in existence requirement for consortium applicants, at this time the CDFI Fund will maintain the requirements as stated in the proposed rule. As the CMF is a new program, the CDFI Fund will evaluate the program implementation and impacts before making additional modifications in these areas. If in the future, the CDFI Fund determines that it is appropriate to develop more than one applicant pool, permit consortium applicants or otherwise modify the time in existence requirements, the CDFI Fund will do so in the Notice of Funding Availability (NOFA) for the applicable funding round as permitted in the interim rule.

B. Eligible Uses

The proposed rule in 12 CFR 1807.302 sets forth a number of restrictions on use of CMF award funds. Are there suggested restrictions that will prevent the CMF from financing predatory lending practices that should be included in this section? Is the use restriction that no more than 30 percent of an Awardee's CMF award can be used for Economic Development Activities and Community Service Facilities appropriate (12 CFR 1807.302(d))? If not, what is the appropriate percentage?

One commentator remarked that the new industry rules emerging for mortgage finance will provide additional protections for low-income purchasers and thus, suggested that there is no need for the addition of anti-predatory lending provisions to the proposed rule.

Another commentator suggested that the CDFI Fund lower the statutorily imposed maximum award percentage that an Awardee can receive in any given funding round and also remove the 30 percent restriction on use of CMF awards for Economic Development Activities or Community Service Facilities. To allow for maximum flexibility, a commentator also suggested that no cap be placed on the amount of a CMF award that can be used for Operations. One commentator suggested that the CDFI Fund make clear that Awardees can utilize an Affordable Housing Fund at the enterprise level and be able to aggregate a CMF award with an existing fund maintained by the Awardee. The commentator also suggested that the definition of Affordable Housing Fund mirror that of the FY 2010 NOFA published on March 15, 2010, which allows the Awardee to use the fund to make grants and investments.

The CDFI Fund's response: The CDFI Fund considers the restrictions on eligible uses in 12 CFR 1807.302 of the Proposed Rule appropriate and therefore these restrictions are maintained in the interim rule. As there are other Federal programs and mechanisms better suited to deal with predatory lending, the interim rule will not explicitly address this issue. The six eligible uses of CMF awards are set forth in 12 CFR 1807.301. One of those eligible uses is to capitalize an Affordable Housing Fund. As suggested by Commentators, the definition of Affordable Housing Fund in 12 CFR 1807.104(e) is revised in this interim rule to include grants and investments to be consistent with the definition published in the FY 2010 CMF NOFA. Any previous inconsistency between the Proposed Rule and the NOFA was inadvertent.

The statutory purpose of the CMF is to attract private capital for and increase investment in Affordable Housing Activities and related Economic Development Activities and Community Service Facilities. The CDFI Fund wants to ensure that the awards are used primarily for those specific purposes. Therefore, the CDFI Fund thinks the 5 percent cap on Operations uses and the 30 percent cap on use of CMF awards for Economic Development Activities or Community Service Facilities is in line with the spirit of the authorizing statute. As this is a new program, the CDFI Fund may at a future point determine that the Operations use restriction should be modified. In such a case, the interim rule, as set forth in 12 CFR 1807.302(b), allows the CDFI Fund to establish the restrictions on Operations uses in the applicable NOFA.

Finally, an Awardee is not required to create a separate legal entity or investment vehicle in which it will undertake the eligible activities listed in 12 CFR 1807.301. However, as set forth in 12 CFR 1807.600, the Awardee must be able to account for every dollar of its CMF award and track its uses.

C. Affordable Housing Activities, Economic Development Activities and Community Service Facilities

This proposed rule currently defines Economic Development Activities as "the Development, Preservation, Rehabilitation, or Purchase of Community Service Facilities and/or other physical structures in which neighborhood-based businesses operate which, In Conjunction With Affordable Housing Activities, implements a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area." Is this an appropriate definition? Should it be expanded to include working capital loans to businesses? Should refinancing of existing loans be a permissible activity?

One commentator generally agreed with the proposed rule's definition of Economic Development Activities and supported limiting the use of CMF awards for non-housing activities. However, the same commentator suggested that the CDFI Fund broaden the definition of Economic Development Activity beyond its relation to defined Affordable Housing Activities and instead have it apply to housing-related activities more generally. The same commentator also suggested changing the definitions of Development, Preservation, Rehabilitation and Purchase to align with that which is used in the affordable housing industry, which would allow for more flexibility. This commentator suggested that these terms are used interchangeably and are not mutually exclusive. The commentator recommended adding the term "resident services" to the definition of Community Service Facility to acknowledge the presumed eligibility of physical spaces for resident services in the use of CMF awards, as well as expanding the list of the types of community services provided.

The CDFI Fund's response: The interim rule accepts the commentator's suggestion and revises the definition of Economic Development Activity in 12 CFR 1807.104(t) to apply to real estate development activities generally. The interim rule revises the definition of Preservation in 12 CFR 1807.104(tt) to provide for the purchase or refinance of single-family or multi-family rental mortgages or housing that was not previously subject to affordability restrictions, with the intent of subjecting the housing to the CMF affordability qualifications, as set forth in 12 CFR 1807.400 *et seq.* The definition of Purchase is also revised in 12 CFR 1807.104(vv) to clarify the authorization of mortgage financing of Single-family housing. The interim rule also adds the definition of Multi-family housing, as set forth in 12 CFR 1807.104(nn), and Family in 12 CFR 1807.104(x).

Under the interim rule, Awardees may pursue any or all of the strategies set forth in 12 CFR 1807.300(a). Thus, it is not necessary to revise the definitions of Development, Preservation, Rehabilitation and Purchase to make them interchangeable, as the commentator suggested. The interim rule, however, makes technical and clarifying corrections to those definitions, as previously described. It also revises the definition of Community Services Facility in 12 CFR 1807.104(o) to expand the types of services, as suggested by the commentator.

The interim rule also revises 12 CFR 1807.501 to require the date by which CMF awards must be Committed for use and initially disbursed, to the date designated in the Awardee's Assistance Agreement. Similarly, 12 CFR 1807.503 of the interim rule is revised to require that CMF-funded projects must be completed and placed into service by the date designated in the Awardee's Assistance Agreement. The proposed rule required CMF funds to be Committed for use within two and disbursed within three years of the effective date of the Assistance Agreement. The CDFI Fund anticipates that the Assistance Agreement will still

provide an Awardee at least two years to commit for use and three years to initially disburse its CMF award, and five years to complete CMF-funded projects. The interim rule incorporates these changes to provide the Awardee flexibility, should additional time be needed to complete environmental reviews and to accommodate unique circumstances.

Should physical proximity be necessary to meet the requirement that Economic Development Activities or Community Service Facilities financed In Conjunction with Affordable Housing Activities implement a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area? If physical proximity is necessary, what is the best measure of being "physically proximate" with respect to projects undertaken in urban areas, and with respect to projects undertaken in rural areas?

One commentator remarked that census tract boundaries are sometimes inconsistent with neighborhood boundaries, which would limit the usefulness of census tracts as proxies for physical proximity. This commentator suggested that "physically proximate" should allow for strategies that provide access to the services through readily available transit options within the Awardee's Service Area. Another commentator suggested that "or located within 20 miles" be added to the definition of In Conjunction With to deal with situations in which a property is located near a county line but may rely on services that are just a few miles away.

The CDFI Fund's response: Geographical proximity is the best measure of being "physically proximate." However, the CDFI Fund recognizes that census tract boundaries can be limiting in certain instances. Therefore, the interim rule revises the definition of In Conjunction With in 12 CFR 1807.104(cc) to include a 2 mile radius for a Metropolitan Area and a 20 mile radius for a Non-Metropolitan Area.

D. Affordability Qualifications

Is the Affordable Housing qualification that requires a minimum of 20 percent of units in multi-family rental housing projects financed with a CMF award be occupied by Low-Income, Very Low-Income, or Extremely Low-Income Families appropriate (12 CFR 1807.401)? If not, what is the appropriate percentage?

One commentator agreed with the proposed rule's level of targeting.

The CDFI Fund's response: The percentage threshold in 12 CFR 1807.401 remains unchanged.

As set forth in 12 CFR 1807.400 et seq., Affordable Housing is subject to a 10-year affordability requirement that begins at Project Completion. Is this 10-year affordability requirement appropriate? How should this be measured with respect to funds that are deployed, returned to the Awardee, and reinvested during the life of the Assistance Agreement (e.g., in the case of CMF awards that are used to establish a revolving loan fund)?

Two commentators expressed significant concern with the 10-year affordability requirement for homeownership. One commentator remarked that the 10-year provision would impose an onerous administrative burden on nonprofit program sponsors, as well as the homeowner, and suggested that the affordability qualification only be measured at purchase. That same commentator also opposed specific underwriting criteria as the affordability criteria. A second commentator opposed the 10-year affordability requirement because it would impose an affordability covenant and deter otherwise qualified homeowners. It would create a situation where the homeowner would have to suppress the sale price if he or she had to sell before the 10-year period ended. Thus, the provision serves as a barrier to homeownership, cited the commentator. The commentator provided an alternative to the 10-year affordability requirement: To remove the 10-year affordability covenant for each individual loan and instead require Awardees to redeploy the CMF dollars, upon resale, to new borrowers that meet the affordability requirements. Another commentator suggested that the proposed rule adopt the affordability qualifications of all Federal and state affordable housing programs.

One commentator suggested that the front-end and back-end ratios for homeownership affordability qualification are too inflexible. The commentator suggested deleting the ratios and provide for the ability to negotiate specific terms with an Awardee should the CDFI Fund discover abusive lending.

The CDFI Fund's response: The CDFI Fund recognizes the limitation of an affordability covenant on homeownership. However, the CDFI Fund also recognizes the challenges from a compliance standpoint in accepting the many definitions of "affordable housing" across all Federal and state programs. In an effort to balance the two interests, the interim rule removes the required affordability covenant on homeownership and allows Awardees to create their own mechanism of recouping and redeploying the CMF award in cases where the original homeowner sells the property to a buyer that does not meet the affordability qualifications. Under those circumstances, the Awardee must ensure that the portion of the CMF award spent or designated to finance the Affordable Housing Activity is recouped from the homeowner or the Awardee's other resources, and redeployed in an eligible use for a qualified family for the remaining affordability period. The interim rule thus places the affordability restriction on the dollar amount of the CMF award used for the eligible activity, instead of the housing itself. The interim rule sets forth the parameters of resale, recoupment and redeployment in 12 CFR 1807.402(a)(5).

Likewise, the CDFI Fund wants to allow for increases in tenant incomes while also increasing affordable housing opportunities. Therefore, in 12 CFR 1807.401(g)(3), the interim rule provides that in the event a tenant's income increases, the Awardee may replace that unit with another qualifying unit for purposes of meeting the 10-year affordability requirement. This provision encourages increases in wealth by low-income families, yet allows Awardees to fulfill the purpose of the CMF without encountering noncompliance.

With regard to the homeownership front-end and back-end ratios, the interim rule removes those as affordability standards and simply uses the "no greater than 95 percent of median purchase price" as the qualification.

The interim rule also adds the new defined term, "Eligible-Income" in 12 CFR 1807.104(u), to describe families whose annual income does not exceed 120 percent of the area median income, as determined by HUD.

E. Record Retention

The proposed rule sets forth record data collection and record retention requirements in 12 CFR 1807.902. What documentation should Awardees be required to retain to demonstrate compliance with (i) the affordability qualification requirements in 12 CFR 1807.400 et seq. and (ii) the leveraging, commitment and Project Completion requirements in 12 CFR 1807.500 et seq.?

No commentators offered specific recommendations regarding the documentation Awardees should be

required to retain in order to demonstrate compliance.

The CDFI Fund's response: The CDFI Fund will set forth guidance and information on the documentation requirements in the Assistance Agreements and compliance guidance documents to be issued at a future date.

F. Income Determination and Rent Limitations

Although the CDFI Fund did not ask a specific question about the income determination and rent limitation provisions in the proposed rule, comments were submitted regarding these issues. One commentator remarked that the rent-setting mechanisms and income definitions are unnecessarily complex and should defer to the Department of Housing and Urban Development (HUD) program, the U.S. Department of Agriculture (USDA) program and the Low Income Housing Tax Credit (LIHTC) Program, authorized under the Tax Reform Act of 1986, I.R.C. section 42, rules for rent-setting and income determinations. The commentator also suggested that the rent limitation of no more than 30 percent of a family's annual income is too restrictive, especially if the housing provider does not have access to rental assistance subsidies. In addition, the developer must be able to demonstrate predictable rental proceeds for the property, which would be speculative under the proposed rule, remarked the commentator. As an alternative, the commentator suggested that in projects where CMF funds will represent 10 percent or less of the total capital, the proposed rule should defer to the income targeting and rent-setting requirements of other Federal programs, thus allowing rents to increase but not decrease below a floor, based on the initial rents.

Another commentator suggested in lieu of the "30 percent of the family's annual income" rent limitation is to adopt the LIHTC standard in which rents are restricted based on levels that are affordable to a family making 60 percent of area median income or less.

The CDFI Fund's response: The proposed rule largely mirrors the income determination rules and rent limits of the HOME Investment Partnership Program (HOME Program), authorized under title II of the Cranston-Gonzalez National Affordable Housing Act, as amended, 42 U.S.C. 12701 *et seq.,* administered by HUD. Thus, in 12 CFR 1807.401(a), the interim rule adopts the commentator's suggestion of using the HOME Program rent limitations and sets the rent limitations as 30 percent of the income threshold of Eligible-Income, Low-Income, Very Low-Income and Extremely-Low Income Families. Similar to the HOME Program, 12 CFR 1807.401(2)(iii) is added to the interim rule to allow an Awardee to determine a tenant's income by using HUD's definition of "annual income" in its Section 8 program, as set forth in the United States Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.*

G. Rural Definitions

The CDFI Fund received comments on the definition of Underserved Rural Area. One commentator suggested that the proposed rule revise the definition of Underserved Rural Area to include rural areas that are eligible for USDA housing. The commentator remarked that defining only Non-Metropolitan Areas as "rural" areas excludes many underserved rural areas from consideration. In addition, the commentator advocated that the CDFI Fund use USDA's definition of "housing stress" as one criteria of economic distress.

The CDFI Fund's response: The CDFI Fund has opted to use Non-Metropolitan areas as a proxy for rural areas because it is an objective classification that wholly comprises areas that would be deemed "rural" under most, if not all other definitions of the word "rural."

With regard to the use of "housing stress" as an additional criteria of economic distress, the interim rule in 12 CFR 1807.800(c)(5) provides for the addition of any criteria the CDFI Fund deems appropriate. Should the CDFI Fund decide to include additional criteria of economic distress, it will do so in the applicable NOFA.

III. Rulemaking Analysis

Executive Order (E.O.) 12866

It has been determined that this interim rule is not a significant regulatory action under Executive Order 12866. Accordingly, a regulatory impact assessment is not required.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required under the Administrative Procedure Act (5 U.S.C 553), the Regulatory Flexibility Act does not apply.

Paperwork Reduction Act

The collection of information contained in this interim rule has been previously reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 and assigned OMB Control Number 1559–0036. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. This document restates the collections of information without substantive change. Comments concerning suggestions for reducing the burden of collections of information should be directed to the Capital Magnet Fund Manager, Community Development Financial Institutions Fund, 601 13th Street, NW., Suite 200 South, Washington, DC 20005.

National Environmental Policy Act

This interim rule has been reviewed in accordance with 12 CFR part 1815. The CDFI Fund's Environmental Regulations under the National Environmental Protection Act of 1969 (NEPA) require that the CDFI Fund adequately consider the cumulative impact proposed activities have upon the human environment. It is the determination of the CDFI Fund that the interim rule does not constitute a major Federal action significantly affecting the quality of the human environment and, in accordance with the NEPA and the CDFI Fund Environmental Quality Regulations, 12 CFR part 1815, neither an Environmental Assessment nor an Environmental Impact Statement is required.

Administrative Procedure Act

Because this interim rule relates to loans and grants, notice and public procedure and a delayed effective date are not required pursuant to the Administrative Procedure Act, 5 U.S.C. 553(a)(2).

Catalogue of Federal Domestic Assistance Number

Capital Magnet Fund—21.011.

List of Subjects in 12 CFR Part 1807

Community development, Grant programs—housing and community development, Reporting and record keeping requirements.

■ For the reasons set forth in the preamble, 12 CFR chapter XVIII is amended by adding part 1807 to read as follows:

PART 1807—CAPITAL MAGNET FUND

Subpart A—General Provisions

Sec.

1807.100 Purpose.
1807.101 Summary.
1807.102 Relationship to other CDFI Fund programs.
1807.103 Awardee not instrumentality.
1807.104 Definitions.
1807.105 Waiver authority.
1807.106 OMB control number.

Subpart B—Eligibility

1807.200 Applicant eligibility.

Subpart C—Use of Funds/Eligible Activities

1807.300 Purposes of grants.
1807.301 Eligible activities.
1807.302 Restrictions on use of assistance.

Subpart D—Qualification as Affordable Housing

1807.400 Affordable Housing—General.
1807.401 Affordable Housing—Rental Housing.
1807.402 Affordable Housing—Homeownership.

Subpart E—Leveraging and Commitment Requirement.

1807.500 Leveraged costs—general.
1807.501 Commitment for use.
1807.502 Assistance limits.
1807.503 Projection completion.

Subpart F—Tracking Requirements

1807.600 Tracking funds—general.
1807.601 Nature of funds.

Subpart G—Applications for Assistance

1807.700 Notice of Funds Availability.

Subpart H—Evaluation and Selection of Applications

1807.800 Evaluation and selection—general.
1807.801 Evaluation of Applications.

Subpart I—Terms and Conditions of Assistance

1807.900 Assistance Agreement.
1807.901 Disbursement of funds.
1807.902 Data collection and reporting.
1807.903 Compliance with government requirements.
1807.904 Lobbying restrictions.
1807.905 Criminal provisions.
1807.906 CDFI Fund deemed not to control.
1807.907 Limitation on liability.
1807.908 Fraud, waste and abuse.

Authority: Housing and Economic Recovery Act of 2008, Pub. L. No.110–289, section 1131

Subpart A—General Provisions

§ 1807.100 Purpose.

The purpose of the Capital Magnet Fund (CMF) is to attract private capital for and increase investment in Affordable Housing Activities and related Economic Development Activities and Community Service Facilities.

§ 1807.101 Summary.

(a) Through the CMF, the CDFI Fund will competitively award grants to CDFIs and qualified Nonprofit Organizations to leverage dollars for:

(1) The Development, Preservation, Rehabilitation or Purchase of Affordable Housing primarily for Low-Income Families; and

(2) Financing Economic Development Activities or Community Service Facilities.

(b) The CDFI Fund will select Awardees to receive financial assistance grants through a merit-based, competitive application process. Financial assistance grants that are awarded through the CMF may only be used for eligible uses set forth in subpart C of this part. Each Awardee will enter into an Assistance Agreement which will require it to leverage the CMF grant amount and abide by other terms and conditions pertinent to any assistance received under this part.

§ 1807.102 Relationship to other CDFI Fund programs.

A Certified CDFI will automatically be deemed to meet the eligible entity requirements, provided that it has been in business as an operating entity for a period of at least three years prior to the application deadline.

§ 1807.103 Awardee not instrumentality.

No Awardee shall be deemed to be an agency, department, or instrumentality of the United States.

§ 1807.104 Definitions.

For the purpose of this part:

(a) *Act* means the Housing and Economic Recovery Act of 2008, as amended, Public Law 110–289, section 1131;

(b) *Affiliate* means any entity that Controls, is Controlled by, or is under common Control with, an entity;

(c) *Affordable Housing* means rental or for-sale single-family or multi-family housing that meets the requirements set forth in subpart D of this part;

(d) *Affordable Housing Activities* means the Development, Preservation, Rehabilitation, or Purchase of Affordable Housing;

(e) *Affordable Housing Fund* means a loan, grant or investment fund, managed by the Awardee, whose capital is used to finance Affordable Housing Activities;

(f) *Appropriate Federal Banking Agency* has the same meaning as in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q), and includes, with respect to Insured Credit Unions, the National Credit Union Administration;

(g) *Applicant* means any entity submitting an application for assistance under this part;

(h) *Appropriate State Agency* means an agency or instrumentality of a State that regulates and/or insures the member accounts of a State-Insured Credit Union;

(i) *Assistance Agreement* means a formal, written agreement between the CDFI Fund and an Awardee which specifies the terms and conditions of assistance under this part;

(j) *Awardee* means an Applicant selected by the CDFI Fund to receive assistance pursuant to this part;

(k) *Capital Magnet Fund (or CMF)* means the program authorized by section 1131 of the Act, Public Law 110–289, and implemented under this part;

(l) *Certified Community Development Financial Institution (or Certified CDFI)* means an entity that has been determined by the CDFI Fund to meet the eligibility requirements set forth in 12 CFR 1805.201;

(m) *Committed* means that the Awardee is able to demonstrate, in written form and substance that is acceptable to the CDFI Fund, a commitment for use pursuant to § 1807.501;

(n) *Community Development Financial Institutions Fund (or CDFI Fund)* means the Community Development Financial Institutions Fund, an office of the U.S. Department of Treasury, established under the Community Development Banking and Financial Institutions Act of 1994, as amended, 12 U.S.C. 4701 *et seq.;*

(o) *Community Service Facility* means the physical structure in which service programs for residents or service programs for the broader community (including, but not limited to, health care, childcare, educational programs including literacy and after school programs, job training, food and nutrition services, cultural, and/or social services) operate which, In Conjunction With Affordable Housing Activities, implements a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area;

(p) *Concerted Strategy* means a formal planning document that evidences the connection between Affordable Housing Activities and Economic Development Activities or Community Service Facilities. Such documents include, but are not limited to, a comprehensive, consolidated, or redevelopment plan, or some other local or regional planning document adopted or approved by the jurisdiction;

(q) *Control* means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of Voting Securities of any company, directly or indirectly or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of any company; or

(3) The power to exercise, directly or indirectly, a controlling influence over

the management, credit or investment decisions, or policies of any company;

(r) *Depository Institution Holding Company* means a bank holding company or a savings and loan holding company as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813(w)(1);

(s) *Development* means land acquisition, demolition of existing facilities, and construction of new facilities, which may include site improvement, utilities development and rehabilitation of utilities, necessary infrastructure, utility services, conversion, and other related activities;

(t) *Economic Development Activity* means the development, preservation, rehabilitation, or purchase of Community Service Facilities and/or other physical structures in which neighborhood-based businesses operate which, In Conjunction With Affordable Housing Activities, implements a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area;

(u) *Eligible-Income* means:

(1) In the case of owner-occupied housing units, income not in excess of 120 percent of the area median income; and

(2) In the case of rental housing units, income not in excess of 120 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD;

(v) *Eligible Project Costs* means Leverage Costs plus those costs funded directly by a CMF award, exclusive of Operations;

(w) *Extremely Low-Income* means:

(1) In the case of owner-occupied housing units, income not in excess of 30 percent of the area median income; and

(2) In the case of rental housing units, income not in excess of 30 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD;

(x) *Families* means households that reside within the boundaries of the United Sates (which shall encompass any State of the United States, the District of Columbia or any territory of the United States, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands) and that meet the criteria set forth in § 1807.104(u), (w), (jj) or (fff);

(y) *HOME Program* means the HOME Investment Partnership Program set forth in the HOME Investment Partnerships Act under title II of the Cranston-Gonzalez National Affordable Housing Act, as amended, 42 U.S.C. 12701 *et seq.;*

(z) *Homeownership* means ownership in fee simple title or a 99-year leasehold interest in a one- to four-unit dwelling or in a condominium unit, or equivalent form of ownership (which shall include cooperative housing and mutual housing project). For purposes of housing located on trust or restricted Indian lands, homeownership includes leases of 50 years. The ownership interest may be subject only to the following:

(1) Restrictions on resale permitted under the Assistance Agreement;

(2) Mortgages, deeds of trust, or other liens or instruments securing debt on the property; or

(3) Any other restrictions or encumbrances that do not impair the good and marketable nature of title to the ownership interest;

(aa) *Housing* means single- and multi-family residential units, including, but not limited to, manufactured housing and manufactured housing lots, permanent housing for disabled and/or homeless persons, transitional housing, single-room occupancy housing, and group homes. Housing also includes elder cottage housing opportunity (ECHO), as described in 24 CFR 92.258;

(bb) *HUD* means the Department of Housing and Urban Development established under the Department of Housing and Urban Development Act of 1965, 42 U.S.C. 3532–3537;

(cc) *In Conjunction With* means physically proximate to Affordable Housing and reasonably available to residents of Affordable Housing. For a Metropolitan Area, In Conjunction With means located within the same census tract or within 2 miles of the Affordable Housing. For a Non-Metropolitan Area, In Conjunction With means located within the same county, township, or village, or within 20 miles of the Affordable Housing;

(dd) *Insured CDFI* means a Certified CDFI that is an Insured Depository Institution or an Insured Credit Union;

(ee) *Insured Credit Union* means any credit union, the member accounts of which are insured by the National Credit Union Share Insurance Fund by the National Credit Union Administration pursuant to authority granted in 12 U.S.C. 1783 *et seq.;*

(ff) *Insured Depository Institution* means any bank or thrift, the deposits of which are insured by the Federal Deposit Insurance Corporation as determined in 12 U.S.C. 1813(c)(2);

(gg) *Leveraged Costs* means those costs as described in 12 CFR 1807.500;

(hh) *Loan Guarantee* means an agreement to indemnify the holder of a loan all or a portion of the unpaid principal balance in case of default by the borrower;

(ii) *Loan Loss Reserves* means funds that the Applicant or Awardee will set aside in the form of cash reserves, or through accounting-based accrual reserves, to cover losses on loans, accounts, and notes receivable, or for related purposes that the CDFI Fund deems appropriate;

(jj) *Low-Income* means:

(1) In the case of owner-occupied housing units, income not in excess of 80 percent of area median income; and

(2) In the case of rental housing units, income not in excess of 80 percent of area median income, with adjustments for smaller and larger families, as determined by HUD;

(kk) *Low-Income Area (LIA)* means a census tract or block numbering area in which the median income does not exceed 80 percent of the median income for the area in which such census tract or block numbering area is located. With respect to a census tract or block numbering area located within a Metropolitan Area, the median family income shall be at or below 80 percent of the Metropolitan Area median family income or the national Metropolitan Area median family income, whichever is greater. In the case of a census tract or block numbering area located outside of a Metropolitan Area, the median family income shall be at or below 80 percent of the statewide Non-Metropolitan Area median family income or the national Non-Metropolitan Area median family income, whichever is greater;

(ll) *Low Income Housing Tax Credit Program or LIHTC Program* means the program as set forth under Title I of the U.S. Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.;*

(mm) *Metropolitan Area* means an area designated as such by the Office of Management and Budget pursuant to 44 U.S.C. 3504(e) and 31 U.S.C. 1104(d) and Executive Order 10253 (3 CFR, 1949–1953 Comp., p. 758), as amended;

(nn) *Multi-family housing* means residential properties consisting of five or more dwelling units, such as a condominium unit, cooperative unit, apartment or townhouse;

(oo) *Non-Metropolitan Area* means an area set forth in the Assistance Agreement;

(pp) *Nonprofit Organization* means any corporation, trust, association, cooperative, or other organization that is:

(1) Designated as a nonprofit or not-for-profit entity under the laws of the organization's State of formation; and

(2) Exempt from Federal income taxation pursuant to the Internal Revenue Code of 1986;

(qq) *Non-Regulated CDFI* means any entity meeting the eligibility requirements described in 12 CFR 1805.200 which is not a Depository Institution Holding Company, Insured Depository Institution, or Insured Credit Union;

(rr) *Operations* means all allowable expenses as defined by Office of Management and Budget (OMB) Circular A–122, "Cost Principles For Non-Profit Organizations," and OMB Circular A–87, "Cost Principles for State, Local, and Indian Tribal Governments," incurred by the Awardee in the administration, operation, and implementation of a CMF award;

(ss) *Participating Jurisdiction* means a jurisdiction designated by HUD, as a participating jurisdiction under the HOME Program in accordance with the requirements of 24 CFR 92.105;

(tt) *Preservation* means:

(1) Activities to refinance, with or without Rehabilitation, single-family or multi-family rental property mortgages that, at the time of refinancing, are subject to affordability and use restrictions under State or Federal affordable housing programs, including but not limited to, the HOME Program, the LIHTC Program, the Section 8 Tenant-Based Assistance and the Section 8 Rental Voucher programs (24 CFR part 982), or the Section 515 Rural Rental Housing program (7 CFR part 3560), hereinafter referred to as "similar State or Federal affordable housing programs," where such refinancing has the effect of extending the term of any affordability and use restrictions on the properties;

(2) Activities to refinance and acquire single-family or multi-family properties that, at the time of refinancing or acquisition, were subject to affordability and use restrictions under similar State or Federal affordable housing programs, by the former tenants of such properties, where such refinancing has the effect of extending the term of any affordability and use restrictions on the properties;

(3) Activities to refinance the mortgages of single-family, owner-occupied housing that at the time of refinancing are subject to affordability and use restrictions under similar State or Federal affordable housing programs, where such refinancing has the effect of extending the term of any affordability and use restrictions on the properties;

(4) Activities to acquire Single-family or Multi-family housing, with or without rehabilitation, with the commitment to subject the properties to the affordability qualifications set forth in subpart D of this part; or

(5) Activities to refinance, with or without Rehabilitation, single-family or multi-family rental property mortgages, with the commitment to subject the properties to the affordability qualifications set forth in subpart D of this part;

(uu) *Project Completion* means that all of the requirements set forth at § 1807.503 for a project supported by a CMF award have been met;

(vv) *Purchase* means to provide direct financing to a homeowner to acquire Homeownership through an exchange of money;

(ww) *Rehabilitation* means any repairs and/or capital improvements that contribute to the long-term preservation, current building code compliance, habitability, sustainability, or energy efficiency of Affordable Housing.

(xx) *Revolving Loan Fund* means a pool of funds managed by the Applicant or Awardee wherein repayments on Affordable Housing Activities loans, Economic Development Activities loans and/or Community Services Facilities loans are used to finance additional loans;

(yy) *Risk-Sharing Loan* means loans for Affordable Housing Activities and/or Economic Development Activities in which the risk of borrower default is shared by the Applicant or Awardee with other lenders (*e.g.,* participation loans);

(zz) *Service Area* means the geographic area in which the Applicant proposes to use CMF funding, and the geographic area approved by the CDFI Fund in which the Awardee shall use CMF funding as set forth in its Assistance Agreement;

(aaa) *Single-family housing* means a one- to four-family residence, condominium unit, cooperative unit, combination of manufactured housing and lot, or manufactured housing lot;

(bbb) *State* means the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Island, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and any other territory of the United States;

(ccc) *State-Insured Credit Union* means any credit union that is regulated by, and/or the member accounts of which are insured by, a State agency or instrumentality;

(ddd) *Subsidiary* means any company which is owned or Controlled directly or indirectly by another company;

(eee) *Underserved Rural Area* means a Non-Metropolitan Area that:

(1) Qualifies as a Low-Income Area;

(2) Is experiencing housing stress evidenced by 30 percent or more of resident households with one or more of these four housing conditions in the last decennial census:

(i) Lacked complete plumbing,

(ii) Lacked complete kitchen,

(iii) Paid 30 percent or more of income for owner costs or rent, or

(iv) Had more than 1 person per room; or

(3) Is remote-rural county consisting of a Non-Metropolitan Area that is also not adjacent to a Metropolitan Area;

(fff) *Very Low-Income* means:

(1) In the case of owner-occupied housing units, income not greater than 50 percent of the area median income; and

(2) In the case of rental housing units, income not greater than 50 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD.

§ 1807.105 Waiver authority.

The CDFI Fund may waive any requirement of this part that is not required by law upon a determination of good cause. Each such waiver shall be in writing and supported by a statement of the facts and the grounds forming the basis of the waiver. For a waiver in an individual case, the CDFI Fund must determine that application of the requirement to be waived would adversely affect the achievement of the purposes of the Act. For waivers of general applicability, the CDFI Fund will publish notification of granted waivers in the **Federal Register**.

§ 1807.106 OMB control number.

The collection of information requirements in this part have been approved by the Office of Management and Budget and assigned OMB control number 1559–0036.

Subpart B—Eligibility

§ 1807.200 Applicant eligibility.

(a) *General requirements.* An Applicant will be deemed eligible for a CMF award if it is:

(1) A Certified or certifiable CDFI. An entity may meet the requirements described in this paragraph (a)(1) if it is:

(i) A Certified CDFI, as set forth in 12 CFR 1805.201, that has been in existence as a legally formed entity as set forth in the Notice of Funds Availability (NOFA) for the applicable funding round; or

(ii) A certifiable CDFI that has been in existence as a legally formed entity as set forth in the NOFA for the applicable round and, although not yet certified as

a CDFI, has submitted a complete CDFI certification application as of the date set forth in the applicable NOFA; or

(2) A Nonprofit Organization having as one of its principal purposes the development or management of affordable housing. An entity may meet the requirements described in this paragraph (a)(2) if it:

(i) Has been in existence as a legally formed entity as set forth in the applicable NOFA;

(ii) Demonstrates, through articles of incorporation, by-laws, or other board-approved documents, that the development or management of affordable housing are among its principal purposes; and

(iii) Can demonstrate that at least one-third of the Applicant's resources (either as a portion of total staffing or as a portion of total assets) are dedicated to the development or management of affordable housing.

(b) *Eligibility verification.* An Applicant shall demonstrate that it meets the eligibility requirements described in § 1807.200(a)(2) of this section by providing information described in the application, NOFA, and/or supplemental information, as may be requested by the CDFI Fund. For an Applicant seeking eligibility under § 1807.200(a)(1), the CDFI Fund will verify that the Applicant is a Certified CDFI during the application eligibility review. For an Applicant seeking eligibility under § 1807.200(a)(2), the CDFI Fund, in its sole discretion, shall determine whether the Applicant has satisfied said requirements.

Subpart C—Use of Funds/Eligible Activities

§ 1807.300 Purposes of grants.

The CDFI Fund may provide financial assistance grants to organizations described under subpart B of this part for the purpose of attracting private capital for and increase investment in:

(a) The Development, Preservation, Rehabilitation, or Purchase of Affordable Housing for primarily Extremely Low-Income, Very Low-Income, and Low-Income families; and

(b) Economic Development Activities or Community Services Facilities. With respect to an Economic Development Activity or Community Service Facility funded with a CMF grant, the Affordable Housing that it is In Conjunction With may be financed by sources other than the CMF grant.

§ 1807.301 Eligible activities.

Grants awarded under this part shall be used by an Awardee to support Affordable Housing Activities, Economic Development Activities or Community Service Facilities, including the following eligible uses:

(a) To provide Loan Loss Reserves;

(b) To capitalize a Revolving Loan Fund;

(c) To capitalize an Affordable Housing Fund;

(d) To capitalize a fund to support Economic Development Activities or Community Service Facilities;

(e) For Risk-Sharing Loans;

(f) For Loan Guarantees; and

(g) For the Awardee's Operations.

§ 1807.302 Restrictions on use of assistance.

(a) An Awardee's activities under § 1807.301 shall not include the use of CMF for the following:

(1) Political activities;

(2) Advocacy;

(3) Lobbying, whether directly or through other parties;

(4) Counseling services (including homebuyer or financial counseling);

(5) Travel expenses;

(6) Preparing or providing advice on tax returns;

(7) Emergency shelters (including shelters for disaster victims);

(8) Nursing homes;

(9) Convalescent homes;

(10) Residential treatment facilities;

(11) Correctional facilities; or

(12) Student dormitories.

(b) An Awardee may use up to a percentage of CMF award for Operations as specified in the applicable NOFA.

(c) An Awardee shall not use CMF award to support projects that:

(1) Consist of the operation of any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises;

(2) Consist of farming (within the meaning of I.R.C. section 2032A(e)(5)(A) or (B)) if, as of the close of the taxable year of the taxpayer conducting such trade or business, the sum of the aggregate unadjusted bases (or, if greater, the fair market value) of the assets owned by the taxpayer that are used in such a trade or business, and the aggregate value of the assets leased by the taxpayer that are used in such a trade or business, exceeds $500,000.

(d) In any given funding round, no more than 30 percent of an Awardee's CMF award may be used for purposes described in § 1807.300(b).

Subpart D—Qualification as Affordable Housing

§ 1807.400 Affordable housing—general.

Each Awardee that uses CMF funding to support Affordable Housing Activities shall ensure that 100 percent of Eligible Project Costs are attributable to housing units that meet the affordability qualifications set forth below for Eligible-Income Families. In addition, greater than 50 percent of the Eligible Project Costs must be attributable to housing units that meet the affordability qualifications set forth below for either Low-Income, Very Low-Income, or Extremely Low-Income Families.

§ 1807.401 Affordable housing—rental housing.

To qualify as Affordable Housing, a rental Multi-family housing project financed with a CMF award must have at least 20 percent of the housing units occupied by Low-Income, Very Low-Income, or Extremely Low-Income Families and must comply with the rent limits set forth herein.

(a) *Rent limitation.* The maximum rent is a rent that does not exceed:

(1) For an Eligible-Income Family, 30 percent of the annual income of a family whose annual income equals 120 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD;

(2) For a Low-Income Family, 30 percent of the annual income of a family whose annual income equals 80 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD;

(3) For a Very Low-Income Family, 30 percent of the annual income of a family whose annual income equals 50 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD; or

(4) For an Extremely Low-Income Family, 30 percent of the annual income of a family whose annual income equals 30 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD.

(b) *Nondiscrimination against rental assistance subsidy holders.* The Awardee shall require that the owner of a rental unit cannot refuse to lease the unit to a Section 8 Program certificate or voucher holder (24 CFR Part 982, Section 8 Tenant-Based Assistance: Unified Rule for Tenant-Based Assistance under the Section 8 Rental Certificate Program and the Section 8 Rental Voucher Program) or to the holder of a comparable document evidencing participation in a HOME tenant-based rental assistance program

because of the status of the prospective tenant as a holder of such certificate, voucher, or comparable HOME tenant-based assistance document.

(c) *Initial rent schedule and utility allowances.* The Awardee shall ensure that the housing adheres to the applicable Participating Jurisdiction's maximum monthly allowances for utilities and services (excluding telephone). If the Participating Jurisdiction's allowances have not been determined or are otherwise unavailable, the Awardee shall rely upon the utility and services allowances established by the applicable city, county or State public housing authority.

(d) *Periods of Affordability.* Housing under § 1807.401 must meet the affordability requirements for not less than 10 years, beginning after Project Completion and at initial occupancy. The affordability requirements apply without regard to the term of any loan or mortgage or the transfer of ownership and must be imposed by deed restrictions, covenants running with the land, or other recordable mechanisms, except that the affordability restrictions may terminate upon foreclosure or transfer in lieu of foreclosure. Other recordable mechanisms must be approved in writing and in advance by the CDFI Fund. The affordability restrictions shall be revived according to the original terms if, during the original affordability period, the owner of record before the foreclosure, or deed in lieu of foreclosure, or any entity that includes the former owner or those with whom the former owner has or had family or business ties, obtains an ownership interest in the project or property.

(e) *Subsequent rents during the affordability period.* Any increase in rent for a CMF-funded unit requires that tenants of those units be given at least 30 days prior written notice before the implementation of the rent increase.

(f) *Tenant income determination.*

(1) Each year during the period of affordability the tenant's income shall be re-examined; tenant income examination is the responsibility of the Awardee. Annual income shall include income from all household members.

(2) One of the following three definitions of "annual income" must be used to determine whether a family is income eligible:

(i) Annual income as reported under the Census long-form for the most recent available decennial Census. This definition includes:

(A) Wages, salaries, tips, commissions, *etc.;*

(B) Self-employment income from owned non-farm business, including proprietorships and partnerships;

(C) Farm self-employment income;

(D) Interest, dividends, net rental income, or income from estates or trusts;

(E) Social Security or railroad retirement;

(F) Supplemental Security Income, Aid to Families with Dependent Children, or other public assistance or public welfare programs;

(G) Retirement, survivor, or disability pensions;

(H) Any other sources of income received regularly, including Veterans' (VA) payments, unemployment compensation, and alimony; and

(I) Any other sources of income the CDFI Fund may deem appropriate;

(ii) Adjusted gross income as defined for purposes of reporting under Internal Revenue Service (IRS) Form 1040 series for individual Federal annual income tax purposes; or

(iii) "Annual Income" as defined at 24 CFR 5.609 (except that when determining the income of a homeowner for an owner-occupied rehabilitation project, the value of the homeowner's principal residence may be excluded from the calculation of net family assets).

(3) Although any of the above three definitions of "annual income" are permitted, in order to calculate adjusted income, exclusions from income set forth at 24 CFR 5.611 shall be applied.

(4) The CDFI Fund reserves the right to deem certain government programs, under which a Low-Income family is a recipient, as income eligible for purposes of meeting the tenant income requirements under this subsection.

(g) *Over-income tenants.* (1) CMF-funded units continue to qualify as Affordable Housing despite a temporary noncompliance caused by increases in the incomes of existing tenants if actions satisfactory to the CDFI Fund are being taken to ensure that all vacancies are filled in accordance with this section until the noncompliance is corrected.

(2) Tenants whose incomes no longer qualify must pay rent no greater than the lesser of the amount payable by the tenant under State or local law or 30 percent of the family's annual income, except that tenants of units that have been allocated low-income housing tax credits by a housing credit agency pursuant to section 42 of the Internal Revenue Code of 1986, I.R.C. section 42, must pay rent governed by section 42. Tenants who no longer qualify as Eligible-Income are not required to pay as rent an amount that exceeds the market rent for comparable, unassisted units in the neighborhood.

(3) If the income of a tenant of a CMF-funded unit no longer qualifies, the Awardee may designate another unit, in the CMF-funded project, as a replacement unit that meets the affordability qualifications for Eligible-Income, Low-Income, Very Low-Income, or Extremely Low-Income Families and as set forth in the Awardee's Assistance Agreement. If there is not an available replacement unit, the Awardee must fill the first available vacancy with a tenant that meets the affordability qualifications for Eligible-Income, Low-Income, Very Low-Income, or Extremely Low-Income Families as necessary to maintain compliance with the CMF requirements and the Assistance Agreement.

§ 1807.402 Affordable housing—homeownership.

(a) *Acquisition with or without rehabilitation.* Housing that is for Homeownership purchase must meet the affordability requirements of this subsection.

(1) The housing must be Single-family housing.

(2) The housing price does not exceed 95 percent of the median purchase price for the area as used in the HOME Program and as determined by the applicable Participating Jurisdiction.

(3) The housing must be purchased by a qualifying family as set forth in § 1807.400. The housing must be the principal residence of the family throughout the period described in paragraph (a)(4) of this section.

(4) *Periods of Affordability.* Housing under this subsection must meet the affordability requirements for at least 10 years at the time of purchase by the homeowner.

(5) *Resale.* To ensure that CMF awards are being used for qualifying families for the entire 10-year affordability period, recoupment and redeployment or resale strategies must be imposed by the Awardee. A recoupment strategy must ensure that, in the event the qualifying homeowner sells the housing before the end of the 10-year affordability period and the new homeowner does not meet the affordability qualifications set forth in § 1807.400, the portion of the CMF award used to finance the Affordable Housing Activity is recouped and redeployed to a qualifying family for affordable housing homeownership in the manner set forth in § 1807.402, except that the housing must meet the affordability requirements only for the remaining affordability period. The Awardee may design and implement its own recoupment strategy. Deed

restrictions, covenants running with the land, or other similar mechanisms may be used as the mechanism to impose the resale strategy. The Awardee shall report to the CDFI Fund the event of resale, recoupment and redeployment of the CMF award in the manner described in the Assistance Agreement. The affordability restrictions may terminate upon occurrence of any of the following termination events: Foreclosure, transfer in lieu of foreclosure or assignment of an FHA-insured mortgage to HUD. The Awardee may use purchase options, rights of first refusal or other preemptive rights to purchase the housing before foreclosure to preserve affordability. The affordability restrictions shall be revived according to the original terms if, during the original affordability period, the owner of record before the termination event, obtains an ownership interest in the housing.

(b) *Rehabilitation not involving acquisition.* Housing that is currently owned by a qualifying family, as set forth in § 1807.400, qualifies as Affordable Housing if it meets the requirements of this subsection.

(1) The estimated value of the housing, after Rehabilitation, does not exceed 95 percent of the median purchase price for the area, as used in the HOME Program and as determined by the applicable Participating Jurisdiction; or

(2) The housing is the principal residence of a qualifying family as set forth in § 1807.400, at the time that CMF funding is Committed to the housing.

(3) Housing under this subsection must meet the affordability requirements for at least 10 years after Rehabilitation is completed or meet the resale provisions of § 1807.402(a)(5).

(c) *Ownership interest.* The ownership in the housing assisted under this section must meet the definition of "Homeownership" as defined in § 1807.104(z).

(d) *New construction without acquisition.* Newly constructed housing that is built on property currently owned by a family which will occupy the housing upon completion, qualifies as Affordable Housing if it meets the requirements under paragraph (a) of this section.

(e) *Converting rental units to Homeownership units for existing tenants.* CMF-funded rental units may be converted to Homeownership units by selling, donating, or otherwise conveying the units to the existing tenants to enable the tenants to become homeowners in accordance with the requirements of § 1807.402. The Homeownership units are subject to a minimum period of affordability equal to the remaining affordability period.

Subpart E—Leveraging and Commitment Requirement

§ 1807.500 Leveraged costs—general.

(a) Each CMF grant is expected to result in Eligible Project Costs that total at least 10 times the grant amount. Such costs may be for activities that include Affordable Housing Activities, Economic Development Activities, or Community Service Facilities. Thus, an Awardee shall demonstrate that it leveraged, over its CMF funded portfolio, its CMF award at least 10 times the CMF grant amount or some other standard established by the CDFI Fund in the Awardee's Assistance Agreement. Leveraged Costs are costs that exceed the dollar amount of the Awardee's CMF contribution to each CMF-funded activity. However, the applicable NOFA may set forth a required percentage of Leveraged Costs that must be attributable to non-governmental sources. An Awardee may report to the CDFI Fund all Leveraged Costs, with the following limitations:

(1) No costs attributable to Operations may be reported as Leveraged Costs.

(2) No costs attributable to prohibited uses as identified in § 1807.302(a) and (c) may be reported as Leveraged Costs.

(3) All costs attributable to Affordable Housing Activities reported as Leveraged Costs must be for housing units that qualify as Affordable Housing under § 1807.401 or § 1807.402 for Eligible-Income Families.

(b) Awardees shall self-report leveraging information through forms or electronic systems developed by the CDFI Fund, subject to audit requirements set forth herein. Consequently, Awardees shall maintain appropriate documentation, such as audited financial statements, wire transfers documents, pro-formas, and other relevant records, to support its reports.

§ 1807.501 Commitment for use.

(a) CMF awards shall be Committed for use by the date designated in the Awardee's Assistance Agreement. An Awardee shall demonstrate that its CMF award is Committed by having executed a written, legally binding agreement under which CMF assistance will be provided to the developer or project sponsor for an identifiable project under which:

(1) Construction can reasonably be expected to start within 12 months of the agreement date; or

(2) Property title will be transferred within six months of the agreement date.

(b) An Awardee shall make an initial disbursement of its CMF award for Affordable Housing Activities, Economic Development Activities or Community Service Facilities by the date designated in its Assistance Agreement.

§ 1807.502 Assistance limits.

An eligible Applicant and its Subsidiaries and Affiliates may not be awarded more than 15 percent of the aggregate funds available for CMF grants during any funding year.

§ 1807.503 Project completion.

Once a CMF-funded project has been completed, it must be placed into service by the date designated in the Awardee's Assistance Agreement. Project Completion occurs, as determined by the CDFI Fund, when:

(a) All necessary title transfer requirements and construction work have been performed;

(b) The project complies with the requirements of this part, including the following property standards (these property standards must be complied with at the time of Project Completion and maintained for a period of at least 10 years thereafter):

(1) Housing that is constructed or rehabilitated with CMF funding must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances at the time of project completion. In the absence of a local code for new construction or rehabilitation, such housing must meet, as applicable: One of three model codes (Uniform Building Code (ICBO), National Building Code (BOCA), Standard (Southern) Building Code (SBCCI)); or the Council of American Building Officials (CABO) one or two family code; or the Minimum Property Standards (MPS) in 24 CFR 200.925 or 200.926. Newly constructed housing must meet the current edition of the Model Energy Code published by the Council of American Building Officials.

(2) The housing must meet the accessibility requirements at 24 CFR part 8, which implements section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and covered multifamily dwellings, as defined at 24 CFR 100.201, must also meet the design and construction requirements at 24 CFR 100.205, which implements the Fair Housing Act (42 U.S.C. 3601–3619).

(3) Construction of all manufactured housing must meet the Manufactured Home Construction and Safety Standards established in 24 CFR part 3280. These standards pre-empt State and local codes covering the same aspects of performance for such

housing. The installation of all manufactured housing units must comply with applicable State and local laws or codes. In the absence of such laws or codes, the installation must comply with the manufacturer's written instructions for installation of manufactured housing units. Manufactured housing that is rehabilitated using CMF funds must meet the requirements set out in paragraph (b)(1) of this section; and

(c) The final drawdown has been disbursed for the project.

Subpart F—Tracking Requirements

§ 1807.600 Tracking funds—general.

An Awardee receiving a CMF award shall develop and maintain a system to ensure that its CMF award is used in accordance with this part, the Act, its Assistance Agreement, and any requirements or conditions under which such amounts were awarded. Thus, an Awardee may create a separate account or accounting code for CMF activities.

§ 1807.601 Nature of funds.

A CMF award shall be considered Federal financial assistance in regards to applying Federal civil rights laws.

Subpart G—Applications for Assistance

§ 1807.700 Notice of funds availability.

Each Applicant shall submit an application for funding under this part in accordance with the regulations in this subpart. The applicable NOFA will advise potential Applicants on how to obtain and complete an application and will establish deadlines and other requirements. The NOFA will specify any limitations, special rules, procedures, and restrictions for a particular funding round. After receipt of an application, the CDFI Fund may request clarifying or technical information on the materials submitted as part of such application.

Subpart H—Evaluation and Selection of Applications

§ 1807.800 Evaluation and selection—general.

Applicants will be evaluated and selected, at the sole discretion of the CDFI Fund, to receive assistance based on a review process that may include an interview(s) and/or site visit(s) intended to:

(a) Ensure that Applicants are evaluated on a merit basis and in a fair and consistent manner;

(b) Ensure that each Awardee can successfully meet its leveraging goals and achieve Affordable Housing Activity, Community Service Facility and/or Economic Development Activity impacts;

(c) Ensure that Awardees represent a geographically diverse group of Applicants serving Metropolitan Areas and Underserved Rural Areas across the United States that meet criteria of economic distress, which may include:

(1) The percentage of Low-Income Families or the extent of poverty;

(2) The rate of unemployment or underemployment;

(3) The extent of blight and disinvestment;

(4) Economic Development Activities or Community Service Facilities that target Extremely Low-Income, Very Low-Income, and Low-Income families within the Awardee's Service Area; or

(5) Any other criteria the CDFI Fund shall set forth in the applicable NOFA; and

(d) Take into consideration other factors as described in the applicable NOFA.

§ 1807.801 Evaluation of applications.

(a) *Eligibility and completeness.* An Applicant will not be eligible to receive a CMF award if it fails to meet the eligibility requirements described in Part 1807.200 and in the applicable NOFA, or if the Applicant has not submitted complete application materials. For the purposes of this paragraph (a), the CDFI Fund reserves the right to request additional information from the Applicant, if the CDFI Fund deems it appropriate.

(b) *Substantive review.* In evaluating and selecting applications to receive assistance, the CDFI Fund will evaluate the Applicant's likelihood of success in meeting the factors set forth in the applicable NOFA, including but not limited to:

(1) The Applicant's ability to use CMF funding to generate additional investments;

(2) The need for affordable housing in the Applicant's market; and

(3) The ability of the Applicant to obligate amounts and undertake activities in a timely manner. In the case of an Applicant that has previously received assistance under any CDFI Fund program, the CDFI Fund will also consider the Applicant's level of success in meeting its performance goals, reporting requirements, and other requirements contained in the previously negotiated and executed assistance, allocation or award agreement(s) with the CDFI Fund, any undisbursed balance of assistance, and compliance with applicable Federal laws. The CDFI Fund may consider any other factors, as it deems appropriate, in reviewing an application, as set forth in the applicable NOFA.

(c) *Consultation with appropriate regulatory agencies.* In the case of an Applicant that is a federally-regulated financial institution, the CDFI Fund may consult with the Appropriate Federal Banking Agency or Appropriate State Agency prior to making a final award decision and prior to entering into an Assistance Agreement.

(d) *Awardee selection.* The CDFI Fund will select CMF Awardees based on the criteria described in paragraph (b) of this section and any other criteria set forth in this part or the applicable NOFA.

Subpart I —Terms and Conditions of Assistance

§ 1807.900 Assistance agreement.

(a) Each Applicant that is selected to receive a CMF award must enter into an Assistance Agreement with the CDFI Fund. The Assistance Agreement will set forth certain required terms and conditions of the Assistance Agreement which may include, but are not limited to, the following:

(1) The amount of the award;

(2) The approved uses of the award;

(3) The approved Service Area in which the award may be used;

(4) The time period by which the award proceeds must be Committed;

(5) The required documentation to evidence Project Completion; and

(6) Performance goals that have been established by the CDFI Fund based upon the Awardee's application.

(b) The Assistance Agreement shall provide that in the event of fraud, mismanagement, noncompliance with the Act or the CDFI Fund's regulations; or noncompliance with the terms and conditions of the Assistance Agreement on the part of the Awardee; the CDFI Fund, in its discretion, may:

(1) Require changes in the performance goals set forth in the Assistance Agreement;

(2) Revoke approval of the Awardee's Application;

(3) Reduce or terminate the Awardee's assistance;

(4) Require repayment of any assistance that has been distributed to the Awardee;

(5) Bar the Awardee from reapplying for any assistance from the CDFI Fund; or

(6) Take such other actions as the CDFI Fund deems appropriate or as set forth in the Assistance Agreement.

(c) Prior to imposing any sanctions pursuant to this section or an Assistance Agreement, the CDFI Fund shall, to the maximum extent practicable, provide

the Awardee with written notice of the proposed sanction and an opportunity to comment. Nothing in this section, however, shall provide an Awardee the right to any formal or informal hearing or comparable proceeding not otherwise required by law.

§ 1807.901 Disbursement of funds.

Assistance provided pursuant to this part may be provided in a lump sum or in some other manner, as determined appropriate by the CDFI Fund. The CDFI Fund shall not provide any assistance under this part until an Awardee has satisfied all conditions set forth in the applicable NOFA and Assistance Agreement.

§ 1807.902 Data collection and reporting.

(a) *Data—General.* An Awardee shall maintain such records as may be prescribed by the CDFI Fund that are necessary to:

(1) Disclose the manner in which CMF funding is used, including providing documentation to demonstrate Project Completion;

(2) Demonstrate compliance with the requirements of this part and the Assistance Agreement; and

(3) Evaluate the impact of CMF funding.

(b) *Customer profiles.* An Awardee shall compile such data on the gender, race, ethnicity, national origin, or other information on individuals that utilize its products and services as the CDFI Fund shall prescribe in an Assistance Agreement. Such data will be used to determine whether residents of the Awardee's Service Area are adequately served and to evaluate the impact of CMF funding.

(c) *Access to records.* An Awardee must submit such financial and activity reports, records, statements, and documents at such times, in such forms, and accompanied by such reporting data, as required by the CDFI Fund or the U.S. Department of Treasury to ensure compliance with the requirements of this part and to evaluate the impact of CMF funding. The United States Government, including the U.S. Department of Treasury, the Comptroller General, and their duly authorized representatives, shall have full and free access to the Awardee's offices and facilities and all books, documents, records, and financial statements relating to use of Federal funds and may copy such documents as they deem appropriate and audit or provide for an audit at least annually. The CDFI Fund, if it deems appropriate, may prescribe access to record requirements for entities that are borrowers of, or that receive investments from, an Awardee.

(d) *Retention of records.* An Awardee shall comply with all record retention requirements as set forth in OMB Circular A–110 (as applicable).

(e) *Data collection and reporting.*

(1) Financial Reporting: (i) All Non-Profit Awardees (excluding Insured CDFIs and State-Insured Credit Unions) must submit to the CDFI Fund financial statements that have been reviewed by an independent certified public accountant in accordance with *Statements on Standards for Accounting and Review Services,* issued by the American Institute of Certified Public Accountants by a time set forth in the applicable Notice of Funding Availability or Assistance Agreement (audited financial statements can be provided by the due date in lieu of reviewed statements, if available). Non-Profit Awardees (excluding Insured CDFIs and State-Insured Credit Unions) that are required to have their financial statements audited pursuant to OMB Circular A–133 *Audits of States, Local Governments and Non-Profit Organizations,* must also submit their A–133 audited financial statements by a time set forth in the applicable NOFA or Assistance Agreement. Non-Profit Awardees (excluding Insured CDFIs and State-Insured Credit Unions) that are not required to have financial statements audited pursuant to OMB Circular A–133, *Audits of States, Local Governments and Non-Profit Organizations,* must submit to the CDFI Fund a statement signed by the Awardee's authorized representative or certified public accountant, asserting that the Awardee is not required to have a single audit pursuant OMB Circular A–133.

(ii) For-profit Awardees (excluding Insured CDFIs and State-Insured Credit Unions) must submit to the CDFI Fund financial statements audited in conformity with generally accepted auditing standards as promulgated by the American Institute of Certified Public by a time set forth in the applicable NOFA or Assistance Agreement.

(iii) Insured CDFIs are not required to submit financial statements to the CDFI Fund. The CDFI Fund will obtain the necessary information from publicly available sources. State-Insured Credit Unions must submit to the CDFI Fund copies of the financial statements that they submit to the Appropriate State Agency.

(2) Performance Goal Reporting: Performance goals and measures that are specific to the Awardee's application for funding shall be met as set forth in its Assistance Agreement. Awardees shall submit data and information to the CDFI Fund regarding achievement of these Performance Goals as described in the Assistance Agreement.

(f) *Availability of referenced publications.* The publications referenced in this section are available as follows:

(1) OMB Circulars may be obtained from the Office of Administration, Publications Office, 725 17th Street, NW., Room 2200, New Executive Office Building, Washington, DC 20503 or on the Internet (*http://www.whitehouse.gov/omb/grants_circulars/*); and

(2) General Accounting Office materials may be obtained from GAO Distribution, 700 4th Street, NW., Suite 1100, Washington, DC 20548.

§ 1807.903 Compliance with government requirements.

In carrying out its responsibilities pursuant to an Assistance Agreement, the Awardee shall comply with all applicable Federal, State, and local laws, regulations, and ordinances, OMB Circulars, and Executive Orders.

§ 1807.904 Lobbying restrictions.

No assistance made available under this part may be expended by an Awardee to pay any person to influence or attempt to influence any agency, elected official, officer or employee of a State or local government in connection with the making, award, extension, continuation, renewal, amendment, or modification of any State or local government contract, grant, loan or cooperative agreement as such terms are defined in 31 U.S.C. 1352.

§ 1807.905 Criminal provisions.

The criminal provisions of 18 U.S.C. 657 regarding embezzlement or misappropriation of funds is applicable to all Awardees and insiders.

§ 1807.906 CDFI Fund deemed not to control.

The CDFI Fund shall not be deemed to control an Awardee by reason of any assistance provided under the Act for the purpose of any applicable law.

§ 1807.907 Limitation on liability.

The liability of the CDFI Fund and the United States Government arising out of any assistance to an Awardee in accordance with this part shall be limited to the amount of the investment in the Awardee. The CDFI Fund shall be exempt from any assessments and other liabilities that may be imposed on controlling or principal shareholders by any Federal law or the law of any State.

Nothing in this section shall affect the application of any Federal tax law.

§ 1807.908 Fraud, waste and abuse.

Any person who becomes aware of the existence or apparent existence of fraud, waste or abuse of assistance provided under this part should report such incidences to the Office of Inspector General of the U.S. Department of the Treasury.

Dated: November 24, 2010.

Donna J. Gambrell,

Director, Community Development Financial Institutions Fund.

[FR Doc. 2010–30303 Filed 12–2–10; 8:45 am]

BILLING CODE 4810–70–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0732; FRL–8854–6]

Metrafenone; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of metrafenone (3-bromo-6-methoxy-2-methylphenyl)(2,3,4-trimethoxy-6-methylphenyl)methanone in or on grapes. BASF Corporation requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 3, 2010. Objections and requests for hearings must be received on or before February 1, 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–2008–0732. 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: Tawanda Maignan, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 308–8050; *e-mail address*: *maignan.tawanda@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.* To access the harmonized test guidelines referenced in this document electronically, please go *http://www.epa.gov/ocspp* and select "Test Methods and Guidelines."

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–2008–0732 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 February 1, 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–2008–0732, 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 October 7, 2009 (74 FR 51599) (FRL–8792–7), 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 8F7371) by BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.624 be amended by establishing tolerances for residues of the fungicide metrafenone, (3-bromo-6-methoxy-2-methylphenyl)(2,3,4-trimethoxy-6-methylphenyl) methanone, in or on table and wine grapes at 4.5 parts per million (ppm), juice grapes at 0.45 ppm, and raisin grapes at 17 ppm. That notice

referenced a summary of the petition prepared by BASF Corporation, 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 determined that the proposed tolerances for wine and juice grapes are not needed. The reason for this change is 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 metrafenone including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with metrafenone follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its 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.

Metrafenone has low acute toxicity via oral, inhalation and dermal routes. It is not a dermal sensitizer, or a skin or eye irritant. Subchronic and chronic studies showed that the liver was the primary organ affected in toxicity studies with mice, rats and rabbits, along with impacts on body weights and body weight gains. After chronic durations, the liver and body weight effects were accompanied by kidney effects. In the subchronic and chronic toxicity studies in dogs, no effects were seen at any dose, up to 500 milligrams/kilogram/day (mg/kg/day). In developmental toxicity studies in rats and rabbits, there were no effects observed in fetuses at any dose level up to 700 mg/kg/day in rabbits and 1,000 mg/kg/day in rats. The maternal effects in the rabbit developmental study consisted of liver effects as well as decreased body weight gains and food consumption. In the rat developmental toxicity study, no effects were observed in the maternal animals. In the 2-generation reproduction study, there was no evidence of reproductive effects or any impacts on the endocrine system. Effects in parental animals and offspring consisted of decreased body weights and body weight gains, and these were observed at similar doses. In addition, in the parental animals liver effects and decreased thymus weights were observed at the same high doses that resulted in decreased body weight gains.

Based on a battery of mutagenicity studies, metrafenone is not considered to be genotoxic. In accordance with the EPA's Final Guidelines for Carcinogen Risk Assessment (March, 2005), metrafenone is classified as "Suggestive Evidence of Carcinogenicity," and concluded that human risk to liver tumorgenesis would not be expected at exposure levels that do not cause tumors in mice. The no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) selected for the chronic reference dose (cRfD) are based on hepatotoxicity and nephrotoxicity observed at doses lower than the liver tumor response dose. Thus, the cRfD is protective of the cancer effects. The weight of evidence considerations can be found in the **Federal Register** of September 20, 2006 (71 FR 54915) (FRL–8093–7).

Specific information on the studies received and the nature of the adverse effects caused by metrafenone as well as the NOAEL and the LOAEL from the toxicity studies can be found at *http://www.regulations.gov* in document *Metrafenone: Human Health Risk Assessment for Foliar Use on Grapes* in docket ID number EPA–HQ–OPP–2008–0732.

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 the NOAEL and the LOAEL. Uncertainty/safety factors (U/SF) are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) (a = acute c = chronic) 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 Metrafenone used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR METRAFENONE 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 (All populations, including infants and children).	No appropriate endpoint attributable to a single dose identified.		

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR METRAFENONE FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Chronic dietary (All populations, including infants and children).	NOAEL = 24.9 mg/kg/day ..... UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.249 mg/kg/day cPAD = 0.249 mg/kg/day	Combined Chronic/Carcinogenicity – Rat LOAEL = 260 mg/kg/day based on hepatotoxicity and nephrotoxicity in both sexes.
Cancer (Oral, dermal, inhalation)	**Suggestive evidence of carcinogenicity**. Quantification of cancer risk using a cancer potency factor is not required. The chronic reference dose is protective of potential cancer risk.		

UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). UF_L = use of a LOAEL to extrapolate a NOAEL. UF_S = use of a short-term study for long-term risk assessment. UF_{DB} = to account for the absence of data or other data deficiency. FQPA SF = Food Quality Protection Act Safety Factor. LOC = level of concern.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to metrafenone, EPA considered exposure under the petitioned-for tolerances. EPA assessed dietary exposures from metrafenone 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 Metrafenone; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM–FCID, Version 2.03), which incorporates food consumption data as reported by respondents in the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). No Percent Crop Treated (PCT) information was incorporated into the dietary exposure and risk assessment; it was assumed that 100 PCT for grapes. As to residue levels, EPA assumed treated commodities would contain tolerance level residues 2X higher than the proposed tolerances to account for additional residues of potential concern with respect to toxicity which were not included in the proposed tolerance for enforcement purposes.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. Cancer risk is quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or non-linear approach is used and a cancer RfD is calculated based on an earlier noncancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data summarized and referenced in Unit III.A., EPA has concluded that metrafenone is classified as "Suggestive Evidence of Carcinogenicity." Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for metrafenone in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of metrafenone. 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 First Index Reservoir Screening Tool (FIRST), 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 metrafenone for chronic exposures for non-cancer assessments are estimated to be 22.82 parts per billion (ppb) for surface water and 0.097 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic (non-cancer) dietary risk assessment, the water concentration of value 22.82 ppb was used to assess the contribution to drinking water because the Tier II PRZM/EXAMS value was higher than the Tier I FIRST and groundwater values.

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).

Metrafenone is not registered for any specific use patterns that would result in residential exposure.

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 metrafenone to share a common mechanism of toxicity with any other substances, and metrafenone does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that metrafenone 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 Web site 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 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.* There is no evidence of increased susceptibility following *in utero* and/or postnatal exposure in the developmental toxicity studies in rats or rabbits, and in the 2-generation rat reproduction study.

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. The toxicity database for metrafenone is complete with the exception of an immunotoxicity study. In accordance with the updated 40 CFR part 158 toxicity data requirements for conventional pesticides, an immunotoxicity study is required for metrafenone. EPA has evaluated the available metrafenone toxicity data to determine whether an additional UF_{DB} is needed to account for the lack of the study. Decreased thymus weight, a potential immunotoxic effect, was observed only in adults and solely in a 2-generation reproduction study in rats. Because this effect was observed in only one species (rats) in one study, at the highest dose tested, and the NOAEL for this effect is 3X higher than the NOAEL for liver toxicity on which the cPAD is based, EPA believes the NOAEL for liver toxicity is protective of this effect, and an additional UF_{DB} is not needed to account for potential immunotoxicity.

ii. There is no indication that metrafenone is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that metrafenone results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were based on assuming 100 PCT and residues 2X higher than the proposed tolerance residue levels. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to metrafenone in drinking water. These assessments will not underestimate the exposure and risks posed by metrafenone.

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 aPAD and 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, metrafenone 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 metrafenone from food and water will utilize 1% of the cPAD for the general U.S. population and 5% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. There are no residential uses for metrafenone.

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). Because there is no residential exposure, metrafenone is not expected to pose a short-term risk.

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). Because there is no residential exposure, metrafenone is not expected to pose an intermediate-term risk.

5. *Aggregate cancer risk for U.S. population.* Based on the data summarized and referenced in Unit III.A., EPA has concluded that the cRfD/cPAD for metrafenone is protective of the cancer effects. As noted above, the chronic exposure for the general U.S. population utilizes only 1% of the cPAD.

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 metrafenone residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

An adequate gas chromatography (GC) method with electron capture (ECD) and mass spectrometry (MS) detection, Method FAMS 105–01, is available to enforce the tolerance expression for grapes. However, EPA requires radiovalidation data for any future tolerances on other commodities. Such data were being generated at the time EPA was reviewing the grape submission.

The method 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 United States 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 a MRL for metrafenone. Although there has been an agreement to harmonize the proposed grape MRL with Canada, the MRL has yet to be harmonized between member states.

C. Revisions to Petitioned-for Tolerances

EPA is not establishing the proposed tolerances for wine and juice grapes. Tolerances on raw agricultural commodities (such as grapes) are applicable to food processed from those commodities (such as grape juice and wine). Because the processing data indicate that residues of metrafenone do not concentrate in grape juice or wine, a tolerance on the raw agricultural commodity is all that is necessary.

EPA is revising the requested tolerance expression to clarify the chemical moieties that are covered by

the tolerances and specify how compliance with the tolerances is to be measured. The revised tolerance expression makes clear that the tolerances cover residues of the fungicide metrafenone, including its metabolites and degradates, but that compliance with the specified tolerance levels is to be determined by measuring only metrafenone (3-bromo-6-methoxy-2-methylphenyl)(2,3,4-trimethoxy-6-methylphenyl)methanone in or on the commodities.

V. Conclusion

Therefore, tolerances are established for residues of metrafenone, (3-bromo-6-methoxy-2-methylphenyl)(2,3,4-trimethoxy-6-methylphenyl)methanone, in or on grape at 4.5 ppm and grape, raisin at 17 ppm.

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 24, 2010.

Steven Bradbury,

Director, 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 180.624 paragraph (a) is revised to read as follows:

§ 180.624 Metrafenone; tolerances for residues.

(a) *General.* Tolerances are established for residues of the fungicide metrafenone, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified in the following table is to be determined by measuring only metrafenone (3-bromo-6-methoxy-2-methylphenyl)(2,3,4-trimethoxy-6-methylphenyl)methanone in or on the following commodities:

Commodity	Parts per million
Grape	4.5
Grape, raisin	17

* * * * *

[FR Doc. 2010–30363 Filed 12–2–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[CC Docket No. 02–6, GN Docket No. 09–51; FCC 10–175]

Schools and Libraries Universal Service Support Mechanism and A National Broadband Plan for Our Future

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) takes another step toward realizing the National Broadband Plan's vision of improving connectivity to schools and libraries by upgrading and modernizing the successful E-rate program. In particular, the Commission takes action on upgrades that can be implemented in funding year 2011 (July 1, 2011–June 30, 2012); enables schools and libraries to better serve students, teachers, librarians, and their communities by providing more flexibility to select and make available the most cost-effective broadband and other communications services; simplifies and streamlines the program; and improves safeguards against waste, fraud and abuse. In addition, the Commission adopts the eligible services list for funding year 2011.

DATES: Effective January 3, 2011.

FOR FURTHER INFORMATION CONTACT: Regina Brown, Wireline Competition

Bureau, Telecommunications Access Policy Division, (202) 418–0792 or TTY: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Sixth Report and Order in CC Docket No. 02–6, GN Docket No. 09–51, FCC 10–175, adopted September 23, 2010, and released September 28, 2010. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com*. It is also available on the Commission's Web site at *http://www.fcc.gov*. People with Disabilities: 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).

I. Introduction

1. In this order, we take another step toward realizing the National Broadband Plan's (NBP) vision of improving connectivity to schools and libraries by upgrading and modernizing the successful E-rate program (more formally known as the schools and libraries universal service support mechanism). Schools and libraries can serve as anchor institutions for their communities, and certain areas may depend on these anchor institutions to achieve the NBP's goal of affordable access to broadband of at least 1 gigabit per second in every community in the country. Broadband is an essential tool to help educators, parents, and students meet challenges in education and life-long learning. Through broadband, librarians can assist library patrons to improve skills for jobs, apply for employment, or access government resources. Access to broadband—at home or at anchor institutions—is a critical component of enabling everyone in America to develop the digital skills they need to prosper in the 21st century.

2. The NBP, delivered to Congress on March 16, 2010, recommended that the Commission take a fresh look at the E-rate program and identify potential improvements to reflect changes in technology and evolving teaching methods used by schools. In May 2010, the Commission issued a Notice of Proposed Rulemaking (NPRM) seeking public comment on proposals to ensure that the E-rate program continues to help our children and communities prepare for the high-skilled jobs of the future and reap the full benefits of the Internet. The Commission received extensive comments in response to the *E-rate Broadband NPRM,* 75 FR 32699, June 9, 2010, which inform the policy choices made in this order.

3. We adopt a number of the proposals put forward in the *E-rate Broadband NPRM.* The revisions we adopt today fall into three conceptual categories: (1) Enabling schools and libraries to better serve students, teachers, librarians, and their communities by providing more flexibility to select and make available the most cost-effective broadband and other communications services; (2) simplifying and streamlining the E-rate application process; and (3) improving safeguards against waste, fraud, and abuse. As a result of these changes, schools and libraries throughout the country can make their limited dollars go further. The changes we adopt will increase the ability of students and the public to utilize broadband services for educational needs. In addition, the changes to simplify the E-rate program will help reduce the cost of participating in the program, thereby making the program more accessible, particularly to smaller school districts and libraries that are often located in more rural areas and may not have staff dedicated to managing E-rate applications and related activities.

4. In particular, in this report and order, we:

○ Enable schools and libraries to better serve students, teachers, librarians, and their communities by providing more flexibility to select and make available the most cost-effective broadband and other communications services by

- Allowing applicants to lease dark or lit fiber from the most cost-effective provider, including non-profit and for-profit entities, so that applicants can choose the services that best meet their needs from a broad set of competitive options and in the most cost-effective manner available in the marketplace;
- Changing our rules to permit schools to allow community use of E-rate funded services outside of school hours;
- Supporting eligible services to the residential portion of schools that serve students with special circumstances;
- Indexing E-rate's funding cap to inflation to preserve the purchasing power of a successful program;

■ Seeking proposals for a limited pilot program to establish best practices to support off-campus wireless connectivity for portable learning devices outside of regular school or library operating hours;

○ Simplify and streamline the program by

■ Streamlining the application process to reduce the administrative burden on applicants;

■ Removing the technology plan requirement for priority one (telecommunications services and Internet access) services;

■ Facilitating the disposal and recycling of obsolete equipment that received E-rate support by authorizing schools and libraries to receive consideration for such equipment; and

○ Improve safeguards against waste, fraud and abuse by

■ Codifying the requirement that competitive bidding processes be fair and open. In addition, the report and order adopts the eligible services list (ESL) for funding year 2011.

II. Upgrading E-Rate for the 21st Century

A. Improving Broadband Access for Students, Teachers, Librarians, and the Communities They Serve

1. Expanded Access to Low-Cost Fiber

5. Pursuant to sections 254(c)(3), (h)(1)(B), and (h)(2) of the Act, we include dark fiber on the ESL and allow eligible schools and libraries to receive support for the lease of fiber, whether lit or dark, as a priority one service, from *any* entity, including but not limited to telecommunications carriers and non-telecommunications carriers, such as research and education networks; regional, state, and local government entities or networks; non-profits and for-profit providers; and utility companies. Accordingly, we amend § 54.502 of our rules to allow any entity to provide supported telecommunications in whole or in part via fiber. Specifically, we require applicants that choose to lease dark (*i.e.,* unlit) fiber to light it immediately and to use the lit fiber to meet their broadband needs in order to receive E-rate support. Our decision today will not allow applicants to use E-rate discounts to acquire unneeded capacity or warehouse dark fiber for future use. Because dark fiber has not been classified as either a telecommunications service or Internet access, we hereby include it in the telecommunications section of the ESL. For purposes of funding year 2011, we

direct applicants to select either the telecommunications service or Internet access box on the FCC Form 471 for type of service requested when applying for funding for leased dark or lit fiber, based on the type of provider they select to provide the leased dark fiber service. We emphasize that selecting a telecommunications carrier as a service provider does not absolve schools and libraries of their obligation to adhere to the Children's Internet Protection Act (CIPA) requirements when they use that service to obtain Internet service or access to the Internet. Furthermore, we amend § 54.518 of our rules to clarify that states acting as service providers are treated the same as telecommunications carriers or other non-telecommunications providers when applicants are leasing a wide area network (WAN).

6. Section 254 of the Act gives the Commission authority to designate "telecommunications services" and additional services as eligible for support under the E-rate program. In the *Universal Service First Report and Order,* 62 FR 32862, June 17, 1997, the Commission designated all commercially available telecommunications services as services eligible for support (or discounts) under the E-rate program. At the same time, the Commission determined that it could provide E-rate support for additional, non-telecommunications services, particularly Internet access, email, and internal connections, provided by both telecommunications carriers and non-telecommunications carriers pursuant to sections 4(i) and 254(c)(1), (c)(3), (h)(1)(B), and (h)(2). The Commission reasoned that such services enhance access to advanced telecommunications and information services for public and non-profit elementary and secondary school classrooms and libraries. Thus, pursuant to this authority, we now include on the ESL leased dark and lit fiber provided by both telecommunications carriers and non-telecommunications carrier providers, as described below.

7. Although lit fiber is already eligible for funding as either a telecommunications service or an Internet access service (depending upon how it is used by an eligible school or library and who is providing the service), under current implementation of section 254, an applicant cannot lease the lit fiber for voice telecommunications from a non-telecommunications carrier. State networks and other providers, however, may be able to provide the voice telecommunications, even if they are not "offering it to the public for a fee," as is required of a telecommunications carrier. Section 254(h)(1)(B) requires telecommunications carriers to provide universal service to schools and libraries; it does not, however, stand as a bar to our authority to allow non-telecommunications providers to provide such services and participate in the E-rate program. As explained below, drawing a distinction between telecommunications carriers and entities other than telecommunications carriers in this specific context would unduly limit the flexibility of schools and libraries to select the most cost-effective broadband solutions to meet their needs, which would be inconsistent with our schools and libraries policies. We find that broadening the scope of potential suppliers of broadband increases competitive options, which in turn enhances choice and reduces cost. Thus, pursuant to section 254(c)(3) and (h)(2) and section 4(i), we now include lit fiber provided by non-telecommunications providers on the ESL. We conclude that eligible schools and libraries should be free to meet their communications needs by leasing fiber from entities other than telecommunications carriers that are able to provide schools and libraries the same services that a traditional telecommunications carrier can provide a school or library over a fiber network.

8. The Commission precedent refutes any contention that leasing dark fiber is not a "service." Because dark fiber is a service, we do not have to decide whether we could otherwise fund it under section 254(h). Moreover, like internal connections, which the Commission has found to be services for purposes of the E-rate program, dark fiber is part of the transmission path that enables the requisite functionality (delivery of voice, video and/or data) to be delivered to the classroom. Further, contrary to opponents' arguments, we find that dark fiber does enhance access to advanced telecommunications and information services consistent with section 254(h)(2)(A). As discussed below, allowing schools and libraries to lease fiber from any provider will give the institutions more flexibility to select the most cost-effective broadband solutions. It should also increase competition among providers of fiber and ensures that schools and libraries can pay less for the same or greater bandwidth, which should increase access to advanced telecommunications and information services, including Internet access. Additionally, if schools and libraries are able to receive additional capacity for less money, this should free up E-rate funding to help other schools and libraries meet their connectivity goals.

9. As instructional technology requires greater bandwidth, applicants will benefit from having the freedom to select from more options for broadband access. If more providers bid to provide services to schools and libraries, the resulting competition should better ensure that applicants—and the E-rate program—receive the best price for the most bandwidth. If schools and libraries are able to receive the same—or better—capacity for less money, the program should save money that can be spent on other services to help schools and libraries meet their connectivity goals. We thus find that allowing schools and libraries to lease fiber from any provider will best serve the purposes of the E-rate program.

10. The designation of dark and lit fiber provided by telecommunications carriers and non-telecommunications carrier providers as services eligible for E-rate support should help schools and libraries save money or receive additional capacity for the same or fewer dollars. Commenters provided many examples of schools and libraries that are using fiber today because it is the most cost-effective solution for them, even without E-rate support. For example, the Tri-County Educational Service Center in Wooster, Ohio, which serves more than 30,000 students in 19 school districts across three Central Ohio counties, has been able to save 50 percent over traditional carrier services through the use of dark fiber, along with a 750 percent increase in network performance. Such cost savings will help E-rate funds go further.

11. Furthermore, the increased capacity available through fiber will enable schools and libraries to develop and deliver a wide variety of educational programs and services to students and library patrons. For example, the bandwidth used by San Francisco's public libraries has increased over the past five years, from 1.44 megabits per second (Mbps) to 50 Mbps, but even 50 Mbps is currently insufficient for San Francisco to deliver the bandwidth-intensive content available on the Internet through its libraries' online resources and databases. San Francisco's public library branches serve as community anchors, both as centers for digital literacy and as hubs for access to public computers. While their bandwidth needs are increasing, their local government and school district budgets are shrinking. Currently, San Francisco's public libraries must rely on commercial telecommunications services in order to

take advantage of E-rate discounts. As bandwidth needs continue to increase, the ability to receive E-rate discounts on leased fiber will provide another option for schools and libraries, such as those in San Francisco, to access the bandwidth they need to deliver the most cost-effective services to their students and patrons, thus enhancing access to advanced telecommunications and information services. Our action today encourages collaboration with local, state, and federal agencies to more effectively utilize existing facilities and resources to meet the broadband needs of schools and libraries across the nation.

12. We are not persuaded by commercial service providers' arguments that entities other than commercial service providers cannot be trusted to serve applicants adequately, or that schools and libraries are unequipped to lease dark fiber. There are a variety of entities—from telecommunications carriers to non-traditional providers, including research and education networks; regional, state, and local government entities and networks; other non-profit and for-profit providers; and utility companies—that are successfully provisioning fiber solutions. For example, the City of San Francisco has provisioned dark fiber to 10 campus sites of City College of San Francisco, one of the largest college systems in the country. The City College network has enabled the implementation of new classes, allowed expansion of computer labs, and facilitated deployment of new educational applications that would not have been possible with City College's previous networking environment. Additionally, in the last 13 years, non-profit national and state research and education networks have deployed almost 25,000 miles of a national fiber infrastructure to more than 66,000 community anchor institutions.

13. Some commercial service providers argue that school and library information technology (IT) professionals are unlikely to understand how to use leased dark fiber. We find no evidence in the record supporting that assertion, and note that many schools and libraries have expert, professional IT staff. We believe applicants are generally in the best position to know their needs, resources, and capabilities, and to procure from the full range of competitive options in the marketplace the most cost-effective broadband solutions for those needs. Nor are we persuaded by suggestions that we should not provide flexibility to allow schools to lease dark fiber or other spare capacity from a municipal network because the schools would be unprotected if the municipality cannot continue to operate. It is unclear why a municipality would be more likely to discontinue service than a private company, and, in any event, our rules permit schools and libraries to change service providers under certain circumstances when the service provider ceases operations or is unable to perform. Further, we are not convinced that schools and libraries purchasing services from other governmental or non-profit entities will raise conflict of interest issues or financial conflicts related to their employees. We believe our competitive bidding rules protect against any such waste, fraud, and abuse of the E-rate program. To the extent the Commission finds violations of its rules, such as sharing of inside information during the competitive bidding process, the Commission will require USAC to adjust its funding commitment or recover any disbursed E-rate funds through its normal processes.

14. Commenters that opposed including leased dark fiber on the ESL also argue that schools and libraries will be unaware of or unable to bear the additional cost of installation. They also argue that leased fiber may include more capacity than needed by a school or library system for educational purposes. We are not persuaded by such arguments. The Commission's competitive bidding rules serve as a central tenet of the E-rate program. They ensure more efficient pricing for telecommunications and information services purchased by schools and libraries and help deter waste, fraud and abuse. Thus, while not all schools and libraries may choose to use leased fiber to meet their broadband needs, our rules require all applicants to select the service or equipment offering that will be the most cost-effective means of meeting their educational needs and technology goals. Our rules also require schools and libraries to have the necessary resources to support any non-discounted portion of the eligible services, in order to make the most effective use of E-rate funding. We believe these two rules will ensure that all applicants that choose to use a leased fiber solution are considering the full range of costs associated with implementing leased fiber and are not requesting funding for more capacity than necessary for their educational needs. We also emphasize, in this context, the importance of applicants making "apples-to-apples comparisons when evaluating competing bids to meet their needs. Providing services using dark fiber may involve a number of additional costs beyond lease payments for fiber connectivity, and those costs should be factored in to a total-cost comparison across bids.

15. In order for schools and libraries to utilize and make the most efficient use of dark fiber, we include as eligible certain costs associated with leased dark fiber. Specifically, we include as eligible maintenance costs and installation charges. Providing support for maintenance costs and installation charges will enhance access to advanced telecommunications and information services by helping schools and libraries make use of an existing or new local fiber network. At this time, however, we decline to extend support to cover special construction charges that may be incurred to build out connections from applicants' facilities to an off-premises fiber network, preferring to seek further comment in a subsequent proceeding on the potential effect of such changes on the fund. We also do not include as eligible the cost of modulating electronics needed to light dark fiber. The applicant is therefore responsible for covering these costs in order to receive E-rate funding for the lease of dark fiber. While we conclude that including leased dark fiber on the ESL should provide greater flexibility to E-rate participants to meet their bandwidth needs and reduce their overall cost of broadband, we nevertheless limit funding in this manner pending further inquiry into the potential impact on the E-rate fund of allowing related costs.

2. Community Use of Schools' E-Rate Funded Facilities and Services

16. We conclude that we should revise our rules to permanently allow schools to open their facilities, when classes are not in session, to the general public to utilize services and facilities supported by E-rate. Specifically, we revise §§ 54.503 and 54.504 of our rules to require applicants to certify that "[t]he services the applicant purchases at discounts will be used *primarily* for educational purposes." This is consistent with the standard we adopted in the *Community Use Order,* 75 FR 10199, March 24, 2010. Thus, schools must primarily use services funded under the E-rate program, in the first instance, for educational purposes. To primarily use services supported by E-rate, E-rate recipients must ensure that students always get first priority in use of the schools' resources.

17. Our experience convinces us that our decision will expand the benefits of using E-rate funds. For example, after we waived the rule in February 2010,

the State of West Virginia allowed community use of school Internet access and networks by offering evening community technology training lab classes and school technology nights. Most notably, during the April 2010 Upper Big Branch coal mining disaster, a school in West Virginia whose students were on spring break provided community access to its facilities to be used as a government and media command center during the rescue and eventual search and recovery efforts. We thus find that permitting community use of E-rate services and equipment during times when classes are not in session (non-operating hours) will promote broadband access. Moreover, this decision is consistent with Congress's directive to consider how anchor institutions, such as schools, can ensure access to broadband service. We remain focused on Congress's primary purpose in establishing the schools component of the E-rate program: to ensure that educators, students, and school personnel have access to advanced telecommunications and information services for educational purposes. At the same time, there are many times when schools are out of session—evenings, weekends, school holidays, and summer breaks, for example—and we conclude that it is in the public interest to allow greater use of government-supported services and facilities during those times, particularly because that enhanced access comes at no additional cost to the E-rate program. Moreover, we find that the revised rules are consistent with the overarching goals of universal service to promote access to telecommunications and information services, and that no provision of the Communications Act prohibits this use of E-rate supported services.

18. To reduce the likelihood of waste, fraud, and abuse, and to guard against expanding the cost of the E-rate program, we set forth certain conditions for schools that choose to allow the community to use their E-rate funded services. First, schools participating in the E-rate program may not request funding for more services than are necessary for educational purposes to serve their current student population. This condition is necessary to ensure that E-rate funds that schools receive remain targeted to the educational needs of the institution and its students. This is essential to preserve limited funds and to carry out Congress's intent in establishing the E-rate program. To the extent that a school desires to augment services beyond that which is necessary for educational purposes, it must use other, non-E-rate funded resources. Any community use of the services purchased under the E-rate program must be incidental and not increase overall costs to the E-rate program.

19. Second, any community use of E-rate funded services at a school facility shall be limited to non-operating hours of the school and to community members who access the Internet while on a school's campus. Thus, the public can utilize a school's facilities and services during times when the school is not in session, such as after school hours, weekends, school holidays, and summer breaks. Services supported by E-rate funds must, in the first instance, be used for educational purposes, and students, educators, and other school personnel shall always get priority in the use of these resources. Further, the decision about whether to allow community access rests with the school, and we thus leave it to schools to establish their own policies regarding specific use of their services and facilities, including, for example, the hours of use. We decline at this time to provide guidance on after-hours community use policies. We find that schools are in the best position to establish their own individualized policies, including ways in which to inform the public of the hours of operation to the general public. While we are sensitive to placing additional administrative burdens on applicants, we plan to include a box on the FCC Form 471 when we next revise this form for applicants to check if they are taking advantage of this rule change. We believe checking a box indicating community use, without requiring additional, specific information, will enable the Commission to develop a better understanding of where such community use is occurring while at the same time minimizing applicants' reporting burden. In addition, we urge schools to make their community use policies and hours publicly available on their Web sites. Additionally, schools can submit their success stories directly to the Commission regarding the community's use of their E-rate funded facilities and services at the Commission's Web site, *http://www.fcc.gov/wcb/tapd/universal_service/schoolsandlibs.html,* in the section titled "E-rate Community Use Success Stories."

20. Third, as set forth in the Act and our rules, schools' discounted service or network capacity may not be "sold, resold, or transferred by such user in consideration for money or any other thing of value." Specifically, schools may not charge for the use of services and facilities purchased using E-rate funds. The Commission concluded, however, in the *Universal Service First Report and Order,* that section 254(h)(3) of the Act does not prohibit an eligible entity from charging fees for any services that schools or libraries purchase that are not subject to a universal service discount. Thus, the Commission found that an eligible school or library may assess computer fees to help defray the cost of computers or training fees to help cover the cost of training because these purchases are not subsidized by the universal service support mechanisms. Similarly, we agree with the Massachusetts Department of Telecommunications and Cable (MDTC) and Sprint that schools should not be prohibited from recovering costs reasonably associated with permitting community access, such as additional electricity, security, and heating costs used to facilitate community access.

21. We emphasize that the revision of our rules creates an opportunity for schools, but not an obligation. Schools may have any number of reasons to decide not to open their facilities to the general public to utilize services and facilities supported by E-rate during non-operating hours. For example, some schools may find that school activities utilize all or almost all of the E-rate supported services, or that there is not a public need for use during non-operating hours in a particular school. We therefore stress the optional nature of these rule revisions, leaving this decision up to individual recipients of E-rate funding.

3. Expanding Access for Residential Schools That Serve Unique Populations

22. We adopt our proposal to allow residential schools that serve unique populations—schools on Tribal lands; schools designed to serve students with medical needs; schools designed to serve students with physical, cognitive or behavioral disabilities; schools where 35 percent or more of their students are eligible for the national school lunch program; or juvenile justice facilities—to receive E-rate funding for all supported services provided in the residential areas of those schools. We find that, because these schools also serve as residences to the students, the supported E-rate services will be used primarily, if not exclusively, for educational purposes, and thus support is consistent with our rules and with the purposes of section 254. As the Commission stated in the *Schools and Libraries Second Report and Order,* 68 FR 36931, June 20, 2003, the technology needs of participants in the E-rate program are often complex and unique

to each participant. Based on the record before us, we find that these schools serve students whose educational needs may not be otherwise met without attending such a residential school. We therefore find it to be reasonable and consistent with the public interest to provide support for E-rate services provided to the residential areas of those schools, including Internet access, telecommunications, telecommunications services, and internal connections. Additionally, E-rate support will facilitate ongoing access to educational and learning materials beyond the normal school day and increase the ability of those students to complete homework assignments, such as those that require broadband access for research projects, after school hours. Accordingly, we find that such use meets the definition of educational purposes. Additionally, we amend § 54.502 to permit discounts for internal connections in non-instructional buildings of a school or school district where the Commission has found that the use of those services meets the definition of educational purpose.

23. We decline, at this time, to adopt SECA's suggestion to expand this proposal to *any* school that has a dormitory or residential facility on its grounds. While we recognize that there are other residential schools that do not fall within the categories outlined above, we want to proceed in a conservative fashion to focus on schools serving students with the most unique needs as provided above, rather than providing funding more broadly to all residential schools. Thus, we believe it is preferable to limit the potential impact of this revision on the E-rate program as we consider additional upgrades to the program. We agree with SECA, however, that we should not limit support to residential campuses that are state- or federal-sponsored institutions. For instance, there may be private schools that serve students with physical, cognitive, or behavioral disabilities, and their students face the same need to have ongoing access to technology-based learning outside of the classroom. Therefore, we decline to limit support for services to residential areas only to schools partly or fully sponsored by state or federal funds.

24. *West Virginia Request for Waiver and Clarification.* The West Virginia Department of Education (WVDE) filed a request for waiver and clarification of the Commission's rules to allow the West Virginia Schools for the Deaf and the Blind to receive funding for services for their students who reside on the school campus. Because we address the issues raised by WVDE in this order, we dismiss WVDE's request as moot.

4. Indexing the Annual Funding Cap to Inflation

25. Many commenters encouraged the Commission to increase the E-rate program funding cap significantly from its current $2.25 billion level before indexing the cap to inflation on a going-forward basis. Commenters contend that the Commission should increase the cap to reflect all inflationary adjustments since the program was initiated in 1997, which would immediately add about $650 million to the E-rate program. Others said that indexing the E-rate cap to inflation on a going-forward basis would not be sufficient to meaningfully fund the program. We note that when the E-rate program began in 1997, basic Internet connectivity required a phone line and dial-up Internet service, which might have cost a total of less than $50 per month. Today, for basic Internet connectivity capable of supporting common applications and learning tools such as educational video content, a school or library needs broadband at speeds of at least several megabits per second, which might cost upwards of $500 per month (*e.g.,* for a T–1 line), plus the costs of necessary internal connections.

26. We find that indexing the current $2.25 billion E-rate cap to inflation is a sensible approach to gradually aligning the support provided by E-rate with the needs of schools and libraries, which the E-rate program is designed to serve. Using the analysis described below, the cap for funding year 2010 will be increased to $2,270,250,000. The Commission must balance its desire to ensure that schools and libraries have access to valuable communications opportunities with the need to ensure that consumer rates for communications services remain affordable. End users ultimately bear the cost of supporting universal service, through carrier charges. Thus, we amend § 54.507 of our rules to index the E-rate program funding cap to the rate of inflation on a going-forward basis, beginning in the current funding year. Indexing the cap to inflation will ensure that the program maintains its current purchasing power in today's dollars without significantly increasing the fund and raising the contribution factor.

27. It could be argued that the existence of substantial rollover funds demonstrates that an increase in the cap is unwarranted. The rollover funding is not surplus funding left over after demand has been met, however. To the contrary, even with an additional $600 million in rollover funding for funding year 2008, added to the $2.25 billion cap, the program still did not come close to meeting demand for priority two services and was forced to deny millions of dollars in applications because existing funding had been exhausted. The Commission uses the full extent of funds available, including rollover funds, to meet demand each year. Nevertheless, demand still exceeds available funding.

28. We also note that additional universal service funds required to index the E-rate cap to inflation will be offset by the Commission's recent decision to use reclaimed funds surrendered from competitive eligible telecommunications carriers as a "fiscally responsible down payment on proposed broadband universal service reforms," including indexing the E-rate funding cap to inflation. Thus, reclaimed universal service funds will be used to cover any increase that results from increases to the fund from inflation adjustments. Finally, no party objected to an increase in the cap and many supported the proposal. They noted that this step will ensure that the program continues to serve a key role in bringing essential communications and information services to thousands of schools and libraries. One commenter noted that an increase in the E-rate funding cap should occur only after the completion of comprehensive reform of the contribution methodology. We find, however, that the adoption of a fiscally responsible increase in the funding cap will not interfere with our broader efforts to reform the contribution methodology and acts only to give some relief to a capped support mechanism that is consistently oversubscribed.

29. As proposed, the Commission will use the gross domestic product chain-type price index (GDP–CPI) to inflation-adjust the amount of funds available annually to E-rate program participants. This is the same index the Commission uses to inflation-adjust revenue thresholds used for classifying carrier categories for various accounting and reporting purposes and to calculate adjustments to the annual funding cap for the high-cost loop support mechanism. There is no index that specifically examines the cost of the services funded under the E-rate program, and no record support for a more targeted measure of inflation than the GDP–CPI. Moreover, the Commission has used the GDP–CPI index in other contexts to estimate inflation of carrier costs, and we find it reasonable to use the GDP–CPI to approximate the impact of inflation on E-rate supported services. During periods of deflation, we will maintain

the prior-year cap to maintain predictability. When the calculation of the yearly average GDP–CPI is determined, the Wireline Competition Bureau Commission will publish a Public Notice in the **Federal Register** within 60 days announcing any increase of the annual funding cap based on the rate of inflation.

30. Specifically, to compute the annual increase, the percentage increase in the GDP–CPI from the previous year will be used. The increase shall be rounded to the nearest 0.1 percent. The increase in the inflation index will then be used to calculate the amount of funding for the next E-rate funding year (which runs from July 1 to June 30). Using this computation, we find that the GDP–CPI from 2008 to 2009 increased .9 percent. Using the analysis described below, the cap for funding year 2010 will be increased to $2,270,250,000.

5. Limited Trial To Investigate Offsite Access

31. Currently, our rules presume that services used on school or library premises are serving an educational purpose, and the E-rate program supports wireless Internet access on school and library grounds. If a device that provides wireless Internet access service, such as a laptop or other mobile computing device, is taken off school or library premises, however, applicants are required to cost-allocate the dollar amount of support for wireless Internet access use for the time that the device is not at the school or library and remove that portion from its E-rate funding request. If that same device, however, is left on school or library grounds all of the time, the E-rate program would pay 100 percent of the applicant's non-discount share for wireless Internet access use. As such, our current rules may prevent full utilization of the learning opportunities that portable wireless devices, such as digital textbooks, can provide off campus and outside of regular school hours.

32. Advances in technology have enabled students to continue to learn well after the school bell rings, including from their homes or other locations, for example, youth centers. As noted in the NBP, "[o]nline educational systems are rapidly taking learning outside the classroom, creating a potential situation where students with access to broadband at home will have an even greater advantage over those students who can only access these resources at their public schools and libraries." In the *E-rate Broadband NPRM,* we sought comment on the NBP recommendation to provide full E-rate support for wireless Internet access service for portable learning devices that are used beyond school or library premises. In response, commenters generally agreed that students need to learn "anytime/anywhere," which would require Internet access outside schools and libraries. Some schools identified that they are already implementing innovative programs utilizing portable devices that can use data applications wirelessly, such as e-readers, tablet PCs, smartphones, and netbooks. Some of these programs enable students to download all of their textbooks onto one portable device and access them both during school and at home. Others use software applications to help students write essays or create presentations for their classmates. Initial studies indicate that—with the correct support and training for teachers, students, and parents—targeted programs like these can demonstrably improve student achievement. Commenters noted that, in addition to the educational benefits, improvements and cost reductions in portable learning devices like e-readers, smartphones, and tablet computers make funding off-premises wireless connectivity for these devices a cost-efficient supported service.

33. We recognize the benefits of enabling innovation in learning outside the boundaries of the school building and the traditional school day, as well as of enabling libraries to innovate with new models of delivering service to library patrons. We note the potential for meaningful gains in student achievement that new devices and applications may deliver. We also see significant utility in devices that allow remote access to the Internet for library patrons. At the same time, however, we acknowledge the concerns of commenters who urged us to proceed cautiously in this area and emphasized the challenges that may accompany support for connectivity for portable learning devices used outside the physical grounds of schools and libraries. For example, some commenters identified possible challenges in administration and oversight, and in ensuring compliance with existing program rules, including requirements under CIPA and the program's definition of educational purposes. Others raised concerns about the potential for waste, fraud, and abuse, as well as increased costs to the E-rate fund, noting that if support is expanded for wireless Internet access outside of school or library grounds, the availability of funding for other equally or more important services may be reduced. Some commenters also were concerned about schools or students who may not be able to afford the equipment or devices necessary to connect to E-rate funded wireless Internet services. Finally, some commenters argued that E-rate funding for wireless access off premises is not technology-neutral and improperly favors wireless services over wired services. We believe these concerns warrant further inquiry and consideration before such services should be eligible for support on a program-wide basis.

34. *The E-rate Deployed Ubiquitously (EDU) 2011 Pilot Program.* To assist us in our inquiry and program development, we establish a trial program to investigate the merits and challenges of wireless off-premises connectivity services, and to help us determine whether they should ultimately be eligible for E-rate support. We plan to use this trial program to gather more information about the implementation challenges described above and to identify and disseminate best practices in existing projects. We ask schools and libraries that already are implementing or experimenting with wireless off-campus learning to provide us with information about their projects, as described below.

35. A number of commenters have indicated that they have already found solutions to the challenges to successfully implementing off-premises wireless Internet connectivity, including ensuring CIPA compliance and other protections against waste, fraud and abuse. Additionally, some commenters suggested that corporate partnerships may help with equipment and application costs. Through the EDU2011 Program, we expect to obtain more information about how wireless learning programs are operating today. For example, we hope to gain a better understanding of operational and administrative issues associated with off-premises use and connectivity, as well as the financial impact on the E-rate program overall. We also hope to learn what conditions, if any, should accompany off-premises access to prevent waste, fraud, and abuse; to ensure compliance with the statute and Commission rules, such as CIPA; and to enable such programs to maximize student achievement and utilization of library services. Additionally, we recognize that schools and libraries face different issues when considering off-premises use, and we would like to gain a greater understanding about how libraries are using remote access to serve their communities. Finally, we hope to gain insight on evolving uses of mobile

wireless devices that will assist us in crafting effective permanent rules in this area should we decide to support offsite wireless access.

36. As part of this first phase, we may decide to fund off-campus wireless telecommunications and Internet access for some small number of select programs for funding year 2011, if we find proposals that we believe adequately meet the factors we discuss below. We expect that most of these proposals will not provide broad access to the Internet, but instead will provide connectivity for limited purposes, for example downloading digital textbooks. We authorize up to $10 million for funding year 2011 to support innovative and interactive off-premise wireless device connectivity for schools and libraries. Given the Commission's planning and competitive bidding requirements, we recognize there is limited time for applicants to develop a proposal from scratch for this round of funding. Therefore, considering those practical barriers, we anticipate that any first phase EDU2011 Program funding will primarily, if not exclusively, be provided to already-existing portable wireless device programs.

37. *How To Apply.* We delegate implementation of this pilot program to the Wireline Competition Bureau (Bureau). To be considered for first phase EDU2011 Program funding, applicants must complete a two-step application process. After publication of this Order in the **Federal Register**, the Bureau will release a public notice with the due date for applications. First, applicants must submit the information detailed in the following paragraph to the Bureau. Second, applicants must apply for E-rate funding by following the regular E-rate program rules. Because potential applicants will most likely already be using portable wireless devices in their school or library, we understand that the applicants may have an established relationship with a service provider. Therefore, to the extent necessary, we waive the applicable sections of our E-rate competitive bidding rules for those first phase EDU2011 Program applicants that have already entered into legally binding agreements with a service provider for portable wireless device connectivity off-premises. We also delegate to the Bureau the authority to waive any other E-rate rules, to the extent necessary, to effectuate this program. Applicants for first phase EDU2011 Program funding must submit FCC Form 471 to USAC during the regular application window. We encourage applicants to submit FCC Form 471 specifically for the wireless Internet access services to be used off premises, and file a separate FCC Form 471 for any services to be used on premises. We note that support under this program will not be provided for the portable devices or equipment, but for the connectivity services.

38. To be considered for first phase EDU2011 Program funding, E-rate eligible applicants must have implemented or already be in the process of implementing a program to provide off-premise 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 CIPA 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 or 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.

39. *Selection.* After applications are received, for schools, the Bureau should consider the extent to which applicants are providing innovative and interactive learning programs using portable wireless devices for students. For libraries, the Bureau should consider how the library's portable wireless device program facilitates access in the community to needed services, such as job applications, governmental services, job training, and online learning opportunities. Factors the Bureau should consider in selecting programs that may be eligible for additional funding include: The magnitude of the impact E-rate support for off-premise connectivity is likely to have; the number of students or library patrons served; the cost of the program; the poverty level and current discount rate of the school or library; the financial need of the school or library; the location and topography of the school or library, so that we can analyze the availability of wireless access; the committed school or library resources available to implement the entire proposal, including funding for necessary equipment, as well as teacher, librarian, and student training and data collection; and the extent of CIPA protections and other protections to guard against waste, fraud, and abuse.

40. The Bureau will notify USAC of selected applicants. We expect that, if the Bureau decides to award funding for these programs, there will be only a handful of selected applicants. Selected applicants will receive the identified connectivity support and will not be required to cost-allocate the dollar amount of support for the time that portable devices are not at the school or library. Applicants will receive funds sufficient to cover the connectivity amount eligible for E-rate funding based on their discount; they will still be required to pay their non-discount share. After the trial period, applicants will be required to submit a report to the 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.

B. Streamlining and Simplifying Administrative Requirements

41. We next adopt proposals to streamline and simplify the E-rate programs. First, we amend § 54.508 of our rules to eliminate the E-rate technology plan requirements for all priority one applications. We retain the technology plan requirements for applicants requesting priority two funding. Second, we find that applicants are not required to have a technology plan in place before a third-party master contract's FCC Form 470 is posted. Third, we also amend § 54.508 to eliminate the requirement that applicants demonstrate they have a budget sufficient to acquire and support the non-discounted elements of the plan. Fourth, we permit the disposal of E-rate equipment for payment or other consideration, but no sooner than five years after the equipment is installed.

1. Technology Plans

42. We amend §§ 54.504 and 54.508 of our rules to eliminate the E-rate technology plan requirements for all priority one applications. We retain, however, the technology plan requirements for applicants requesting priority two funding.

43. To avoid duplication of technology plan requirements and to simplify the application process in

general, we proposed in the NPRM to eliminate E-rate technology plan requirements for applicants seeking priority one services that are otherwise subject to state and local technology planning requirements. Commenters indicated, however, that determining which applicants seeking priority one services are subject to technology plan requirements outside of the E-rate program could be difficult, might lead to unnecessary violations of program rules, and could be administratively difficult to administer. Because the record demonstrates that applicants are required to or will likely perform technology planning even without the E-rate program requirements, we find that eliminating the technology planning requirement entirely for priority one funding will better serve the intent of the NPRM proposal to simplify the application process, while still adequately addressing concerns regarding waste, fraud, and abuse.

44. *Priority One.* The Commission must strive to balance the need to ensure that E-rate funds are being used for their intended purposes with avoiding the imposition of unnecessarily burdensome requirements on applicants. Moreover, the Commission must routinely reevaluate its program rules to ensure that it has struck the proper balance. After careful consideration of our experience and comments in the record, we conclude that the proper balance warrants eliminating the Commission's technology plan requirements for applicants requesting priority one services.

45. We find that it is reasonable to eliminate the technology plan requirement for all priority one service requests, even when the applicant is not subject to a state or local technology planning requirement, and regardless of the amount of the request. Even without a Commission requirement, most entities will continue to evaluate their needs by conducting technology planning. Applicants applying for Enhancing Education Through Technology (EETT) funding from the Department of Education must comply with a technology plan requirement nearly identical to the Commission's. The Elementary and Secondary Education Act, reauthorized in 2002 as the No Child Left Behind Act, also has requirements that overlap with E-Rate's technology planning rules. In addition, technology planning is often incorporated into the budget and procurement processes of schools and libraries. Thus, we find that applicants generally will continue to perform technology analyses notwithstanding elimination of the technology plan requirement for E-rate.

46. Furthermore, we find that this change will simplify the current application process and will reduce the costs for applicants of complying with and administering the E-rate program. Reducing the burden on applicants will result in greater E-rate participation, particularly for the schools with the fewest resources and greatest need to participate in the program. Eliminating the technology plan requirement for priority one applications also will reduce costs associated with administering the E-rate program.

47. Moreover, the Commission has other safeguards to ensure that priority one funding requests are based "on the reasonable needs and resources of the applicant and are consistent with the goals of the program." For instance, to ensure that applicants are able to use the discounted services effectively, and thereby minimize waste, our rules require applicants to certify that they have "secured access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections, necessary to make effective use of the services." The Commission has additional protections in place to guard against waste, fraud, and abuse in the E-rate program. Although we find that we no longer need the technology play requirement for priority one services in light of the other protections in place, we will remain vigilant to ensure that eliminating this requirement does not increase opportunities for waste, fraud, and abuse.

48. *Priority Two.* We conclude that we should retain the requirement to have a technology plan for priority two services. We find that maintaining a specific technology plan requirement for E-rate applicants for priority two services—internal connections and basic maintenance of internal connections—continues to serve a valuable purpose and therefore outweighs any potential administrative burden. Many commenters support this conclusion. First, our experience reflects that waste, fraud, and abuse tends to be concentrated in use of priority two services. Past experience convinces us that we should not at this time eliminate the technology plan requirement for priority two services. Second, installing internal connections in schools and libraries is a complex and expensive process, with installation techniques that vary depending on the nature of the project. Unlike priority one services, which are generally recurring services, internal connections are one-time upgrades that are designed to produce long-term benefits to schools and libraries. Maintaining the requirement for priority two services will require applicants to plan and justify these requests and strategically define their vision for use of these technologies.

49. For the reasons stated above, we decline to adopt proposals suggested by commenters either (1) to completely eliminate the technology plan requirement for priority two applicants; or (2) to establish a bifurcated approach in which only priority two applicants not subject to other state or local requirements are required to develop technology plans. It would be administratively burdensome for USAC to determine which schools and libraries are subject to official state and local technology plan requirements and which are not.

50. While we decline to eliminate the technology plan for priority two applicants, we adopt measures to simplify the technology planning process. First, we amend § 54.504 of our rules to eliminate the requirement that technology plans covering the entire, upcoming funding year be in place when the FCC Form 470 is submitted. Under the current rule, an applicant may not rely on an approved, existing technology plan if it expires prior to the last date of service of the upcoming funding year. We believe that the three-year technology plan cycle that has evolved for the E-rate program does not accurately reflect how schools and libraries plan for their technology needs. For example, if a school has developed and is implementing a three-year technology plan, it does not make sense to require the school to develop a new plan in October (before filing its Form 470) just because the existing plan expires before the upcoming funding year ends. The school should be able to obtain services under that existing technology plan if it covers part of the upcoming funding year and then revise the plan over the next several months before it expires. Forcing the applicant to prepare another three-year plan so far in advance of the end of the current one is administratively burdensome. Technology plans are evolving documents, and we want to encourage applicants to have technology plans that reflect their current needs. We thus find that applicants with approved technology plans that cover at least part of the upcoming funding year in effect as of the date of their FCC Form 470 filings will be deemed to be in compliance with our rules.

51. We also find that applicants are not required to have a technology plan in place before a third-party master

contract's FCC Form 470 is posted. FCC Forms 470 for master contracts typically are filed far in advance of the filing window because of the more detailed solicitation process they require. Schools and libraries typically have no control or advance knowledge of the solicitation of bids for third-party master contracts, and, as such, would have no way of knowing when their technology plans would need to be completed. Therefore, we find that, if an applicant has filed its own FCC Form 470, but later chooses to purchase a service from a state master contract, the applicant only needs to have a technology plan in existence prior to filing its own FCC Form 470. To do otherwise could unintentionally discourage applicants from taking service from a master contract.

52. We also amend § 54.508 of our rules to eliminate the requirement that applicants demonstrate they have a budget sufficient to acquire and support the non-discounted elements of the plan. The E-rate program already has rules in place to ensure that applicants have sufficient resources, and thus this requirement is redundant.

53. *E-Rate Central Petition.* E-rate Central filed a petition seeking clarification of the language defining "basic telephone services" for priority one services in the funding year 2008 ESL. The actions in this order address E-Rate Central's concerns. Therefore, we find that no further Commission action on E-Rate Central's petition is necessary.

2. Competitive Bidding Process

54. *FCC Form 470.* We retain the competitive bidding and waiting period obligations for all service requests, even where applicants are subject to state or local procurement obligations, rather than subjecting priority one and priority two applications to different standards, as proposed in the *NPRM.* We find, however, that we should simplify the FCC Form 470 process for all program participants. Many applicants requested that we simplify the FCC Form 470 if we do not eliminate it. After consideration of the record and our programmatic experience, we conclude that the competitive bidding and waiting period requirements have provided consistency and transparency for program participants in their search for the most cost-effective provider of E-rate eligible services. In seeking to achieve the proper balance between ensuring program integrity and eliminating excessive administrative burdens, we conclude that the preferable course is to simplify and redesign the FCC Form 470. We find that the changes we adopt will decrease the number of denials that stem purely from technical deficiencies rather than the applicant's failure to conduct a fair and open competitive bidding process. Streamlining the form to include only the information necessary to the competitive bidding process will also reduce appeals and increase program participation. Accordingly, we amend § 54.504(b) of the Commission's rules to reflect accurately the specific information being requested on the FCC Form 470 in order to facilitate a fair and open competitive bidding process.

55. We find that requiring the FCC Form 470 produces a better competitive bidding process. Currently, schools and libraries are required to post an FCC Form 470 to USAC's website so that service providers easily can view the services that are requested in one centralized location. While many schools and libraries must also follow their own state or local procurement processes, those bid requests are often limited to publication, for example, in local newspapers. The nationwide posting on USAC's website ensures that more service providers can obtain notice about the requests for bids. If more service providers are viewing and responding to proposals, the resulting additional competition should help keep prices lower for applicants and, in turn, require fewer dollars from the universal service fund. Many service providers noted that they annually review the posted FCC Forms 470 and submit bids to provide the requested services.

56. We anticipate that the new, simplified FCC Form 470 will take effect prior to the opening of the filing window for funding year 2011. However, if an applicant has already submitted an FCC Form 470 (in the current format) for funding year 2011, the applicant will not be required to submit a new form. Once the revised form has received Office of Management and Budget (OMB) approval, all applicants will be required to prepare and submit the newly revised form going forward. The Wireline Competition Bureau will announce the effective date of the new FCC Form 470 once approval has been received from OMB. If an applicant has not submitted an FCC Form 470 by the effective date, the applicant will need to submit the new FCC Form 470.

3. Clarifying Process for Disposal of Obsolete Equipment

57. *E-rate Program Rules and Requirements.* Section 254(h)(3) of the Act prohibits an eligible school or library that has purchased telecommunications services and network capacity at a discount under the E-rate program from reselling or otherwise transferring those services, or any equipment components of such service, in consideration for money or any other thing of value. In the *Schools and Libraries Third Report and Order,* 69 FR 6181, February 10, 2004, the Commission also prohibited schools and libraries from transferring the equipment components of eligible services to other schools within three years of their purchase, even without receiving money or other consideration, unless the donating school or library permanently or temporarily closes. The Commission also stated that "[r]ecipients of support are expected to use all equipment purchased with universal service discounts at the particular location, for the specified purpose for a reasonable amount of time." The Act and the Commission's rules, however, do not currently specify what schools and libraries are permitted do with equipment components of eligible services acquired with E-rate support once the equipment is obsolete.

58. *Process for Disposal of Obsolete Equipment.* We amend § 54.513(a) of our rules to permit the disposal of equipment components of E-rate services (E-rate equipment) for payment or other consideration, but no sooner than five years after the equipment is installed. We decline to adopt the reporting and recordkeeping requirements proposed in the *E-rate Broadband NPRM.*

59. First, we revise our rules to permit the disposal of E-rate equipment for payment or other consideration, but no sooner than five years after the equipment is installed. We find that section 254(h)(3) of the Act was intended to address the concern that schools and libraries might resell current telecommunications services and network capacity, and does not address obsolete equipment. As it is in the public interest and consistent with the Commission's environmental initiatives and the goal of making technology affordable for all, we encourage schools and libraries to donate and recycle their obsolete equipment whenever possible. To further assist this goal, we direct USAC to make available on its website and update on an ongoing basis a list of donation and recycling locations for communications equipment.

60. We adopt the five-year threshold for a number of reasons. We conclude that five years from the date of installation is a reasonable period of time based on the rate of change in communications technology and equipment, industry standards for the

useful life of E-rate eligible equipment, and the need for schools and libraries to maintain viable networks that reflect those changes. Moreover, we find that adopting a straightforward and easy-to-understand rule will help reduce the confusion that has led to applicants either throwing away equipment or to storing the equipment indefinitely because applicants are unsure if disposing of it will violate E-rate rules.

61. We conclude that adopting five years as a minimum threshold standard is superior to attempting to discern a specific useful life for each piece of equipment under E-rate. As the E-rate program supports thousands of different pieces of eligible equipment, and as that equipment and the eligible services list is constantly evolving, the burden of verifying the useful life for each piece of equipment would be unduly onerous. In the *Schools and Libraries Third Report and Order,* we discussed the adoption of useful life criteria in the context of transferring services and equipment. In that context, we decided not to adopt useful life criteria, finding that "developing and enforcing useful life criteria would add a significant degree of complexity to the program, which would result in increased administrative costs and burden for both recipients and USAC." We agree that detailing a specific period of useful life for each of the thousands of types of equipment supported under E-rate would be unduly costly and burdensome.

62. We emphasize that this rule does not require schools and libraries to continue using equipment for five years, nor does it require disposal five years after installation, but it does prohibit resale or disposal before five years has passed. We strongly encourage schools and libraries to be the best stewards of E-rate funding possible and to continue to fully use equipment purchased with universal service funds for as long as the equipment remains viable as an effective and efficient technology solution. Additionally, the New York State Education Department inquired whether the disposal of obsolete equipment by a service provider, free of charge, violates § 54.523 of our rules. We conclude that this service does not provide the incentive or inducement for selection that § 54.523 is designed to prevent, and therefore we find that free of charge disposal of obsolete equipment by a service provider does not violate § 54.523 of our rules.

63. We decline to adopt a time period of three years, as suggested by some commenters. Some schools and libraries transfer equipment from the location that originally sought funding for the equipment to other locations after three years, as permitted by our rules. Those transfers suggest that that equipment may not typically exhaust its useful life within three years. Additionally, although in some instances we allow applicants to receive funding twice every five years to help, in part, allow for updated internal connections, that rule is primarily intended to allow funding to be distributed more equitably. It is not a benchmark for measuring equipment obsolescence.

64. Second, we decline to adopt the proposal that would require applicants to formally declare that equipment is obsolete. Schools and libraries should make this determination in the normal course as they create technology plans and determine what equipment is required to keep the network running efficiently. Each school and library board has its own established procedures for making this determination. We find that a formal declaration would serve little if any value, and would create an unnecessary administrative burden. Therefore, we decline to adopt this proposed condition.

65. Third, we decline to adopt a rule that schools and libraries must notify USAC of the resale or disposal of equipment funded by the E-rate program within 90 days of its disposal, or that applicants be required to keep a record of the disposal for a period of five years following the disposal. We also decline to require schools and libraries to track disposal of obsolete equipment on their asset and inventory lists beyond what the current rules already require. As we decline to adopt the reporting requirement, we see little utility in revising the FCC Form 500 as proposed, and we decline to do so. Because we are convinced that the remaining value of equipment purchased using E-rate funds is generally *de minimis* after five years, we find that such reporting requirements do not justify the substantial administrative burden they would impose on both applicants and USAC. Nevertheless, the purpose of permitting applicants to dispose of equipment for money or other consideration is to encourage recycling and optimization of resources. It is not intended to create a profit-making opportunity for E-rate participants or to create incentives to request services that exceed the applicant's immediate needs. Thus, if we have reason to believe that this revised rule results in waste or abuse, we may impose reporting obligations, recover funding, or take other steps to eliminate opportunities for abuse.

66. Fourth, we decline to adopt, as a condition of compliance with our E-rate rules, a specific rule that the disposal process must comply with state and local laws. While we expect any schools and libraries disposing of obsolete equipment will comply with applicable federal, state, and local laws, we find that making such compliance a condition of our E-rate program requirements would impose significant administrative burdens on USAC to track such compliance, and that such burden outweighs any potential benefit of imposing such a requirement.

67. Finally, we decline to require schools and libraries to return to USAC any funds received in exchange for the sale or disposal of obsolete E-rate equipment. We sought comment on E-rate Central's proposal that would require the return to USAC of any funds greater than $1,000 related to the resale or disposal of E-rate equipment. Because our intent is to permit disposal only of obsolete equipment, we expect that any consideration that schools or libraries receive should be nominal. Thus we find that the potential recovery does not warrant the administrative burdens that USAC and applicants would face as a result of requiring remission of such amounts.

68. *E-Rate Central Petition for Clarification or Waiver.* As discussed in the *E-rate Broadband NPRM,* E-Rate Central filed a petition for clarification or waiver of the Commission's rules concerning the disposal of equipment purchased under the E-rate program. The rules adopted in this order address E-Rate Central's Petition for Clarification or Waiver. Therefore, we dismiss E-Rate Central's petition as moot.

C. Improving Safeguards Against Waste, Fraud and Abuse

69. *Fair and Open Competitive Bidding Rule.* We amend § 54.503 of the Commission's rules to codify the existing requirement that the E-rate competitive bidding process be fair and open. The Commission has observed that competitive bidding is vital to ensuring that schools and libraries—and the E-rate program—receive the best value for their limited funds, and to clarify the prohibition against E-rate applicants receiving gifts. Although numerous Commission orders already make clear that, to comply with the Commission's competitive bidding process requirements, applicants and service providers must conduct and participate in a fair and open competitive bidding process, we find that codification of this requirement is warranted. We remind parties that all

applicants and service providers have had, and will continue to have, an obligation to comply with any applicable state or local procurement laws, in addition to the Commission's requirements.

70. As proposed in the *E-rate Broadband NPRM,* we find that the following types of conduct are necessary to satisfy a fair and open competitive bidding requirement. As a general matter, all potential bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process. Any additions or modifications to the FCC Form 470, RFP, or other requirements or specifications must be available to all potential providers at the same time and in a uniform manner. Moreover, consistent with precedent, it is a violation of the Commission's competitive bidding rules if: (1) The applicant has a relationship with a service provider that would unfairly influence the outcome of a competition or would furnish the service provider with "inside" information; (2) someone other than the applicant or an authorized representative of the applicant prepares, signs, and submits the FCC Form 470 and certification; (3) a service provider representative is listed as the FCC Form 470 contact person and that service provider is allowed to participate in the competitive bidding process; or (4) a service provider prepares the applicant's FCC Form 470 or participates in the bid evaluation or vendor selection process in any way. In the *Mastermind Order,* the Commission found that an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process. The Commission concluded in the *SEND Order* that a competitive bidding process is undermined when an applicant employee with a role in the service provider selection process also has an ownership interest in the vendor that is seeking to provide the products or services. In the *Ysleta Order,* the Commission found that an applicant violates the Commission's competitive bidding rules if its FCC Form 470 does not describe the desired products and services with sufficient specificity to enable interested parties to submit responsive bids. We emphasize that this is not an exhaustive summary of the types of conduct that we have found, and will continue to find, to violate the competitive bidding process. Because we cannot anticipate and address every possible action that parties may take in the E-rate application process, we expect that we will continue to use the appeal process as necessary to decide alleged competitive bidding violations.

71. In addition to this precedent, we address the receipt of gifts by applicants from service providers and potential service providers under the E-rate program. As noted above, the Commission's rules and precedent require that applicants conduct a fair and open competitive bidding process. In addition, applicants are required to certify on the FCC Form 471 that they have not received anything of value or a promise of anything of value other than the services and equipment requested on the form. In the *E-rate Broadband NPRM,* we listed gift-giving as one example of prohibited conduct under a fair and open competitive bidding process.

72. We find that the best approach is to make gift rules under the E-rate program consistent with the gift rules applicable to federal agencies, which permit only certain *de minimis* gifts. Generally, the federal rules prohibit a federal employee from directly or indirectly soliciting or accepting a gift (*i.e.,* anything of value) from someone who does business with his or her agency or accepting a gift given as a result of the employee's official position. The federal rules do, however, permit two categories of circumscribed *de minimis* gifts: (1) Modest refreshments that are not offered as part of a meal (*e.g.,* coffee and donuts provided at a meeting) and items with little intrinsic value intended solely for presentation (*e.g.,* certificates and plaques); and (2) items that are worth $20 or less (*e.g.,* pencils, pens, hats, t-shirts, and other items worth less than $20, including meals), as long as those items do not exceed $50 per employee from any one source per calendar year. Similarly, the rule we adopt today also allows such *de minimis* gifts. In determining the amount of gifts from any one source, we will consider the aggregate value of all gifts from any employees, officers, representatives, agents, independent contractors, or directors of the service providers in a given funding year. We note that the restriction on gifts is always applicable, and is not in effect or triggered only during the time period when the competitive bidding process is taking place. Based on our experience, gift activities that undermine the competitive bidding process may occur outside the bidding period. Accordingly, we amend § 54.503 of our rules to prohibit E-rate applicants from soliciting or accepting any gift or other thing of value from a service provider participating in or seeking to participate in the E-rate program. We further amend that rule to make it a violation for any service provider to offer or provide any gift or other thing of value to those personnel of eligible entities involved with the E-rate program. Like the federal rules, we include an exception for gifts to family and personal friends when those gifts are made using personal funds of the donor (without reimbursement from an employer) and are not related to a business transaction or business relationship.

73. We find that the federal rules offer a fair balance between prohibiting gifts that might have undue or improper influence on a procurement decision and acknowledging the realities of professional interactions, which might occasionally involve giving people coffee or other modest refreshments or a token gift. Moreover, the federal rules are well-established and have been interpreted frequently, and parties can look to these decisions if there are questions about the propriety of a particular offering. In addition, we find that this rule is appropriate for ease of administration and also to provide clarity for service providers and applicants. Finally, we emphasize again that schools, libraries, and service providers remain subject to applicable state and local restrictions regarding gifts. Thus, to the extent a state or local provision is more stringent than the federal requirements, violation of the state or local provision constitutes a violation of the Commission rule we adopt herein.

74. AT&T was concerned that a prohibition against gifts might prevent companies from making charitable contributions to schools, or would deter other philanthropic activities, such as employee donations through United Way. The rule we articulate today does not discourage companies from making charitable donations to E-rate eligible entities in the support of schools—including, for example, literacy programs, scholarships, and capital improvements—as long as such contributions are not directly or indirectly related to E-rate procurement activities or decisions. If contributions have no relationship to the procurement of E-rate eligible services and are not given by service providers to circumvent our rules, including rules that require schools and libraries to pay their own non-discount share for the services they are purchasing, such contributions will not violate the prohibition against gift-giving. If applicants or service providers are unclear about a particular anticipated

gift, they should seek guidance from USAC or the FCC.

75. We also offer greater clarity with regard to permissible service provider identification number (SPIN) changes following a competitive bidding process. In the E-rate Broadband *NPRM,* we proposed to prohibit a service provider from circumventing a competitive bidding process by offering a new, lower price for products and services that have already been competitively bid and are part of an existing contract. The Commission currently permits applicants to change service providers for specified reasons (*e.g.,* the service provider went out of business or is unable to perform) after a funding commitment has been issued through the operational SPIN change process. Applicants must wait until after the funding commitment has been issued to enable USAC to review and identify any issues related to the competitive bidding process of the original service provider. There may be some instances, however, where the reason for the SPIN change is not consistent with program purposes. For example, the applicant might identify a service provider as the winning bidder but intend to change providers through the SPIN change process as soon as USAC issues a funding commitment. We believe that this type of conduct is inappropriate and is not conducive to a fair and open competitive bidding process. Therefore, to alleviate uncertainty regarding the types of SPIN changes that are permissible following a competitive bidding process, we clarify that once a contract for products or services is signed by the applicant and service provider, the applicant may not change to a different service provider unless (1) there is a legitimate reason to change providers (*e.g.,* breach of contract or the service provider is unable to perform); and (2) the newly selected service provider received the next highest point value in the original bid evaluation, assuming there was more than one bidder.

76. Some commenters challenged the statement in the *E-rate Broadband NPRM* that "[a] service provider may provide information to an applicant about products or services—including demonstrations—before the applicant posts the FCC Form 470, but not during the bid selection process." They argue that applicants need vendor information during the bid selection process in order to make the best decision about the services they are requesting. We agree with these commenters and note that, currently, service providers are permitted to supply information about their products and services during the 28-day waiting period. Our concern regarding vendor communication during the 28-day waiting period was not about the specific products or services being requested, but rather about ensuring that potential bidders are not influencing the bidding process by providing inappropriate assistance as explained above. Thus, we clarify that we do not prohibit communications during the 28-day waiting period as long as all parties are privy to the same information from the applicant during that period and the communications are consistent with any applicable state or local competitive bidding requirements.

III. Eligible Services List

77. In this order, we release the ESL for funding year 2011 and adopt most of the proposals made in the *2009 ESL Further NPRM,* 75 FR 32692, June 9, 2010, and the *2010 ESL Public Notice.* We add dark fiber to the ESL as an eligible service. We also retain web hosting as an eligible priority one service. Finally, we decline to add the following services to the ESL: (1) Software applications that are used in connection with wireless devices; (2) enhanced firewalls and intrusion detection/intrusion prevention devices; (3) anti-virus and anti-spam software; (4) online backup solutions; and (5) unbundled warranties.

78. We also make slight modifications to the rules pertaining to ESL administration. First, as explained below, we find that individual eligible and ineligible services should be listed in the ESL only rather than in our rules. Second, we require USAC to submit any proposed changes to the ESL to the Commission by March 30 of each year. Third, the rules will now provide the Commission with flexibility to release the ESL by public notice or order. Finally, because we are releasing the final ESL for funding year 2011 by this report and order, pursuant to our rules, we also authorize USAC to open the annual application filing window no earlier than November 29, 2010.

79. The Commission uses several criteria to determine whether to include a service in the ESL. First, under the statute, a service must serve an educational purpose. Second, the service should be primarily or significantly used to facilitate connectivity. The E-rate program does not provide support for content or end-user devices such as computers or telephones. Third, due to the financial constraints on the fund, we must balance the benefits of particular services with the costs of adding to our list of supported services—*i.e.,* if more services are eligible for E-rate funding, some schools may receive more funding, but some schools may not receive any funding for priority two services. We recognize that E-rate may not be able to fund every service that potentially serves an educational purpose, and for that reason we need to evaluate potential impact of adding additional services to the eligible services list. Finally, the Commission must exercise discretion in order to balance the goals of the E-rate program with the overarching (and potentially competing) goals of universal service, such as ensuring affordable rates to all Americans across the country. In deciding whether to extend E-rate support to a particular service, the Commission must keep in mind that the support ultimately is paid for by consumers. This balancing bears on each decision about whether to designate a service as eligible or ineligible for E-rate support.

1. Eligible Services

80. *Web Hosting.* Based on the record before us, we find that web hosting should continue to receive priority one funding. Comments provided compelling examples of how web hosting is essential for facilitating teaching and learning as well as communication among the entire school community. For example, teachers use individual web pages to post homework assignments, collect completed homework from students, post messages to students and parents, and respond to student or parent questions. Web pages also can increase learning time outside of school by providing students and parents with 24/7 access to classroom information and supplemental educational resources. Moreover, parental and family engagement in a child's school has been linked to improved educational outcomes for students. Web hosting, as the commenters have shown, is an example of a service that can provide a substantial educational impact for a relatively small cost.

81. We are also persuaded that features that facilitate the ability to communicate, such as blogging, e-mailing over a school or library's hosted website, discussion boards, and services that may facilitate real-time interactive communication such as instant messaging or chat, should be eligible for E-rate funds as part of a web hosting package. Therefore, we revise the ESL to include those features of web hosting. This decision alters prior decisions limiting web hosting support to hosting a school or library's static website and excluded the ability to engage in interactive activity such as blogging. We

recognize that the transfer of messages across a school's hosted website is functionally equivalent to other services that facilitate the ability to communicate such as e-mail, text messaging, voice mail, and paging. We remind applicants, however, that content—including content created by third-party vendors, and any features involving data input or retrieval—including searching of databases for grades, student attendance files, or other reports—remains ineligible. In addition, support for web hosting will not include support for the applications necessary to run online classes or collaborative meetings.

2. Ineligible Services

82. *Wireless Internet Access Applications.* We conclude that wireless Internet access applications should remain ineligible for E-rate support. The E-rate program generally does not provide support for software or applications. Our decision does not contradict the *Schools and Libraries Second Report and Order* determination that wireless telecommunications services *on* a school bus or a library's mobile unit are eligible for E-rate funding, because in that order the Commission decided to fund the telecommunications service used on school buses but not any overlying functionalities or applications. Although some commenters argue that wireless Internet applications should be funded if they are used for an "educational purpose," we find that even if certain of these applications do serve educational purposes, they should not be funded given the overall constraints on the universal service fund, and our desire to maintain the focus of E-rate on its core purpose of ensuring communications connectivity. Thus, we are not persuaded that expanding eligibility to fund wireless Internet access applications at this time is a prudent course of action.

83. We disagree with commenters that applications for wireless devices should be eligible if they are bundled with eligible voice and data services. Such an approach would allow providers in effect to expand the ESL by bundling ineligible wireless applications with eligible services. Although we do not prohibit providers from choosing how to offer their services, individual ineligible services within the bundle will still need to be cost allocated. To the extent that carriers bundle eligible and ineligible services and do not present a reasonable cost allocation between the services, we direct USAC to continue to provide outreach to applicants during the program integrity assurance review process and make determinations based on any additional information provided in the discussions and information-sharing with applicants.

84. Funds for Learning asserts that the language in the draft 2011 ESL appears to say that applicants may not receive discounts on any data charges used for accessing wireless applications. This language was intended to indicate that wireless Internet access service and data charges for a service that is solely dedicated to accessing an ineligible functionality is ineligible for E-rate funding. For example, wireless Internet access service that enables students to access the Internet on a laptop computer will still be eligible for E-rate funding even if that service happens to allow a student to access applications that would not be eligible for E-rate funds. If a wireless Internet access service is dedicated to a service or group of services that are ineligible, however, the entire service request will be deemed ineligible. For example, a wireless service solely dedicated to applications that track the location of a school's bus drivers or student attendance would be fully ineligible.

85. *Enhanced Firewalls, Intrusion Detection/Intrusion Prevention Devices, Anti-Virus and Anti-Spam Software.* Firewall services are intended to prevent unauthorized access to a school or library's network. Anti-virus and anti-spam software and intrusion protection and intrusion prevention devices monitor, detect, and deter threats to a network from external and internal attacks. We decline to extend E-rate support to anti-virus and anti-spam software and intrusion protection and intrusion prevention devices. We will continue to fund basic firewall protection, but we will not at this time extend E-rate support beyond basic firewall protection that is included as part of an Internet access service. While some commenters support greater support for firewall services, contending that such services are necessary protection for Internet services and equipment, we must balance the benefits of such protections with the costs of augmenting our list of supported services. We are concerned about the financial impact on the fund—*i.e.,* if more services are eligible for E-rate funding, fewer schools will get funding for priority two services. Although we agree that protection from unauthorized access is a legitimate concern, the funds available to support the E-rate program are constrained. Therefore, we find that, on balance, the limited E-rate funds should not be used to support these services.

86. *Unbundled Warranties.* We add unbundled warranties to our list of ineligible basic maintenance of internal connections (BMIC). This conforms to the decision we made last year that unbundled warranties are ineligible. The Commission has found that basic maintenance services are eligible for universal service support as priority two internal connections service if, but for the maintenance at issue, the internal connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services. USAC has treated as an unbundled warranty a separately priced warranty allowing for broken equipment to be fixed or, in the event that the problem is beyond repair, replaced. We find that an unbundled warranty is an ineligible BMIC service because it is purchased as a type of retainer and not as an actual maintenance service. That is, BMIC contracts that require an upfront payment and that payment is required regardless of whether any service is actually performed are not eligible. In light of the limited funds available for the program, we decline to include support for service that may not need to be performed. To avoid the potential waste of E-rate resources, therefore, we will continue to disallow E-rate discounts for unbundled warranties.

87. Requests for basic maintenance will continue to be funded as internal connections if, but for the maintenance at issue, the service would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services. Thus, requests for routine maintenance will continue to be funded. In addition, if applicants are able to estimate a certain number of hours per year for maintenance, based on the current life of their equipment and a history of needed repairs and upkeep, they may seek E-rate funds for upfront costs on service contracts designed to cover this estimate of repairs and upkeep. Reimbursements will be paid on the actual work performed and hours used only. For example, if a school determines it will need 30 service hours in a given year to maintain its internal connections but uses only 20 hours, the school will be reimbursed only for 20 hours even if they were approved for E-rate funds on 30 hours. We find that this procedure will ensure that E-rate funds will be used only for actual maintenance performed.

88. We understand from the comments that there may be confusion about the eligibility of manufacturer's warranties. The language in the ESL under the entry for "Miscellaneous Fees and Charges," states that, "a

manufacturer's multi-year warranty provided as an integral part of an eligible component without separately identifiable cost can be included in the cost of the component." We agree with commenters that a manufacturer's warranty of no more than three years that is included in the price of eligible equipment should continue to be eligible as priority two internal connections equipment, and add the clarification of the three year period to the ESL. In the same entry for "Miscellaneous Fees and Charges," however, it states that "[e]xtended warranties and service contracts are eligible only for that portion associated with the relevant funding year." We will remove this language from the ESL for funding year 2011 to eliminate any implication in the ESL that an unbundled warranty may be eligible for E-rate funding.

89. *Other Ineligible Services.* We also decline to designate scheduling services and online backup solutions as eligible for E-rate funding. Given the overall constraints on the universal service fund, and our desire to maintain the focus of E-rate on its core purpose of ensuring communications connectivity, we are not persuaded that expanding eligibility to fund these services at this time is a prudent course of action.

3. Administrative Changes Pertaining to the ESL

90. We adopt the proposal in the *2009 ESL Further NPRM* to restructure our rules such that the services eligible for support will be listed in the ESL and will not specified in the Commission's rules. Any reference to specific services or products in the rules will be removed and the revised rule regarding the ESL will state that all products and services eligible for E-rate support will be listed in the ESL. This change will help the Commission ensure that the ESL is updated in a timely manner. We find that listing general categories of eligible services in the rules and specific types of eligible services that fall within those categories of eligible services in the ESL is confusing. Moreover, it does not serve the public interest to change both the Commission's rules and the ESL each time a new service or product is designated eligible (or ineligible) for E-rate support. Therefore, to alleviate this confusion, we will list the services and products eligible for E-rate support only in the ESL. This change will enable the Commission to modify the ESL only as necessary to keep up with rapidly changing technology. We note that the Commission will continue to seek comment on each funding year's proposed ESL, pursuant to our rules. Additionally, we will modify our rules pertaining to the ESL when necessary to designate new categories of services as eligible for E-rate support.

91. We also adopt the proposal that USAC should be required to submit any proposed changes to the ESL to the Commission by March 30 of each year, instead of June 30. Accordingly, we amend § 54.522 of our rules. We agree with commenters that requiring USAC to submit the proposed ESL earlier will allow additional time for the Commission to review the proposal and to review and analyze public comment on the proposed ESL. Some commenters also propose that we release the ESL earlier than the existing deadline. Although we agree that applicants should have ample time to review the final ESL while they prepare their funding applications, the existing rule requires the final ESL to be released at least 60 days prior to the opening of the funding window. We find that this 60 day period, in addition to the period of time applicants had to review the proposed changes released in the draft ESL, should afford applicants a reasonable amount of time to understand any changes to the ESL and prepare their applications.

92. Finally, we adopt our proposal that the final ESL should no longer be required to be released by public notice. We find that it is important that the Commission have the flexibility to release the ESL through a public notice or an order to account for the situations where the Commission will need to provide more detailed explanations as to why a service is deemed eligible or ineligible for E-rate funding. We wish to dispel any concerns that this change would eliminate the opportunity for public comment on any modifications to the ESL. Indeed, the proposed rule attached to the *2009 ESL Further NPRM* states that "[t]he Wireline Competition Bureau will issue a Public Notice seeking comment on the Administrator's proposed eligible services list," and we adopt that proposed rule herein.

IV. Procedural Matters

A. Final Regulatory Flexibility Analysis

93. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Federal Communications Commission (Commission) included an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the policies and rules considered in the *E-rate Broadband NPRM* in CC Docket No. 02–6 and GN Docket No. 09–51. The Commission sought written public comment on the proposals in the *E-rate Broadband NPRM,* including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

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

94. The Commission is required by section 254 of the Communications Act of 1934, as amended, to promulgate rules to implement the universal service provisions of section 254. On May 8, 1997, the Commission adopted rules to reform its system of universal service support mechanisms so that universal service is preserved and advanced as markets move toward competition. Specifically, under the schools and libraries universal service support mechanism, also known as the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may receive discounts for eligible telecommunications services, Internet access, and internal connections.

95. The National Broadband Plan (NBP), issued on March 16, 2010, recommended that the Commission take a fresh look at the E-rate program and identify potential improvements to reflect changes in technology and evolving teaching methods used by schools. In May 2010, the Commission issued a Notice of Proposed Rulemaking seeking public comment on proposals to ensure that the E-rate program continues to help our children and communities prepare for the high-skilled jobs of the future and reap the full benefits of the Internet. In this Report and Order, the Commission adopts a number of the proposals put forward in the *E-rate Broadband NPRM.*

96. The revisions adopted by the Commission in the Report and Order fall into three conceptual categories. First, the Commission enables schools and libraries to better serve students, teachers, librarians, and their communities by providing more flexibility to select and make available the most cost-effective broadband and other communications services. Specifically, the Commission allows applicants to lease fiber from the most cost-effective provider, including not-for-profit entities, so that applicants can choose the services that best meet their needs from a broad set of competitive options and in the most cost-effective manner available in the marketplace. It also changes the rules to permit schools to allow community use of E-rate funded services outside of school hours and supports broadband connections to the residential portion of schools that serve students with special

circumstances. The Commission further indexes E-rate's funding cap to inflation to preserve the purchasing power of a successful program. Additionally, the Commission seeks proposals for a limited pilot program to establish best practices to support off-campus wireless connectivity for portable learning devices outside of regular school or library operating hours. Second, the Commission simplifies and streamlines the E-rate application process by removing the technology plan requirement for priority one telecommunications and Internet access services, and facilitating the disposal and recycling of obsolete equipment supported by E-rate by authorizing schools and libraries to receive consideration for such equipment. Third, the Commission improves safeguards against waste, fraud, and abuse by codifying the requirement that competitive bidding processes be fair and open. In addition, the Commission adopts the eligible services list for funding year 2011.

97. As a result of these changes, schools and libraries throughout the country can make their limited dollars go further. The changes adopted in this Report and Order will increase the ability of students and the public to utilize broadband services for educational needs. In addition, the changes to simplify the E-rate program will help reduce the cost of participating in the program, thereby making the program more accessible, particularly to smaller school districts and libraries that are often located in more rural areas and may not have staff dedicated to managing E-rate applications and related activities.

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

98. No comments specifically addressed the IRFA.

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

99. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA. A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 2002, there were approximately 1.6 million small organizations. The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. We estimate that, of this total, 84,377 entities were "small governmental jurisdictions." Thus, we estimate that most governmental jurisdictions are small.

100. Small entities potentially affected by the proposals herein include eligible schools and libraries and the eligible service providers offering them discounted services, including telecommunications service providers, Internet Service Providers (ISPs), and vendors of the services and equipment used for internal connections.

a. Schools

101. As noted, "small entity" includes non-profit and small governmental entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools, an elementary school is generally "a non-profit institutional day or residential school that provides elementary education, as determined under state law." A secondary school is generally defined as "a non-profit institutional day or residential school that provides secondary education, as determined under state law," and not offering education beyond grade 12. For-profit schools, and schools and libraries with endowments in excess of $50,000,000, are not eligible to receive discounts under the program. Certain other restrictive definitions apply as well. The SBA has also defined for-profit, elementary and secondary schools having $7 million or less in annual receipts as small entities. In funding year 2007, approximately 105,500 schools received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these additional entities that would qualify as small entities under SBA's size standard, we estimate that fewer than 105,500 such schools might be affected annually by our action, under current operation of the program.

b. Telecommunications Service Providers

102. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small incumbent local exchange services. The closest size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,311 incumbent carriers reported that they were engaged in the provision of local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Thus, under this category and associated small business size standard, we estimate that the majority of entities are small.

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

104. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for wired telecommunications carriers. This provides that a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees. According to the Commission's *2008 Trends Report,* 300 companies reported that they were engaged in the provision of interexchange services. Of these 300 IXCs, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that most providers of interexchange services are small businesses.

105. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for wired telecommunications carriers. This provides that a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees. According to the *2008 Trends Report,* 1,005 CAPs and competitive local exchange carriers (competitive LECs) reported that they were engaged in the provision of competitive local exchange services. Of these 1,005 CAPs and competitive LECs, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive exchange services are small businesses.

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

107. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to the *2008 Trends Report,* 434 carriers reported that they were engaged in wireless telephony. Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees. We have estimated that 222 of these are small under the SBA small business size standard.

108. *Common Carrier Paging.* As noted, since 2007 the Census Bureau has placed paging providers within the broad economic census category of Wireless Telecommunications Carriers (except Satellite). Prior to that time, such firms were within the now-superseded category of "Paging." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior category and associated data. The data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, we estimate that the majority of paging firms are small.

109. In addition, in the *Paging Second Report and Order,* the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An initial auction of Metropolitan Economic Area ("MEA") licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. A subsequent auction of MEA and Economic Area ("EA") licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.

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

c. Internet Service Providers

111. The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (*e.g.,* cable and DSL ISPs), or over client-supplied telecommunications connections (*e.g.,* dial-up ISPs). The former are within the category of Wired Telecommunications Carriers, which has an SBA small business size standard of 1,500 or fewer employees. The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of $25 million or less. The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers. That category had a small business size standard of $21 million or less in annual receipts, which was revised in late 2005 to $23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year. Of those, 2,437 firms had annual receipts of under $10 million, and an additional 47 firms had receipts of between $10 million and $24, 999,999. Consequently, we estimate that the majority of ISP firms are small entities.

d. Vendors of Internal Connections

112. *Telephone Apparatus Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be standalone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways." The SBA has developed a small business size standard for Telephone Apparatus Manufacturing, which is: All such firms having 1,000 or fewer employees. According to Census Bureau data for 2002, there were a total of 518 establishments in this category that operated for the entire year. Of this total, 511 had employment of under 1,000, and an additional seven had employment of 1,000 to 2,499. Thus,

under this size standard, the majority of firms can be considered small.

113. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment." The SBA has developed a small business size standard for firms in this category, which is: All such firms having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

114. *Other Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment)." The SBA has developed a small business size standard for Other Communications Equipment Manufacturing, which is: All such firms having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 503 establishments in this category that operated for the entire year. Of this total, 493 had employment of under 500, and an additional 7 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

115. In the Report and Order, the Commission establishes a trial program—E-rate Deployed Ubiquitously (EDU) 2011 Pilot Program—to investigate the merits and challenges of wireless off-premises connectivity services, and to help the Commission determine whether they should ultimately be eligible for E-rate support. To be considered for first phase EDU2011 Program funding, E-rate eligible applicants must have implemented or already be in the process of implementing a program to provide off-premise connectivity to students or library patrons through the use of portable wireless devices. Applicants also must submit certain information to the Wireline Competition Bureau for review and consideration as part of the application process as part of this trial program. Specifically, 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 (July 1, 2011–June 30, 2012);

(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 Act (CIPA) 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 or 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.

As indicated above, we have assessed the effects of this trial program and find that any information submitted by the applicants to the Commission as part of this program will not significantly impact the burden on small businesses. The trial program is limited to schools and libraries that are already implementing or experimenting with wireless off-campus learning; therefore, any information collected from participants in this program is limited to information about their current projects.

F. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

116. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or part thereof, for small entities.

117. In this Report and Order, as detailed above, the Commission adopts a number of the proposals put forward in the *E-rate Broadband NPRM* to help realize the NBP's vision of improving connectivity to schools and libraries by upgrading and modernizing the successful E-rate program. We believe the reforms adopted in this Report and Order will not have a significant economic impact on small entities under the E-rate program. Rather, the reforms will benefit small entities by simplifying the application process, providing more flexibility to select and make available the most cost-effective broadband and other communications services, and improving safeguards against waste, fraud, and abuse, while ensuring that the amount of funding available keeps pace with the rate of inflation. Because this Report and Order does not adopt additional regulation for service providers and equipment vendors, these small entities will experience no significant additional burden.

G. Report to Congress

118. The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Second Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

H. Paperwork Reduction Act Analysis

119. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection

burden for small business concerns with fewer than 25 employees.

120. In this present document, we establish a trial program to investigate the merits and challenges of wireless off-premises connectivity services, and to help us determine whether and how they should ultimately be eligible for E-rate support. We have assessed the effects of this trial program and find that any information submitted by the applicants to the Commission as part of this program will not significantly impact the burden on small businesses. The trial program is limited to schools and libraries that are already implementing or planning to implement wireless off-campus learning; therefore, any information collected from participants in this program is limited to information about their current projects.

I. Congressional Review Act

121. The Commission will include a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 54

Communications Common Carriers, Health Facilities, Infants and Children, Libraries, Reporting and Recordkeeping requirements, Schools, Telecommunications, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 54 as follows:

PART 54—UNIVERSAL SERVICE

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

Authority: 47 U.S.C. 151, 154(i), 201, 205, 214, and 254 unless otherwise noted.

■ 2. Amend § 54.501 by revising the section heading, removing paragraph (a), redesignating paragraphs (b), (c), and (d) as paragraphs (a), (b), and (c), and revising newly redesignated paragraphs (a)(1), (b)(1), and (c)(1) to read as follows:

§ 54.501 Eligible recipients.

(a) *Schools.* (1) Only schools meeting the statutory definitions of "elementary school," as defined in 20 U.S.C. 7801(18), or "secondary school," as defined in 20 U.S.C. 7801(38), and not excluded under paragraphs (a)(2) or (3) of this section shall be eligible for discounts on telecommunications and other supported services under this subpart.

* * * * *

(b) *Libraries.* (1) Only libraries eligible for assistance from a State library administrative agency under the Library Services and Technology Act (Pub. L. 104–208) and not excluded under paragraphs (b)(2) or (3) of this section shall be eligible for discounts under this subpart.

* * * * *

(c) *Consortia.* (1) For purposes of seeking competitive bids for supported services, schools and libraries eligible for support under this subpart may form consortia with other eligible schools and libraries, with health care providers eligible under subpart G, and with public sector (governmental) entities, including, but not limited to, state colleges and state universities, state educational broadcasters, counties, and municipalities, when ordering telecommunications and other supported services under this subpart. With one exception, eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for interstate services under this subpart. A consortium may include ineligible private sector entities if the pre-discount prices of any services that such consortium receives are generally tariffed rates.

* * * * *

■ 3. Revise § 54.502 to read as follows:

§ 54.502 Eligible services.

(a) *Supported services.* Supported services are listed in the Eligible Services List as updated annually in accordance with paragraph (b) of this section. The services in this subpart will be supported in addition to all reasonable charges that are incurred by taking such services, such as state and federal taxes. Charges for termination liability, penalty surcharges, and other charges not included in the cost of taking such service shall not be covered by the universal service support mechanisms. These supported services fall within the following general categories:

(1) *Telecommunications services.* For purposes of this subpart, supported telecommunications services provided by telecommunications carriers include all commercially available telecommunications services.

(2) *Telecommunications.* For purposes of this subpart, supported telecommunications can be provided in whole or in part via fiber by any entity.

(3) *Internet access.* For purposes of this subpart, Internet access is as defined in § 54.5.

(4) *Internal connections and basic maintenance.* (i) For purposes of this subpart, a service is eligible for support as a component of an institution's internal connections if such service is necessary to transport information within one or more instructional buildings of a single school campus or within one or more non-administrative buildings that comprise a single library branch. Discounts are not available for internal connections in non-instructional buildings of a school or school district, or in administrative buildings of a library, to the extent that a library system has separate administrative buildings, unless those internal connections are essential for the effective transport of information to an instructional building of a school or to a non-administrative building of a library or the Commission has found that the use of those services meets the definition of educational purpose. Internal connections do not include connections that extend beyond a single school campus or single library branch. There is a rebuttable presumption that a connection does not constitute an internal connection if it crosses a public right-of-way.

(ii) For purposes of this subpart, basic maintenance services shall be eligible as an internal connections service if, but for the maintenance at issue, the internal connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services. Basic maintenance services do not include services that maintain equipment that is not supported or that enhance the utility of equipment beyond the transport of information, or diagnostic services in excess of those necessary to maintain the equipment's ability to transport information.

(iii) Each eligible school or library shall be eligible for support for internal connections services, except basic maintenance services, no more than twice every five funding years. For the purpose of determining eligibility, the five-year period begins in any funding year in which the school or library receives discounted internal connections services other than basic maintenance services. If a school or library receives internal connections services other than basic maintenance services that are shared with other schools or libraries (for example, as part of a consortium), the shared services will be attributed to the school or library

in determining whether it is eligible for support.

(b) *Eligible Services List.* (1) The Administrator shall submit by March 30 of each year a draft list of services eligible for support, based on the Commission's rules for the following funding year. The Wireline Competition Bureau will issue a Public Notice seeking comment on the Administrator's proposed eligible services list. At least 60 days prior to the opening of the window for the following funding year, the final list of services eligible for support will be released.

(2) All supported services are listed in the Eligible Services List as updated annually in accordance with paragraph (b)(1) of this section.

■ 4. Revise § 54.503 to read as follows:

§ 54.503 Competitive bidding requirements.

(a) All entities participating in the schools and libraries universal service support program must conduct a fair and open competitive bidding process, consistent with all requirements set forth in this subpart. Note to paragraph (a): The following is an illustrative list of activities or behaviors that would not result in a fair and open competitive bidding process: the applicant for supported services has a relationship with a service provider that would unfairly influence the outcome of a competition or would furnish the service provider with inside information; someone other than the applicant or an authorized representative of the applicant prepares, signs, and submits the FCC Form 470 and certification; a service provider representative is listed as the FCC Form 470 contact person and allows that service provider to participate in the competitive bidding process; the service provider prepares the applicant's FCC Form 470 or participates in the bid evaluation or vendor selection process in any way; the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process; an applicant employee with a role in the service provider selection process also has an ownership interest in the service provider seeking to participate in the competitive bidding process; and the applicant's FCC Form 470 does not describe the supported services with sufficient specificity to enable interested service providers to submit responsive bids.

(b) *Competitive Bid Requirements.* Except as provided in § 54.511(c), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under § 54.502. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.

(c) *Posting of FCC Form 470.* (1) An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall submit a completed FCC Form 470 to the Administrator to initiate the competitive bidding process. The FCC Form 470 and any request for proposal cited in the FCC Form 470 shall include, at a minimum, the following information, to the extent applicable with respect to the services requested:

(i) A list of specified services for which the school, library, or consortia including such entities, anticipates they are likely to seek discounts; and

(ii) Sufficient information to enable bidders to reasonably determine the needs of the applicant.

(2) The FCC Form 470 shall be signed by the person authorized to order eligible services for the eligible school, library, or consortium including such entities and shall include that person's certification under oath that:

(i) The schools meet the statutory definition of elementary and secondary schools found under section 254(h) of the Act, as amended in the No Child Left Behind Act of 2001, 20 U.S.C. 7801(18) and (38), do not operate as for-profit businesses, and do not have endowments exceeding $50 million;

(ii) The libraries or library consortia eligible for assistance from a State library administrative agency under the Library Services and Technology Act of 1996 do not operate as for-profit businesses and whose budgets are completely separate from any school (including, but not limited to, elementary and secondary schools, colleges, and universities).

(iii) All of the individual schools, libraries, and library consortia receiving services are or will be covered by:

(A) Technology plans for using the services requested in the application; or

(B) No technology plan is required by Commission rules.

(iv) To the extent a technology plan is required by § 54.508, the technology plan(s) has/have been/will be approved consistent with § 54.508.

(v) The services the school, library, or consortium purchases at discounts will be used primarily for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value, except as allowed by § 54.513.

(vi) Support under this support mechanism is conditional upon the school(s) and library(ies) securing access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections necessary to use the services purchased effectively.

(vii) All bids submitted for eligible products and services will be carefully considered, with price being the primary factor, and the bid selected will be for the most cost-effective service offering consistent with § 54.511.

(3) The Administrator shall post each FCC Form 470 that it receives from an eligible school, library, or consortium that includes an eligible school or library on its website designated for this purpose.

(4) After posting on the Administrator's website an eligible school's, library's, or consortium's FCC Form 470, the Administrator shall send confirmation of the posting to the entity requesting service. That entity shall then wait at least four weeks from the date on which its description of services is posted on the Administrator's website before making commitments with the selected providers of services. The confirmation from the Administrator shall include the date after which the requestor may sign a contract with its chosen provider(s).

(d) *Gift Restrictions.* (1) Subject to paragraphs (d)(3) and (4) of this section, an eligible school, library, or consortium that includes an eligible school or library may not directly or indirectly solicit or accept any gift, gratuity, favor, entertainment, loan, or any other thing of value from a service provider participating in or seeking to participate in the schools and libraries universal service program. No such service provider shall offer or provide any such gift, gratuity, favor, entertainment, loan, or other thing of value except as otherwise provided herein. Modest refreshments not offered as part of a meal, items with little intrinsic value intended solely for presentation, and items worth $20 or less, including meals, may be offered or provided, and accepted by any individuals or entities subject to this rule, if the value of these items received by any individual does not exceed $50 from any one service provider per funding year. The $50 amount for any service provider shall be calculated as the aggregate value of all gifts provided during a funding year by the individuals specified in paragraph (d)(2)(ii) of this section.

(2) For purposes of this paragraph:

(i) The terms "school, library, or consortium" include all individuals who are on the governing boards of such

entities (such as members of a school committee), and all employees, officers, representatives, agents, consultants or independent contractors of such entities involved on behalf of such school, library, or consortium with the Schools and Libraries Program of the Universal Service Fund (E-rate Program), including individuals who prepare, approve, sign or submit E-rate applications, technology plans, or other forms related to the E-rate Program, or who prepare bids, communicate or work with E-rate service providers, E-rate consultants, or with USAC, as well as any staff of such entities responsible for monitoring compliance with the E-rate Program; and

(ii) The term "service provider" includes all individuals who are on the governing boards of such an entity (such as members of the board of directors), and all employees, officers, representatives, agents, or independent contractors of such entities.

(3) The restrictions set forth in this paragraph shall not be applicable to the provision of any gift, gratuity, favor, entertainment, loan, or any other thing of value, to the extent given to a family member or a friend working for an eligible school, library, or consortium that includes an eligible school or library, provided that such transactions:

(i) Are motivated solely by a personal relationship,

(ii) Are not rooted in any service provider business activities or any other business relationship with any such eligible school, library, or consortium, and

(iii) Are provided using only the donor's personal funds that will not be reimbursed through any employment or business relationship.

(4) Any service provider may make charitable donations to an eligible school, library, or consortium that includes an eligible school or library in the support of its programs as long as such contributions are not directly or indirectly related to E-rate procurement activities or decisions and are not given by service providers to circumvent competitive bidding and other E-rate program rules, including those in paragraph (c)(2)(vi) of this section, requiring schools and libraries to pay their own non-discount share for the services they are purchasing.

■ 5. Revise § 54.504 to read as follows:

§ 54.504 Requests for services.

(a) *Filing of the FCC Form 471.* An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall, upon signing a contract for eligible services, submit a completed FCC Form 471 to the Administrator. A commitment of support is contingent upon the filing of an FCC Form 471.

(1) The FCC Form 471 shall be signed by the person authorized to order eligible services for the eligible school, library, or consortium and shall include that person's certification under oath that:

(i) The schools meet the statutory definition of elementary and secondary schools found under section 254(h) of the Act, as amended in the No Child Left Behind Act of 2001, 20 U.S.C. 7801(18) and (38), do not operate as for-profit businesses, and do not have endowments exceeding $50 million.

(ii) The libraries or library consortia eligible for assistance from a State library administrative agency under the Library Services and Technology Act of 1996 do not operate as for-profit businesses and whose budgets are completely separate from any school (including, but not limited to, elementary and secondary schools, colleges, and universities).

(iii) The entities listed on the FCC Form 471 application have secured access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections, necessary to make effective use of the services purchased, as well as to pay the discounted charges for eligible services from funds to which access has been secured in the current funding year. The billed entity will pay the non-discount portion of the cost of the goods and services to the service provider(s).

(iv) All of the schools and libraries listed on the FCC Form 471 application are or will be covered by:

(A) Technology plan(s) for using the services requested in the application; or

(B) No technology plan is required by Commission rules.

(v) To the extent a technology plan is required by § 54.508, status of technology plan(s) has/have been approved or will be approved by a state or other authorized body.

(vi) The entities listed on the FCC Form 471 application have complied with all applicable state and local laws regarding procurement of services for which support is being sought.

(vii) The services the school, library, or consortium purchases at discounts will be used primarily for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value, except as allowed by § 54.513.

(viii) The entities listed in the application have complied with all program rules and acknowledge that failure to do so may result in denial of discount funding and/or recovery of funding.

(ix) The applicant understands that the discount level used for shared services is conditional, for future years, upon ensuring that the most disadvantaged schools and libraries that are treated as sharing in the service, receive an appropriate share of benefits from those services.

(x) The applicant recognizes that it may be audited pursuant to its application, that it will retain for five years any and all worksheets and other records relied upon to fill out its application, and that, if audited, it will make such records available to the Administrator.

(xi) All bids submitted to a school, library, or consortium seeking eligible services were carefully considered and the most cost-effective bid was selected in accordance with § 54.503 of this subpart, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals.

(2) [Reserved]

(b) *Mixed eligibility requests.* If 30 percent or more of a request for discounts made in an FCC Form 471 is for ineligible services, the request shall be denied in its entirety.

(c) *Rate disputes.* Schools, libraries, and consortia including those entities, and service providers may have recourse to the Commission, regarding interstate rates, and to state commissions, regarding intrastate rates, if they reasonably believe that the lowest corresponding price is unfairly high or low.

(1) Schools, libraries, and consortia including those entities may request lower rates if the rate offered by the carrier does not represent the lowest corresponding price.

(2) Service providers may request higher rates if they can show that the lowest corresponding price is not compensatory, because the relevant school, library, or consortium including those entities is not similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price.

(d) *Service substitution.* (1) The Administrator shall grant a request by an applicant to substitute a service or product for one identified on its FCC Form 471 where:

(i) The service or product has the same functionality;

(ii) The substitution does not violate any contract provisions or state or local procurement laws;

(iii) The substitution does not result in an increase in the percentage of ineligible services or functions; and

(iv) The applicant certifies that the requested change is within the scope of the controlling FCC Form 470, including any associated Requests for Proposal, for the original services.

(2) In the event that a service substitution results in a change in the pre-discount price for the supported service, support shall be based on the lower of either the pre-discount price of the service for which support was originally requested or the pre-discount price of the new, substituted service.

(3) For purposes of this rule, the broad categories of eligible services (telecommunications service, Internet access, and internal connections) are not deemed to have the same functionality with one another.

(e) *Mixed eligibility services.* A request for discounts for a product or service that includes both eligible and ineligible components must allocate the cost of the contract to eligible and ineligible components.

(1) *Ineligible components.* If a product or service contains ineligible components, costs must be allocated to the extent that a clear delineation can be made between the eligible and ineligible components. The delineation must have a tangible basis, and the price for the eligible portion must be the most cost-effective means of receiving the eligible service.

(2) *Ancillary ineligible components.* If a product or service contains ineligible components that are ancillary to the eligible components, and the product or service is the most cost-effective means of receiving the eligible component functionality, without regard to the value of the ineligible component, costs need not be allocated between the eligible and ineligible components. Discounts shall be provided on the full cost of the product or service. An ineligible component is "ancillary" if a price for the ineligible component cannot be determined separately and independently from the price of the eligible components, and the specific package remains the most cost-effective means of receiving the eligible services, without regard to the value of the ineligible functionality.

(3) The Administrator shall utilize the cost allocation requirements of this subparagraph in evaluating mixed eligibility requests under paragraph (e)(1) of this section.

(f) *Filing of FCC Form 473.* All service providers eligible to provide telecommunications and other supported services under this subpart shall submit annually a completed FCC Form 473 to the Administrator. The FCC Form 473 shall be signed by an authorized person and shall include that person's certification under oath that:

(1) The prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to those prices, the intention to submit an offer, or the methods or factors used to calculate the prices offered;

(2) The prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program will not be knowingly disclosed by this service provider, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt will be made by this service provider to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

■ 6. Amend § 54.505 by revising paragraph (b)(4) to read as follows:

§ 54.505 Discounts.

* * * * *

(b) * * *

(4) School districts, library systems, or other billed entities shall calculate discounts on supported services described in § 54.502(b) that are shared by two or more of their schools, libraries, or consortia members by calculating an average based on the applicable discounts of all member schools and libraries. School districts, library systems, or other billed entities shall ensure that, for each year in which an eligible school or library is included for purposes of calculating the aggregate discount rate, that eligible school or library shall receive a proportionate share of the shared services for which support is sought. For schools, the average discount shall be a weighted average of the applicable discount of all schools sharing a portion of the shared services, with the weighting based on the number of students in each school. For libraries, the average discount shall be a simple average of the applicable discounts to which the libraries sharing a portion of the shared services are entitled.

* * * * *

§ 54.506 [Removed and Reserved]

■ 7. Remove and reserve § 54.506.

■ 8. Amend § 54.507 by revising paragraphs (a), (g) introductory text, and (g)(1)(i), to read as follows:

§ 54.507 Cap.

(a) *Amount of the annual cap.* In funding year 2010 and subsequent funding years, the $2.25 billion funding cap on federal universal service support for schools and libraries shall be automatically increased annually to take into account increases in the rate of inflation as calculated in paragraph (a)(1) of this section.

(1) *Increase Calculation.* To measure increases in the rate of inflation for the purposes of this paragraph (a), the Commission shall use the Gross Domestic Product Chain-type Price Index (GDP–CPI). To compute the annual increase as required by this paragraph (a), the percentage increase in the GDP–CPI from the previous year will be used. For instance, the annual increase in the GDP–CPI from 2008 to 2009 would be used for the 2010 funding year. The increase shall be rounded to the nearest 0.1 percent by rounding 0.05 percent and above to the next higher 0.1 percent and otherwise rounding to the next lower 0.1 percent. This percentage increase shall be added to the amount of the annual funding cap from the previous funding year. If the yearly average GDP–CPI decreases or stays the same, the annual funding cap shall remain the same as the previous year.

(2) *Public notice.* When the calculation of the yearly average GDP–CPI is determined, the Wireline Competition Bureau shall publish a public notice in the **Federal Register** within 60 days announcing any increase of the annual funding cap based on the rate of inflation.

(3) *Amount of unused funds.* All funds collected that are unused shall be carried forward into subsequent funding years for use in the schools and libraries support mechanism in accordance with the public interest and notwithstanding the annual cap.

(i) The Administrator shall report to the Commission, on a quarterly basis, funding that is unused from prior years of the schools and libraries support mechanism.

(ii) *Application of unused funds.* On an annual basis, in the second quarter of each calendar year, all funds that are collected and that are unused from prior years shall be available for use in the next full funding year of the schools and libraries mechanism in accordance with the public interest and notwithstanding

the annual cap as described in this paragraph (a).

* * * * *

(g) *Rules of priority.* The Administrator shall act in accordance with paragraph (g)(1) of this section with respect to applicants that file an FCC Form 471, as described in § 54.504(a), when a filing period described in paragraph (c) of this section is in effect. The Administrator shall act in accordance with paragraph (g)(2) of this section with respect to applicants that file an FCC Form 471, as described in § 54.504(a), at all times other than within a filing period described in paragraph (c) of this section.

(1) * * *

(i) Schools and Libraries Corporation shall first calculate the demand for telecommunications, telecommunications services, voice-mail, and Internet access for all discount categories as determined by the schools and libraries discount matrix in § 54.505(c). These services shall receive first priority for the available funding.

* * * * *

■ 9. Revise § 54.508 to read as follows:

§ 54.508 Technology plans.

(a) Applicants must develop a technology plan when requesting discounts for internal connections and basic maintenance for internal connections. Applicants must document the date on which the technology plan was created. The technology plan must include the following elements:

(1) A clear statement of goals and a realistic strategy for using telecommunications and information technology to improve education or library services;

(2) A professional development strategy to ensure that the staff understands how to use these new technologies to improve education or library services;

(3) An assessment of the telecommunication services, hardware, software, and other services that will be needed to improve education or library services; and

(4) An evaluation process that enables the school or library to monitor progress toward the specified goals and make mid-course corrections in response to new developments and opportunities as they arise.

(b) *Relevance of approval under Enhancing Education through Technology.* Technology plans that meet the standards of the U.S. Department of Education's Enhancing Education Through Technology (EETT), 20 U.S.C. 6764, are sufficient for satisfying paragraphs (a)(1) through (4) of this section. Furthermore, to the extent that the U.S. Department of Education adopts future technology plan requirements that require one or more of the four elements described in paragraph (a) of this section, such plans will be acceptable for satisfying those elements of paragraph (a) of this section. Applicants with such plans will only need to supplement such plans with the analysis needed to satisfy those elements of paragraph (a) of this section not covered by the future Department of Education technology plan requirements.

(c) *Timing of certification.* As required under §§ 54.503(c)(2)(iii) and 54.504(a)(1)(iv), applicants must certify that they have prepared any required technology plans. They must also confirm, in FCC Form 486, that their plan was approved before they began receiving services pursuant to it.

(d) *Parties qualified to approve technology plans required in this subpart.* Applicants required to prepare and obtain approval of technology plans under this subpart must obtain such approval from either their state, the Administrator, or an independent entity approved by the Commission or certified by the Administrator as qualified to provide such approval. All parties who will provide such approval must apply the standards set forth in paragraphs (a) and (b) of this section.

■ 10. Amend § 54.511 by revising paragraphs (a), (c)(1) introductory text, (c)(1)(ii), and (d)(1), and removing paragraph (c)(3).

The revisions read as follows:

§ 54.511 Ordering services.

(a) *Selecting a provider of eligible services.* In selecting a provider of eligible services, schools, libraries, library consortia, and consortia including any of those entities shall carefully consider all bids submitted and must select the most cost-effective service offering. In determining which service offering is the most cost-effective, entities may consider relevant factors other than the pre-discount prices submitted by providers, but price should be the primary factor considered.

* * * * *

(c) *Existing contracts.* (1) A signed contract for services eligible for discounts pursuant to this subpart between an eligible school or library as defined under § 54.501 or consortium that includes an eligible school or library and a service provider shall be exempt from the requirements set forth in § 54.503 as follows:

* * * * *

(ii) A contract signed after July 10, 1997, but before the date on which the universal service competitive bid system described in § 54.503 is operational, is exempt from the competitive bid requirements only with respect to services that are provided under such contract between January 1, 1998 and December 31, 1998.

* * * * *

(d)(1) The exemption from the competitive bid requirements set forth in paragraph (c) of this section shall not apply to voluntary extensions or renewals of existing contracts.

* * * * *

■ 11. Amend § 54.513 by revising paragraph (a) and redesignating paragraphs (b) and (c) as paragraphs (c) and (d) and adding new paragraph (b) to read as follows:

§ 54.513 Resale and transfer of services.

(a) *Prohibition on resale.* Eligible supported services provided at a discount under this subpart shall not be sold, resold, or transferred in consideration of money or any other thing of value, except as provided in paragraph (b) of this section.

(b) *Disposal of obsolete equipment components of eligible services.* Eligible equipment components of eligible services purchased at a discount under this subpart shall be considered obsolete if the equipment components have has been installed for at least five years. Obsolete equipment components of eligible services may be resold or transferred in consideration of money or any other thing of value, disposed of, donated, or traded.

* * * * *

§ 54.517 [Removed and Reserved]

■ 12. Remove and Reserve § 54.517.

■ 13. Revise § 54.518 to read as follows:

§ 54.518 Support for wide area networks.

To the extent that schools, libraries or consortia that include an eligible school or library build or purchase a wide area network to provide telecommunications services, the cost of such wide area networks shall not be eligible for universal service discounts provided under this subpart.

■ 14. Revise § 54.519 by revising paragraphs (a) introductory text, (a)(6), and (b) to read as follows:

§ 54.519 State telecommunications networks.

(a) *Telecommunications services.* State telecommunications networks may secure discounts under the universal service support mechanisms on supported telecommunications services

(as described in § 54.502(a)) on behalf of eligible schools and libraries (as described in § 54.501) or consortia that include an eligible school or library. Such state telecommunications networks shall pass on such discounts to eligible schools and libraries and shall:

* * * * *

(6) Comply with the competitive bid requirements set forth in § 54.503.

(b) *Internet access and installation and maintenance of internal connections.* State telecommunications networks either may secure discounts on Internet access and installation and maintenance of internal connections in the manner described in paragraph (a) of this section with regard to telecommunications, or shall be eligible, consistent with § 54.502(a), to receive universal service support for providing such services to eligible schools, libraries, and consortia including those entities.

§ 54.522 [Removed and Reserved]

■ 15. Remove and reserve § 54.522.

[FR Doc. 2010–29386 Filed 12–2–10; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 0906221072–91425–02]

RIN 0648–XA052

Atlantic Highly Migratory Species; Inseason Action To Close the Commercial Non-Sandbar Large Coastal Shark Fishery in the Atlantic Region

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Fishery closures.

SUMMARY: NMFS is closing the commercial fishery for non-sandbar large coastal sharks (LCS) in the Atlantic region. This action is necessary because landings in this fishery have exceeded 80 percent of the available quota.

DATES: The commercial non-sandbar LCS fishery in the Atlantic region is closed effective 11:30 p.m. local time, December 5, 2010, until the effective date of the final 2011 shark season specifications, which NMFS will publish as a separate document in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz or Guy DuBeck, 301–713–2347; (fax) 301–713–1917.

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the 2006 Consolidated Atlantic Highly Migratory Species (HMS) Fishery Management Plan (FMP), its amendments, and its implementing regulations found at 50 CFR part 635 issued under authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

Under § 635.5(b)(1), shark dealers are required to report to NMFS all sharks landed every two weeks. Dealer reports for fish received between the 1st and 15th of any month must be received by NMFS by the 25th of that month. Dealer reports for fish received between the 16th and the end of any month must be received by NMFS by the 10th of the following month. Under § 635.28(b)(2), when NMFS projects that fishing season landings for a species group have reached or are about to reach 80 percent of the available quota, NMFS will file for publication with the Office of the Federal Register a notice of closure for that shark species group that will be effective no fewer than 5 days from the date of filing. From the effective date and time of the closure until NMFS announces, via a notice in the **Federal Register**, that additional quota is available and the season is reopened, the fishery for that species group is closed, even across fishing years.

On January 5, 2010 (75 FR 250), NMFS announced that the non-sandbar LCS fishery quota in the Atlantic region for the 2010 fishing year would be 169.7 metric tons (mt) dressed weight (dw) (374,121 lb dw). Dealer reports through October 31, 2010, indicate that 142 mt dw or 83.6 percent of the available quota for non-sandbar LCS Atlantic fishery has been landed. The fishery has to date reached 83.6 percent of the quota, which exceeds the 80 percent limit specified in the regulations. Dealer reports received to date indicate that 13.1 percent of the quota was landed from the opening of the fishery on July 15, 2010, through July 31, 2010; 31.9 percent of the quota was landed in August; 22.9 percent of the quota was landed in September; and 15.7 percent of the quota was landed in October. Accordingly, NMFS is closing the commercial non-sandbar LCS fishery in the Atlantic region as of 11:30 p.m. local time, December 5, 2010. This closure does not affect any other shark fishery.

As such, as of 11:30 p.m. local time, December 5, 2010, all commercial non-sandbar LCS fisheries in all regions and fisheries will be closed. All of the pelagic shark fisheries will remain open.

During this closure, a fishing vessel, issued an Atlantic Shark LAP, pursuant to § 635.4, may not possess or sell a non-sandbar LCS. A shark dealer, issued a permit pursuant to § 635.4, may not purchase or receive non-sandbar LCS from a vessel issued an Atlantic Shark LAP, except that a permitted shark dealer or processor may possess sharks that were harvested, off-loaded, and sold, traded, or bartered, prior to the effective date of the closure and were held in storage. Additionally, a shark dealer issued a Federal permit, pursuant to § 635.4, may in accordance with state regulations, purchase or receive a non-sandbar LCS if the shark was harvested, off-loaded, and sold, traded, or bartered from a vessel that fishes only in state waters and had not been issued an Atlantic Shark LAP, HMS Angling permit, or HMS Charter/Headboat permit pursuant to § 635.4.

Classification

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries, NOAA (AA), finds that providing for prior notice and public comment for this action is impracticable and contrary to the public interest because the fisheries are currently under way, and any delay in this action would cause overharvest of the quotas and be inconsistent with management requirements and objectives. Similarly, affording prior notice and opportunity for public comment on this action is contrary to the public interest because if the quotas are exceeded, the affected public is likely to experience reductions in the available quotas and a lack of fishing opportunities in future seasons. Thus, for these reasons, the AA also finds good cause to waive the 30-day delay in effective date pursuant to 5 U.S.C. 553(d)(3). This action is required under 50 CFR 635.28(b)(2) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 30, 2010.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–30389 Filed 11–30–10; 4:15 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 090428799–9802–01]

RIN 0648–BA44

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Inseason Adjustments to Fishery Management Measures

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule; inseason adjustments to biennial groundfish management measures; request for comments.

SUMMARY: This final rule makes inseason adjustments to commercial and tribal fishery management measures for several groundfish species taken in the U.S. exclusive economic zone (EEZ) off the coasts of Washington, Oregon, and California. These actions, which are authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP), are intended to allow fisheries to access more abundant groundfish stocks while protecting overfished and depleted stocks.

DATES: Effective 0001 hours (local time) December 1, 2010. Comments on this final rule must be received no later than 5 p.m., local time on January 3, 2011.

ADDRESSES: You may submit comments, identified by RIN 0648–BA44, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Fax:* 206–526–6736, Attn: Gretchen Hanshew.
- *Mail:* William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way, NE., Seattle, WA 98115–0070, Attn: Gretchen Hanshew.

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.

FOR FURTHER INFORMATION CONTACT: Gretchen Hanshew (Northwest Region, NMFS), 206–526–6147, fax: 206–526–6736, *gretchen.hanshew@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Access

This final rule is accessible via the Internet at the Office of the **Federal Register's** Web site at *http://www.gpoaccess.gov/fr/index.html.* Background information and documents are available at the Pacific Fishery Management Council's (the Council or PFMC) Web site at *http://www.pcouncil.org/.*

Background

On December 31, 2008, NMFS published a proposed rule to implement the 2009–2010 specifications and management measures for the Pacific Coast groundfish fishery (73 FR 80516). The final rule to implement the 2009–2010 specifications and management measures for the Pacific Coast Groundfish Fishery was published on March 6, 2009 (74 FR 9874). This final rule was subsequently amended by inseason actions on April 27, 2009 (74 FR 19011), July 6, 2009 (74 FR 31874), October 28, 2009 (74 FR 55468), February 26, 2010 (75 FR 8820), May 4, 2010 (75 FR 23620), July 1, 2010 (75 FR 38030), July 16, 2010 (75 FR 41386), August 23, 2010 (75 FR 51684); and October 4, 2010 (75 FR 61102). Additional changes to the 2009–2010 specifications and management measures for petrale sole were made in two final rules: On November 4, 2009 (74 FR 57117), and December 10, 2009 (74 FR 65480). NMFS issued a final rule in response to a duly issued court order on July 8, 2010 (75 FR 39178). NMFS also issued a final rule to implement Amendments 20 and 21 to the Pacific Coast Groundfish Fishery Management Plan (FMP) on October 1, 2010 (75 FR 60868). The October 1, 2010 final rule, in part, re-organized the entire Pacific Coast Groundfish Fishery Regulations. Because of the restructuring, beginning on November 1, 2010, these specifications and management measures are at 50 CFR part 660, subparts C through G.

Changes to the groundfish management measures implemented by this action were recommended by the Council, in consultation with Pacific Coast Treaty Indian Tribes and the States of Washington, Oregon, and California, at its November 2–10, 2010, meeting in Costa Mesa, CA. The Council recommended adjusting the groundfish management measures to respond to updated fishery information and other inseason management needs. These changes include: Expansion of the trawl Rockfish Conservation Area (RCA) and a closure of the minor slope rockfish and darkblotched rockfish fishing in the limited entry trawl commercial fisheries off Washington, Oregon, and northern California (north of 40°10′ N. lat.); reductions to sector specific bycatch limits of darkblotched rockfish for all sectors of the primary Pacific whiting fishery; reductions to daily trip limits (DTL) for sablefish in the limited entry fixed gear fishery south of 36° N. lat. and a closure of the open access commercial fisheries for sablefish in that same area; increases to sablefish DTL limits in the limited entry fixed gear and open access commercial fisheries north of 36° N. lat.; and changes to the Makah tribal midwater trawl fishery management measures.

Limited Entry Trawl Fishery

At their November 2–10, 2010, meeting, the Council received new data and analyses on the catch of groundfish in the limited entry non-whiting trawl fishery. As described below, the Council considered inseason actions to reduce the mortality of darkblotched rockfish in the limited entry non-whiting trawl fishery and the limited entry primary season whiting fishery, the fisheries in which most darkblotched rockfish are taken. Cumulative limit fishing Period 6, November-December, was already underway by the Council's November meeting. Because the new information was available so late in the year, making inseason changes to fishing regulations as quickly as possible can only affect the last 4–5 weeks of the year.

The Council uses a model to predict annual groundfish mortality in the limited entry non-whiting trawl fishery. At the November 2010 meeting, the Groundfish Management Team (GMT), an advisory body to the Council, determined that the model was underestimating the mortality of darkblotched rockfish. The model uses historical data, weighted more heavily towards the most recent year, to predict how current management measures will affect the mortality of groundfish species. The model has limited ability to account for recent, large-scale shifts in fishing effort and target catch species composition for use in its projection of bycatch species' total mortality.

Instead of relying solely on the model projections, which were by then understood to be too low for

darkblotched rockfish, the GMT made an adjustment to the model to produce a better estimate of the mortality of darkblotched rockfish through the end of 2010. The GMT used the best inseason estimates of landings of darkblotched rockfish, through October 2010, to project what the darkblotched rockfish landings may be through the rest of the year. An assumption was also made about the discard rate (assumed to be 50 percent of the darkblotched total mortality, a 5-year average, weighted toward the most recent data) to estimate how much darkblotched rockfish was discarded in 2010, and that discard mortality estimate was added to the landed mortality estimate to produce an estimate of total mortality of darkblotched rockfish through the end of the year. Using the adjusted projection, the GMT projected that 335 mt of darkblotched rockfish would be caught in the limited entry non-whiting trawl fishery, through the end of the year, if no action were taken to reduce impacts. This level of mortality in the limited entry non-whiting trawl fishery, combined with projected impacts to darkblotched rockfish from all other fisheries, would exceed the 2010 darkblotched rockfish OY of 330 mt by 53 mt, or approximately 16 percent.

Darkblotched rockfish total mortality is highly variable, largely due to the high variability in the discard rate and its sensitivity to area closures and slope rockfish trip limits. Because the adjusted projection of darkblotched rockfish mortality assumed a discard rate, which is known to be highly variable, the point estimate of the total mortality for darkblotched rockfish in the limited entry non-whiting trawl fishery is highly uncertain. If the actual 2010 trawl discard rate is lower than assumed, total mortality, which includes mortality estimates from all other sources, of darkblotched rockfish could actually be well below the 2010 OY. If the actual 2010 discard rate is higher than assumed, total mortality of darkblotched rockfish could actually be higher than projected. However, NMFS anticipates that the assumed bycatch rate of 50 percent may be higher than the actual discard rate for early 2010 because landings were very high from January–April, when there was a large trip limit in place. It is very likely that, with the high landings early in the year, discards during this time were much lower than 50 percent. If that is the case, the adjusted projection that resulted in a projected impact of 335 mt of darkblotched rockfish is more likely to be an overestimate.

The Council considered and recommended expanding the northern trawl RCA seaward as soon as possible after their November meeting, for the remainder of 2010, in order to close areas where darkblotched rockfish are encountered, and to therefore lower impacts to darkblotched rockfish. The Council also considered and recommended reductions to the trip limits for "minor slope rockfish and darkblotched rockfish" to lower the landings of darkblotched rockfish through the end of the year. These changes to management measures are intended reduce the total mortality of darkblotched rockfish. Using the adjusted projection, assuming a 50 percent discard rate, the GMT projected 298 mt of darkblotched rockfish mortality in the limited entry non-whiting trawl fishery through the end of the year if the RCA was expanded and the trip limits were "closed" on December 1, 2011. Reducing a two-month limit in the middle of the period has limited effectiveness, because many vessels may have already taken their full limit, and others could swiftly take theirs before the recommended reduction can be implemented. Nonetheless, the trip limits for slope and darkblotched rockfish are being reduced to zero, as of December 1, 2010. Because the new fishery information and analyses were available so late in the year, the options for restrictions to fishery management measures that would reduce darkblotched rockfish impacts are limited. However, the restrictions proposed for the last 4–5 weeks of the year in the limited entry non-whiting trawl fishery are anticipated to reduce the projected total impacts to darkblotched rockfish by approximately 37 mt.

The Council did not recommend changes to management measures in the limited entry non-whiting trawl fishery south of 40°10′ N. lat. to reduce impacts to darkblotched rockfish. This is because only a very small amount of darkblotched rockfish are encountered in the limited entry non-whiting trawl fishery south of 40°10′ N. lat., and even drastic restrictions were not projected to reduce impacts by an appreciable amount.

Based on the considerations outlined above, the Council recommended and NMFS is implementing the following changes to the trawl RCA and cumulative limits in the limited entry non-whiting trawl fishery North of 40°10′ N. lat.: Modify the November-December 2010 bi-monthly cumulative limit from "4,000 lb per two months" to "4,000 lb per month" for the month of November only, effective on December 1, 2010; decrease the minor slope rockfish and darkblotched rockfish bi-monthly cumulative limit in December to "CLOSED" beginning on December 1, 2010 through the end of the year; and shift the seaward boundary of the trawl RCA from "the boundary line approximating the 200 fm depth contour and modified to allow fishing for petrale sole" to "the boundary line approximating the 250 fm depth contour" beginning on December 1, 2010 through the end of the year.

The Council also considered restrictions in the limited entry Pacific whiting midwater trawl fishery to reduce the potential harvest of darkblotched rockfish at the end of the year. The Pacific whiting fishery is managed with sector specific bycatch limits for several species, one of which is darkblotched rockfish. Several thousand metric tons of Pacific whiting have yet to be harvested in this fishery through the end of the year. Historical information and anecdotal testimony indicate that darkblotched bycatch in the whiting fishery is lower later in the year. Therefore, there is a considerable amount of the darkblotched rockfish bycatch limits that will likely go unharvested. The most recent fishery information, available on November 4, 2010, indicated that: The catcher/processor sector had taken only 2.3 mt of their 8.5 mt darkblotched rockfish bycatch limit, had 17 percent of their whiting allocation remaining to be harvested, and was continuing to fish; the mothership sector had taken 5.5 mt of their 6.0 mt darkblotched rockfish bycatch limit, had only 2,000 mt of their whiting allocation remaining, and was unlikely to harvest this remaining amount; and the shorebased sector had taken only 4.0 mt of their 10.5 mt darkblotched rockfish bycatch limit, had 17 percent left of their whiting allocation, and it was likely that only a few vessels would continue to fish for whiting. Fishers in the Pacific whiting fishery informed the Council that it was their intent to fish deeper than 170 fm, which is beyond the area in which the majority of darkblotched are encountered, to help ensure that darkblotched catch would remain much lower than their bycatch limits. The Council considered reductions to the sector specific bycatch limits for darkblotched rockfish that would reduce the remaining potential impacts in the primary whiting fishery, while still allowing the fishery to harvest their remaining allocations of Pacific whiting

Based on the considerations outlined above, the Council recommended and NMFS is implementing the following changes to the sector specific bycatch limits for darkblotched rockfish in the limited entry Pacific whiting midwater

trawl fishery, beginning on December 1: Reduce the darkblotched rockfish bycatch limit for the catcher/processor sector from 8.5 mt to 5.5 mt (of which 2.3 mt had already be taken); reduce the darkblotched rockfish bycatch limit for the mothership sector from 6.0 mt to 5.5 mt (which had already been taken); and reduce the darkblotched rockfish bycatch limit for the shorebased sector from 10.5 mt to 5.0 mt (of which 4.0 mt had already been taken). It appears that 4.2 mt of darkblotched rockfish was available for harvest in this fishery as of November 1, 2010, through the end of the year, some of which may already be taken before this action is effective.

With the changes to fishery management measures described above, the total projected impacts to darkblotched rockfish through the end of the year is 337 mt, which exceeds the 2010 darkblotched rockfish OY of 330 mt by 7 mt, or approximately 2 percent. The projected impact of 337 mt includes 298 mt from the limited entry non-whiting trawl fishery and also assumes that all sectors of the Pacific whiting fishery will catch their entire revised sector specific darkblotched rockfish bycatch limits (that is, the 4.2 mt was available for harvest in this fishery as of November 1, 2010, through the end of the year). As described above, the adjusted projection for the limited entry non-whiting trawl fishery are highly uncertain and is likely to be an overestimate of impacts. In addition, it is unlikely that the catcher processor and shorebased sectors will catch their entire sector specific bycatch limits of darkblotched rockfish this year. Based on these considerations, and with the restrictions to the limited entry trawl fishery and the precautionary measures that the Pacific whiting fishers will take to avoid bycatch of darkblotched rockfish, it is probable that the actual total mortality of darkblotched rockfish will be kept below the 2010 OY of 330 mt. The most accurate 2010 discard rate of darkblotched rockfish in the non-whiting trawl fishery, and the total mortality of darkblotched rockfish in the entire groundfish fishery, will only be known after the west coast groundfish observer program publishes the 2010 total mortality report, between July 2011 and January 2012.

Sablefish Daily Trip Limit Fishery North of 36° N. Lat.

The Council considered increases to sablefish trip limits for the Limited Entry and Open Access Daily Trip Limit (DTL) fisheries north of 36° N. lat. at their June and September 2010 meetings. Trip limits were modestly increased for the Limited Entry DTL fishery after the June 2010 meeting because that fishery was tracking lower than anticipated. Changes to management measures were not recommended for either sector at the September 2010 meeting because available information indicated that catches were tracking similar to anticipated levels for the limited entry fixed gear fishery, and there was a possibility of effort shifts from south to north of 36° N. latitude due to trip-limit reductions to sablefish in the south. Catch of sablefish in the limited entry fixed gear and open access daily trip limit (DTL) fisheries north of 36° N. lat. are anticipated to be below their allocations. Based on the most recent fishery information, if no action is taken and catch remains lower than expected, landings of sablefish through the end of the year would be: 281 mt, or 88 percent of the limited entry fixed gear sablefish DTL fishery allocation of 321 mt; and 435 mt, or 82 percent of the open access fishery sablefish allocation of 529 mt. The Council considered options for trip limit increases in the limited entry fixed gear and open access sablefish DTL fisheries north of 36° N. lat. to allow these fisheries to attain a higher proportion of their sablefish allocations, while keeping total projected catch below the 2010 sablefish OY for the area north of 36° N. lat.

Projected impacts to overfished species in the limited entry fixed gear and open access fisheries are calculated assuming the entire sablefish OY is harvested. Therefore, increases to trip limits to allow additional fishing opportunities do not result in changes to projected impacts to co-occurring overfished groundfish species. The total projected impacts to darkblotched rockfish in the limited entry fixed gear and open access fisheries are very low.

Based on the considerations outlined above, the Council recommended and NMFS is implementing a modest increase in the limited entry fixed gear sablefish DTL fishery weekly limits north of 36° N. lat. from "1,750 lb per week, not to exceed 8,000 lb per two months" to "2,000 lb per week, not to exceed 8,000 lb per two months" beginning on December 1, 2010 through the end of the year.

Based on the considerations outlined above, the Council recommended and NMFS is implementing increases to the open access sablefish DTL fishery trip limits north of 36° N. lat. from "300 lb per day, or 1 landing per week of up to 950 lb, not to exceed 2,750 lb per two months" to "400 lb per day, or 1 landing per week of up to 1,500 lb, not to exceed 4,500 lb per two months" beginning on December 1, 2010 through the end of the year.

Sablefish DTL Fishery South of 36° N. Lat.

Catch of sablefish in the limited entry fixed gear and open access DTL fisheries south of 36° N. lat. has been higher than anticipated. In September, the Council recommended and NMFS implemented modest decreases to sablefish weekly limits in the limited entry fixed gear fishery, and more substantial decreases to the open access sablefish trip limits. The changes that went into effect on October 1, 2010 were anticipated to lower the projected impacts by approximately 45 percent and keep projected impacts within the sablefish OY south of 36° N. lat. Based on the most recent fishery information, if no additional action is taken and catch remains higher than expected, landings of sablefish through the end of the year would be 1,319 mt. This level of catch would exceed the 2010 sablefish OY for the area south of 36° N. lat. of 1,258 mt by approximately 5 percent. The Council considered several combinations of trip limit reductions in the limited entry fixed gear and open access sablefish DTL fisheries south of 36° N. lat. to allow some fishing opportunities to remain open in December 2010, while preventing the 2010 sablefish OY for the area south of 36° N. lat. from being exceeded. Options were somewhat more limited than in September 2010, because only a single month of fishing can be restricted in this late-season inseason action.

Sablefish landings from July through October 2010 indicate that sablefish catch were higher in these fisheries during July 2010 than estimated in September 2010. The Council considered several options for reducing the sablefish catch late in the season. The Council considered closing both the limited entry and open access fisheries for sablefish beginning on December 1, 2010 through the end of the year. However, the higher than anticipated catch of sablefish is primarily due to increased effort in the open access fishery. Because the participation in the open access fishery is not limited, it is more difficult to project and to control the harvest in that fishery. Therefore, the Council considered larger restrictions in the open access sablefish DTL fishery, including complete closure. Modest decreases were necessary for the limited entry fixed gear fishery to further reduce projected impacts and to prevent the 2010 sablefish OY from being exceeded. With the closure of the open access sablefish fishery and the limited entry fixed gear

fishery trip limit reductions, projected impacts are not anticipated to exceed 2010 sablefish OY for the area south of 36° N. lat. of 1,258 mt.

West Coast Groundfish Observer data indicate that impacts to overfished species in the commercial fixed gear sablefish fisheries south of 36° N. lat. are extremely low. Therefore, decreases to trip limits to prevent exceeding the 2010 sablefish OY are not anticipated to result in changes to impacts to co-occurring overfished groundfish species.

Based on the considerations outlined above, the Council recommended and NMFS is implementing a decrease in the limited entry fixed gear sablefish DTL fishery cumulative limits south of 36° N. lat. from "2,800 lb per week" to "1,800 lb per week" beginning on December 1, 2010 through the end of the year.

Based on the considerations outlined above, the Council recommended and NMFS is implementing restrictions to the open access sablefish DTL fishery trip limits south of 36° N. lat. from "800 lb per week, not to exceed 1,600 lb per month" to "CLOSED" beginning on December 1, 2010 through the end of the year.

Tribal Fishery Management Measures

The Council considered a request from the Makah Tribe, a Washington State coastal treaty tribe, to increase the amount of yellowtail rockfish that would be available in the tribal fisheries for 2010. The Makah Tribe would like to test the use of electric jig machines in the midwater fishery to see if overfished species are encountered in an area before they set the midwater trawl net. These activities are anticipated to reduce bycatch rate of co-occurring overfished species, primarily widow rockfish and canary rockfish, in the midwater trawl fishery. Bycatch of widow rockfish has been higher than anticipated in the tribal midwater trawl fishery in 2010, and the Makah Tribe anticipates that, if testing is successful, the use of electric jigs could lower bycatch rates and increase access to yellowtail rockfish in the future. The Makah Tribe requested an additional 187 mt of yellowtail rockfish, from 490 mt to 677 mt, to allow the testing of the jig gear that may reduce bycatch of co-occurring overfished rockfish. In order to do the initial testing of the jig gear, some additional catch of widow rockfish and canary rockfish is anticipated. However, total impacts, when combined with those in other fisheries, are not anticipated to exceed the 2010 rebuilding OYs for these species.

Yellowtail rockfish north of 40°30′ N. lat. was assessed in 2005 and is a healthy stock. Yellowtail rockfish are underutilized because of fishing restrictions to protect co-occurring overfished species. The most recent fishery information indicates that less than 19 percent of the 2010 yellowtail OY in this area has been caught.

Based on the considerations outlined above, the Council recommended and NMFS is implementing an increase in the yellowtail rockfish catch limit for the Makah Tribe's midwater trawl fishery.

Classification

This final rule makes routine inseason adjustments to groundfish fishery management measures based on the best available information and is taken pursuant to the regulations implementing the Pacific Coast Groundfish FMP.

These actions are taken under the authority of 50 CFR 660.370(c) and are exempt from review under Executive Order 12866.

These inseason adjustments are taken under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and are in accordance with 50 CFR part 660, the regulations implementing the FMP. These actions are based on the most recent data available. The aggregate data upon which these actions are based are available for public inspection at the Office of the Administrator, Northwest Region, NMFS, (*see* **ADDRESSES**) during business hours.

For the following reasons, NMFS finds good cause to waive prior public notice and comment on the revisions to groundfish management measures under 5 U.S.C. 553(b)(B) because notice and comment would be impracticable and contrary to the public interest. Also, for the same reasons, NMFS finds good cause to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(3), so that this final rule may become effective as quickly as possible.

The recently available data upon which these recommendations were based was provided to the Council, and the Council made its recommendations, at its November 2–10, 2010, meeting in Costa Mesa, CA. The Council recommended that these changes be implemented by December 1, 2010 or as quickly as possible. There was not sufficient time after that meeting to draft this document and undergo proposed and final rulemaking before these actions need to be in effect. For the actions to be implemented in this final rule, affording the time necessary for prior notice and opportunity for public comment would prevent the Agency from managing fisheries using the best available science to approach, without exceeding, the OYs for federally managed species in accordance with the FMP and applicable laws. The adjustments to management measures in this document affect commercial fisheries off Washington, Oregon, and California and commercial tribal fisheries off Washington.

Because the new fishery information and analyses were available so late in the year, the options for restrictions to fishery management measures that would reduce darkblotched rockfish impacts are limited. However, the restrictions proposed for the last 4–5 weeks of the year in the limited entry non-whiting trawl fishery and the limited entry primary whiting fishery are anticipated to reduce the projected total impacts to darkblotched rockfish by approximately 46 mt. The adjustments to management measures in the limited entry trawl fishery north of 40°10′ N. lat. and to the primary whiting fishery must be implemented as soon as possible to limit the fishery during 2010 in order to reduce projected impacts to darkblotched rockfish to keep the total mortality very near, and probably below, the 2010 darkblotched rockfish OY. Reductions to cumulative limits in the limited entry fixed gear fishery and closure of the open access sablefish DTL fishery are needed to prevent the 2010 sablefish OY in the area south of 36° N. lat. from being exceeded. These changes must be implemented in a timely manner by December 1, 2010. Failure to implement trip limit restrictions by December 1, 2010 would risk continued higher than anticipated catch of sablefish and the fishery could exceed the 2010 sablefish OY in the area south of 36° N. lat. These revisions are needed to keep the harvest of groundfish species within the harvest levels established for 2010, while allowing fishermen access to healthy stocks. Without these measures in place, the fisheries could risk exceeding some 2010 OYs if catch continues to be higher than anticipated. Delaying these changes would keep management measures in place that are not based on the best available data and that could lead to exceeding OYs. Such delay would impair achievement of one of the Pacific Coast Groundfish FMP goals to prevent overfishing and rebuild overfished stocks.

The increases to cumulative limits in the limited entry fixed gear and open access sablefish DTL fishery north of 36° N. lat. allow fishermen an opportunity to achieve the allocations and 2010 OY for sablefish in that area. Changes to management measures in the Makah

tribal midwater trawl fishery allow fishermen additional harvest opportunities for yellowtail rockfish, a healthy and underutilized stock. This also allows for testing of a fishing technique that could reduce bycatch rates as explained above. Increases are necessary to relieve a restriction by allowing fishermen increased opportunities to harvest sablefish north of 36° N. lat. and yellowtail rockfish, while staying within OYs. These changes must be implemented in a timely manner, as quickly as possible, so that fishermen are allowed increased opportunities to harvest available healthy stocks and meet the objective of the Pacific Coast Groundfish FMP to allow fisheries to approach, but not exceed, OYs. It would be contrary to the public interest to wait to implement these changes until after public notice and comment, because that would prevent fishermen from taking these fish at the time they are available, preventing additional harvest in fisheries that are important to coastal communities.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian fisheries.

Dated: November 30, 2010.

Brian Parker,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 660.50 to subpart C, paragraph (g)(5) is revised to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

* * * * *

(g) * * *

(5) *Yellowtail and widow rockfish.* The Makah Tribe will manage the midwater trawl fisheries as follows: Yellowtail rockfish taken in the directed tribal mid-water trawl fisheries are subject to a catch limit of 677 mt for the entire fleet. Landings of widow rockfish must not exceed 10 percent of the weight of yellowtail rockfish landed, for a given vessel, throughout the year. These limits may be adjusted by the tribe inseason to minimize the incidental catch of canary rockfish and widow rockfish, provided the catch of yellowtail rockfish does not exceed 677 mt for the fleet.

* * * * *

■ 3. In § 660.131 to subpart D, paragraph (b)(5)(i) is revised to read as follows:

§ 660.131 Pacific whiting fishery management measures.

* * * * *

(b) * * *

(5) * * *

(i) The whiting fishery bycatch limit is apportioned among the sectors identified in paragraph (a) of this section based on the same percentages used to allocate whiting among the sectors, established in § 660.55(i)(2), subpart C. The sector specific bycatch limits are: For catcher/processors 4.8 mt of canary rockfish, 95 mt of widow rockfish, and 5.5 mt of darkblotched rockfish; for motherships 3.3 mt of canary rockfish, 67 mt of widow rockfish, and 5.5 mt of darkblotched rockfish; and for shorebased 5.9 mt of canary rockfish, 117 mt of widow rockfish, and 5.0 mt of darkblotched rockfish.

* * * * *

■ 4. Table 1 (North) to part 660, subpart D, is revised to read as follows:

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Table 1 (North) to Part 660, Subpart D -- 2010 Trip Limits for Limited Entry Trawl Gear North of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read § 660.10 - § 660.160 before using this table

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		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC	
	Rockfish Conservation Area (RCA)[6/]:							
1	North of 48°10' N. lat.	shore - modified[7/] 200 fm line[6/]	shore - 200 fm line[6/]	shore - 150 fm line[6/]		shore - 200 fm line[6/]	shore - modified[7/] 200 fm line[6/]	shore - 250 fm line[6/]
2	48°10' N. lat. - 45°46' N. lat.	75 fm line[6/] - modified[7/] 200 fm line[6/]	75 fm line[6/] - 200 fm line[6/]	75 fm line[6/] - 150 fm line[6/]	100 fm line[6/] - 150 fm line[6/]	75 fm line[6/] - 200 fm line[6/]	75 fm line[6/] - modified[7/] 200 fm line[6/]	75 fm line[6/] - 250 fm line[6/]
3	45°46' N. lat. - 40°10' N. lat.			75 fm line[6/] - 200 fm line[6/]	100 fm line[6/] - 200 fm line[6/]			

Selective flatfish trawl gear is required shoreward of the RCA; all trawl gear (large footrope, selective flatfish trawl, and small footrope trawl gear) is permitted seaward of the RCA. Large footrope and small footrope trawl gears (except for selective flatfish trawl gear) are prohibited shoreward of the RCA. Midwater trawl gear is permitted only for vessels participating in the primary whiting season.

See § 660.60 and § 660.130 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).

State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.

4	**Minor slope rockfish[2/] & Darkblotched rockfish**	6,000 lb/ 2 months		2,000 lb/ 2 months		4,000 lb/ 2 months	4,000 lb/ month	CLOSED
5	**Pacific ocean perch**	1,500 lb/ 2 months						
6	**DTS complex**							
7	Sablefish							
8	large & small footrope gear	20,000 lb/ 2 months		24,000 lb/ 2 months	21,000 lb/ 2 months	24,000 lb/ 2 months		
9	selective flatfish trawl gear	9,000 lb/ 2 months				10,000 lb/ 2 months		
10	multiple bottom trawl gear [8/]	9,000 lb/ 2 months				10,000 lb/ 2 months		
11	Longspine thornyhead							
12	large & small footrope gear	24,000 lb/ 2 months				26,000 lb/ 2 months		
13	selective flatfish trawl gear	5,000 lb/ 2 months				5,500 lb/ 2 months		
14	multiple bottom trawl gear [8/]	5,000 lb/ 2 months				5,500 lb/ 2 months		
15	Shortspine thornyhead							
16	large & small footrope gear	18,000 lb/ 2 months				20,000 lb/ 2 months		
17	selective flatfish trawl gear	5,000 lb/ 2 months				5,500 lb/ 2 months		
18	multiple bottom trawl gear [8/]	5,000 lb/ 2 months				5,500 lb/ 2 months		
19	Dover sole							
20	large & small footrope gear	110,000 lb/ 2 months			100,000 lb/ 2 months	110,000 lb/ 2 months		
21	selective flatfish trawl gear	65,000 lb/ 2 months				70,000 lb/ 2 months		
22	multiple bottom trawl gear [8/]	65,000 lb/ 2 months				70,000 lb/ 2 months		

TABLE 1 (North)

Table 1 (North). Continued

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
23	**Whiting**						
24	midwater trawl	Before the primary whiting season: CLOSED. -- During the primary season: mid-water trawl permitted in the RCA. See §660.131 for season and trip limit details. -- After the primary whiting season: CLOSED.					
25	large & small footrope gear	Before the primary whiting season: 20,000 lb/trip. -- During the primary season: 10,000 lb/trip. -- After the primary whiting season: 10,000 lb/trip.					
26	**Flatfish** (except Dover sole)						
27	Arrowtooth flounder						
28	large & small footrope gear	150,000 lb/ 2 months				180,000 lb/ 2 months	
29	selective flatfish trawl gear	90,000 lb/ 2 months				100,000 lb/ 2 months	
30	multiple bottom trawl gear [8/]	90,000 lb/ 2 months				100,000 lb/ 2 months	
31	Other flatfish [3/], English sole, starry flounder, & Petrale sole						
32	large & small footrope gear for Other flatfish[3/], English sole, & starry flounder	110,000 lb/ 2 months	110,000 lb/ 2 months, no more than 9,500 lb/ 2 months of which may be petrale sole.		100,000 lb/ 2 months, no more than 6,300 lb/ 2 months of which may be petrale sole.	110,000 lb/ 2 months, no more than 6,300 lb/ 2 months of which may be petrale sole.	110,000 lb/ 2 months
33	large & small footrope gear for Petrale sole	9,500 lb/ 2 months					6,300 lb/ 2 months
34	selective flatfish trawl gear for Other flatfish[3/], English sole, & starry flounder	90,000 lb/ 2 months, no more than 9,500 lb/ 2 months of which may be petrale sole.	60,000 lb/ 2 months, no more than 9,500 lb/ 2 months of which may be petrale sole.		60,000 lb/ 2 months, no more than 6,300 lb/ 2 months of which may be petrale sole.	70,000 lb/ 2 months, no more than 6,300 lb/ 2 months of which may be petrale sole.	
35	selective flatfish trawl gear for Petrale sole						
36	multiple bottom trawl gear [8/]	90,000 lb/ 2 months, no more than 9,500 lb/ 2 months of which may be petrale sole.	60,000 lb/ 2 months, no more than 9,500 lb/ 2 months of which may be petrale sole.		60,000 lb/ 2 months, no more than 6,300 lb/ 2 months of which may be petrale sole.	70,000 lb/ 2 months, no more than 6,300 lb/ 2 months of which may be petrale sole.	
37	**Minor shelf rockfish[1/], Shortbelly, Widow & Yelloweye rockfish**						
38	midwater trawl for Widow rockfish	Before the primary whiting season: CLOSED. -- During primary whiting season: In trips of at least 10,000 lb of whiting, combined widow and yellowtail limit of 500 lb/ trip, cumulative widow limit of 1,500 lb/ month. Mid-water trawl permitted in the RCA. See §660.131 for primary whiting season and trip limit details. -- After the primary whiting season: CLOSED.					
39	large & small footrope gear	300 lb/ 2 months					
40	selective flatfish trawl gear	300 lb/ month		1,000 lb/ month, no more than 200 lb/ month of which may be yelloweye rockfish			300 lb/ month
41	multiple bottom trawl gear [8/]	300 lb/ month		300 lb/ 2 months, no more than 200 lb/ month of which may be yelloweye rockfish			300 lb/ month

TABLE 1 (North) con't

Table 1 (North). Continued

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
42	**Canary rockfish**						
43	large & small footrope gear	CLOSED					
44	selective flatfish trawl gear	100 lb/ month		300 lb/ month		100 lb/ month	
45	multiple bottom trawl gear 8/	CLOSED					
46	**Yellowtail**						
47	midwater trawl	Before the primary whiting season: CLOSED. -- During primary whiting season: In trips of at least 10,000 lb of whiting: combined widow and yellowtail limit of 500 lb/ trip, cumulative yellowtail limit of 2,000 lb/ month. Mid-water trawl permitted in the RCA. See §660.131 for primary whiting season and trip limit details. -- After the primary whiting season: CLOSED.					
48	large & small footrope gear	300 lb/ 2 months					
49	selective flatfish trawl gear	2,000 lb/ 2 months					
50	multiple bottom trawl gear 8/	300 lb/ 2 months					
51	**Minor nearshore rockfish & Black rockfish**						
52	large & small footrope gear	CLOSED					
53	selective flatfish trawl gear	300 lb/ month					
54	multiple bottom trawl gear 8/	CLOSED					
55	**Lingcod** 4/						
56	large & small footrope gear	1,200 lb/ 2 months		4,000 lb/ 2 months			
57	selective flatfish trawl gear			1,200 lb/2 months			
58	multiple bottom trawl gear 8/						
59	**Pacific cod**	30,000 lb/ 2 months		70,000 lb/ 2 months			30,000 lb/ 2 months
60	**Spiny dogfish**	200,000 lb/ 2 months		150,000 lb/ 2 months	100,000 lb/ 2 months		
61	**Other Fish** 5/	Not limited					

TABLE 1 (North) con't

1/ Bocaccio, chilipepper and cowcod are included in the trip limits for minor shelf rockfish.
2/ Splitnose rockfish is included in the trip limits for minor slope rockfish.
3/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
4/ The minimum size limit for lingcod is 22 inches (56 cm) total length North of 42° N. lat. and 24 inches (61 cm) total length South of 42° N. lat.
5/ "Other fish" are defined at § 660.11 and include sharks, skates (including longnose skate), ratfish, morids, grenadiers, and kelp greenling. Cabezon is included in the trip limits for "other fish."
6/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours, and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to the RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.
7/ The "modified" fathom lines are modified to exclude certain petrale sole areas from the RCA.
8/ If a vessel has both selective flatfish gear and large or small footrope gear on board during a cumulative limit period (either simultaneously or successively), the most restrictive cumulative limit for any gear on board during the cumulative limit period applies for the entire cumulative limit period.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

■ 5. Table 2 (North) and Table 2 (South) to part 660, subpart E, are revised to read as follows:

Table 2 (North) to Part 660, Subpart E -- 2010 Trip Limits for Limited Entry Fixed Gear North of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read §§ 660.10 - 660.65 and §§ 660.210 - 660.232 before using this table 08252010

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC	
	Rockfish Conservation Area (RCA)[6/]:							
1	North of 46°16' N. lat.	shoreline - 100 fm line[6/]						
2	46°16' N. lat. - 45°03.83' N. lat.	30 fm line[6/] - 100 fm line[6/]						
3	45°03.83' N. lat. - 43°00' N. lat.	30 fm line[6/] - 125 fm line [6/ 7/]						
4	43°00' N. lat. - 42°00' N. lat.	20 fm line[6/] - 100 fm line[6/]						
5	42°00' N. lat. - 40°10' N. lat.	20 fm depth contour - 100 fm line[6/]						
	See § 660.60 and § 660.230 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).							
	State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.							
6	**Minor slope rockfish [2/] & Darkblotched rockfish**	4,000 lb/ 2 months						
7	**Pacific ocean perch**	1,800 lb/ 2 months						
8	**Sablefish**	1,750 lb per week, not to exceed 7,000 lb/ 2 months			1,750 lb per week, not to exceed 8,500 lb/ 2 months		1,750 lb per week in November; 2,000 lb per week in December. Not to exceed 8,000 lb per two month period	
9	**Longspine thornyhead**	10,000 lb/ 2 months						
10	**Shortspine thornyhead**	2,000 lb/ 2 months						
11	**Dover sole**	5,000 lb/ month South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to two 1 lb (0.45 kg) weights per line are not subject to the RCAs.						
12	**Arrowtooth flounder**							
13	**Petrale sole**							
14	**English sole**							
15	**Starry flounder**							
16	**Other flatfish[1/]**							
17	**Whiting**	10,000 lb/ trip						
18	**Minor shelf rockfish[2/], Shortbelly, Widow, & Yellowtail rockfish**	200 lb/ month						
19	**Canary rockfish**	CLOSED						
20	**Yelloweye rockfish**	CLOSED						
21	**Minor nearshore rockfish & Black rockfish**							
22	North of 42° N. lat.	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish [3/]						
23	42° - 40°10' N. lat.	6,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish [3/]	7,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black rockfish [3/]					
24	**Lingcod[4/]**	CLOSED		800 lb/ 2 months			400 lb/ month	CLOSED
25	**Pacific cod**	1,000 lb/ 2 months						
26	**Spiny dogfish**	200,000 lb/ 2 months		150,000 lb/ 2 months	100,000 lb/ 2 months			
27	**Other fish[5/]**	Not limited						

TABLE 2 (North)

1/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
2/ Bocaccio, chilipepper and cowcod are included in the trip limits for minor shelf rockfish and splitnose rockfish is included in the trip limits for minor slope rockfish.
3/ For black rockfish north of Cape Alava (48°09.50' N. lat.), and between Destruction Is. (47°40' N. lat.) and Leadbetter Pnt. (46°38.17' N. lat.), there is an additional limit of 100 lb or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.
4/ The minimum size limit for lingcod is 22 inches (56 cm) total length North of 42° N. lat. and 24 inches (61 cm) total length South of 42° N. lat.
5/ "Other fish" are defined at § 660.11 and include sharks, skates (including longnose skates), ratfish, morids, grenadiers, and kelp greenling. Cabezon is included in the trip limits for "other fish."
6/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.
7/ The 125 fm line restriction is in place all year, except on days when the directed halibut fishery is open. On those days the 100 fm line restriction is in effect.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 2 (South) to Part 660, Subpart E -- 2010 Trip Limits for Limited Entry Fixed Gear South of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read §§ 660.10 - 660.65 and §§ 660.210 - 660.232 before using this table

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		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[5/]:						
1	40°10' - 34°27' N. lat.	30 fm line[5/] - 150 fm line[5/]					
2	South of 34°27' N. lat.	60 fm line[5/] - 150 fm line[5/] (also applies around islands)					
	See § 660.60 and § 660.230 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).						
	State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.						
3	**Minor slope rockfish[2/] & Darkblotched rockfish**	40,000 lb/ 2 months					
4	**Splitnose**	40,000 lb/ 2 months					
5	**Sablefish**						
6	40°10' - 36° N. lat.	1,750 lb per week, not to exceed 7,000 lb/ 2 months			1,750 lb per week, not to exceed 8,500 lb/ 2 months		1,750 lb per week in November; 2,000 lb per week in December. Not to exceed 8,000 lb per two month period
7	South of 36° N. lat.	400 lb/ day, or 1 landing per week of up to 1,500 lb				3,000 lb/ week	2,800 lb/ week / 1,800 lb/ week
8	**Longspine thornyhead**	10,000 lb / 2 months					
9	**Shortspine thornyhead**						
10	40°10' - 34°27' N. lat.	2,000 lb/ 2 months					
11	South of 34°27' N. lat.	3,000 lb/ 2 months					
12	**Dover sole**	5,000 lb/ month South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to two 1 lb (0.45 kg) weights per line are not subject to the RCAs.					
13	**Arrowtooth flounder**						
14	**Petrale sole**						
15	**English sole**						
16	**Starry flounder**						
17	**Other flatfish[1/]**						
18	**Whiting**	10,000 lb/ trip					
19	**Minor shelf rockfish[2/], Shortbelly, Widow rockfish, and Bocaccio (including Chilipepper between 40°10' - 34°27' N. lat.)**						
20	40°10' - 34°27' N. lat.	Minor shelf rockfish, shortbelly, widow rockfish, bocaccio & chilipepper: 2,500 lb/ 2 months, of which no more than 500 lb/ 2 months may be any species other than chilipepper.					
21	South of 34°27' N. lat.	3,000 lb/ 2 months	CLOSED	3,000 lb/ 2 months			
22	**Chilipepper rockfish**						
23	40°10' - 34°27' N. lat.	Chilipepper included under minor shelf rockfish, shortbelly, widow and bocaccio limits - - See above					
24	South of 34°27' N. lat.	2,000 lb/ 2 months, this opportunity only available seaward of the nontrawl RCA					
25	**Canary rockfish**	CLOSED					
26	**Yelloweye rockfish**	CLOSED					
27	**Cowcod**	CLOSED					
28	**Bronzespotted rockfish**	CLOSED					
29	**Bocaccio**						
30	40°10' - 34°27' N. lat.	Bocaccio included under Minor shelf rockfish, shortbelly, widow & chilipepper limits -- See above					
31	South of 34°27' N. lat.	300 lb/ 2 months	CLOSED	300 lb/ 2 months			

TABLE 2 (South)

Table 2 (South). Continued

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC	
32	**Minor nearshore rockfish & Black rockfish**							
33	Shallow nearshore	600 lb/ 2 months	CLOSED	800 lb/ 2 months	900 lb/ 2 months	800 lb/ 2 months	600 lb/ 2 months	
34	Deeper nearshore							
35	40°10' - 34°27' N. lat.	700 lb/ 2 months	CLOSED	700 lb/ 2 months		800 lb/ 2 months		
36	South of 34°27' N. lat.	500 lb/ 2 months		600 lb/ 2 months				
37	California scorpionfish	600 lb/ 2 months	CLOSED	600 lb/ 2 months	1,200 lb/ 2 months			
38	**Lingcod**[3/]	CLOSED		800 lb/ 2 months			400 lb/ month	CLOSED
39	**Pacific cod**	1,000 lb/ 2 months						
40	**Spiny dogfish**	200,000 lb/ 2 months		150,000 lb/ 2 months	100,000 lb/ 2 months			
41	**Other fish**[4/] **& Cabezon**	Not limited						

TABLE 2 (South)

1/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
2/ POP is included in the trip limits for minor slope rockfish. Yellowtail is included in the trip limits for minor shelf rockfish. Bronzespotted rockfish have a species specific trip limit.
3/ The minimum size limit for lingcod is 24 inches (61 cm) total length South of 42° N. lat.
4/ "Other fish" are defined at § 660.11 and include sharks, skates (including longnose skates), ratfish, morids, grenadiers, and kelp greenling.
5/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

■ 6. Table 3 (North) and Table 3 (South) to part 660, subpart F, are revised to read as follows:

BILLING CODE 3510–22–P

Table 3 (North) to Part 660, Subpart F -- 2010 Trip Limits for Open Access Gears North of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read §§ 660.10 - 660.65 and §§ 660.310 - 660.333 before using this table

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		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[6/]:						
1	North of 46°16' N. lat.	shoreline - 100 fm line[6/]					
2	46°16' N. lat. - 45°03.83' N. lat.	30 fm line[6/] - 100 fm line[6/]					
3	45°03.83' N. lat. - 43°00' N. lat.	30 fm line[6/] - 125 fm line [6/ 7/]					
4	43°00' N. lat. - 42°00' N. lat.	20 fm line[6/] - 100 fm line[6/]					
5	42°00' N. lat. - 40°10' N. lat.	20 fm depth contour - 100 fm line[6/]					
	See § 660.60, § 660.330, and § 660.333 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).						
	State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.						
6	**Minor slope rockfish[1/] & Darkblotched rockfish**	Per trip, no more than 25% of weight of the sablefish landed					
7	**Pacific ocean perch**	100 lb/ month					
8	**Sablefish**	300 lb/ day, or 1 landing per week of up to 800 lb, not to exceed 2,400 lb/ 2 months			300 lb/ day, or 1 landing per week of up to 950 lb, not to exceed 2,750 lb/ 2 months		300 lb/ day, or 1 landing per week of up to 950 lb, in November; 400 lb/ day, or 1 landing per week of up to 1,500 lb, in December. Not to exceed 4,500 lb per two month period
9	**Thornyheads**	CLOSED					
10	**Dover sole**	3,000 lb/month, no more than 300 lb of which may be species other than Pacific sanddabs. South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to two 1 lb (0.45 kg) weights per line are not subject to the RCAs.					
11	**Arrowtooth flounder**						
12	**Petrale sole**						
13	**English sole**						
14	**Starry flounder**						
15	**Other flatfish[2/]**						
16	**Whiting**	300 lb/ month					
17	**Minor shelf rockfish[1/], Shortbelly, Widow, & Yellowtail rockfish**	200 lb/ month					
18	**Canary rockfish**	CLOSED					
19	**Yelloweye rockfish**	CLOSED					
20	**Minor nearshore rockfish & Black rockfish**						
21	North of 42° N. lat.	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish [3/]					
22	42° - 40°10' N. lat.	6,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish [3/]	7,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black rockfish [3/]				
23	**Lingcod[4/]**	CLOSED		400 lb/ month			CLOSED
24	**Pacific cod**	1,000 lb/ 2 months					
25	**Spiny dogfish**	200,000 lb/ 2 months		150,000 lb/ 2 months	100,000 lb/ 2 months		
26	**Other Fish[5/]**	Not limited					

TABLE 3 (North)

Table 3 (North). Continued

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC	
27	**SALMON TROLL** *(subject to RCAs when retaining any species of groundfish except for yellowtail rockfish and lingcod, as described below)*							**TABLE 3 (North) con't**
28	North	Salmon trollers may retain and land up to 1 lb of yellowtail rockfish for every 2 lbs of salmon landed, with a cumulative limit of 200 lb/month, both within and outside of the RCA. This limit is within the 200 lb per month combined limit for minor shelf rockfish, widow rockfish and yellowtail rockfish, and not in addition to that limit. Salmon trollers may retain and land up to 1 lingcod per 15 Chinook per trip, plus 1 lingcod per trip, up to a trip limit of 10 lingcod, on a trip where any fishing occurs within the RCA. This limit only applies during times when lingcod retention is allowed, and is not "CLOSED." This limit is within the per month limit for lingcod described in the table above, and not in addition to that limit. All groundfish species are subject to the open access limits, seasons, size limits and RCA restrictions listed in the table above, unless otherwise stated here.						
29	**PINK SHRIMP NON-GROUNDFISH TRAWL** *(not subject to RCAs)*							
30	North	**Effective April 1 - October 31:** Groundfish: 500 lb/day, multiplied by the number of days of the trip, not to exceed 1,500 lb/trip. The following sublimits also apply and are counted toward the overall 500 lb/day and 1,500 lb/trip groundfish limits: lingcod 300 lb/month (minimum 24 inch size limit); sablefish 2,000 lb/month; canary, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lb/day and 1,500 lb/trip groundfish limits. Landings of these species count toward the per day and per trip groundfish limits and do not have species-specific limits. The amount of groundfish landed may not exceed the amount of pink shrimp landed.						

1/ Bocaccio, chilipepper and cowcod rockfishes are included in the trip limits for minor shelf rockfish. Splitnose rockfish is included in the trip limits for minor slope rockfish.

2/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.

3/ For black rockfish north of Cape Alava (48°09.50' N. lat.), and between Destruction Is. (47°40' N. lat.) and Leadbetter Pnt. (46°38.17' N. lat.), there is an additional limit of 100 lbs or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.

4/ The minimum size limit for lingcod is 22 inches (56 cm) total length North of 42° N. lat. and 24 inches (61 cm) total length South of 42° N. lat.

5/ "Other fish" are defined at § 660.11 and include sharks, skates (including longnose skates), ratfish, morids, grenadiers, and kelp greenling. Cabezon is included in the trip limits for "other fish."

6/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

7/ The 125 fm line restriction is in place all year, except on days when the directed halibut fishery is open. On those days the 100 fm line restriction is in effect.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 3 (South) to Part 660, Subpart F -- 2010 Trip Limits for Open Access Gears South of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read §§ 660.10 - 660.65 and §§ 660.310 - 660.333 before using this table

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		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[5/]:						
1	40°10' - 34°27' N. lat.	30 fm line[5/] - 150 fm line[5/]					
2	South of 34°27' N. lat.	60 fm line[5/] - 150 fm line[5/] (also applies around islands)					
	See § 660.60, § 660.330, and § 660.333 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).						
	State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.						
3	**Minor slope rockfish[1/] & Darkblotched rockfish**						
4	40°10' - 38° N. lat.	Per trip, no more than 25% of weight of the sablefish landed					
5	South of 38° N. lat.	10,000 lb/ 2 months					
6	**Splitnose**	200 lb/ month					
7	**Sablefish**						
8	40°10' - 36° N. lat.	300 lb/ day, or 1 landing per week of up to 800 lb, not to exceed 2,400 lb/ 2 months			300 lb/ day, or 1 landing per week of up to 950 lb, not to exceed 2,750 lb/ 2 months		300 lb/ day, or 1 landing per week of up to 950 lb, in November; 400 lb/ day, or 1 landing per week of up to 1,500 lb, in December. Not to exceed 4,500 lb per two month period
9	South of 36° N. lat.	400 lb/ day, or 1 landing per week of up to 1,500 lb, not to exceed 8,000 lb/ 2 months				400 lb/ day, or 1 landing per week of up to 2,500 lb	800 lb/ week, not to exceed 1,600 lb/ month; CLOSED
10	**Thornyheads**						
11	40°10' - 34°27' N. lat.	CLOSED					
12	South of 34°27' N. lat.	50 lb/ day, no more than 1,000 lb/ 2 months					
13	**Dover sole**	3,000 lb/month, no more than 300 lb of which may be species other than Pacific sanddabs. South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to two 1 lb (0.45 kg) weights per line are not subject to the RCAs.					
14	**Arrowtooth flounder**						
15	**Petrale sole**						
16	**English sole**						
17	**Starry flounder**						
18	**Other flatfish[2/]**						
19	**Whiting**	300 lb/ month					
20	**Minor shelf rockfish[1/], Shortbelly, Widow & Chilipepper rockfish**						
21	40°10' - 34°27' N. lat.	300 lb/ 2 months	CLOSED	200 lb/ 2 months		300 lb/ 2 months	
22	South of 34°27' N. lat.	750 lb/ 2 months		750 lb/ 2 months			
23	**Canary rockfish**	CLOSED					
24	**Yelloweye rockfish**	CLOSED					
25	**Cowcod**	CLOSED					
26	**Bronzespotted rockfish**	CLOSED					
27	**Bocaccio**						
28	40°10' - 34°27' N. lat.	200 lb/ 2 months	CLOSED	100 lb/ 2 months		200 lb/ 2 months	
29	South of 34°27' N. lat.	100 lb/ 2 months		100 lb/ 2 months			

TABLE 3 (South)

Table 3 (South). Continued

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
30	**Minor nearshore rockfish & Black rockfish**						
31	Shallow nearshore	600 lb/ 2 months	CLOSED	800 lb/ 2 months	900 lb/ 2 months	800 lb/ 2 months	600 lb/ 2 months
32	Deeper nearshore						
33	40°10' - 34°27' N. lat.	700 lb/ 2 months	CLOSED	700 lb/ 2 months		800 lb/ 2 months	
34	South of 34°27' N. lat.	500 lb/ 2 months		600 lb/ 2 months			
35	California scorpionfish	600 lb/ 2 months	CLOSED	600 lb/ 2 months	1,200 lb/ 2 months		
36	**Lingcod**[3/]	CLOSED		400 lb/ month			CLOSED
37	**Pacific cod**	1,000 lb/ 2 months					
38	**Spiny dogfish**	200,000 lb/ 2 months		150,000 lb/ 2 months	100,000 lb/ 2 months		
39	**Other Fish**[4/] **& Cabezon**	Not limited					
40	**RIDGEBACK PRAWN AND, SOUTH OF 38°57.50' N. LAT., CA HALIBUT AND SEA CUCUMBER NON-GROUNDFISH TRAWL**						
41	**NON-GROUNDFISH TRAWL Rockfish Conservation Area (RCA) for CA Halibut, Sea Cucumber & Ridgeback Prawn:**						
42	40°10' - 38° N. lat.	100 fm - modified 200 fm [6/]	100 fm - 150 fm				100 fm - modified 200 fm [6/]
43	38° - 34°27' N. lat.	100 fm - 150 fm					
44	South of 34°27' N. lat.	100 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands					
45		Groundfish: 300 lb/trip. Trip limits in this table also apply and are counted toward the 300 lb groundfish per trip limit. The amount of groundfish landed may not exceed the amount of the target species landed, except that the amount of spiny dogfish landed may exceed the amount of target species landed. Spiny dogfish are limited by the 300 lb/trip overall groundfish limit. The daily trip limits for sablefish coastwide and thornyheads south of Pt. Conception and the overall groundfish "per trip" limit may not be multiplied by the number of days of the trip. Vessels participating in the California halibut fishery south of 38°57.50' N. lat. are allowed to (1) land up to 100 lb/day of groundfish without the ratio requirement, provided that at least one California halibut is landed and (2) land up to 3,000 lb/month of flatfish, no more than 300 lb of which may be species other than Pacific sanddabs, sand sole, starry flounder, rock sole, curlfin sole, or California scorpionfish (California scorpionfish is also subject to the trip limits and closures in line 31).					
46	**PINK SHRIMP NON-GROUNDFISH TRAWL GEAR** *(not subject to RCAs)*						
47	South	**Effective April 1 - October 31:** Groundfish: 500 lb/day, multiplied by the number of days of the trip, not to exceed 1,500 lb/trip. The following sublimits also apply and are counted toward the overall 500 lb/day and 1,500 lb/trip groundfish limits: lingcod 300 lb/ month (minimum 24 inch size limit); sablefish 2,000 lb/ month; canary, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lb/day and 1,500 lb/trip groundfish limits. Landings of these species count toward the per day and per trip groundfish limits and do not have species-specific limits. The amount of groundfish landed may not exceed the amount of pink shrimp landed.					

TABLE 3 (South) con't

1/ Yellowtail rockfish is included in the trip limits for minor shelf rockfish. POP is included in the trip limits for minor slope rockfish. Bronzespotted rockfish have a species specific trip limit.
2/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
3/ The size limit for lingcod is 24 inches (61 cm) total length South of 42° N. lat.
4/ "Other fish" are defined at § 660.11 and include sharks, skates (including longnose skates), ratfish, morids, grenadiers, and kelp greenling.
5/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.
6/ The "modified 200 fm" line is modified to exclude certain petrale sole areas from the RCA.
To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

[FR Doc. 2010–30390 Filed 11–30–10; 4:15 pm]
BILLING CODE 3510–22–C

Proposed Rules

Federal Register

Vol. 75, No. 232

Friday, December 3, 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.

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 23 and 190

RIN 3038–AD28

Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (the "Commission") hereby proposes rules to implement new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Specifically, the proposed rules contained herein impose requirements on swap dealers ("SDs") and major swap participants ("MSPs") with respect to the treatment of collateral posted by their counterparties to margin, guarantee, or secure uncleared swaps. Additionally, such proposed rules ensure that, for purposes of subchapter IV of chapter 7 of the Bankruptcy Code: Securities held in a portfolio margining account that is a futures account constitute "customer property"; and owners of such account constitute "customers".

DATES: Submit comments on or before February 1, 2011.

ADDRESSES: You may submit comments, identified by RIN number 3038–AD28, 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 by 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: Robert B. Wasserman, Associate Director, Division of Clearing and Intermediary Oversight (DCIO), at 202–418–5092 or *rwasserman@cftc.gov;* Martin White, Assistant General Counsel, at 202–418–5129 or *mwhite@cftc.gov;* Nancy Liao Schnabel, Special Counsel, DCIO, at 202–418–5344 or *nschnabel@cftc.gov;* in each case, also at the 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 Commodity Exchange Act ("CEA")[3] to establish a comprehensive new regulatory framework for swaps and certain security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (i) Providing for the registration and comprehensive regulation of SDs and MSPs;[4] (ii) imposing mandatory clearing and trade execution requirements on clearable swap contracts; (iii) creating robust recordkeeping and real-time reporting regimes; and (iv) enhancing the rulemaking and enforcement authorities of the Commission with respect to, among others, all registered entities and intermediaries subject to the oversight of the Commission.

Section 724(c) of the Dodd-Frank Act amends the CEA to add, as section 4s(l) thereof, provisions concerning the rights of counterparties to SDs and MSPs with respect to the treatment of margin for uncleared swaps. As discussed further in Part II of this preamble, these changes are implemented in proposed new Subpart L to Part 23 of Title 17, §§ 23.600 through 23.609.

Section 713(c) of the Dodd-Frank Act amends the CEA to add, as section 20(c) thereof, a provision that requires the Commission to exercise its authority to clarify the legal status, in the event of a commodity broker[5] bankruptcy, of (i)

[1] *See* Dodd-Frank Act, Public Law. 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov./LawRegulation/OTCDERIVATIVES/index.htm.*

[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] In this release, the terms "swap dealer" and "major swap participant" shall have the meanings set forth in Section 721(a) of the Dodd-Frank Act, which added Sections 1a(49) and (33) of the CEA. However, Section 721(c) of the Dodd-Frank Act directs the Commission to promulgate rules to further define, among other terms, "swap dealer" and "major swap participant." The Commission anticipates that such rulemaking will be completed by the statutory deadline of July 15, 2011. *See, e.g., Http://Www.Cftc.Gov/Lawregulation/Otcderivatives/OTC_2_Definitions.Html.*

[5] Commission regulation ("Regulation") 190.01(f) defines "commodity broker" as "any person who is registered or required to register as a futures commission merchant under the Commodity Exchange Act including a person registered as such under Parts 32 and 33 of this chapter, and a 'commodity options dealer,' 'foreign futures commission merchant,' 'clearing organization,' and 'leverage transaction merchant' with respect to which there is a 'customer' as those terms are defined in this section, but excluding a person registered as a futures commission merchant under section 4f(a)(2) of the Commodity Exchange Act." Pursuant to the Bankruptcy Code, 11 U.S.C. 101 *et*

securities in a portfolio margining account held as a futures account, and (ii) an owner of such account. As discussed further in Part III of this preamble, these changes are implemented in proposed amendments to §§ 190.01(k) and 190.08(a)(1)(i).

Part IV below describes proposed technical amendments to Regulation part 190 that are not required by the Dodd-Frank Act, but rather address the changes to 11 U.S.C. 764(b) implemented by Public Law 111–16, the Statutory Time-Periods Technical Amendments Act of 2009. Specifically, such act changed the time period (*i.e.,* from five (5) business days to seven (7) calendar days) during which a transfer of "commodity contracts" [6] and "customer property" [7] becomes not avoidable by the trustee in a commodity broker bankruptcy.

The Commission requests comment on all aspects of this release.

II. Segregation of Margin for SD and MSP Counterparties With Respect to Uncleared Swaps

New Section 4s(l) of the CEA, enacted by Section 724(c) of the Dodd-Frank Act, sets forth certain requirements concerning the rights of counterparties of SDs and MSPs with respect to the segregation of collateral supplied for margining, guaranteeing, or securing uncleared swaps.[8] Such requirements [9] include:

- An SD or MSP must notify each counterparty at the beginning of a swap transaction that the counterparty has the right to require segregation of the funds or other property that it supplies to margin, guarantee, or secure its obligations; and
- At the request of the counterparty, the SD or MSP must segregate such funds or other property with an independent third party.

To implement the statute, the Commission proposes new subpart L to part 23 of title 17.

A. Regulation 23.600: Definitions

The Commission proposes to define "segregate" according to its commonly-understood meaning: To keep two or more items in separate accounts, and to avoid combining them in the same transfer between two accounts.

The Commission has never before defined "initial margin" (for which a counterparty has the right to segregation pursuant to CEA Section 4s(l)) or "variation margin" (for which a counterparty does not have such a right) in a regulation. The distinction between "initial margin" and "variation margin" established in proposed § 23.600 is temporally-based:

1. Initial Margin

"Initial margin" is defined as an amount calculated based on anticipated exposure to future changes in the value of a swap.

2. Variation Margin

"Variation margin" is defined as an amount calculated to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was marked to market.

The Commission may also consider, in a future rulemaking, placing an expanded version of these definitions (to include initial and variation margin with respect to futures and options on futures) in Part 1, and incorporating those definitions by reference here.

The Commission seeks comment on the appropriateness of these definitions in this context, and on the potential use of such expanded definitions.

B. Regulation 23.601: Notification of Right to Segregation

1. Required Notification

Proposed Regulation 23.601(a) incorporates the statutory requirement of Section 4s(l)(1)(A) of the CEA that a SD or MSP must notify each counterparty with respect to an uncleared swap that the counterparty has the right to require that initial margin posted by that counterparty be segregated in accordance with these rules. The Commission interprets the language of Section 4s(l)(1)(A) of the CEA that the counterparty must be "notified * * * [of a] right to require segregation" to mean that this right can be grasped or renounced, at the election of the counterparty.[10] Congress's description as a "right" of what would otherwise be a simple matter for commercial negotiation suggests that this decision is an important one, with a certain degree of favor given to an affirmative election.

The Commission has not proposed any particular disclosure requirements with respect to this notification. Should the SD or MSP be required to disclose the cost of segregation, whether the cost of fees to be paid to the custodian (if the SD or MSP is aware of the amount of such fees), or differences in the terms of the swap that the SD or MSP is willing to offer to the counterparty (*e.g.,* differences in the fixed interest rate for an interest rate swap) if the counterparty elects or renounces the right to segregation?

2. Limitation of Right—Variation Margin

Proposed Regulation 23.601(b) incorporates the limitation in Section 4s(l)(2)(B)(i) of the CEA that the right to segregation does not apply to variation margin.

3. Counterparty Notification

The Commission regards the inclusion of the term "right to require segregation" as requiring that this decision is taken at an appropriate level of the counterparty organization. Proposed Regulation 23.601(c) requires that such notification be made to certain senior decisionmakers, in descending order of preference. Notification is made to the Chief Risk Officer, or the Chief Executive Officer, or to the highest level decisionmaker for the counterparty. The Commission seeks comment as to whether this list of decision-makers is appropriate, in particular, whether it is appropriate for "Special Entities" as such term is defined in Section 4s(h)(1)(C) of the CEA (*e.g.* a municipality).

4. Required Confirmation

Proposed § 23.601(d) requires that the SD or MSP must obtain from the counterparty confirmation of receipt of such notification by the specified decisionmaker, and the election to require segregation or not, before the terms of the swap are confirmed. The SD or MSP must maintain records of such confirmation and election as business records in accordance with Regulation 1.31.

5. Limitation of Responsibility To Notify

The requirement in Section 4s(l)(1)(A) of the CEA that notification be made "at

seq., if a commodity broker experiences bankruptcy, it must be liquidated in accordance with chapter 7, subchapter IV ("Subchapter IV"). In the event of such liquidation, Subchapter IV provides certain protections for collateral that customers deposit with the commodity broker. Pursuant to its authority under Section 20 of the CEA, the Commission has interpreted Subchapter IV in promulgating Regulation Part 190.

[6] Section 761(4) of the Bankruptcy Code, 11 U.S.C. 761(4), defines "commodity contract."

[7] Regulation 190.01(n) defines "customer property" as "the property subject to pro rata distribution in a commodity broker bankruptcy which is entitled to the priority set forth in Section 766(h) of the Bankruptcy Code and includes certain cash, securities, and other property as set forth in § 190.08(a)."

[8] It should be noted that this rulemaking addresses segregation of margin, and does not address what amount of margin, if any, a counterparty is required to post.

[9] Such requirements do not apply to "variation margin payments." Section 724(c) of the Dodd-Frank Act does not set forth a definition for such term. The Commission has proposed such a definition below.

[10] *See also* CEA Section 4s(l)(4) (referring to cases where the counterparty "does not choose to require segregation" of margin).

the beginning of a swap transaction" could be read to require such notification at the beginning of each swap transaction. Such repetitive notification could, however, be redundant. On the other hand, the importance of the decision discussed above suggests that some periodic reconsideration might be appropriate. Proposed § 23.601(e) seeks to balance these considerations by providing that notification of a particular counterparty by a particular SD or MSP need only be made once in any calendar year.

6. Power To Change Election With Regard to Segregation

Proposed § 23.601(f) makes clear that a counterparty's election to require segregation of initial margin, or not to require such segregation, may be changed at the discretion of the counterparty upon delivery of written notice, and shall be applicable with respect to swaps entered into between the parties after such delivery.

The Commission seeks comments on the issues referred to in this section I(B).

C. Regulation 23.602: Requirements for Segregated Collateral

1. Independent Custodian and Separate Account

Pursuant to Section 4s(l)(3) of the CEA, proposed Regulation 23.602(a)(1) requires initial margin segregated in accordance with an election under proposed Regulation 23.601 to be segregated with a custodian that is independent of both the SD or MSP and the counterparty. Proposed § 23.602(a)(2) requires the initial margin to be held in an account designated as a segregated account for and on behalf of the counterparty. While, as noted above, the right to segregation does not apply to variation margin, the regulation provides the swap dealer or major swap participant and the counterparty may agree that variation margin may also be held in such an account.

Proposed § 23.602(a)(1) does *not* require that the initial margin be held in an account that is independent of any *affiliate* of the SD or MSP or the counterparty, in order to permit parties to engage in swaps transactions with affiliates of their usual depositories. Comment is requested as to whether this approach is appropriate. Moreover, the proposed regulation does not specify which party (the counterparty, or the SD or MSP) has the right to designate a custodian, thus, by implication, leaving the choice to the agreement of the parties. Is this approach appropriate? Should either party be entitled to choose a custodian? If so, what restrictions, if any, should be placed on that choice?

2. Requirements for Custody Agreement

Proposed § 23.602(b) is intended to provide a balance between the minimum interests of (i) the counterparty posting the initial margin, (ii) the SD or MSP for whom the initial margin is posted, and (iii) the custodian, while avoiding the necessity for time-consuming and expensive interpleader proceedings.[11] The custody agreement applicable to such initial margin must be in writing, and must include the custodian as a party. To ensure that the SD or MSP receives the initial margin promptly in case it is entitled to do so, and that the initial margin is returned to the counterparty in case it is entitled to such return, the agreement must provide that turnover of control shall be made promptly upon presentation of a statement in writing, signed by an authorized person under penalty of perjury, that one party is entitled to such turnover pursuant to an agreement between the parties. The requirement of a signature under oath or under penalty of perjury pursuant to 28 U.S.C. 1746 is intended to ensure that such statement is not lightly made.[12] Otherwise, withdrawal of collateral may only be made pursuant to the agreement of both the counterparty and the SD or MSP, with the non-withdrawing party also receiving immediate notice of such withdrawal.[13] The Commission requests comment on whether the foregoing approach is appropriate, including on whether a statement under penalty of perjury should be required, and on whether such a statement, if required, should be required to be based on personal knowledge.

D. Regulation 23.603: Investment of Segregated Collateral

1. Limitations on Investments

Section 4s(l)(2)(B)(ii)(I) of the CEA refers to "commercial arrangements regarding the investment of segregated funds or other property *that may only be invested in such investments as the Commission may permit by rule or regulation*." Proposed § 22.603(a) accordingly provides that segregated initial margin may only be invested consistent with the standards for investment of customer funds that the Commission applies to exchange-traded futures, Regulation § 1.25. That regulation has been designed to permit an appropriate degree of flexibility in making investments with segregated property, while safeguarding such property for the parties who have posted it, and decreasing the credit, market, and liquidity risk exposures of the parties who are relying on that margin.[14]

This regulation governs only investments of initial margin posted by the counterparty, and does not govern what collateral is eligible to be posted as such margin.

2. Commercial Arrangements Regarding Investments and Allocations

As required by new Section 4s(l)(2)(B)(ii) of the CEA, proposed Regulation 22.603(b) provides that the SD or MSP and the counterparty may enter into any commercial arrangement, in writing, regarding the investment of segregated initial margin and the related allocation of gains and losses resulting from such investment.

E. Regulation 23.604: Requirements for Non-Segregated Collateral

Section 4s(l)(4) of the CEA mandates that, if the counterparty does not choose to require segregation, the SD or MSP shall report to the counterparty, on a quarterly basis, "that the back office procedures of the swap dealer or major swap participant relating to margin and collateral requirements are in compliance with the agreement of the counterparties." This provision is implemented in proposed § 22.604(a), which requires that such reports be made no later than the fifteenth (15th) business day of each calendar quarter for the preceding calendar quarter. Proposed Regulation 22.604(a) makes the Chief Compliance Officer of the SD or MSP required by Section 4s(k) of the CEA responsible for such report.

[11] If the SD or MSP and the counterparty were to make competing claims to the collateral, and if the custodian did not have a means under the agreement among the parties to decide between such claims without risking legal liability, the custodian would likely choose to interplead the collateral.

[12] *See* 18 U.S.C. 1621 (Perjury Generally).

[13] The importance of taking steps to ensure that unauthorized withdrawals are not made is enhanced by the findings of the Commission's Division of Clearing and Intermediary Oversight in Financial and Segregation Interpretation 10–1, 20 FR 24768, 24770 (May 11, 2005) ("Findings by both Commission audit staff and the SROs of actual releases of customer funds [from third-party custodial accounts], without the required knowledge or approval of the FCMs, further demonstrate that the risks associated with third-party custodial accounts are real and material, not merely theoretical.").

[14] *See generally Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions,* 75 FR 67642, 67652–53 (Nov. 3, 2010) (Release proposing amendments to Commission Regulation 1.25).

Proposed § 22.604(b) provides that this obligation shall apply no earlier than the 90th calendar day after the first swap is transacted between the counterparties.

F. Effective Date

The Commission requests comment on the appropriate timing of effectiveness for the final rules for Part 23. Specifically, is six months after the promulgation of final rules sufficient? If not, please specify a recommended time period, and explain in detail the reasons why a shorter period will not be sufficient.

III. Portfolio Margining Accounts

Section 713(c) of the Dodd-Frank Act added Section 20(c) of the CEA, which specifies that the Commission "shall exercise its authority to ensure that securities held in a portfolio margining account carried as a futures account are customer property and the owners of those accounts are customers for the purposes of" Subchapter IV. To implement this provision, the Commission proposes changes to §§ 190.01(k) and 190.08(a)(1)(i).

A. Regulation 190.01(k): Definition of Customer

The "customer" portion of this provision is implemented in the proposed amendment to § 190.01(k), which adds to the definition of "customer" the sentence "To the extent not otherwise included, customer shall include the owner of a portfolio margining account carried as a futures account."

B. Regulation 190.08(a)(1)(i)(F): Definition of Customer Property

The "customer property" portion of this provision is implemented in proposed § 190.08(a)(1)(i)(F), which adds to the definition of "customer property" the sentence "To the extent not otherwise included, securities held in a portfolio margining account carried as a futures account."

C. Effective Date of Proposal

The Commission believes that these rule amendments clarify existing law, and thus may be made effective immediately upon promulgation of a final rule. Comment is solicited with respect to these conclusions.

IV. Statutory Time-Periods Technical Amendments Act of 2009

The purpose of this portion of the rulemaking is to implement Public Law 111–16, the Statutory Time-Periods Technical Amendments Act of 2009, which (in relevant part) changed the time period in 11 U.S.C. 764(b), discussed below, from five (business) days to seven (calendar) days. As noted above, these changes are not related to the Dodd-Frank Act.

Certain sections of the Bankruptcy Code [15] provide the trustee of a debtor the power to avoid (*i.e.,* retract) certain transfers of property from the debtor, whether shortly before or after the bankruptcy filing, that would otherwise allow a creditor to obtain more than that creditor would in a bankruptcy distribution. Section 764(b) of the Bankruptcy Code provides that a trustee may not avoid a transfer of "commodity contracts" [16] or "customer property" [17] that is authorized by the Commission, whether before or after the transfer, before the specified time period after the bankruptcy "order for relief."

The change in the statutory deadline should be reflected in the relevant Commission regulations. Moreover, under current business and legal practice, emergency matters (such as transfers during a bankruptcy) may be accomplished outside of business hours. Accordingly, the words "the close of business on the fourth business day after the order for relief" are replaced by the words "11:59 P.M. on the seventh day after the order for relief" in proposed § 190.02(e)(1) (trustee to use best efforts to effect transfer before this time), § 190.02(f)(1) (deadline for transfer of dealer option contracts), § 190.06(g)(2)(i)(A) (prohibition of avoidance of transfers of which the Commission is notified prior to the transfer pursuant to § 190.02(a)(2) and does not disapprove), and § 190.06(g)(2)(ii) (prohibition of avoidance of transfers at the direction of the Commission).

These amendments would only affect "commodity brokers" [18] in bankruptcy, and are meant to make Part 190 consistent with amendments to the Bankruptcy Code. Accordingly, the Commission proposes to make the foregoing amendments to part 190 effective immediately upon promulgation of a final rule.

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") was adopted to address the concerns that government regulations may have a significant and/or disproportionate effect on small businesses. To mitigate this risk, the RFA requires agencies to conduct an initial and final regulatory flexibility analysis for each rule of general applicability for which the agency issues a general notice of proposed rulemaking.[19] These analyses must describe the impact of the proposed rule on small entities, including a statement of the objectives and the legal bases for the rulemaking; an estimate of the number of small entities to be affected; identification of federal rules that may duplicate, overlap, or conflict with the proposed rules; and a description of any significant alternatives to the proposed rule that would minimize any significant impacts on small entities.[20]

The proposed Regulations will impose regulatory obligations on SDs and MSPs. The Commission has already established certain definitions of "small entities" to be used in evaluating the impact of its rules on such small entities in accordance with the RFA.[21] SDs and MSPs are new categories of registrant. Accordingly, the Commission has not previously decided whether such persons are, in fact, small entities for purposes of the RFA.

The Commission previously has determined that FCMs should not be considered to be small entities for purposes of the RFA. The Commission's determination was based in part upon their obligation to meet the minimum financial requirements established by the Commission to enhance the protection of customers' segregated funds and protect the financial condition of FCMs generally.[22] Like FCMs, SDs will be subject to minimum capital and margin requirements, and are expected to comprise the largest global financial firms. The Commission is required to exempt from designation entities that engage in a *de minimis* level of swaps dealing in connection with transactions with or on behalf of customers. Accordingly, for purposes of the RFA, the Commission is hereby determining that SDs not be considered "small entities" for essentially the same reasons that FCMs have previously been determined not to be small entities.

The Commission has also previously determined that large traders are not "small entities" for RFA purposes.[23] The Commission considered the size of a trader's position to be the only appropriate test for purposes of large trader reporting.[24] MSPs maintain substantial positions in swaps, creating substantial counterparty exposure that

[15] *See* 11 U.S.C. 544, 545, 547, 548, 724(a).

[16] *See supra* note 6.

[17] *See supra* note 7.

[18] *See supra* note 5.

[19] 5 U.S.C. 601 *et seq.*

[20] 5 U.S.C. 603, 604.

[21] 47 FR 18618 (Apr. 30, 1982).

[22] *Id.* at 18619.

[23] *Id.* at 18620.

[24] *Id.*

could have serious adverse effects on the financial stability of the United States banking system or financial markets. Accordingly, for purposes of the RFA, the Commission is hereby determining that MSPs not be considered "small entities" for essentially the same reasons that large traders have previously been determined not to be small entities.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

Provisions of proposed new Regulation Part 23 include new information disclosure and recordkeeping requirements that constitute the collection of information within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[25] The Commission therefore is submitting this proposed collection of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. Under the PRA, 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.[26] The title for this collection of information is "Disclosure and Retention of Certain Information Relating to Swaps Customer Collateral," OMB Control Number 3038–NEW. The collection of information will be mandatory. The information in question will be held by private entities and, to the extent it involves consumer financial information, may be protected under Title V of the Gramm-Leach-Bliley Act as amended by the Dodd-Frank Act.[27] 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. This collection of information has not yet been assigned an OMB control number.

1. Information Provided by Reporting Entities

Proposed § 23.601 requires SDs and/or MSPs to notify each counterparty to an uncleared swap transaction that the counterparty may require that the counterparty's initial margin be held in a segregated account. The notification must be provided at the beginning of each swap transaction. However, notification need only be given once a year to any particular counterparty. The SD or MSP must provide the notification to the chief risk officer of the counterparty, if such an officer exists; and otherwise to another appropriate official of the counterparty as specified in the regulation. The SD or MSP must obtain a receipt of the notification and maintain it as a business record. The purpose of proposed § 23.601 is to implement Section 4s(l)(1)(A) of the CEA which requires SDs and MSPs in uncleared swaps transactions to notify counterparties that they have the right to require segregation of their initial margin deposits.

Proposed § 23.604 requires the chief compliance officer of each SD or MSP to report on a quarterly basis to each counterparty that does not choose to require segregation of initial margin on whether or not the back-office procedures of the SD or MSP relating to margin and collateral requirements were, at any point during the previous quarter, not in compliance with the agreement of the counterparties. The purpose of this requirement is to implement Section 4s(1)(4) of the CEA, which requires these reports.

The disclosure requirement of proposed § 23.601 is expected to apply to about 300 entities.[28] Each such entity will be required to make the required disclosure once each year to each of its counterparties in uncleared swaps transactions. It is expected that each disclosure would require approximately 0.3 hours of staff time by staff with a salary level of approximately $20 per hour. Because of the absence of experience under the new requirements of the Dodd-Frank Act, it is uncertain what average number of uncleared swaps counterparties will be dealt with annually by swap dealers and major swap participants. Assuming that each of 14 major swap dealers or major swap participants makes the required disclosure to 5,000–10,000 counterparties per year, and each of the 286 remaining swap dealers or major swap participants makes the required disclosure to 200 counterparties per year, there would be a total of approximately 130,000–200,000 disclosures per year, and thus the estimated total annual burden would be approximately 40,000–60,000 hours and $800,000–$1,200,000.[29]

The disclosure requirement of proposed Regulation 23.604 will apply to the same 300 entities as the requirement of proposed Regulation 23.601. Each such entity will be required to make the required disclosure four times each year to each of its uncleared swaps counterparties that does not choose to require segregation of capital. Because there is as yet no experience with the effect of the disclosure of the right to segregation of collateral and other requirements of the Dodd-Frank Act, it is uncertain how many uncleared swaps counterparties will decline such segregation. Assuming that half of all uncleared swaps counterparties do not choose segregation of collateral, proposed § 23.604 would require a total of approximately 260,000–400,000 disclosures annually. It is expected that each disclosure would, on average, require approximately 0.3 hours of staff time by staff with a salary level of about $30 per hour.[30] The estimated total annual burden would be approximately 80,000–120,000 hours and $2,400,000–$3,500,000.

2. Information Collection Comments

The Commission invites the public and other federal agencies to comment on any aspect of the reporting and 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.

[25] 44 U.S.C. 3501 *et seq.*

[26] *Id.*

[27] *See generally* 75 FR 66014, *Notice of Proposed Rulemaking, Privacy of Consumer Financial Information; Conforming Amendments Under Dodd-Frank Act* (October 27, 2010).

[28] This estimate is based on the assumption that there will be about 250 SDs and 50 MSPs.

[29] The estimate of the number of counterparties receiving disclosure from each swap dealer or major swap participant takes into consideration the possibility that a single counterparty may deal with more than one swap dealer or major swap participant in a year. Thus, the total number of required disclosures may exceed the total number of counterparties making use of uncleared swaps subject to the disclosure requirement.

[30] The time and level of personnel required for the disclosure required by proposed § 23.604 in particular transactions will depend, to some extent, on the specifics of the agreement of the parties with regard to the back-office procedures of the SD relating to margin and collateral requirements, and the extent to which such agreements with regard to procedures are standardized at a particular SD. The average burden figure thus reflects a varying level of burden in particular transactions.

Comments may be submitted directly to the OMB 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 all comments can be summarized and addressed in the final rule preamble. 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 *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 [31] requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. By its terms, Section 15(a) of the CEA does not require the Commission to quantify the costs and benefits of a 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) of the CEA further specifies that the costs and benefits 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 CEA.

1. Cost-Benefit Analysis of Proposed Part 23

a. Summary of Proposed Requirements

Proposed Part 23 of the Commission's regulations implements the requirement of newly-enacted Section 4s(l) of the CEA that counterparties to uncleared swaps transactions with SDs and MSPs be given the right to require to require segregation of their initial margin in an account separate from those of the SD or MSP. Proposed Part 23 also implements the statutory requirement that SDs and MSPs notify their counterparties of this right. Additionally, amendments are being made to Part 190 of the Commission's regulations that would clarify existing law, particularly that (i) "customer property," for purposes of Regulation Part 190, includes securities held in a portfolio margining account carried as a futures account, and (ii) "customers," for purposes of Regulation part 190, includes owners of such a portfolio margining account. Technical amendments also are being proposed for part 190. These amendments would change the deadline for certain actions in bankruptcy proceedings to conform with recent amendments to the Bankruptcy Code, as well as current business and legal practice.

b. Costs

The costs directly imposed by proposed part 23 and the amendments to Part 190 relate to the protection of market participants, the risk management practices of market participants, and the efficiency of bankruptcy proceedings. If proposed part 23 and the proposed amendments to Part 190 are not implemented, it will be less likely that a market participant will be informed of their option to require segregation of their initial margin from the assets of the SD or MSP opposite which the market participant will be transacting swaps. The segregation option is intended to preserve the assets of the market participant in the event of an insolvency of the SD or MSP.

c. Benefits

The benefits of proposed part 23 relate to the protection of market participants and the financial integrity of the futures and swap markets. The proposed regulatons would ensure that segregated accounts for initial margin are available in all uncleared swaps transactions involving SDs or MSPs and that counterparties are informed of their availability. This could result in the increased use of segregated accounts with resulting reduced risk of loss of collateral by counterparties in the event of the insolvency of an SD or MSP and reduced chance of counterparty assets being intentionally or inadvertently misused. In addition proposed Regulation Part 23 can be expected to increase the likelihood that any lack of use of segregated collateral accounts by uncleared swaps counterparties is the result of genuine choices by counterparties and reduce the likelihood that it is the result of inertia, market power, or other market imperfections.

The definitions and technical amendments being proposed for Part 190 similarly are intended to relate to the protection of market participants, as well as to efficiency associated with bankruptcy proceedings. The definitional changes are expected to increase legal certainty in some circumstances. The technical amendments are intended to increase the efficiency with which certain acts in bankruptcy proceedings of commodity brokers are carried out by insuring consistency between the Regulations, the Bankruptcy Code, and current bankruptcy practice.

3. Public Comment

The Commission invites public comment on its cost-benefit considerations. Commenters are also are invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposal with their comment letters.

List of Subjects

17 CFR Part 23

Consumer protection, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 190

Bankruptcy, Brokers, Commodity futures, Reporting and recordkeeping requirements, Swaps.

For the reasons stated in this release, the Commission hereby proposes to amend 17 CFR part 23 as previously proposed in FR Doc. 2010–29024, published on November 23, 2010 (75 FR 71379) and part 190 as follows:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

1. The authority citation for Part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6c, 6p, 6s, 9, 9a, 13b, 13c, 16a, 18, 19, 21 as amended by Pub. L. 111–203, 124 Stat. 1376 (Jul. 21, 2010).

2. Add subpart L to read as follows:

Subpart L—Segregation of Assets Held as Collateral in Uncleared Swap Transactions

Sec.
23.600 Definitions.
23.601 Notification of right to segregation.
23.602 Requirements for segregated margin.
23.603 Investment of segregated initial margin.
23.604 Requirements for non-segregated margin.

[31] 7 U.S.C. 19(a).

Subpart L—Segregation of Assets Held as Collateral in Uncleared Swap Transactions

§ 23.600 Definitions.

"*Initial Margin*" means money, securities, or property posted by a party to a swap as performance bond to cover potential future exposures arising from changes in the market value of the position.

"*Margin*" means both Initial Margin and Variation Margin.

"*Segregate.*" To segregate two or more items is to keep them in separate accounts, and to avoid combining them in the same transfer between two accounts.

"*Variation Margin*" means a payment made by a party to a swap to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was marked to market.

§ 23.601 Notification of right to segregation.

(a) At the beginning of each swap transaction that is not submitted for clearing, a swap dealer or major swap participant shall notify each counterparty to such transaction that the counterparty has the right to require that any Initial Margin the counterparty provides in connection with such transaction be segregated in accordance with §§ 23.602 and 23.603 of this part.

(b) The right referred to in paragraph (a) of this section does not extend to Variation Margin.

(c) The notification referred to in paragraph (a) of this section shall be made to the Chief Risk Officer, or, if there is no such Officer, the Chief Executive Officer, or if none, the highest-level decisionmaker for the counterparty.

(d) Prior to confirming the terms of any such swap, the swap dealer or major swap participant shall obtain from the counterparty confirmation of receipt by the person specified in paragraph (c) of this section of the notification specified in paragraph (a) of this section, and an election to require such segregation or not. The swap dealer or major swap participant shall maintain such confirmation and such election as business records pursuant to § 1.31 of this chapter.

(e) Notification pursuant to paragraph (a) of this section to a particular counterparty by a particular swap dealer or major swap participant need only be made once in any calendar year.

(f) A counterparty's election to require segregation of initial margin, or not to require such segregation, may be changed at the discretion of the counterparty upon written notice delivered to the swap dealer or major swap participant, which changed election shall be applicable to all swaps entered into between the parties after such delivery.

§ 23.602 Requirements for segregated margin.

(a) Initial margin that is segregated pursuant to an election under § 23.601 of this part must be:

(1) Segregated with a custodian that is independent of both the swap dealer or major swap participant and the counterparty, and

(2) Held in an account segregated, and designated as such, for and on behalf of the counterparty. Such an account may, if the swap dealer or major swap participant and the counterparty agree, also hold Variation Margin.

(b) Any agreement for the segregation of Margin pursuant to this section shall be in writing, shall include the custodian as a party, and shall provide that:

(1) Turnover of control of such margin, either to the counterparty or to the swap dealer or major swap participant, shall be made promptly upon presentation to the custodian of a statement in writing, made under oath or under penalty of perjury as specified in 28 U.S.C. 1746, by an authorized representative of either such party, stating that such party is entitled to such control pursuant to an agreement between such parties. The other party shall be immediately notified of such turnover, and

(2) Any withdrawal of such margin, other than pursuant to paragraph (b)(1) of this section, shall only be made pursuant to the agreement of both the counterparty and the swap dealer or major swap participant, and notification of such withdrawal shall be given immediately to the non-withdrawing party.

§ 23.603 Investment of segregated initial margin.

(a) Initial Margin that is segregated pursuant to an election under § 23.601 may only be invested consistent with § 1.25 of this chapter.

(b) Subject to paragraph (a) of this section, the swap dealer or major swap participant and the counterparty may enter into any commercial arrangement, in writing, regarding the investment of such Initial Margin, and the related allocation of gains and losses resulting from such investment.

§ 23.604 Requirements for non-segregated margin.

(a) The chief compliance officer of each swap dealer or major swap participant shall report to each counterparty that does not choose to require segregation of Initial Margin pursuant to § 23.601(a), no later than the fifteenth business day of each calendar quarter, on whether or not the back office procedures of the swap dealer or major swap participant relating to margin and collateral requirements were, at any point during the previous calendar quarter, not in compliance with the agreement of the counterparties.

(b) The obligation specified in paragraph (a) of this section shall apply with respect to each counterparty no earlier than the 90th calendar day after the date on which the first swap is transacted between the counterparty and the swap dealer or major swap participant.

PART 190—BANKRUPTCY

3. The authority citation for Part 190 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4a, 6c, 6d, 6g, 7a, 12, 19, and 24, and 11 U.S.C. 362, 546, 548, 556, and 761–766, unless otherwise noted.

4. Amend § 190.01(k) to read as follows:

§ 190.01 Definitions.

* * * * *

(k) *Customer* shall have the same meaning as that set forth in section 761(9) of the Bankruptcy Code. To the extent not otherwise included, *customer* shall include the owner of a portfolio margining account carried as a futures account.

* * * * *

§ 190.02 [Amended]

5. In § 190.02, amend paragraphs (e)(1) and (f)(1)(i) by removing the words "the close of business on the fourth business day after the order for relief" and adding, in their place, the words "11:59 P.M. on the seventh day after the order for relief."

§ 190.06 [Amended]

6. In § 190.06, amend paragraph (g)(2)(i)(A) by removing the words "the close of business on the fourth business day after the entry of the order for relief" and adding, in their place, the words "11:59 P.M. on the seventh day after the order for relief"; and amend paragraph (g)(2)(ii) by removing the words "the close of business on the fourth business day after the order for relief" and adding, in their place, the words "11:59 P.M. on the seventh day after the order for relief".

7. Amend § 190.08 by redesignating paragraph (a)(1)(i)(F) as

§ 190.08(a)(1)(i)(G), and by adding a new paragraph (a)(1)(i)(F):

§ 190.08 Allocation of property and allowance of claims.

* * * * *

(a) * * *

(1) * * *

(i) * * *

(F) To the extent not otherwise included, securities held in a portfolio margining account carried as a futures account;

* * * * *

Issued in Washington, DC, on November 19, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

Statement of Chairman Gary Gensler

Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy

I support the proposed rulemaking concerning protection of collateral of counterparties to uncleared swaps. The proposal includes important protections for end-users when entering into bilateral or customized swaps. The proposal follows the Congressional direction that end-users must have a choice to have any initial margin that they post with a swap dealer to be kept in a segregated account and with a third party custodian. The proposed rules would protect market participants while promoting the financial integrity of the marketplace. The proposal also includes necessary housekeeping details with regard to the Bankruptcy code.

[FR Doc. 2010–29831 Filed 12–2–10; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–100194–10]

RIN 1545–BJ52

Specified Tax Return Preparers Required To File Individual Income Tax Returns Using Magnetic Media

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the requirement for "specified tax return preparers," generally tax return preparers who reasonably expect to file more than 10 individual income tax returns in a calendar year, to file individual income tax returns using magnetic media pursuant to section 6011(e)(3) of the Internal Revenue Code (Code). The proposed regulations reflect changes to the law made by the Worker, Homeownership, and Business Assistance Act of 2009. The proposed regulations affect specified tax return preparers who prepare and file individual income tax returns, as defined in section 6011(e)(3)(C). For calendar year 2011, the proposed regulations define a specified tax return preparer as a tax return preparer who reasonably expects to file (or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 100 or more individual income tax returns during the year, while beginning January 1, 2012 a specified tax return preparer is a tax return preparer who reasonably expects to file (or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 11 or more individual income tax returns in a calendar year. The proposed regulations are unrelated to and are not intended to address the requirements for obtaining a preparer tax identification number (PTIN) under section 6109. See the final regulations under section 6109 published in the **Federal Register** (75 FR 60309–01). This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by January 3, 2011. Outlines of topics to be discussed at the public hearing scheduled for January 7, 2011 must be received by January 3, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–100194–10), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–100194–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS—REG–100194–10). The public hearing will be held in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Keith L. Brau, (202) 622–4940; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Oluwafunmilayo Taylor of the Publications and Regulations Branch at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by January 3, 2011. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (*see below*) or of the certification contained under the heading "Special Analyses";

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchases of service to provide information.

The collection of information in this proposed regulation is in § 301.6011–6(a)(4)(ii). This information can be used by tax return preparers and specified tax return preparers, if necessary, to demonstrate to the IRS that the related individual income tax returns filed in paper format were not required to be filed electronically pursuant to section 6011(e)(3) and § 301.6011–6. The collection of information is voluntary to obtain a benefit. The likely respondents are the individuals and small businesses who prepare individual income tax returns in exchange for compensation. It is estimated that 5 minutes of preparation time is needed for a tax return preparer to explain the purpose of the information and obtain it from the taxpayer in the manner prescribed by the IRS and 6 minutes for recordkeeping, consisting of maintaining a copy of the information submitted for the respondent's records.

Estimated total annual reporting burden: 1,222,815 hours in calendar year 2011 and 1,689,930 hours in calendar year 2012.

Estimated average annual burden hours per respondent: 9.06 hours (per firm) in calendar year 2011 and 5.42 hours (per firm) in calendar year 2012.

Estimated number of respondents or recordkeepers: 135,000 in calendar year 2011 and 312,000 in calendar year 2012.

Estimated annual frequency of responses per respondent: 49 in calendar year 2011 and 29.5 in calendar year 2012.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.

Background

Recognizing the benefits of electronic filing, Congress enacted section 2001(a) of the IRS Restructuring and Reform Act of 1998, Public Law 105–206 (112 Stat. 727), which states that a policy of Congress is to promote paperless filing. Electronic filing of tax returns benefits taxpayers and the IRS by reducing errors that are more likely to occur during the manual preparation and processing of paper returns. Electronic filing of tax returns results in faster settling of accounts and better customer service because the time required to process paper returns is eliminated. Electronic filing of tax returns improves taxpayer satisfaction and confidence in the filing process, and may be more cost effective. Electronic filing of tax returns enables the IRS to review taxpayer submissions expeditiously to reduce audit cycle time and helps the IRS identify emerging trends more efficiently.

Section 6011(e)(1) generally authorizes the Secretary to prescribe regulations providing the standards for determining which returns must be filed on magnetic media, including electronic filing. Prior to passage of the Worker, Homeownership, and Business Assistance Act of 2009, Public Law 111–92 (123 Stat. 2984, 2997 (2009)) (Act), section 6011(e)(1) provided that, without exception, the Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be other than on paper forms supplied by the Secretary. Under section 6011(e)(2)(A), in prescribing regulations under section 6011(e)(1), the Secretary shall not require any person (taxpayer) to file on magnetic media (including electronically) unless the person is required to file at least 250 returns during the calendar year.

With respect to the restriction that the Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be filed in any format other than paper forms supplied by the Secretary, the Act amended section 6011(e)(1) to provide an exception for individual income tax returns filed by specified tax return preparers, as set forth in new section 6011(e)(3). New section 6011(e)(3) provides that the Secretary shall require the filing on magnetic media of any individual income tax returns prepared and filed by a specified tax return preparer. As more fully discussed below, filing on magnetic media includes electronic filing.

The Act's amendment to section 6011(e) requires the Secretary to issue regulations to implement the statute. These proposed regulations require that the individual income tax returns prepared and filed by specified tax return preparers be filed electronically. To enhance compliance and to promote effective and efficient administration of the congressionally-mandated requirement of section 6011(e)(3), the proposed regulations provide a transition rule for certain specified tax return preparers.

Explanation of Provisions

1. Specified Tax Return Preparers Required To File Individual Income Tax Returns Using Magnetic Media

In General

With certain exclusions, discussed in the next section, the proposed regulations provide that any individual income tax return prepared and filed by a specified tax return preparer must be filed using magnetic media, as required under section 6011(e)(3). For purposes of these proposed regulations, *magnetic media* is defined in § 301.6011–2(a)(1), which generally includes magnetic tape, tape cartridge, and diskette, as well as other media, such as electronic filing, specifically permitted under the applicable regulations, procedures, or publications. Also, for purposes of these proposed regulations and as defined under section 6011(e)(3)(C), an *individual income tax return* is any return of income tax imposed by subtitle A on individuals, estates, and trusts. This includes any return of income tax in the Form 1040 series and Form 1041 series. It also includes Form 990–T (Exempt Organization Business Income Tax Return) when the exempt organization is a trust subject to tax on unrelated business taxable income under section 511(b).

The electronic filing requirement in these proposed regulations applies to specified tax return preparers. A *specified tax return preparer* is defined as any person who is a tax return preparer, as defined in section 7701(a)(36) and § 301.7701–15, unless the tax return preparer reasonably expects to file 10 or fewer individual income tax returns in a calendar year, and if a person who is a tax return preparer is a member of a firm, that person is a specified tax return preparer unless the person's firm members in the aggregate reasonably expect to file 10 or fewer individual income tax returns in a calendar year. The proposed regulations do not apply to individuals described in section 7701(a)(36)(B)(i) through (iv) and § 301.7701–15(f) who are not defined as tax return preparers under that Code section and regulation, such as an individual who provides tax assistance under a Volunteer Income Tax Assistance (VITA) program, a person who merely prepares a return of the employer (or of an officer or employee of the employer) by whom the person is regularly and continuously employed, or a person who prepares a return as a fiduciary for any person. Solely for the 2011 calendar year, a tax return preparer will not be considered a specified tax return preparer if the tax return preparer reasonably expects, or the preparer's firm members in the aggregate reasonably expect, to file fewer than 100 individual income tax returns in the 2011 calendar year.

Under section 6011(e)(3), the concept of "file" or "filed" individual income tax returns affects both tax return preparers and specified tax return preparers. Tax return preparers are affected by this concept because a tax return preparer's classification as a specified tax return preparer is based upon the number of individual income tax returns the tax return preparer reasonably expects to file in a given calendar year. Specified tax return preparers are further affected by this concept because the electronic filing requirement for any particular or specific individual income tax return depends upon whether the specified tax return preparer files the return. Therefore, for purposes of section 6011(e)(3) and these regulations only, an individual income tax return is considered to be "filed" by a tax return preparer or a specified tax return preparer if the preparer or any member, employee, or agent of the preparer or the preparer's firm submits the tax return to the IRS on the taxpayer's behalf, either electronically (by e-file or other magnetic media) or in non-electronic or

non-magnetic media (paper) form. Submission of a tax return in paper form includes the direct or indirect transmission, sending, mailing, or otherwise delivering of the paper tax return to the IRS by the tax return preparer or the specified tax return preparer, or by any member, employee, or agent of the tax return preparer or the preparer's firm, and may include any act or acts of assistance that go beyond the provision of filing or delivery instructions to the taxpayer. For example, this can include the preparer or a member of the preparer's firm dropping the return in the mailbox for the taxpayer. The assistance of others is considered for purposes of determining whether a return is filed by a tax return preparer or specified tax return preparer, to prevent a preparer from avoiding these rules by merely handing the return to an employee or someone else in the firm to mail to the IRS.

A tax return preparer or specified tax return preparer, or if the preparer is a member of a firm, the preparer's firm, will be able to affirmatively demonstrate, if asked, that it was a taxpayer's choice to file an individual income tax return in paper format if the preparer who prepared the return obtains a signed statement from the taxpayer that states the taxpayer chooses to file the return in paper format and that the taxpayer, and not the preparer, will submit the paper return to the IRS. This statement must be signed by the taxpayer (by both spouses if a joint return) and dated on or before the date the taxpayer files the return. The IRS may provide guidance through forms, instructions or other appropriate guidance regarding how preparers can document taxpayer choices to file individual income tax returns in paper format. A Notice containing a proposed revenue procedure outlining the requirements and format of statements to document when a taxpayer chooses to file individual income tax returns in paper format is being published in the Internal Revenue Bulletin (IRB) concurrently with these proposed regulations.

In addition, the proposed regulations provide that the definition of file or filed does not alter or affect a taxpayer's obligation to file any type of tax return required under any other provision of law. The definition of *file* or *filed* by a tax return preparer or a specified tax return preparer contained in these proposed regulations applies only for the purposes of section 6011(e)(3) and these regulations, and does not apply for any other purpose under any other provision of law, such as the statutory period of limitations based on the filing of a tax return.

2. Exclusions

The proposed regulations provide the following exclusions from the electronic filing requirement.

A. Undue Hardship Waivers

Under the proposed regulations, the IRS may grant a waiver of the requirement of this rule in cases of undue hardship. A waiver may generally be granted to a specified tax return preparer for an undue hardship that can be identified in advance, before the specified tax return preparer would otherwise be required to file individual income tax returns electronically. Because this electronic filing requirement is statutorily imposed, the IRS will ordinarily grant undue hardship waivers only in rare cases. An undue hardship waiver may be granted to a specified tax return preparer for a series or class of individual income tax returns or for a specified period of time. A determination of undue hardship will be based upon all facts and circumstances. A specified tax return preparer shall request an undue hardship waiver in the manner prescribed by the IRS in forms, instructions, or other appropriate guidance. A Notice containing a proposed revenue procedure outlining the requirements and format for undue hardship waiver requests is being published concurrently with these proposed regulations.

B. Administrative Exemptions

The IRS may provide administrative exemptions for certain classes of specified tax return preparers or types of individual income tax returns as the IRS determines necessary to promote effective and efficient tax administration. For example, the IRS may provide a broad administrative exemption applicable to all tax return preparers for a particular type of form if the IRS does not yet provide the capability to file the form electronically, or for individual income tax returns prepared by specified tax return preparers who meet certain conditions defined by the IRS. The IRS may also provide an administrative exemption for individual income tax returns that contain or require documentation or attachments that the IRS does not yet provide the capability to file electronically, for example, documentation for the First-Time Homebuyer Credit, section 6707A disclosures, or required appraisals to support charitable contributions. The IRS may also provide a limited administrative exemption for specified tax return preparers who are certified members of, and follow the teachings of, a recognized religious group that is conscientiously opposed to using electronic media, which would include filing electronically. Unlike undue hardship waivers, specified tax return preparers who meet the criteria of an administrative exemption generally need not submit a request to the IRS to claim applicability of the administrative exemption. The IRS may provide the criteria and procedures, if any are necessary, for administrative exemptions through forms, instructions, or other appropriate guidance.

3. Reasonably Expect To File

A. In General

The determination of whether a tax return preparer (or if the preparer is a member of a firm, the preparer's firm members in the aggregate) reasonably expects to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made by adding together all of the individual income tax returns (forms in the Form 1040 series, Form 1041 series, and Forms 990–T (when the exempt organizations are trusts subject to tax on unrelated business taxable income under section 511(b)), in the aggregate) the tax return preparer and, if the preparer is a member of a firm, the firm's members, reasonably expect to prepare and file in each calendar year. In making this determination individual income tax returns that are excluded from the electronic filing requirement due to taxpayer choice or under the administrative exemption exclusion, as provided in these proposed regulations, are not to be counted. Returns excluded under the undue hardship waiver exclusion are to be counted, however, because it is expected that such waivers will generally be sought by tax return preparers who are specified tax return preparers and who would ordinarily have to file these returns electronically but for the waivers granted by the IRS in cases of undue hardship.

B. Time for Making Determination of Reasonable Expectations

The determination regarding reasonable expectations is made separately for each calendar year in order to ascertain whether the electronic filing requirement applies to a tax return preparer for that year. For each calendar year, the determination of whether a tax return preparer and the preparer's firm reasonably expect to file 10 or fewer individual income tax returns (or, in the

case of the 2011 calendar year, fewer than 100 individual income tax returns) is made based on all relevant, objective, and demonstrable facts and circumstances prior to the time the tax return preparer and the preparer's firm first file an individual income tax return during the calendar year.

4. Additional Guidance

The proposed regulations authorize the IRS to implement the requirements of section 6011(e)(3) and the regulations through additional guidance, including by revenue procedures, notices, publications, forms, and instructions, including those issued electronically.

5. Proposed Effective and Applicability Dates

The proposed regulations are effective and applicable on January 1, 2011. To promote the effective and efficient administration of the electronic filing requirement in section 6011(e)(3), the proposed regulations provide a transition rule for 2011, based upon the number of individual income tax returns a tax return preparer files, to permit the IRS and affected tax return preparers sufficient time to prepare for and implement the requirements of section 6011(e)(3) and these proposed regulations. Beginning January 1, 2011, tax return preparers who reasonably expect to file (if a member of a firm whose firm members in the aggregate reasonably expect to file) 100 or more individual income tax returns in calendar year 2011 are specified tax return preparers who are subject to these regulations in 2011. Beginning January 1, 2012, tax return preparers who reasonably expect to file (if a member of a firm whose firm members in the aggregate reasonably expect to file) 11 or more individual income tax returns in a calendar year are specified tax return preparers who are subject to these regulations for that calendar year.

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 is hereby certified that the collection of information contained in these proposed regulations would not have a significant economic impact on a substantial number of small entities. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. This certification is based on a determination that these proposed regulations would impose, at most, a minimal additional reporting or recordkeeping requirement. As discussed in the Paperwork Reduction Act section of this preamble, the economic impact on affected small entities is not significant.

It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed regulations. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on the clarity of the proposed rules and how they can be made easier to understand. The Treasury Department and the IRS also request comments on the procedures and criteria to be established to document taxpayer choices to file in paper format and to request the undue hardship waiver, as well as circumstances that may warrant the granting of an administrative exemption for the 2011 calendar year. Finally, the Treasury Department and the IRS request comments on the accuracy of the certification that the regulations in this document will not have a significant economic impact on a substantial number of small entities as well as comments on the Paperwork Reduction Act burden estimates contained in the Special Analysis section of this preamble. All comments that are submitted by the public will be available for public inspection and copying.

A public hearing has been scheduled for Tuesday, January 7, 2011 at 10 a.m. in the auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, all visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, *see* the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic by January 3, 2011.

A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Keith L. Brau, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read, in part, as follows:

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

Section 1.6011–6 also issued under 26 U.S.C. 6011. * * *

Par. 2. Section 1.6011–6 is added to read as follows:

§ 1.6011–6 Specified tax return preparers required to file individual income tax returns using magnetic media.

Individual income tax returns that are required to be filed on magnetic media by tax return preparers under § 301.6011–6 of this chapter must be filed in accordance with Internal Revenue Service regulations, revenue procedures, revenue rulings, publications, forms or instructions, including those posted electronically.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 3. The authority citation for part 301 is amended by adding an entry in

numerical order to read, in part, as follows:

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

Section 301.6011–6 also issued under 26 U.S.C. 6011. * * *

Par. 4. Section 301.6011–6 is added to read as follows:

§ 301.6011–6 Specified tax return preparers required to file individual income tax returns using magnetic media.

(a) *Definitions.*

(1) *Magnetic media.* For purposes of this section, the term *magnetic media* has the same meaning as in § 301.6011–2(a)(1).

(2) *Individual income tax return.* The term *individual income tax return* means any return of tax imposed by subtitle A on individuals, estates, and trusts.

(3) *Specified tax return preparer.* The term *specified tax return preparer* means any person who is a tax return preparer, as defined in section 7701(a)(36) and § 301.7701–15, unless that person reasonably expects to file 10 or fewer individual income tax returns in a calendar year. If a person who is a tax return preparer is a member of a firm, that person is a specified tax return preparer unless the person's firm members in the aggregate reasonably expect to file 10 or fewer individual income tax returns in a calendar year. Solely for the 2011 calendar year, a person will not be considered a specified tax return preparer if that person reasonably expects, or if the person is a member of a firm, the firm's members in the aggregate reasonably expect, to file fewer than 100 individual income tax returns in the 2011 calendar year. Solely for purposes of this section, an individual is considered a member of a firm if the individual is an employee, agent, member, partner, shareholder, or other equity holder of the firm.

(4) *File or Filed.* (i) For purposes of section 6011(e)(3) and these regulations only, an individual income tax return is considered to be "filed" by a tax return preparer or a specified tax return preparer if the preparer submits the tax return to the IRS on the taxpayer's behalf, either electronically (by e-file or other magnetic media) or in non-electronic (paper) form. Submission of an individual income tax return by a tax return preparer or a specified tax return preparer in non-electronic form includes the direct or indirect transmission, sending, mailing or otherwise delivering of the paper tax return to the IRS by the preparer, any member, employee, or agent of the preparer, or any member, employee, or agent of the preparer's firm, and includes any act or acts of assistance beyond providing filing or delivery instructions to the taxpayer.

(ii) An individual income tax return will not be considered to be filed, as defined in paragraph (a)(4)(i) of this section, by a tax return preparer or specified tax return preparer if the tax return preparer or specified tax return preparer who prepared the return obtains, on or prior to the date the return is filed, a signed (by both spouses if a joint return) and dated written statement from the taxpayer that states the taxpayer chooses to file the return in paper format, and that the taxpayer, and not the preparer, will submit the paper return to the IRS. The IRS may provide guidance through forms, instructions or other appropriate guidance regarding how preparers can document taxpayer choices to file individual income tax returns in paper format.

(iii) The rules contained in this section do not alter or affect a taxpayer's obligation to file returns under any other provision of law. The definition of *file* or *filed* by a tax return preparer or specified tax return preparer contained in paragraph (a)(4)(i) of this section applies only for the purposes of section 6011(e)(3) and these regulations and does not apply for any other purpose under any other provision of law.

(b) *Magnetic media filing requirement.* Except as provided in paragraphs (a)(4)(ii) and (c) of this section, any individual income tax return prepared by a specified tax return preparer in a calendar year must be filed on magnetic media if the return is filed by the specified tax return preparer.

(c) *Exclusions.* The following exclusions apply to the magnetic media filing requirement in this section:

(1) *Undue hardship waiver.* The IRS may grant a waiver of the requirement of this section in cases of undue hardship. An undue hardship waiver may be granted upon application by a specified tax return preparer consistent with instructions provided in published guidance and as prescribed in relevant forms and instructions. A determination of undue hardship will be based upon all facts and circumstances. The undue hardship waiver provided to a specified tax return preparer may apply to a series or class of individual income tax returns or for a specified period of time, subject to the terms and conditions regarding the method of filing prescribed in such waiver.

(2) *Administrative exemptions.* The IRS may provide administrative exemptions from the requirement of this section for certain classes of specified tax return preparers, or regarding certain types of individual income tax returns, as the IRS determines necessary to promote effective and efficient tax administration. The IRS may provide administrative exemptions and any criteria or procedures necessary to claim an administrative exemption through forms, instructions, or other appropriate guidance.

(d) *Reasonably expect to file*—(1) *In general.* The determination of whether a tax return preparer reasonably expects, or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect, to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made by adding together all of the individual income tax returns the tax return preparer and, if the preparer is a member of a firm, the firm's members reasonably expect to prepare and file in the calendar year. In making this determination, individual income tax returns that the tax return preparer reasonably expects will not be subject to the magnetic media filing requirement under paragraph (a)(4)(ii) of this section or are excluded from the requirement under (c)(2) of this section are not to be counted. Returns excluded from the magnetic media filing requirement under paragraph (c)(1) of this section are to be counted for purposes of making this determination.

(2) *Time for making determination of reasonable expectations.* The determination regarding reasonable expectations is made separately for each calendar year in order to ascertain whether the magnetic media filing requirement applies to a tax return preparer for that year. For each calendar year, the determination of whether a tax return preparer and the preparer's firm reasonably expect to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made based on all relevant, objective, and demonstrable facts and circumstances prior to the time the tax return preparer and the preparer's firm first file an individual income tax return during the calendar year.

(e) *Examples.* The examples read as follows:

Example 1. Tax Return Preparer A is an accountant who recently graduated from college with an accounting degree and has opened his own practice. A has not prepared individual income tax returns for compensation in the past and does not plan to focus his practice on individual income tax return preparation. A intends instead to focus his practice on providing specialized accounting services to certain health care service providers. A has no plans to, and does not, employ or engage any other tax return preparers. A estimates that he may be

asked by some clients to prepare and file their individual income tax returns for compensation, but A expects that the number of people who do ask him to provide this service will be no more than seven in 2012. In fact, A actually prepares and files six paper Form 1040 (U.S. Individual Income Tax Return) returns in 2012. Due to a growing client base, and based upon his experience in 2012, A expects that the number of individual income tax returns he will prepare and file in 2013 will at least double, estimating he will prepare and file 12 Form 1040 returns in 2013. A does not qualify as a specified tax return preparer for 2012 because A reasonably expects to file 10 or fewer (seven) in 2012. Consequently, A is not required to electronically file the individual income tax returns he prepares and files in 2012. He does not qualify as a specified tax return preparer for that year because A reasonably expects to file 10 or fewer returns (seven) in 2012. A's expectation is reasonable based on his business projections, individual income tax return filing history, and staffing decisions. A is a specified tax return preparer in 2013, however, because based on those same factors A reasonably expects to file more than 10 individual income tax returns (12) during that calendar year. A, therefore, must electronically file all individual income tax returns that A prepares and files in 2013 that are not otherwise excluded from the electronic filing requirement.

Example 2. Same facts as in *Example 1,* except three of Tax Return Preparer A's clients specifically chose to have A prepare their individual income tax returns in paper format in 2012 with the clients mailing their respective returns to the IRS. A expects that these three clients will similarly choose to have him prepare their returns in paper format in 2013, with the clients being responsible for mailing their returns to the IRS. A is not required to electronically file these three returns in 2013 because the taxpayers chose to file their returns in paper format, and A obtained a dated written statement from each of those taxpayers, indicating that they chose to file their returns in paper format. These three individual income tax returns are not counted in determining how many individual income tax returns A reasonably expects to file in 2013. Because the total number of individual income tax returns A reasonably expects to file in 2013 (nine) does not exceed 10, A is not a specified tax return preparer for calendar year 2013, and A is not required to electronically file any individual income tax return that he prepares and files in 2013.

Example 3. Tax Return Preparer B is a solo general practice attorney in a small county. Her practice includes the preparation of wills and assisting executors in administering estates. As part of her practice, B infrequently prepares and files Forms 1041 (U.S. Income Tax Return for Estates and Trusts) for executors. In the past three years, she prepared and filed an average of five Forms 1041 each year and never exceeded more than seven Forms 1041 in any year. Based on B's prior experience and her estimate for 2012, made prior to the time she first files an individual income tax return in 2012, she reasonably expects to prepare and file no more than five Forms 1041 in 2012. Due to the unforeseen deaths of several of her clients in late 2011, B actually prepares and files 12 Forms 1041 in 2012. B does not find out about these deaths until after she has already filed the first Form 1041 in 2012 for another client. B is not required to electronically file these returns in 2012. She does not qualify as a specified tax return preparer for calendar year 2012 because prior to the time she filed the first Form 1041 in 2012, she reasonably expected to file 10 or fewer individual income tax returns in 2012.

Example 4. Same facts as *Example 3,* except, in addition to the five Forms 1041 that she expects to prepare and file in 2012, Tax Return Preparer B also expects to prepare and file 10 paper Forms 1040 (U.S. Individual Income Tax Return) in 2012, based upon the requests that she has received from some of her clients. Because the total number of individual income tax returns B reasonably expects to file in 2012 (fifteen) exceeds 10, B is a specified tax return preparer for calendar year 2012, and B must electronically file all individual income tax returns that B prepares and files in 2012 that are not otherwise excluded from the electronic filing requirement.

Example 5. Firm X consists of two tax return preparers, Tax Return Preparer C who owns Firm X, and Tax Return Preparer D who is employed by C in Firm X. Based upon the firm's experience over the past three years, C and D reasonably expect to file nine and ten individual income tax returns for compensation, respectively, in 2012. Both C and D must electronically file the individual income tax returns that they prepare in 2012, unless the returns are otherwise excluded from the electronic filing requirement, because they are members of the same firm and the aggregated total of individual income tax returns that they reasonably expect to file in 2012 (nineteen), exceeds 10 individual income tax returns.

(f) *Additional guidance.* The IRS may implement the requirements of this section through additional guidance, including by revenue procedures, notices, publications, forms and instructions, including those issued electronically.

(g) *Proposed effective/applicability dates.* This section is proposed to be effective and applicable on January 1, 2011.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2010–30500 Filed 12–1–10; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 201, 245, and 252

RIN Number 0750–AG38

Defense Federal Acquisition Regulation Supplement; Government Property (DFARS Case 2009–D008)

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

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to revise DFARS part 245, Government Property, to reflect the recent revisions to FAR part 45, Government Property.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before February 1, 2011, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2009–D008, using any of the following methods:

○ *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Internet. Follow the instructions provided at the "Submit a Comment" screen. Please include "DFARS Case 2009–D008".

○ *E-mail: dfars@osd.mil.* Include DFARS Case 2009–D008 in the subject line of the message.

○ *Fax:* 703–602–0350.

○ *Mail:* Defense Acquisition Regulations System, *Attn:* Ms. Mary Overstreet, OUSD(AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060. Please cite DFARS Case 2009–D008.

Comments received generally will be posted without change, including any personal information provided. Please check *http://www.regulations.gov* approximately two to three days after electronic submission to verify posting—allow 30 days for posting of comments submitted by mail.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Overstreet, 703–602–0311.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to update and reorganize DFARS subparts 245.6 and 245.7 for consistency with FAR changes published at 72 FR 27364 on May 15, 2007, that address management of Government property in the possession of contractors, as well as the related

DFARS changes published at 74 FR 37645 on July 29, under DFARS Case 2007–D020. Minor related changes are proposed in part 201 and subparts 245.1 and 245.5. The rule also proposes to add a new property disposal clause at 252.245–70XX, Reporting, Reutilization, and Disposal. The following table summarizes the proposed rule revisions.

DFARS Citation	Changes made by this rule
201.670	Updated and relocated from 245.70.
245.107–70	Redesignated as 245.107 and added reference to DFARS clause 252.245–70XX.
245.5	Added subpart to address support of Government property administration.
245.570	Updated and relocated from 245.612.
245.6	Renamed subpart as Reporting, Reutilization and Disposal.
245.601	Deleted section and relocated updated definitions under DFARS clause 252.245–70XX.
245.602	Added section to address reutilization of Government property.
245.602–1	Added subsection, updated, and relocated from 245.606–3 and 245.7201.
245.602–3	Added subsection, updated, and relocated from 245.608–1 and 245.608–2.
245.602–70	Added subsection to address plant clearance procedures.
245.603	Deleted section heading.
245.603–70	Deleted subsection.
245.603–71	Deleted subsection. Updated and relocated requirements under DFARS clause 252.245–70XX.
245.604	Updated and relocated policy under DFARS clause 252.245–70XX. Renamed section as "Disposal of surplus property" to conform to FAR.
245.604–3	Updated and relocated from 245.73.
245.606	Deleted section.
245.606–3	Deleted subsection. Updated and relocated to 245.602–1.
245.606–5	Deleted subsection. Updated and relocated under DFARS clause 252.245–70XX.
245.606–70	Deleted subsection.
245.607	Deleted section heading.
245.607–1	Deleted subsection. Updated and relocated subsection under DFARS clause 252.245–70XX.
245.607–2	Deleted subsection.
245.607–70	Deleted subsection. Updated and relocated subsection under DFARS clause 252.245–70XX.
245.608	Deleted section heading.
245.608–1	Deleted subsection. Updated and relocated to 245.602–3.
245.608–2	Deleted subsection. Updated and relocated to 245.602–3.
245.608–5	Deleted subsection.
245.608–7	Deleted subsection.
245.608–70	Deleted subsection.
245.608–71	Deleted subsection.
245.608–72	Deleted subsection.
245.609	Deleted section.
245.610	Deleted section. Updated and relocated under DFARS clause 252.245–70XX.
245.612	Deleted section. Updated and relocated in 245.570.
245.613	Deleted section.
245.70	Deleted subpart. Updated and relocated to 201.670.
245.71	Deleted subpart. Updated and relocated to 245.70.
245.72	Deleted subpart. Updated and relocated to 245.602–1 and DFARS Procedures, Guidance, and Information.
245.73	Deleted subpart. Updated and relocated to 245.604–3.
252.245–7000	Added reference to 245.107.
252.245–70XX	Added clause.

II. Executive Order 12866

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

III. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the proposed rule imposes no new requirements on small businesses. It makes no significant change to DoD policy regarding the management of Government property in the possession of contractors. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties on the expected impact of this rule on small entities.

DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2009–D008.

IV. Paperwork Reduction Act

The information collection requirements of the Defense Federal Acquisition Regulation Supplement (DFARS) part 245, Government Property, related clauses in DFARS part 252, and related forms in DFARS part 253, have been approved by the Office of Management and Budget (OMB) under OMB Control Number 0704–0246. No new information collection requirements are imposed by this proposed rule.

List of Subjects in 48 CFR Parts 201, 245, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 201, 245, and 252 as follows:

1. The authority citation for 48 CFR parts 201, 245, and 252 continues to read as follows:

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

PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Add section 201.670 to read as follows:

201.670 Appointment of property administrators and plant clearance officers.

(a) The head of a contracting activity shall appoint or terminate (in writing) property administrators and plant clearance officers.

(b) In appointing qualified property administrators and plant clearance officers, the appointment authority shall consider experience, training, education, business acumen, judgment, character, and ethics.

PART 245—GOVERNMENT PROPERTY

245.107–70 [Redesignated as 245.107]

3. Redesignate section 245.107–70 as 245.107 and revise to read as follows:

245.107 Contract clauses.

(a) Use the clause at 252.245–7000, Government-Furnished Mapping, Charting, and Geodesy Property, in solicitations and contracts when mapping, charting, and geodesy property is to be furnished.

(b) Use the clause at 252.245–70XX, Reporting, Reutilization and Disposal, in solicitations and contracts that contain the clause at—

(1) FAR 52.245–1, Government Property; or

(2) FAR 52.245–2, Government Property Installation Operation Services.

4. Add subpart 245.5 to read as follows:

Sec.

Subpart 245.5—Support Government Property Administration

245.570 Storage at the Government's expense.

All storage contracts or agreements shall be separately priced and shall include all costs associated with the storage.

5. Revise subpart 245.6 to read as follows:

Subpart 245.6—Reporting, Reutilization, and Disposal

Sec.
245.602 Reutilization of Government property.
245.602–1 Inventory disposal schedules.
245.602–3 Screening.
245.602–70 Plant clearance procedures.
245.604 Disposal of surplus property.
245.604–3 Sale of surplus property.

Subpart 245.6—Reporting, Reutilization, and Disposal

245.602 Reutilization of Government property.

245.602–1 Inventory disposal schedules.

Plant clearance officers shall verify inventory schedules to determine the following:

(1) *Allocability.*

(i) Review contract requirements, delivery schedules, bills of material, and other pertinent documents to determine whether schedules include property that—

(A) Is appropriate for use on the contract; or

(B) Exceeds the quantity required for completion of the contract, but could be diverted to other commercial work or Government use.

(ii) Review the contractor's—

(A) Recent purchases of similar material;

(B) Plans for current and scheduled production;

(C) Stock record entries; and

(D) Bills of material for similar items.

(2) *Quantity.* While a complete physical count of each item may not be required, take adequate measures to provide reasonable assurance that available inventory is in accordance with quantities listed on the inventory schedules.

(3) *Condition.* Ensure the inventory condition matches that shown on the inventory schedules.

245.602–3 Screening.

Property will be screened DoD-wide, including the contracting agency, requiring agency and, as appropriate, the General Services Administration. The requiring agency shall have priority for retention of listed items. All required screening must be completed before any surplus contractor inventory sale can take place. The plant clearance officer shall arrange for inspection of property at the contractor's plant if requested by a prospective transferee, in such a manner as to avoid interruption of the contractor's operations.

245.602–70 Plant clearance procedures.

Follow the procedures at PGI 245.602–70 for establishing and processing a plant clearance case.

245.604 Disposal of surplus property.

245.604–3 Sale of surplus property.

Plant clearance officers shall use the following procedures for the sale of surplus property:

(1) *Informal bid procedures.* The plant clearance officer may direct the contractor to issue informal invitations for bid (orally, telephonically, or by other informal media), provided—

(i) Maximum practical competition is maintained;

(ii) Sources solicited are recorded; and

(iii) Informal bids are confirmed in writing.

(2) *Sale approval and award.*

(i) Evaluate bids to establish that the sale price is fair and reasonable, taking into consideration—

(A) Knowledge or tests of the market;

(B) Current published prices for the property;

(C) The nature, condition, quantity, and location of the property; and

(D) Past sale history for like or similar items.

(ii) Approve award to the responsible bidder whose bid is most advantageous to the Government. The plant clearance officer shall not approve award to any bidder who is not eligible to enter into a contract with DoD due to inclusion on the Excluded Parties List System. If a compelling reason exists to award to a bidder on the excluded list, the plant clearance officer shall request approval from the contracting officer.

(iii) Notify the contractor of the bidder to whom an award will be made within five working days from receipt of bids.

(3) *Noncompetitive sales.*

(i) Noncompetitive sales include purchases or retention at less than cost by the contractor. Noncompetitive sales may be made when—

(A) The contracting department/agency or the plant clearance officer determines that this method is essential to expeditious plant clearance; and

(B) The Government's interests are adequately protected.

(ii) Noncompetitive sales shall be at fair and reasonable prices, not less than those reasonably expected under competitive sales.

(iii) Conditions justifying non-competitive sales are—

(A) No acceptable bids are received under competitive sale;

(B) Anticipated proceeds do not warrant competitive sale;

(C) Specialized nature of the property would not create bidder interest;

(D) Removal of the property would reduce its value or result in disproportionate handling expenses; or

(E) Such action is essential to the Government's interests.

Subpart 245.70—[Removed]

6. Subpart 245.70 is removed.

7. Redesignate subpart 245.71 as 245.70, and revise to read as follows:

Subpart 245.70—Plant Clearance Forms

Sec.
245.7001 Forms.
245.7001–1 Standard Form 97, Certificate of Release of a Motor Vehicle (Agency Record Copy).
245.7001–2 DD Form 1149, Requisition and Invoice Shipping Document.
245.7001–3 DD Form 1348–1, DoD Single Line Item Release/Receipt Document.

245.7001–4 DD Form 1640, Request for Plant Clearance.
245.7001–5 DD Form 1641, Disposal Determination/Approval.
245.7001–6 Defense Logistics Agency Form 1822, End Use Certificate.

Subpart 245.70—Plant Clearance Forms

245.7001 Forms.

Use the forms listed below in performance of plant clearance actions.

245.7001–1 Standard Form 97, Certificate of Release of a Motor Vehicle (Agency Record Copy).

Use for transfers, donations, and sales of motor vehicles. The contracting officer shall execute the SF 97 and furnish it to the purchaser.

245.7001–2 DD Form 1149, Requisition and Invoice Shipping Document.

Use for transfer and donation of contractor inventory.

245.7001–3 DD Form 1348–1, DoD Single Line Item Release/Receip Document.

Use when authorized by the plant clearance officer.

245.7001–4 DD Form 1640, Request for Plant Clearance.

Use to request plant clearance assistance or transfer plant clearance.

245.7001–5 DD Form 1641, Disposal Determination/Approval.

Use to record rationale for the following disposal determinations:

(a) Downgrade useable property to scrap.

(b) Abandonment or destruction.

(c) Noncompetitive sale of surplus property.

245.7001–6 Defense Logistics Agency Form 1822, End Use Certificate.

Use when directed by the plant clearance officer.

Subpart 245.72—[Removed]

8. Subpart 245.72 is removed.

Subpart 245.73—[Removed]

9. Subpart 245.73 is removed.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

10. Revise the introductory text of section 252.245–7000 to read as follows:

252.245–7000 Government-Furnished Mapping, Charting, and Geodesy Property.

As prescribed in 245.107(a), use the following clause:

* * * * *

11. Add section 252.245–70XX to read as follows:

252.245–70XX Reporting, Reutilization and Disposal.

As prescribed in 245.107(b), use the following clause:

REPORTING, REUTILIZATION AND DISPOSAL (DATE)

(a) *Definitions.* As used in this clause—

(1) *Commerce Control List Item (CCLI)* means commodities and associated technical data (including software) subject to export controls by the Department of Commerce. (14 CFR 772)

(2) *Demilitarization* means the act of eliminating the functional capabilities and inherent military design features from DoD personal property. Methods and degree range from removal and destruction of critical features to total destruction by cutting, tearing, crushing, mangling, shredding, melting, burning, etc.

(3) *Munitions List Items (MLI)* means commodities and associated technical data (including software) contained in the U.S. Munitions List (USML) that are subject to export controls by the Department of State. (22 CFR 121)

(4) *Scrap* means property that has no value except for its basic material content. For purposes of demilitarization, scrap is defined as recyclable waste and discarded materials derived from items that have been rendered useless beyond repair, rehabilitation, or restoration such that the item's original identity, utility, form, fit and function have been destroyed. Items can be classified as scrap if processed by cutting, tearing, crushing, mangling, shredding, or melting. Intact or recognizable MLI or CCLI components, and parts are not "scrap."

(5) *Serviceable or usable property* means property with potential for reutilization or sale "as is" or with minor repairs or alterations; in Federal Condition Codes: A1, A2, A4, A5, B1, and B4.

(b) *Inventory disposal schedules.*

(1) The Contractor shall complete SF 1428, Inventory Schedule B, within the Plant Clearance Automated Reutilization Screening System (PCARSS). Information on PCARSS can be obtained from the plant clearance officer and at *http://www.dcma.mil/ITCSO/CBT/PCARSS/index.cfm.* Instructions for completing the form are provided on the reverse side of the form.

(i) SF 1428 shall contain the following supply condition codes together with disposal codes 1 through 9, X, and S (*e.g.,* A1, F7, SS):

(A) A—New, used, repaired, or reconditioned property; serviceable and issuable to all customers without limitations or restrictions; includes material with remaining shelf life of more than six months.

(B) B—New, used, repaired, or reconditioned property; serviceable and issuable or for its intended purpose but restricted from issue to specific units, activities, or geographical areas because of its limited usefulness or short service-life expectancy; includes material and remaining shelf life of three to six months.

(C) F—Economically reparable property which requires repair, overhaul or reconditioning; includes reparable items which are radioactively contaminated.

(D) H—Property which has been determined to be unserviceable and does not meet repair criteria.

(E) S—Property that has no value except for its basic material content.

(ii) The item description on the SF 1428 shall contain the following:

(A) The applicable Federal Supply Code (FSC) for all items, except items in scrap condition.

(B) The manufacturer name for all aircraft components under Federal Supply Group (FSG) 16 or 17 and FSCs 2620, 2810, 2915, 2925, 2935, 2945, 2995, 4920, 5821, 5826, 5841, 6340, and 6615.

(C) The manufacturer name, make, model number, model year and serial number for all aircraft under FSCs 1510 and 1520.

(iii) If the schedules are acceptable, the plant clearance officer shall complete and send the Contractor a DD Form 1637, Notice of Acceptance of Inventory.

(c) *Proceeds from sales of surplus property.*

(1) Unless otherwise provided in the contract, the proceeds of any sale, purchase, or retention shall be—

(i) Credited to the Government as part of the settlement agreement;

(ii) Credited to the price or cost of the contract;

(iii) Applied as otherwise directed by the Contracting Officer; or

(iv) Forwarded to the plant clearance officer.

(d) *Contractor inventory in foreign countries.*

The Contracting Officer may allow the contractor to dispose of inventory in foreign countries provided that—

(1) The proposed purchaser's name is not on the list of Parties Excluded from Procurement Programs;

(2) The sales contract or other document forbids exports by purchasers and subpurchasers to Communist areas (FAR 25.702) or other prohibited destinations; and

(3) Sale or other disposition of foreign inventory by the contractor, including sale to foreign governments, requires that the sales contract or other document transferring title include the following certificate:

"The Purchaser certifies that the property covered by this contract will be used in (name of country). In the event of resale or export by the Purchaser of any of the property acquired at a price in excess of U.S. $1,000 or equivalent in other currency at the official exchange rate, the Purchaser agrees to obtain the approval of (name and address of Contracting Officer)."

(e) *Restrictions on purchase or retention of contractor inventory.*

(1) Contractors may not knowingly sell the inventory to any person or that person's agent, employee, or household member if that person—

(i) Is a civilian employee of the DoD or the U.S. Coast Guard;

(ii) Is a member of the armed forces of the United States, including the U.S. Coast Guard; or

(iii) Has any functional or supervisory responsibilities for or within the Defense Reutilization and Marketing Program, or for the disposal of contractor inventory.

(2) The Contractor may conduct internet-based sales, to include use of a third-party.

(f) *Demilitarization.* Demilitarization of contractor inventory may be required to prevent the property (both serviceable and unserviceable) from being used for its originally intended purpose, or prevent the release of inherent design information that could be used against the United States. The Contractor shall demilitarize contractor inventory possessing offensive or defense characteristics, and not required within DoD, in accordance with the terms and conditions of the contract and consistent with Defense Demilitarization Manual, DoD 4160.21–M–1, edition in effect as of the date of this contract. The plant clearance officer may authorize the purchaser to perform the demilitarization provided the property is not inherently dangerous to public health and safety.

(g) *Classified contractor inventory.* The Contractor shall dispose of classified contractor inventory in accordance with applicable security guides and regulations or as directed by the contracting officer.

(h) *Inherently dangerous inventory.* Contractor inventory dangerous to public health or safety shall not be donated or otherwise disposed of unless rendered innocuous or until adequate safeguards are provided.

(i) *Compliance with export control requirements.* The Contractor is responsible for complying with export control laws and regulations. This includes ensuring necessary and appropriate reviews of potential surplus sales buyers of MLI and CCLI.

(j) *Disposal of scrap.*

(1) Contractor with an approved scrap procedure.

(i) The Contractor shall submit for approval to the property administrator a procedure for the untability and management of scrap. The procedure shall, at a minimum, provide for the effective and efficient disposition of scrap so as to minimize costs and maximize sales proceeds; and contain the necessary internal controls for mitigating the improper release of non-scrap property. Government- and contractor-owned scrap may be commingled, with plant clearance officer concurrence, when determined to be effective and efficient.

(ii) Once approved by the property administrator, the plant clearance officer may authorize routine disposal of scrap.

(2) The property administrator may waive the requirement for an approved scrap procedure if the amount of scrap produced or to be produced is minimal and poses little risk.

(3) *Scrap warranty.*

(i) The Contractor shall require all buyers of scrap to sign a DD Form 1639, Scrap Warranty.

(ii) The Contracting Officer may release the Contractor from the terms of the scrap warranty in return for consideration paid to the Government. The consideration will represent the difference between—

(A) The sale price of the scrap; and

(B) A fair and reasonable price for the material if it had been sold for purposes other than scrap.

(iii) The Contractor shall pay the consideration to the Government and the Government may execute the release even though the contract containing the warranty was not made directly with the Government.

(iv) If the scrap is resold to a second buyer, the first buyer shall obtain a scrap warranty from the second buyer. Upon receipt of the second buyer's scrap warranty, the Government will release the first buyer from liability under the original warranty.

(k) *Disposal of contractor inventory for NATO cooperative projects.*

(1) North Atlantic Treaty Organization (NATO) cooperative project agreements may include disposal provisions of jointly acquired property without regard to any applicable disposal laws of the United States.

(2) Disposal of such property includes transfer of U.S. interests in the property to one of the other governments participating in the agreements, or the sale of the property.

(3) Payment for the transfer or sale of any U.S. interest shall be made in accordance with the terms of the project agreement.

(l) *Sale of surplus contractor inventory.*

(1) The Contractor or its employees shall submit their bids to the plant clearance officer prior to soliciting bids from other prospective bidders.

(2) The Contractor shall solicit a sufficient number of bidders to obtain adequate competition and use formal invitations for bid, unless the plant clearance officer approves use of informal bid procedures. The Contractor shall include in its invitation for bids, the sales terms and conditions provided by the plant clearance officer.

(3) The Contractor shall solicit bids at least 15 calendar days before bid opening to allow adequate opportunity to inspect property and prepare bids.

(4) For large sales, the Contractor may use summary lists of items offered as bid sheets with detailed descriptions attached.

(5) In addition to mailing or delivering notice of the proposed sale to prospective bidders, the Contractor may (when the results are expected to justify the additional expense) display a notice of the proposed sale in appropriate public places, e.g., publish a sales notice in appropriate trade journals or magazines and local newspapers.

(6) When the acquisition cost of the property to be sold at one time, in one place, is $250,000 or more, the Contractor shall send a notice of the proposed sale to FedBizOpps (*http://www.fbo.gov*).

(7) The plant clearance officer or representative will witness the bid opening. Within two working days after bid opening, the Contractor will submit to the plant clearance officer, either electronically or manually, two copies of the bid abstract.

(8) When demilitarization of property is required, whether on or off contractor or Government premises, the sales contract must include the following provisions:

(i) *Demilitarization.* Item(s) ____ require demilitarization by the Purchaser. Insert item number(s) and specific demilitarization requirements for item(s) shown in Defense Demilitarization Manual, DoD 4160.21–M–1, edition in effect as of the date of this contract.

(ii) *Demilitarization on Government or non-Government premises.* Property requiring demilitarization shall be demilitarized by the Purchaser under the supervision of qualified Department of Defense personnel. Property requiring demilitarization shall not be removed, and title shall not pass to the Purchaser, until demilitarization has been accomplished and verified by a Government representative. Demilitarization will be accomplished as specified in the contract. The Purchaser agrees to assume all costs incident to the demilitarization and to restore the working area to its present condition after removing the demilitarized property.

(iii) *Failure to demilitarize.* If the Purchaser fails to demilitarize the property as specified in the contract, the Contractor may, upon giving ten days written notice from date of mailing to the Purchaser—

(A) Repossess, demilitarize, and return the property to the Purchaser. The Purchaser hereby agrees to pay to the Contractor, prior to the return of the property, all costs incurred by the Contractor in repossessing, demilitarizing, and returning the property to the Purchaser.

(B) Repossess, demilitarize, and resell the property, and charge the defaulting Purchaser with all excess costs incurred by the Contractor. The Contractor shall deduct these costs from the purchase price and refund the balance of the purchase price, if any, to the Purchaser. In the event the excess costs exceed the purchase price, the defaulting Purchaser hereby agrees to pay these excess costs to the Contractor.

(C) Repossess and resell the property under similar terms and conditions. In the event this option is exercised, the Contractor shall charge the defaulting Purchaser with all excess costs incurred by the Contractor. The Contractor shall deduct these excess costs from the original purchase price and refund the balance of the purchase price, if any, to the defaulting Purchaser. Should the excess costs to the Contractor exceed the purchase price, the defaulting Purchaser hereby agrees to pay these excess costs to the Contractor.

(End of clause)

[FR Doc. 2010–30285 Filed 12–2–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 209, 213, 214, 215, 217, 218, 219, 220, 221, 222, 223, 224, 225, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 238, 239, 240, and 241

[Docket No. FRA–2006–25274, Notice No. 3]

RIN 2130–ZA00

Revised Proposal for Revisions to the Schedules of Civil Penalties for a Violation of a Federal Railroad Safety Law or Federal Railroad Administration Safety Regulation or Order; Reopening and Extending the Comment Period

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Reopening and extending the comment period.

SUMMARY: Due to comments received from the Association of American Railroads (AAR) during the initial comment period, FRA is reopening the comment period for its proposal published on September 21, 2010. The proposal, if adopted, would amend, line by line, FRA's schedules of civil penalties issued as appendices to FRA's rail safety regulations, as well as other guidance. AAR stated in its comments on the proposal that FRA did not give the railroad industry adequate time to review all the penalties listed in the proposal to determine if they match the severity-scale criteria, which are also listed in the proposal. Therefore, FRA is reopening and extending the comment period in order to allow AAR more time to review the penalties in the severity scale and to identify and comment more fully on which individual penalties do not in its opinion satisfy the severity-scale criteria. FRA also seeks further comments from other interested parties that were unable to comment during the initial comment period. The comment period is reopened until February 1, 2011.

DATES: Written comments must be received by February 1, 2011. Comments received after that date will be considered to the extent possible without incurring additional delay or expense.

ADDRESSES: *Comments:* Comments related to this Docket No. FRA 2006–25274, Notice No. 3, may be submitted by any of the following methods:

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

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov* at any time or to U.S. Department of Transportation, Docket Operations, 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.

FOR FURTHER INFORMATION CONTACT: Ron Hynes, Director, Office of Safety Compliance and Assurance, Office of Railroad Safety, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone 202–493–6404), *ronald.hynes@dot.gov;* or Brian Roberts, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Mail Stop 10, Washington, DC 20590 (telephone 202–493–6052), *brian.roberts@dot.gov.*

SUPPLEMENTARY INFORMATION: FRA's proposal to amend, line by line, FRA's schedules of civil penalties as well as other guidance was published on September 21, 2010 (75 FR 57598). The initial comment period closed on October 21, 2010. During this 30-day comment period, FRA received comments from both AAR and The American Short Line and Regional Railroad Association. In its comments, AAR provided examples of penalties in the proposal that it believed did not match the severity-scale criteria. However, AAR also stated that FRA did not give it adequate time to review all the penalties in the proposal and determine whether they matched the severity-scale criteria. Therefore, FRA is reopening the comment period to allow AAR an opportunity to comment on these perceived inconsistencies more fully. FRA will address all other comments made during the initial and additional comment period in the final statement of agency policy.

Privacy Act: FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any agency docket 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 edition of the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://regulations.gov/search/footer/privacyanduse.jsp.*

Issued in Washington, DC, on November 29, 2010.

Karen J. Rae,

Deputy Administrator.

[FR Doc. 2010–30366 Filed 12–2–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 100804324–0489–01]

RIN 0648–BA01

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Comment Period Extension

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; extension of a comment period.

SUMMARY: NMFS is extending the comment period for the proposed rule to implement the 2011–2012 Biennial Specifications and Management Measures; Amendment 16–5; and Amendment 23 to the Pacific Coast Groundfish Fishery Management Plan (PCGFMP). The comment period is being extended to provide additional opportunity for public comment.

DATES: Comments must be received no later than 5 p.m., local time on January 4, 2011.

ADDRESSES: You may submit comments, identified by the RIN number 0648–BA01, by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov.*
- *Fax:* 206–526–6736, *Attn:* Sarah Williams.
- *Mail:* William Stelle, Administrator, Northwest Region, NMFS, 7600 Sand Point Way, NE., Seattle, WA 98115–0070, *Attn:* Sarah Williams.

Instructions: 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.

National Marine Fisheries Service (NMFS) will accept anonymous

comments (enter N/A if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Information relevant to the proposed rule, which includes a draft environmental impact statement (DEIS), a regulatory impact review (RIR), and an initial regulatory flexibility analysis (IRFA) are available for public review during business hours at the office of the Pacific Fishery Management Council (Council), at 7700 NE Ambassador Place, Portland, OR 97220, *phone:* 503–820–2280. Copies of additional reports referred to in the proposed rule document may also be obtained from the Council.

FOR FURTHER INFORMATION CONTACT: Sarah Williams, *phone:* 206–526–4646, *fax:* 206–526–6736, or *e-mail*: s*arah.williams@noaa.gov.*

SUPPLEMENTARY INFORMATION: The proposed rule that published on November 3, 2010 (75 FR 67810), establishes the 2011–2012 harvest specifications and management measures for groundfish taken in the U.S. exclusive economic zone off the coasts of Washington, Oregon, and California consistent with the Mangunson-Stevens Fishery Conservation and Management Act and the Pacific Coast Groundfish Fishery Management Plan (PCGFMP). The proposed rule revises the harvest specifications for groundfish species and species complexes and the collection of management measures in the groundfish fishery regulations that are intended to keep the total catch within those harvest specifications. The proposed rule also includes regulations to implement Amendment 16–5 to the PCGFMP. Amendment 16–5 would create a new rebuilding plan for Petrale sole, which was declared overfished on February 9, 2010, revise the existing rebuilding plans, and revise status determination criteria and a harvest control rule for flatfish. Finally, the proposed rule is consistent with and partially implements Amendment 23 to the PCGFMP. Amendment 23 would make the PCGFMP consistent with the revised National Standard 1 Guidelines (74 FR 3178, January 16, 2009).

The proposed rule published in the **Federal Register** with a 30-day comment period that closed on December 3, 2010. NMFS announced at the November 2010 Council meeting that the 2011–2012 biennial specifications and management measures originally schedule to be in place January 1, 2011, would be delayed to allow for the preparation of the analytical documents needed to support final action. Because of this delay many of the specifications in the proposed rule will not be effective for the beginning of 2011 and instead specifications from 2010 will be effective for the beginning of 2011, until the final rule is in place. Because of the extra time now available due to the delay in final action, NMFS is extending the comment period on the proposed rule through January 4, 2011 to allow the public and the Council additional time to comment.

Dated: November 30, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2010–30403 Filed 12–2–10; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 75, No. 232

Friday, December 3, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of Public Information Collection Requirements Submitted to OMB for Review

SUMMARY: U.S. Agency for International Development (USAID) has submitted the following information collection to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 10413. Comments regarding this information collection are best assured of having their full effect if received within 30 days of this notification. Comments should be addressed to: Desk Officer for USAID, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503. Copies of submission may be obtained by calling (202) 712–1365.

SUPPLEMENTARY INFORMATION:

OMB Number: OMB 0412–0520.

Form Number: AID 1420–17.

Title: Contract Employee Biographical Data Sheet.

Type of Submission: Renewal of Information Collections.

Purpose: The U.S. Agency for International Development (USAID) is authorized to make contracts with any corporation, international organization, or other body of persons in or outside of the United States in furtherance of the purposes and within limitations of the Foreign Assistance Act (FAA). The information collections requirements placed on the public are published in 48 CFR chapter 7, and include such items as the Contractor Employee Biographical Data Sheet and Performance and Progress Reports (AIDAR 752.7026). These are all USAID unique procurement requirements. The pre-award requirements are based on a need for prudent management in the determination that an offeror either has or can obtain the ability to competently manage development assistance programs utilizing public funds. The requirements for information collection requirements during the post-award period are based on the need to administer public funds prudently.

Annual Reporting Burden:

Respondents: 14,939.

Total annual responses: 41,573.

Total annual hours requested: 63,152 hours.

Dated: November 23, 2010.

Lynn P. Winston,

Acting Chief, Information and Records Division, Office of Management Services, Bureau for Management.

[FR Doc. 2010–30246 Filed 12–2–10; 8:45 am]

BILLING CODE 6116–01–M

DEPARTMENT OF AGRICULTURE

Forest Service

Kern and Tulare Counties Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Call for proposals.

SUMMARY: The Kern and Tulare Counties Resource Advisory Committee (RAC) will be accepting applications for projects that may be recommended for funding under Title II of the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343). The application will soon be available for download from the Sequoia National Forest Web site: *http://www.fs.fed.us/r5/sequoia/projects/rural-schools/index.html* and can be submitted electronically, by mail, or in person after January 15, 2011. The RAC is conducting workshops at meetings 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.

DATES: Applications will be accepted between January 15 and close of business June 1, 2011 electronically, by mail, or in person. Meetings will be held in Porterville on February 17, 2011, and in Bakersfield on March 17, 2011. The February 17 meeting will also be available by video conference at the Kern River Ranger District Office. All meetings will begin at 5 p.m. and include workshops devoted to the development of proposals and the application process from 6 p.m. to 7:30 p.m.

ADDRESSES: The February 17, 2011 workshop will be held at the Sequoia National Forest Headquarters, 1839 South Newcomb Street, Porterville, California, and will be available by video conference at the Kern River Ranger District Office, 105 Whitney Road, Kernville, California. The March 17 workshop will be held at the County of Kern Administrative Office, 1115 Truxtun Avenue, Bakersfield, California.

Applications are to be sent to Penelope Shibley, Kern River Ranger District, P.O. Box 9, Kernville, CA 93238, or by e-mail to *pshibley@fs.fed.us*. The public may deliver applications to the Kern River Ranger District, 105 Whitney Road, Kernville, CA. RAC members will not accept applications. All applications, including names and addresses when provided, are placed in the record and are available for public inspection and copying. Visitors are encouraged to call 760–376–3781 to facilitate entry into the building and access to the record.

FOR FURTHER INFORMATION CONTACT: Penelope Shibley, RAC Coordinator, Kern River Ranger Station, P.O. Box 9, Kernville, CA 93238; (760) 376–3781; or *e-mail: pshibley@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call 559–781–6650 between 8 a.m. and 4:30 p.m., Pacific Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Workshops will offer assistance on completing the application process to anyone choosing to attend. All workshops and meetings are open to the public. During the meetings, committee discussions are limited to Forest Service staff and committee members. The following business will be conducted (1) introductions of all committee members, replacement members, and Forest Service personnel; (2) approve minutes of the last meeting; (3) share updates on the progress of approved projects; and (4) receive public comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: November 29, 2010.

Tina J. Terrell,

Forest Supervisor.

[FR Doc. 2010–30325 Filed 12–2–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Dixie Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meetings.

SUMMARY: The Dixie Resource Advisory Committee will meet in Panguitch, Utah and Santa Clara, Utah. 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 two meetings are to discuss Title II project proposals.

DATES: December 7, 2010, 9 a.m. & January 6, 2011, 9 a.m.

ADDRESSES: December 7, 2010 meeting will be held at Garfield County Courthouse, 55 South Main Street, Panguitch, Utah. January 6, 2011 meeting will be held at the Santa Clara Town Hall, 2721 Santa Clara Drive, Santa Clara, Utah. The public is invited to attend both meetings.

FOR FURTHER INFORMATION CONTACT: Kenton Call, RAC Coordinator, Dixie National Forest, (435) 865–3730; e-mail: *ckcall@fs.fed.us*.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meetings are open to the public. The following business will be conducted: (1) Welcome and committee introductions; (2) Review of project proposals; (3) Category discussion of proposals; (4) RAC discussion and decision on proposals, and (5) Public comment on any propopals. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input will be accepted by the RAC during the meetings.

Dated: November 11, 2010.

Robert G. MacWhorter,

Forest Supervisor.

[FR Doc. 2010–30008 Filed 12–2–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; 2012 Economic Census General Classification Report

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, 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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before February 1, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Scott P. Handmaker, Chief, Economic Classifications Operations Branch, U.S. Census Bureau, 8K149, Washington, DC 20233, Telephone: 301–763–7107 or e-mail at *Scott.P.Handmaker@census.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Economic Census General Classification Report (NC–99023) collects information on new businesses for the purpose of assigning a proper North American Industry Classification System (NAICS) code. New businesses are assigned NAICS codes by the Social Security Administration (SSA); however, many of these businesses cannot be assigned detailed NAICS codes, because insufficient data are provided by respondents on the Internal Revenue Service (IRS) Form SS–4. This report, conducted separately in fiscal years 2012 and 2013, will mail approximately 100,000 businesses per year that are unclassified or have been partially classified. The NC–99023 form collects information on primary business activity in order to determine a complete and reliable NAICS code. Proper industry classification ensures that establishments will be tabulated in the correct detailed industry for the 2012 Economic Census and other survey programs, ensuring high quality economic estimates. Failure to collect these data will have an adverse effect on the quality and usefulness of economic statistics provided by the Census Bureau. Additionally, by ensuring proper industry classification, this survey reduces processing costs and reporting burden for the 2012 Economic Census data collection.

There are few changes since the last request was submitted for an OMB clearance request in 2007. Changes will be made to the wording and organization of existing economic activity descriptions. Additionally, respondents will have the option to respond electronically via the Internet.

II. Method of Collection

Information is collected by Internet, mail, and fax.

III. Data

OMB Control Number: None.

Form Number: NC–99023.

Type of Review: Regular submission.

Affected Public: Businesses or Other for Profit Institutions, Small Businesses or Organizations, Non-profit Institutions, State or Local Governments.

Estimated Number of Respondents: 100,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 16,667.

Estimated Total Annual Cost: $483,510.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C. Sections, 131, 224.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection;

they also will become a matter of public record.

Dated: November 30, 2010.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–30328 Filed 12–2–10; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Technical Data Letter of Explanation

AGENCY: Bureau of Industry and Security.

ACTION: Notice.

SUMMARY: The Department of Commerce, 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.

DATES: Written comments must be submitted on or before February 1, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Larry Hall, BIS ICB Liaison, (202) 482–4895, *lhall@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

These technical data letters of explanation will assure the Bureau of Industry and Security that U.S.-origin technical data will be exported only for authorized end-uses, users and destinations. The information contained in the letters describes the transaction and fixes the scope of technology to be exported, the parties to the transaction, their roles, the purpose for the export, and the methods authorized to be used in exporting the technology. The letters also place the foreign consignee on notice that the technical data is subject to U.S. export controls and may only be re-exported in accordance with U.S. law.

II. Method of Collection

Submitted electronically or in paper form.

III. Data

OMB Control Number: 0694–0047.
Form Number(s): None.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 6,313.
Estimated Time per Response: 30 minutes to 2 hours.
Estimated Total Annual Burden Hours: 10,964.
Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 30, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–30359 Filed 12–2–10; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Five-Year Records Retention Requirement for Export Transactions and Boycott Actions

AGENCY: Bureau of Industry and Security.

ACTION: Notice.

SUMMARY: The Department of Commerce, 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.

DATES: Written comments must be submitted on or before February 1, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Larry Hall, BIS ICB Liaison, (202) 482–4895, *lhall@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

All parties involved in export transactions and the U.S. party involved in a boycott action are required to maintain records of these activities for a period of five years. These records can include memoranda, correspondence, contracts, invitations to bid, books of account, financial records, restrictive trade practice or boycott documents and reports. The five-year record retention period corresponds with the five-year statute of limitations for criminal actions brought under the Export Administration Act of 1979 and predecessor acts, and the five-year statute for administrative compliance proceedings. Without this authority, potential violators could discard records demonstrating violations of the Export Administration Regulations prior to the expiration of the five-year statute of limitations.

II. Method of Collection

Recordkeeping requirement. No information is provided to BIS.

III. Data

OMB Control Number: 0694–0096.
Form Number(s): None.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 84,001,108
Estimated Time per Response: 1 second to 1 minute.
Estimated Total Annual Burden Hours: 251.
Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance

of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 30, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–30332 Filed 12–2–10; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–916]

Laminated Woven Sacks From the People's Republic of China: Extension of Time Limit for Final Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 3, 2010.

FOR FURTHER INFORMATION CONTACT: Jamie Blair-Walker, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2615.

Background

On September 22, 2009, Department of Commerce ("Department") published the notice of the initiation of the antidumping duty administrative review on laminated woven sacks ("LWS") from the People's Republic of China ("PRC"), covering the period January 31, 2008, through July 31, 2009. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 74 FR 48224 (September 22, 2009) ("*Initiation Notice*").

On September 13, 2010, the Department published the preliminary results of this review. *See Laminated Woven Sacks From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 55568 (September 13, 2010) ("*Preliminary Results*"). The final results are currently due on January 11, 2011.

Extension of Time Limits for Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("Act"), requires the Department to issue the final results in an administrative review of an antidumping duty order 120 days after the date on which the preliminary results are published. The Department may, however, extend the deadline for completion of the final results of an administrative review to 180 days if it determines it is not practicable to complete the review within the foregoing time period. *See* section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2).

The Department requires additional time to complete this review because the Department must fully analyze and consider complicated issues raised in the parties' case and rebuttal briefs. Furthermore, the Department requires additional time to give parties an opportunity to comment on data placed on the record by the Department after the publication of the *Preliminary Results.* Thus, it is not practicable to complete this review within the time specified under the Act. Therefore, we are extending the time for the completion of the final results of this review by 60 days to March 14, 2011, the first business day following the extended due date of March 12, 2011.

This notice is published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 26, 2010.

Barbara E. Tillman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–30379 Filed 12–2–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–821]

Polyethylene Retail Carrier Bags From Thailand: Extension of Time Limit for the Final Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 3, 2010.

FOR FURTHER INFORMATION: Thomas Schauer, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0410.

SUPPLEMENTARY INFORMATION:

Background

On September 2, 2010, the Department of Commerce (the Department) published the preliminary results of review of the antidumping duty order on polyethylene retail carrier bags from Thailand. *See Polyethylene Retail Carrier Bags From Thailand: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 53953 (September 2, 2010). The administrative review covers the period August 1, 2008, through July 31, 2009.

Extension of Time Limit for Final Results of Review

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), the Department shall make a final determination in an administrative review of an antidumping duty order within 120 days after the date on which the preliminary results are published. The Act provides further that the Department may extend that 120-day period to 180 days after the preliminary results if it determines it is not practicable to complete the review within the foregoing time period.

The Department finds that it is not practicable to complete the final results of the administrative review of the antidumping duty order on polyethylene retail carrier bags from Thailand within the 120-day time limit due to the necessity of issuing a post-preliminary determination regarding whether it is appropriate to use an alternative cost methodology. We find that additional time is needed to complete the final results. Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for completion of the final results of this review, which is currently due on December 31, 2010, by 60 days to March 1, 2011, which is the 180th day after publication of the preliminary results.

This notice is published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: November 29, 2010.

Susan H. Kuhbach,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–30381 Filed 12–2–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–351–829]

Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil: Final Results of Full Sunset Review of Countervailing Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On April 1, 2010, the Department of Commerce (the Department) initiated the second sunset review of the countervailing duty (CVD) order on certain hot-rolled flat-rolled carbon-quality steel products (hot-rolled steel) from Brazil, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). On the basis of a notice of intent to participate and an adequate substantive response filed on behalf of the domestic interested parties,[1] and adequate responses from Usinas Siderurgicas de Minas Gerais and Companhia Siderurgica Paulista (USIMINAS/COSIPA)[2] and Companhia Siderurgica Nacional (CSN), producers of hot-rolled steel, and the Government of Brazil (GOB), the Department determined to conduct a full sunset review of this CVD order pursuant to section 751(c) of the Act and 19 CFR 351.218(e)(2). As a result of our analysis, the Department finds that revocation of the CVD order would likely lead to continuance or recurrence of a countervailable subsidy.

DATES: *Effective Date:* December 3, 2010.

FOR FURTHER INFORMATION CONTACT: Milton Koch, 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) 482–2584.

SUPPLEMENTARY INFORMATION:

Background

On April 1, 2010, the Department initiated the second sunset review of the countervailing duty order on hot-rolled steel from Brazil in accordance with section 751(c) of the Act. *See Initiation of Five-Year ("Sunset") Review,* 75 FR 16437 (April 1, 2010). The domestic interested parties timely filed a notice of intent to participate. The Department received substantive responses filed on behalf of the domestic interested parties, and responses from USIMINAS/COSIPA and CSN, producers of hot-rolled steel, and the GOB. Based on a finding that the substantive responses were adequate, the Department determined to conduct a full sunset review of this CVD order pursuant to section 751(c) of the Act and 19 CFR 351.218(e)(2). *See* Memorandum from Jacqueline Arrowsmith, Trade Compliance Analyst, to Barbara Tillman, Director, AD/CVD Operations, Office 6 re: Adequacy Determination in Countervailing Duty Sunset Review Of Hot-Rolled Carbon, Steel Flat Products from Brazil—Second Countervailing Duty Review (2005 through 2009) (May 21, 2010).

On July 20, 2010, the Department issued the preliminary results of the full sunset review, finding a likelihood of continuation or recurrence of subsidization with a net countervailable subsidy likely to prevail of zero percent for USIMINAS/COSIPA, CSN and all other companies. *See Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Preliminary Results of Full Sunset Review,* 75 FR 43931 (July 27, 2010). Interested parties were invited to comment on the preliminary results. On September 15, 2010, the Department received timely case briefs from domestic interested parties, USIMINAS/COSIPA, and CSN. On September 20, 2010, the Department received rebuttal briefs from the same parties.

Scope of the Order

The products covered by the order are certain hot-rolled flat-rolled carbon-quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers) regardless of thickness, and in straight lengths, of a thickness less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of the order.

Specifically included in the scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free ("IF")) steels, high strength low alloy ("HSLA") steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products to be included in the scope of the order, regardless of Harmonized Tariff Schedule of the United States ("HTSUS") definitions, are products in which: (1) Iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
1.50 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.012 percent of boron, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.41 percent of titanium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

[1] Bethlehem Steel Corporation, US Steel Group, a unit of USX Corporation, Ispat Inland Steel, LTV Steel Company, Inc., National Steel Corporation, California Steel Industries, Gallatin Steel Company, Geneva Steel, Gulf States Steel Inc., IPSCO Steel Inc., Steel Dynamics, Weirton Steel Corporation, Independent Steelworkers Union, and United Steelworkers of America were petitioners in the original investigation. In 2002, International Steel Group was formed; International Steel Group reported that it is the successor to LTV Steel Company Inc., Weirton Steel Corporation, and Bethlehem Steel Corporation, which are no longer in existence. In 2005, International Steel Group and Ipsat Inland Steel merged with Mittal Steel Company NV. In 2006, Arcelor and Mittal Steel Company NV merged, and Mittal Steel's U.S. hot-rolled steel operations became a part of ArcelorMittal USA. ArcelorMittal USA stated that it is a U.S. producer of hot-rolled steel and an interested party pursuant to section 771(9)(C) of the Act. *See* April 15, 2010 Notice of Intent to Participate letter from ArcelorMittal USA to the Department. Nucor Corporation is also a domestic producer of subject merchandise. According to the domestic interested parties, IPSCO Steel Inc. is now known as SSAB N.A.D.

[2] The Department found that USIMINAS owned 49.79 percent of COSIPA during the period of investigation. *See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil,* 64 FR 38741, 38744 (July 19, 1999). Accordingly, the Department treated these two producers as a single company for purposes of the investigation in accordance with section 771(33)(E) of the Act.

All products that meet the physical and chemical description provided above are within the scope of the order unless otherwise excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of the order:

• Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including *e.g.,* ASTM specifications A543, A387, A514, A517, and A506).

• SAE/AISI grades of series 2300 and higher.

• Ball bearing steels, as defined in the HTSUS.

• Tool steels, as defined in the HTSUS.

• Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 1.50 percent.

• ASTM specifications A710 and A736.

• USS Abrasion-resistant steels (USS AR 400, USS AR 500).

• Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni
0.10–0.14%	0.90% Max	0.025% Max	0.005% Max	0.30–0.50%	0.50–0.70%	0.20–0.40%	0.20% Max

Note: Width = 44.80 inches maximum; Thickness = 0.063–0.198 inches; Yield Strength = 50,000 ksi minimum; Tensile Strength = 70,000–88,000 psi.

• Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni	Mo
0.10–0.16%	0.70–0.90%	0.025% Max	0.006% Max	0.30–0.50%	0.50–0.70%	0.25% Max	0.20% Max	0.21% Max

Note: Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

• Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni	V(wt.)	Cb
0.10–0.14%	1.30–1.80%	0.025% Max	0.005% Max	0.30–0.50%	0.50–0.70%	0.20–0.40%	0.20% Max	0.10% Max	0.08% Max

Note: Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

• Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni	Nb	Ca	Al
0.15% Max	1.40% Max	0.025% Max	0.010% Max	0.50% Max	1.00% Max	0.50% Max	0.20% Max	0.005% Max	Treated	0.01–0.07%

Width = 39.37 inches; Thickness = 0.181 inches maximum; Yield Strength = 70,000 psi minimum for thicknesses ≤0.148 inches and 65,000 psi minimum for thicknesses >0.148 inches; Tensile Strength = 80,000 psi minimum.

• Hot-rolled dual phase steel, phase-hardened, primarily with a ferritic-martensitic microstructure, contains 0.9 percent up to and including 1.5 percent silicon by weight, further characterized by either (i) tensile strength between 540 N/mm^2 and 640 N/mm^2 and an elongation percentage ≥ 26 percent for thicknesses of 2 mm and above, or (ii) a tensile strength between 590 N/mm^2 and 690 N/mm^2 and an elongation percentage ≥ 25 percent for thicknesses of 2mm and above.

• Hot-rolled bearing quality steel, SAE grade 1050, in coils, with an inclusion rating of 1.0 maximum per ASTM E 45, Method A, with excellent surface quality and chemistry restrictions as follows: 0.012 percent maximum phosphorus, 0.015 percent maximum sulfur, and 0.20 percent maximum residuals including 0.15 percent maximum chromium.

• Grade ASTM A570–50 hot-rolled steel sheet in coils or cut lengths, width of 74 inches (nominal, within ASTM tolerances), thickness of 11 gauge (0.119 inch nominal), mill edge and skin passed, with a minimum copper content of 0.20%.

The merchandise subject to the order is classified in the HTSUS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, 7211.19.75.90, 7212.40.10.00, 7212.40.50.00, 7212.50.00.00.

Certain hot-rolled flat-rolled carbon-quality steel covered by the order, including: Vacuum degassed, fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00,

7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise covered by the order is dispositive.

Analysis of Comments Received

All issues raised in this review are addressed in the Issues and Decision Memorandum (*Decision 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, dated concurrently with this notice, which is hereby adopted by this notice. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendation in this public memorandum which is on file in the Central Records Unit, Room 7046 of the main Commerce building. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the Internet at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the *Decision Memorandum* are identical in content.

Final Results of Review

The Department determines that revocation of the CVD order would likely lead to continuation or recurrence of a countervailable subsidy. The net countervailable subsidy likely to prevail if the order were revoked is zero percent for USIMINAS/COSIPA, CSN, and all other companies.

This notice also serves as the only reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective orders 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 the results and notice in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: November 29, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–30383 Filed 12–2–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Advisory Committee on Earthquake Hazards Reduction Meeting

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Earthquake Hazards Reduction (ACEHR or Committee), will hold a meeting via conference call on Tuesday, December 21, 2010 from 1 p.m. to 3:30 p.m. Eastern Daylight Time (EDT). The primary purpose of this meeting is to develop recommendations for public release on the upcoming New Madrid Bicentennial events. Interested members of the public will be able to participate in the meeting from remote locations by calling into a central phone number.

DATES: The ACEHR will hold a meeting via conference call on Tuesday, December 21, 2010, from 1 p.m. until 3:30 p.m. Eastern Daylight Time (EDT). The meeting will be open to the public. Interested parties may participate in the meeting from their remote location.

ADDRESSES: Questions regarding the meeting should be sent to National Earthquake Hazards Reduction Program Director, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8604, Gaithersburg, Maryland 20899–8604. For instructions on how to participate in the meeting, please see the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Dr. Jack Hayes, National Earthquake Hazards Reduction Program Director, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8604, Gaithersburg, Maryland 20899–8604. Dr. Hayes' e-mail address is *jack.hayes@nist.gov* and his phone number is (301) 975–5640.

SUPPLEMENTARY INFORMATION: The Committee was established in accordance with the requirements of Section 103 of the NEHRP Reauthorization Act of 2004 (Pub. L. 108–360). The Committee is composed of 15 members appointed by the Director of NIST, who were selected for their technical expertise and experience, established records of distinguished professional service, and their knowledge of issues affecting the National Earthquake Hazards Reduction Program. In addition, the Chairperson of the U.S. Geological Survey (USGS) Scientific Earthquake Studies Advisory Committee (SESAC) serves in an ex-officio capacity on the Committee. The Committee assesses:

- Trends and developments in the science and engineering of earthquake hazards reduction;
- The effectiveness of NEHRP in performing its statutory activities (improved design and construction methods and practices; land use controls and redevelopment; prediction techniques and early-warning systems; coordinated emergency preparedness plans; and public education and involvement programs);
- Any need to revise NEHRP; and
- The management, coordination, implementation, and activities of NEHRP.

Background information on NEHRP and the Advisory Committee is available at *http://nehrp.gov/.*

Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app., notice is hereby given that the Advisory Committee on Earthquake Hazards Reduction (ACEHR) will hold a meeting via conference call on Tuesday, December 21, 2010, from 1 p.m. until 3:30 p.m. Eastern Daylight Time (EDT). There will be no central meeting location. The public is invited to participate in the meeting by calling in from remote locations. The primary purpose of this meeting is to develop recommendations for public release on the upcoming New Madrid Bicentennial events.

Members of the public who would like to listen to the meeting are required to register by close of business Tuesday, December 14, 2010. Please submit your name, time of participation, e-mail address, and phone number to Michelle Harman. At the time of registration, participants will be provided with detailed instructions on how to dial in from a remote location in order to participate. Michelle Harman's e-mail address is *michelle.harman@nist.gov,* and her phone number is (301) 975–5324.

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Committee's affairs are invited to request detailed instructions on how to dial in from a remote location to participate in the meeting. Approximately fifteen minutes will be reserved from 3:15 p.m.–3:30 p.m. Eastern Daylight Time (EDT) for public comments; speaking times will be assigned on a first-come, first-serve basis. The amount of time per speaker will be determined by the number of requests received, but is likely to be about 3 minutes each. Questions from the public will not be considered during this period. Speakers who wish to

expand upon their oral statements, those who had wished to speak but could not be accommodated, and those who were unable to participate are invited to submit written statements to the ACEHR, National Institute of Standards and Technology, 100 Bureau Drive, MS 8604, Gaithersburg, Maryland 20899–8604, via fax at (301) 975–5433, or electronically by e-mail to *info@nehrp.gov.*

Dated: November 29, 2010.

Harry S. Hertz,

Director, Baldrige Performance Excellence Program.

[FR Doc. 2010–30377 Filed 12–2–10; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA072

Marine Mammals; File No. 15488

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that the Georgia Department of Natural Resources, Wildlife Resources Division [Responsible Party: Dan Forster], has applied in due form for a permit to conduct research on North Atlantic right whales (*Eubalaena glacialis*).

DATES: Written, telefaxed, or e-mail comments must be received on or before January 3, 2011.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 15488 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376; and Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by e-mail to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the e-mail comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Kristy Beard or Carrie Hubard, (301) 713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Permit No. 15488 would authorize harassment of North Atlantic right whales off the coast of Georgia, Florida, and South Carolina. Annual activities would include aerial surveys and close approach by vessel to collect right whale photo-identification and behavioral data from up to 350 whales. An additional 50 adult or juvenile whales and 20 whales older than one month would be approached by vessel to collect photo-identification and behavioral data and skin/blubber biopsy samples. The purpose of the research is to monitor North Atlantic right whale population status, demographics, habitat and anthropogenic impacts. Up to 350 bottlenose (*Tursiops truncatus*) and 200 Atlantic spotted dolphins (*Stenella frontalis*) would be harassed incidental to research. The permit would be valid for five years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a draft environmental assessment (EA) has been prepared to examine whether significant environmental impacts could result from issuance of the proposed scientific research permit. The draft EA is available for review and comment simultaneous with the scientific research permit application.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 30, 2010.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–30401 Filed 12–2–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA008

Atlantic Highly Migratory Species; Exempted Fishing, Scientific Research, Display, and Chartering Permits; Letters of Acknowledgment

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent; request for comments.

SUMMARY: NMFS announces its intent to issue Exempted Fishing Permits (EFPs), Scientific Research Permits (SRPs), Display Permits, Letters of Acknowledgment (LOAs), and Chartering Permits for the collection of Atlantic Highly Migratory Species (HMS) in 2011. In general, EFPs and related permits would authorize collection of a limited number of tunas, swordfish, billfishes, and sharks from Federal waters in the Atlantic Ocean, Caribbean Sea, and Gulf of Mexico for the purposes of scientific data collection and public display. Chartering permits allow the collection of HMS on the high seas or in the Exclusive Economic Zone of other nations. Generally, these permits will be valid from the date of issuance through December 31, 2011, unless otherwise specified, subject to the terms and conditions of individual permits.

DATES: Written comments on these activities received in response to this notice will be considered by NMFS when issuing EFPs and related permits and must be received on or before *January 3, 2011.*

ADDRESSES: Comments may be submitted by any of the following methods:

- *E-mail: HMSEFP.2011@noaa.gov.* Include in the subject line the following identifier: 0648–XA008.
- *Mail:* Craig Cockrell, Highly Migratory Species Management Division (F/SF1), NMFS, 1315 East-West Highway, Silver Spring, MD 20910.
- *Fax:* (301) 713–1917.

FOR FURTHER INFORMATION CONTACT: Craig Cockrell, *phone:* (301) 713–2347,

fax: (301) 713–1917, or Jackie Wilson at (240) 338–3936.

SUPPLEMENTARY INFORMATION: Issuance of EFPs and related permits are necessary for the collection of HMS for public display and scientific research that is exempt from regulations (*e.g.,* seasons, prohibited species, authorized gear, and minimum sizes) that may prohibit the collection of live animals or biological samples. Collection for scientific research and display represents a small portion of the overall fishing mortality for HMS, and this mortality is counted against the quota of the species harvested. The terms and conditions of individual permits are unique; however, all permits will include reporting requirements, limit the number and species of HMS to be collected, and only authorize collection in Federal waters of the Atlantic Ocean, Gulf of Mexico, and Caribbean Sea.

EFPs and related permits are issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*) and/or the Atlantic Tunas Convention Act (ATCA) (16 U.S.C. 971 *et seq.*). Regulations at 50 CFR 600.745 and 50 CFR 635.32 govern scientific research activity, exempted fishing, chartering arrangements, and exempted educational activities with respect to Atlantic HMS. Since the Magnuson-Stevens Act does not consider scientific research to be "fishing," scientific research is exempt from this statute, and NMFS does not issue EFPs for bona fide research activities (*e.g.,* research conducted from a research vessel and not a commercial or recreational fishing vessel) involving species that are only regulated under the Magnuson-Stevens Act (*e.g.,* most species of sharks) and not under ATCA. NMFS requests copies of scientific research plans for these activities and indicates concurrence by issuing a LOA to researchers to indicate that the proposed activity meets the definition of research and is therefore exempt from regulation. Examples of research conducted under LOAs include tagging and releasing of sharks during bottom longline surveys to understand the distribution and seasonal abundance of different shark species, and collecting and sampling sharks caught during trawl surveys for life history studies.

Scientific research is not exempt from regulation under ATCA. NMFS issues SRPs for collection of species managed under this statute (*e.g.,* tunas, swordfish, billfish, and some species of sharks), which authorize researchers to collect HMS from bona fide research vessels. One example of research conducted under SRPs consists of scientific surveys of HMS conducted from the NOAA research vessels. EFPs are issued to researchers collecting ATCA-managed species and conducting research from commercial or recreational fishing vessels. NMFS regulations concerning the implantation or attachment of archival tags in Atlantic HMS require scientists to report their activities associated with these tags. Examples of research conducted under EFPs include deploying pop-up satellite archival tags on billfish, sharks, and tunas to determine migration patterns of these species; conducting billfish larval tows to determine billfish habitat use, life history, and population structure; and determining catch rates and gear characteristics of the swordfish buoy gear fishery.

NMFS is also seeking public comment on its intent to issue Display Permits for the collection of sharks and other HMS for public display in 2010. Collection of sharks and other HMS sought for public display in aquaria often involves collection when the commercial fishing seasons are closed, collection of otherwise prohibited species, and collection of fish below the minimum size for recreational permit holders. NMFS established a 60-metric ton (mt) whole weight (ww) (approximately 3,000 sharks) quota for the public display and research of sharks (combined) in the final Fishery Management Plan (FMP) for Atlantic Tunas, Swordfish, and Sharks (1999 FMP). The quotas available for scientific research and public display of sandbar and dusky sharks were modified in Amendment 2 to the 2006 Consolidated HMS FMP (June 24, 2008, 73 FR 35778; corrected on July 15, 2008 73 FR 40658) in light of the results of recent stock assessments. The public display and scientific research quotas for sandbar sharks are now limited to 2.78 mt ww (2 mt dressed weight (dw)): 1.39 mt ww for public display and 1.39 mt ww for scientific research. Furthermore, Amendment 2 to the 2006 Consolidated HMS FMP limited dusky shark collection to bona fide scientific research and prohibits dusky shark collection for public display. The rule did not modify the overall 60 mt ww quota; rather, it adjusted the proportion of the quota allocated to sandbar and dusky sharks. These quotas have been analyzed in conjunction with other sources of mortality under Amendment 2 to the 2006 Consolidated HMS FMP, and NMFS has determined that harvesting this amount for public display will not have a significant impact on the stocks. The number of sharks harvested for display and research has remained under the annual 60 mt ww quota every year since establishment of the quota. In 2009, approximately 69 percent of the sharks authorized for public display and scientific research purposes were actually harvested or discarded dead. Amendment 3 to the 2006 Consolidated HMS FMP also established a separate set-aside quota for smoothhounds (*i.e.,* smooth dogfish and Florida smoothhounds) taken for research purposes. As of 2012, federal regulations regarding smoothhounds will go into effect, and therefore, scientific research or exempted fishing permits may be required for research involving smoothhounds. A separate set-aside of 6 mt ww (4.3 mt dw) annually was established, which was based on the estimates of maximum yearly smoothhound takes for research from 1999–2009. This set-aside does not change the overall 60 mt ww quota for the public display and research of sharks and will be in effect in 2012.

NMFS may also consider applications for bycatch reduction research in closed areas of the Atlantic Ocean, Gulf of Mexico, and Caribbean Sea to test gear modifications and fishing techniques aimed to avoid incidental capture of non-target species. These permits may require further National Environmental Policy Act (NEPA) analyses. NMFS will seek additional public comment on these applications, as necessary, unless the research is being conducted from bona fide scientific research vessels. For example, NMFS is considering the creation of an electronic monitoring (EM) pilot program that could allow commercial fishing vessels outfitted with EM gear to conduct limited fishing trips inside closed areas to test the effectiveness of such a system as a means of monitoring bycatch. If NMFS decides to move forward with such a program, NMFS would provide the public with an opportunity to comment, as necessary and appropriate.

On January 3, 2008, NMFS announced a final decision to issue EFPs to conduct research in portions of the East Florida Coast (EFC) and Charleston Bump closed areas using a limited number of pelagic longline (PLL) vessels. The goals of the research are to collect baseline data in closed areas under current PLL fishery conditions; evaluate existing PLL bycatch reduction measures; and collect data to examine the effectiveness of existing PLL area closures to meet current conservation and harvesting goals. As part of this research, NMFS issued EFPs to three PLL vessels, only two of which may fish at any one time, to conduct 289 PLL sets consisting of

500, 18/0 non-offset circle hooks each, over a 12-month period. One-half of the sets will be made inside the closed areas and one-half of the sets will be made outside of the closed areas. All participating vessels are required to carry NMFS-certified observers. This research concluded on September 30, 2010, and a final report is forthcoming. NMFS does not intend to issue any additional permits as a result of this research.

Comments are also requested on the issuance of Chartering Permits to U.S. vessels fishing for HMS while operating under chartering arrangements. A chartering arrangement is a contract or agreement between a U.S. vessel owner and a foreign entity by which the control, use, or services of a vessel are secured for a period of time for fishing for Atlantic HMS. Before fishing under a chartering arrangement, the owner of the U.S. fishing vessel must apply for a Chartering Permit. The vessel chartering regulations can be found at 50 CFR 635.5(a)(5) and 635.32(e).

In addition, Amendment 2 to the 2006 Consolidated HMS FMP implemented a shark research fishery. This research fishery is conducted under the auspices of the exempted fishing program. Research fishery permit holders assist NMFS in collecting valuable shark life history data and data for future shark stock assessments. Fishermen must fill out an application for a shark research permit under the exempted fishing program to participate in the shark research fishery. Shark research fishery participants are subject to 100 percent observer coverage in addition to other terms and conditions. A **Federal Register** notice describing the objectives for the shark research fishery in 2011 published on September 20, 2010 (75 FR 57259).

The authorized number of species for 2010, as well as the number of specimens collected in 2009, is summarized in Table 1. The number of specimens collected in 2010 will be available when all 2010 interim and annual reports are submitted to NMFS. In 2009, the number of specimens collected was less than the number of authorized specimens for most permit types, with the exception of the number of larvae collected under billfish exempted fishing permits, and sharks taken under SRPs. It is difficult to control the quantity of larvae that may be collected when sampling fish larvae. However, the impacts of these collections on fish populations are not expected to be significant given the high level of natural mortality of fish larvae. As for sharks taken under SRPs, 550 of the sharks taken were Atlantic sharpnose sharks collected during research trips using longline gear; it is also difficult to control the number and species of animals collected when using this gear type. However, as Atlantic sharpnose sharks were not found to be overfished nor have overfishing occurring during its most recent stock assessment in 2007, these collections are not expected to have any impacts on Atlantic sharpnose populations.

In all cases, mortality associated with an EFP, SRP, Display, or LOA (except for larvae) is counted against the appropriate quota. NMFS issued a total of 25 EFPs, SRPs, Display Permits, and LOAs in 2009 for the collection of HMS. As of October 2010, NMFS has issued a total of 21 EFPs, SRPs, Display Permits, and LOAs. These do not include permits that were issued for research related to the Deepwater Horizon/BP oil spill in the Gulf of Mexico. To date, an additional nine permits and/or amendments to permits already issued under the exempted fishing program have been issued for research related to the oil spill in the Gulf of Mexico.

TABLE 1—SUMMARY OF HMS EXEMPTED PERMITS ISSUED IN 2009 AND 2010. "HMS" REFERS TO MULTIPLE SPECIES BEING COLLECTED UNDER A GIVEN PERMIT TYPE

	2009						2010	
Permit type	Permits issued	Authorized fish (Num)	Authorized larvae (Num)	Fish kept/ discarded dead (Num)	Larvae kept (Num)	Permits issued**	Authorized fish (Num)	Authorized larvae (Num)
EFP:								
HMS	6	1,273	0	6	0	1	454	0
Shark	4	304	0	0	0	8	755	0
†Tuna	4	395	0	4	0	5	295	0
†Billfish	1	20	1,000	0	4,300	2	0	1,000
SRP:								
Shark	4	454	0	812	0	1	140	0
Display:								
HMS	2	135	0	33	0	2	1537	0
Shark	4	140	0	13	0	2	107	0
Total	25	2,721	1,000	868	4,300	21	1,904	1,000
LOA*:								
Shark	5	3,025	0	966	0	6	4,140	0

*LOAs are issued for bona fide scientific research activities involving non-ATCA managed species (*e.g.*, most species of sharks). Collections made under an LOA are not authorized; rather this estimated harvest for research is acknowledged by NMFS. Permitees are encouraged to report all fishing activities in a timely manner.

†The number of animals and larvae authorized under 2009 Tuna and Billfish EFPs was erroneously published in the 2009 notice (74 FR 61105, November 23, 2009). The correct number of authorizations is shown here.

**2010 permits issued listed in Table 1 do not include permits issued solely for research related to the Deepwater Horizon/BP oil spill research in the Gulf of Mexico.

Final decisions on the issuance of any EFPs, SRPs, Display, and Chartering Permits will depend on the submission of all required information about the proposed activities, NMFS's review of public comments received on this notice, an applicant's reporting history on past permits issued, past law enforcement violations, consistency with relevant NEPA documents, and any consultations with appropriate Regional Fishery Management Councils, states, or Federal agencies. NMFS does not anticipate any significant environmental impacts from the

issuance of these EFPs as assessed in the 1999 FMP and Amendment 2 to the 2006 Consolidated HMS FMP.

Authority: 16 U.S.C. 971 *et seq.* and 16 U.S.C. 1801 *et seq.*

Dated: November 30, 2010.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–30400 Filed 12–2–10; 8:45 am]

BILLING CODE P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* 1/3/2011.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 10/8/2010 (75 FR 62370), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to furnish the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. The action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products

Tape, Electrical Insulation

NSN: 5970–01–013–9367.
NSN: 5970–01–245–7042.
NPA: Raleigh Lions Clinic for the Blind, Inc., Raleigh, NC.
Contracting Activity: DEFENSE LOGISTICS AGENCY AVIATION, RICHMOND, VA Coverage: C–List for 100% of the requirement of the Department of Defense, as aggregated by the Defense Logistics Agency Aviation, Richmond, VA.

Services

Service Type/Location: Custodial Service, Fort Gordon, GA.
NPA: Good Vocations, Inc., Macon, GA.
Contracting Activity: Dept of the Army, XR W6BB ACA Gordon, Fort Gordon, GA.

Service Type/Location: Custodial Service, Eglin AFB, FL.
NPA: Lakeview Center, Inc., Pensacola, FL.
Contracting Activity: Dept of the Air Force, FA2823 96 CONS MSC, Eglin AFB, FL.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2010–30323 Filed 12–2–10; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletion

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to and Deletions From Procurement List.

SUMMARY: The Committee is proposing to add services to the Procurement List that will be provided by nonprofit agencies employing persons who are blind or have other severe disabilities and to delete a product previously furnished by such agencies.

Comments Must Be Received On Or Before: 1/3/2011.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or *e-mail CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the services to the Government.

2. If approved, the action will result in authorizing small entities to provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following services are proposed for addition to Procurement List for provision by the nonprofit agencies listed:

Services

Service Type/Location: Base Supply Center, Kirtland AFB, NM.
NPA: San Antonio Lighthouse for the Blind, San Antonio, TX.
Contracting Activity: Dept of the Air Force, FA9401 377 CONS CC, Kirtland AFB, NM.
Service Type/Location: Landscaping & Groundskeeping, FAA Potomac TRACON, 3699/3701 MacIntosh Drive, Warrenton, VA.
NPA: Portco, Inc., Portsmouth, VA.
Contracting Activity: Department of Transportation, Federal Aviation Administration, Jamaica, NY.

Deletion

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. If approved, the action may result in authorizing small entities to furnish the product to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the product proposed for deletion from the Procurement List.

End of Certification

The following product is proposed for deletion from the Procurement List:

Product

Tape, Pocket Duct

NSN: 5640–00–NIB–0005 (2 in. × 5 YD)
NPA: Cincinnati Association for the Blind, Cincinnati, OH
Contracting Activity: GSA/Federal Acquisition Service, New York, NY.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2010–30324 Filed 12–2–10; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, December 8, 2010, 10 a.m.–12 Noon.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

MATTER TO BE CONSIDERED:

Briefing Matter: Full-Sized and Nonfull-Sized Cribs—Final Rules.

A live webcast of the Meeting can be viewed at *http://www.cpsc.gov/webcast.*

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: November 30, 2010.

Todd A. Stevenson,

Secretary.

[FR Doc. 2010–30484 Filed 12–1–10; 4:15 pm]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, December 8, 2010; 2 p.m.–3 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

MATTER TO BE CONSIDERED:

Compliance Status Report

The Commission staff will brief the Commission on the status of compliance matters.

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: November 30, 2010.

Todd A. Stevenson,

Secretary.

[FR Doc. 2010–30486 Filed 12–1–10; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 1, 2011.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to ICDocketMgr@ed.gov or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. 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 Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: November 30, 2010.

Darrin A. King, Director,

Information Collection Clearance Division, Regulatory Information Management Services Office of Management.

Office of Planning, Evaluation and Policy Development

Type of Review: New.

Title of Collection: Evaluation of the Carol M. White Physical Education Program.

OMB Control Number: Pending.

Agency Form Number(s): N/A.

Frequency of Responses: Twice.

Affected Public: Not-for-profit institutions; State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

Total Estimated Number of Annual Responses: 77.

Total Estimated Number of Annual Burden Hours: 154.

Abstract: To answer the evaluation questions put forth by U.S. Department of Education regarding program implementation, partnerships, data use, and student outcomes, American Institutes for Research proposes a two-phase research design, drawing on survey data to be collected from administrators at Carol M. White Physical Education Program (PEP) projects and analyses of extant student outcome data pertinent to physical activity levels, fitness, and nutrition intake. Findings from this study will provide feedback to both ED and grantees with regard to the performance of the PEP, and will inform future improvements to the program.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4458. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection 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. 2010–30393 Filed 12–2–10; 8:45 am]

BILLING CODE 4000–01–P

ENVIROMENTAL PROTECTION AGENCY

[FRL–9234–9]

Clean Air Act Operating Permit Program; Petition To Object to Title V Permit for Luke Paper Company, Luke, MD

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action.

SUMMARY: Pursuant to section 505(b)(2) of the Clean Air Act (CAA), the EPA Administrator signed an order, dated October 18, 2010, partially granting and partially denying a petition to object to a state operating permit issued by the Maryland Department of the Environment (MDE) on January 22, 2009 to Luke Paper Company for its facility located in Luke, Maryland. This order constitutes final action on the petition filed by the Environmental Integrity Project, and Environment Maryland, dated February 27, 2009, requesting that the Administrator object to the issuance of the proposed title V permit.

Pursuant to section 505(b)(2) of the CAA, the petitioner may seek judicial review of those portions of the petition which EPA denied in the United States Court of Appeals for the appropriate circuit. Any petition for review shall be filed within 60 days of this notice in accordance with the requirements of section 307 of the CAA.

ADDRESSES: Copies of the final order, the petition, and all pertinent information relating thereto are on file at the following location: Environmental Protection Agency, Region III, Air Protection Division (APD), 1650 Arch St., Philadelphia, Pennsylvania 19103. The final order is also available electronically at the following Web site: *http://www.epa.gov/region07/air/title5/petitiondb/petitiondb.htm.*

FOR FURTHER INFORMATION CONTACT: David Talley, Air Protection Division, EPA Region III, telephone (215) 814–2117, or by e-mail at *talley.david@epa.gov.*

SUPPLEMENTARY INFORMATION: The Clean Air Act (CAA) affords EPA a 45-day period to review and object to, as appropriate, operating permits proposed by state permitting authorities. Section 505(b)(2) of the CAA authorizes any person to petition the EPA Administrator within 60 days after the expiration of this review period to object to a state operating permit if EPA has not done so. Petitions must be based only on objections raised with reasonable specificity during the public comment period, unless the petitioner demonstrates that it was impracticable to raise these issues during the comment period or that the grounds for objection or other issue arose after the comment period.

EPA received a petition from the Petitioners, dated February 27, 2009, requesting that EPA object to the issuance of the proposed title V permit for Luke Paper Company because of, (1) Inadequate monitoring requirements for particulate matter; (2) failure of the permit to include a Compliance Assurance Monitoring (CAM) plan for boiler Nos. 24 and 25; and (3) failure of the permit to include emission limits for hazardous air pollutants (HAPs) for boiler Nos. 24 and 25 as required by Section 112(j) of the CAA. The order explains the reasons behind EPA's decision to partially grant and partially deny the petition for objection.

Dated: November 19, 2010.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2010–30349 Filed 12–2–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

November 29, 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 February 1, 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: 3060–1079.

Title: Section 15.240, Radio Frequency Identification Equipment.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit and not-for-profit institutions.

Number of Respondents: 10 respondents; 20 responses.

Estimated Time Per Response: 20 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. sections 154(i), 301, 302, 303(e), 303(f), and 303(r).

Total Annual Burden: 200 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this 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 recordkeeping requirements) of this information collection. The Commission is reporting no change in their burden estimates.

Section 15.240 requires each grantee of certification for Radio Frequency Identification (RFID) Equipment to register the location of the equipment/devices it markets with the Commission. The information that the grantee must supply to the Commission when registering the device(s) shall include the name, address and other pertinent contact information of users, the geographic coordinates of the operating location, the FCC identification number(s) of the equipment. The improved RFID equipment could benefit commercial shippers and have significant homeland security benefits by enabling the entire contents of shipping containers to be easily and immediately identified, and by allowing a determination of whether tampering with their contents has occurred during shipping.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–30406 Filed 12–2–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

November 26, 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 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: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 1, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to the Federal Communications Commission. To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–0823.

Title: Part 64, Pay Telephone Reclassification.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 400 respondents; 16,820 responses.

Estimated Time per Response: 2.66 hours (average).

Frequency of Response: On occasion, quarterly and monthly reporting requirements and third party disclosure requirement.

Obligation to Respond: Mandatory. Statutory authority for this information collection is contained in the 47 U.S.C. 151, 154, 201–205, 218, 226, and 276.

Total Annual Burden: 44,700 hours.

Total Annual Cost: $652,000.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: Confidentiality concerns are not relevant to these types of disclosures. The Commission is not requesting carriers or providers to submit confidential information to the Commission. If the Commission requests that carriers or providers submit information which they believe is confidential, the carriers or providers 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 comment period to obtain the full, three year clearance from them. The Commission is not changing any of the reporting and/or third party disclosure requirements. The Commission is reporting no change in the hourly burden estimates. However, we are reporting a $32,000 increase in annual costs. This adjustment is due to an increase in the tariff filing fee from $775 to $815.

The Commission adopted rules and policies governing the payphone industry to implement section 276 of the Telecommunications Act of 1996. Those rules and policies in part established a plan to ensure fair compensation for "each and every completed intrastate and interstate call using [a] payphone." Specifically, the Commission established a plan to ensure that payphone service providers (PSPs) were compensated for certain non-coin calls originated from their payphones.

As part of this plan, the Commission required that by October 7, 1997, Local exchange carriers were to provide payphone-specific coding digits to PSPs, and that PSPs were to provide those digits from their payphones to interexchange carriers (IXCs).

The provision of payphone-specific coding digits was a prerequisite to payphone per-call compensation payments by IXCs to PSPs for subscriber 800 and access code calls. The Commission's Wireline Competition Bureau subsequently provided a waiver until March 9, 1998, for those payphones for which the necessary coding digits were not provided to identify calls. The Bureau also on that date clarified the requirements established in the *Payphones Orders* for the provision of payphone-specific coding digits and for tariffs that LECs must file pursuant to the *Payphone Orders.*

The Bureau also granted a waiver of Part 69 of the Commission's rules so that LECs can establish rate elements to recover the costs of implementing FLEX–ANI (a type of switch software) to provide payphone specific coding digits for per-call compensation. The Commission has identified five specific information collections under this OMB control number.

The information disclosure rules and policies governing the payphone industry to implement section 276 of the Act will ensure the payment of per-call compensation by implementing a method for LECs to provide information to IXCs to identify calls. FLEX ANI is the most flexible method, and has the added capability of providing a number of additional coding digits, in real-time, that can uniquely identify a call as coming from a payphone. FLEX ANI is, therefore, the best method.

OMB Control Number: 3060–0057.

Title: Application for Equipment Authorization.

Form No.: FCC Form 731.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 600 respondents; 10,000 responses.

Estimated Time per Response: 25 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in the 47 U.S.C. 154(i), 301, 302, 303(e), 303(f), and 303(r).

Total Annual Burden: 250,000 hours.

Total Annual Cost: $11,017,500.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: Minimal exemption from the Freedom of Information Act (5 U.S.C. 552(b)(4) and FCC Rules under 47 CFR 0.457(d)) is granted for trade secrets which may be submitted as attachments to the application form FCC Form 731. No other assurances of confidentiality are provided to respondents.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this comment period to obtain the full, three year clearance from them. The Commission is not changing any of the reporting and/or third party disclosure requirements. The Commission is reporting no change in their previous burden estimates.

Commission Rules require that manufacturers of radio frequency (RF) equipment file FCC Form 731 to obtain approval prior to marketing their equipment: (a) The RF equipment is regulated under certain rule sections of 47 CFR part 15 and part 18; (b) manufacturers may then market their RF equipment based on a showing of compliance with technical standards established in the FCC Rules for each type of equipment or device operated under the applicable FCC Rule part; and (c) in addition, rules governing certain RF equipment operating in the licensed services also require equipment authorization as established in the procedural FCC Rules in 47 CFR part 2. The RF equipment manufacturers comply with the information collection requirements (noted above) by: (a) Filing FCC Form 731 electronically with the Commission, or (b) submitting the information to a Telecommunications Certification Body (TCB), which acts on behalf of the FCC to issue grants of certification. The TCBs have flexibility in the format in which they require the collection of information: (a) TCBs may require applicants to submit the required information in FCC Form 731 format or in another format selected by the TCB, but (b) whatever the information collection method, the information required is governed by the procedural rules in 47 CFR part 2 and a showing of compliance with the FCC technical standards for the specific type of equipment. RF manufacturer applicants for equipment certification may also request "expedited authorization" to market their equipment by: (a) Choosing to pay the fee levied by a TCB, and (b) submitting their request to a TCB in order for expedited authorization to market. The TCB processes the RF equipment manufacturer's application as follows: (a) The TCB receives and reviews the RF manufacturer's information submission/application; and (b) the TCB enters the information into the FCC Equipment Authorization System database using an interface that provides the TCB with the tools to issue a standardized Grant of Equipment Authorization. Whichever method the RF manufacturers choose to submit their information—via either the FCC on FCC Form 731 or the TCB, FCC Rules require that applicants supply the following data: (a) Demographic information including Grantee name and address, contact information, etc; (b) information specific to the equipment including FCC Identifier, equipment class, technical specifications, etc; and (c) attachments that demonstrate compliance with FCC Rules that may include any combination of the following based on the applicable Rule parts for the equipment for which

authorization is requested: (1) Identification of equipment (47 CFR 2.925); (2) attestation statements that may be required for specific equipments; (3) external photos of the equipment for which authorization is requested; (4) block diagram of the device; (5) schematics; (6) test report;

- Test setup photos;
- Users Manual;
- Internal Photos;
- Parts List/Tune Up Information;
- RF Exposure Information;
- Operational Description;
- Cover Letters;
- Software Defined Radio/Cognitive Radio Files

In general, an applicant's submission is as follows: (a) FCC Form 731 includes approximately two pages covering the demographic and equipment identification information; and (b) applicants must supply additional documentation and other information, as described above, demonstrating conformance with FCC Rules, which may range from 100–500 pages. The supplemental information is essential to control potential interference to radio communications, which the FCC may use, as is necessary, to investigate complaints of harmful interference. In response to new technologies and in allocating spectrum, the Commission may establish new technical operating standards: (a) RF equipment manufacturers must meet the new standards to receive an equipment authorization, and (b) RF equipment manufacturers must still comply with the Commission's requirements in FCC Form 731 and demonstrate compliance as required by 47 CFR part 2 of FCC Rules. Thus, this information collection applies to a variety of RF equipment: (a) That is currently manufactured, (b) that may be manufactured in the future, and (c) that operates under varying technical standards. On July 8, 2004, the Commission adopted a *Report and Order,* Modification of Parts 2 and 15 of the Commission's Rules for Unlicensed Devices and Equipment Approval, ET Docket No. 03–201, FCC 04–165. The change requires that all paper filings required in 47 CFR Sections 2.913(c), 2.926(c), 2.929(c), and 2.929(d) of the rules are outdated and now must be filed electronically via the Internet on FCC Form 731. The Commission believes that electronic filing speeds up application processing and supports the Commission in further streamlining to reduce cost and increase efficiency. Information on the procedures for electronically filing equipment authorization applications can be obtained from the Commission's rules, and from the Internet at: *https://gullfoss2.fcc.gov/prod/oet/cf/eas/index.cfm.* Designated Telecommunications Certification Body (TCB).

OMB Control Number: 3060–XXXX.

Title: Wireless E911 Location Accuracy Requirements.

Form No.: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit and state, local or tribal government.

Number of Respondents: 6,000 respondents; 13,700 responses.

Estimated Time per Response: 11.85 hours (average).

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Mandatory. Statutory authority for this information collection is contained in the 47 U.S.C. 151, 154, and 332.

Total Annual Burden: 71,100 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: No questions of a confidential nature are asked.

Needs and Uses: The Commission will submit this new information collection to the Office of Management and Budget (OMB) after this comment period to obtain the full, three-year clearance from them.

The Commission's Second Report and Order (FCC 10–176, PS Docket No. 07–114) on September 23, 2010, the Commission released a Second Report and Order in PS Docket No. 07–114, FCC 10–176. With the Second Report and Order, the Commission adopts rules, amending requirements for wireless licensees subject to delivering emergency calls according to location accuracy standards for Enhanced 911 service, to satisfy these standards at either a county-based or Public Safety Answering Point (PSAP)-based geographic level. Specifically, the rules adopted require wireless carriers to take steps to provide more specific automatic location information in connection with 911 emergency calls to Public Safety Answering Points (PSAPs) in areas where they have not done so in the past. Further, the rules adopted provide a framework with interim benchmarks for wireless licensees to achieve the amended requirements, thereby ensuring an appropriate and consistent compliance methodology with respect to location accuracy standards.

The Second Report and Order provides, however, that handset-based wireless carriers may exclude up to 15 percent of the counties or PSAP areas they serve due to heavy forestation that limits handset-based technology accuracy in those counties or areas. The Commission found that permitting this exclusion properly but narrowly accounts for the known technical limitations of handset-based location accuracy technologies, while ensuring that the public safety community and the public at large are sufficiently informed of these limitations. The Second Report and Order also provides a similar exclusion for network-based carriers that permits them to exclude particular counties, or portions of counties, where triangulation of the geographical position of a 911 emergency call is not technically possible, such as locations where at least three cell sites are not sufficiently visible to a handset.

The Second Report and Order requires both handset-based and network based carriers to file a list of the specific counties or portions of counties where they are utilizing their respective exclusions within 90 days following approval from the Office of Management and Budget for the related information collection. The lists must be submitted electronically into PS Docket No. 07–114, and copies must be sent to the National Emergency Number Association, the Association of Public-Safety Communications Officials-International, and the National Association of State 9–1–1 Administrators. For network-based carriers, the exclusion will sunset on [8 years after effective date] of the rule providing for the exclusion.

The rules adopted by the Second Report and Order also require that wireless carriers provide confidence and uncertainty data on a per call basis to PSAPs. To ensure that confidence and uncertainty data is made available to requesting PSAPs, the adopted rules also require entities responsible for transporting this data between the wireless carriers and PSAPs, including LECs, CLECs, owners of E911 networks, and emergency service providers (collectively, System Service Providers (SSPs)), to implement any modifications to enable the transmission of confidence and uncertainty data provided by wireless carriers to the requesting PSAPs.

In view of the amended location accuracy requirements and the timeframes and benchmarks for carriers to comply with them, the Commission recognized that the waiver process is suitable to address individual or unique problems, where the Commission can analyze the particular circumstances and the potential impact to public safety. Thus, the Commission recognized that wireless carriers might file waiver requests, therefore

constituting a collection and reporting requirement. The Commission noted that financial considerations, among others, will be taken into account should a service provider request waiver relief. Additionally, an SSP that does not pass confidence and uncertainty data to PSAPs must demonstrate in a request for waiver relief that it cannot pass this data to the PSAPs due to technical infeasibility.

The adopted rules strengthen and improve the ability of Public Safety Answering Points (PSAPs, or 9–1–1 call centers) to quickly locate wireless 9–1–1 callers and dispatch emergency responders to assist them during emergencies. As a result, emergency responders will be able to reach the site of an emergency more quickly and efficiently.

The new rules will generate new collection and reporting requirements as discussed below:

47 CFR 20.18(h)(1)(F) permits network-based wireless carriers to exclude from compliance particular counties, or portions of counties, where triangulation is not technically possible, such as locations where at least three cell sites are not sufficiently visible to a handset. However, carriers must file a list of the specific counties or portions of counties where they are utilizing this exclusion within 90 days following approval from the Office of Management and Budget for the related information collection. This list must be submitted electronically into PS Docket No. 07–114, and copies must be sent to the National Emergency Number Association, the Association of Public-Safety Communications Officials-International, and the National Association of State 9–1–1 Administrators. Further, carriers must submit in the same manner any changes to their exclusion lists within thirty days of discovering such changes. This exclusion will sunset on [8 years after effective date].

47 CFR 20.18(h)(2)(C) requires that handset-based wireless carriers file a list of the specific counties or PSAP service areas where they are utilizing an exclusion to exclude 15 percent of counties or PSAP service areas from the 150 meter requirement based upon heavy forestation that limits handset-based technology accuracy in those counties or PSAP service areas. Such carriers must file the list within 90 days following approval from the Office of Management and Budget for the related information collection. This list must be submitted electronically into PS Docket No. 07–114, and copies must be sent to the National Emergency Number Association, the Association of Public-Safety Communications Officials-International, and the National Association of State 9–1–1 Administrators. Further, carriers must submit in the same manner any changes to their exclusion lists within thirty days of discovering such changes.

47 CFR 20.18(h)(3) requires that two years after [effective date of the Order], all carriers subject to this section provide confidence and uncertainty data on a per-call basis upon the request of a PSAP. Once a carrier has established baseline confidence and uncertainty levels in a county or PSAP service area, ongoing accuracy shall be monitored based on the trending of uncertainty data and additional testing shall not be required. All entities responsible for transporting confidence and uncertainty between wireless carriers and PSAPs, including LECs, CLECs, owners of E911 networks, and emergency service providers (collectively, System Service Providers (SSPs)) must implement any modifications that will enable the transmission of confidence and uncertainty data provided by wireless carriers to the requesting PSAP. If an SSP does not pass confidence and uncertainty data to PSAPs, the SSP has the burden of proving that it is technically infeasible for it to provide such data.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–30410 Filed 12–2–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

November 24, 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 February 1, 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 email 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: 3060–0653.

Title: Sections 64.703(b) and (c), Consumer Information—Posting by Aggregators.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 56,075 respondents and 5,339,038 responses.

Estimated Time per Response: .017 to 3 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is found at Section 226 [47 U.S.C. 226] Telephone Operator Services codified at 47 CFR section 64.703(b) Consumer Information.

Total Annual Burden: 174,401 hours.

Total Annual Cost: $1,688,168.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: The information collection requirements included under this OMB Control Number 3060–0653, requires aggregators (providers of telephones to the public or to transient users of their premises) under 47 U.S.C. 226 (c) (1) (A), 47 CFR 64.703(b) of the Commission's rules, to post in writing, on or near such phones, information about the pre-subscribed operator services, rates, carrier access, and the FCC address to which consumers may direct complaints. Section 64.703(c) of the Commission's rules requires the posted consumer information to be added when an aggregator has changed the pre-subscribed operator service provider (OSP) no later than 30 days following such change. Consumers will use this information to determine whether they wish to use the services of the identified OSP.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–30409 Filed 12–2–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Information Collection Renewal; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the proposed extension of a continuing information collection, as required by the Paperwork Reduction Act of 1995. The FDIC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. Currently, the FDIC is soliciting comment concerning the proposed extension of OMB approval of its information collection, entitled "Community Reinvestment Act," OMB Control No. 3064–0092.

DATES: Comments should be submitted by February 1, 2011.

ADDRESSES: Interested parties are invited to submit written comments. All comments should refer to the name of the collection. Comments may be submitted by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/propose.html.*
- *E-mail: comments@fdic.gov.*
- *Mail:* Leneta G. Gregorie (202.898.3719), Counsel, Federal Deposit Insurance Corporation, PA1730–3000, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

All comments should refer to the relevant OMB control number. Comments may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503. All comments will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: For further information about the information collection discussed in this notice, please contact Leneta G. Gregorie, by telephone at (202) 898–3719 or by mail at the address identified above.

SUPPLEMENTARY INFORMATION: The FDIC is proposing to renew the following information collection.

Title: Community Reinvestment Act.

OMB Control No.: 3064–0092.

Affected Public: Insured state nonmember banks.

Estimated Number of Respondents: 5,296.

Frequency of Response: Annually.

Estimated Average Time per Response: 36.6 hours.

Estimated Annual Burden: 193,975 hours.

Abstract: This submission covers an extension of the FDIC's currently approved information collections in its CRA regulations (12 CFR Part 345). The FDIC needs the information collected to fulfill its obligations under the CRA (12 U.S.C. 2901 *et seq.*) to evaluate and assign ratings to the performance of institutions, in connection with helping to meet the credit needs of their communities, including low- and moderate-income neighborhoods, consistent with safe and sound banking practices. The FDIC uses the information in the examination process and in evaluating applications for mergers, branches, and certain other corporate activities. Financial institutions maintain and provide the information to the Agencies.

Comments

Comments submitted in response to this notice will be summarized in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection is necessary for the proper performance of the functions of the agency, 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; and

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology.

Dated at Washington, DC, November 29, 2010.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2010–30313 Filed 12–2–10; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notice

AGENCY: Federal Election Commission.

DATE AND TIME: Wednesday, December 1, 2010, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shawn Woodhead Werth,

Secretary and Clerk of the Commission.

[FR Doc. 2010–30260 Filed 12–2–10; 8:45 am]

BILLING CODE 6715–01–M

FEDERAL MARITIME COMMISSION

Sunshine Act Meeting

TIME AND DATE: December 8, 2010–10 a.m.

PLACE: 800 North Capitol Street, NW., First Floor Hearing Room, Washington, DC.

STATUS: Part of the meeting will be in Open Session and the remainder of the meeting will be in Closed Session.

MATTERS TO BE CONSIDERED:

Open Session

1. Staff Update on Cruise West.
2. Initiative to Modernize Commission Rules of Practice and Procedure.

Closed Session

1. *Fact Finding No. 27:* Complaints or Inquiries from Individual Shippers of Household Goods or Private Automobiles—Discussion of the Fact Finding Officer's Interim Report.
2. *Fact Finding Investigation No. 26:* Vessel Capacity and Equipment Availability in the United States Export and Import Liner Trades—Discussion of the Fact Finding Officer's Final Report.
3. *Petition No. P1–01:* Petition of Hainan P O Shipping Co., Ltd., for an Exemption from the First Sentence of Section 9(c) of the Shipping Act.
4. Staff Briefing and Discussion Regarding Passenger Vessel Financial Responsibility.

CONTACT PERSON FOR MORE INFORMATION: Karen V. Gregory, Secretary, (202) 523–5725.

[FR Doc. 2010–30438 Filed 12–1–10; 11:15 am]

BILLING CODE 6730–01–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 20, 2010.

A. Federal Reserve Bank of San Francisco

(Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. BOTC Holdings LLC, Lightyear Fund II, L.P.; Lightyear Co-Invest Partnership II, L.P.; Lightyear Fund II GP, L.P.; Lightyear Fund II GP Holdings, LLC; Marron & Associates, LLC; Chestnut Venture Holdings, LLC; Donald B. Marron; Lightyear Capital LLC and Lightyear Capital II, LLC, all of New York, New York; to acquire voting shares of Cascade Bancorp, and thereby indirectly acquire voting shares of The Bank of the Cascades, both of Bend, Oregon.

Board of Governors of the Federal Reserve System, November 30, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–30361 Filed 12–2–10; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 30, 2010.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. Old Line Bancshares, Inc., Bowie, Maryland; to acquire 100 percent of the voting shares of Maryland Bankcorp, Inc., and thereby indirectly acquire voting shares of Maryland Bank & Trust Company, National Association, both of Lexington Park, Maryland.

Board of Governors of the Federal Reserve System, November 30, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–30362 Filed 12–2–10; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Priority Setting for the Children's Health Insurance Program Reauthorization Act (CHIPRA) Pediatric Quality Measures Program

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Request for public comments.

SUMMARY: Section 401(a) of the Children's Health Insurance Program Reauthorization Act of 2009 (Pub. L. 111–3) amended title Xl of the Social Security Act by inserting after section 1139 the new section 1139A, "Child Health Quality Measures.": Subsection 1139A(b), "Advancing and Improving Pediatric Quality Measures," directs the Secretary to establish a pediatric quality measures program to: improve and strengthen the initial core child health care quality measures established by the Secretary under section 1139A(a); expand on existing pediatric quality measures used by public and private health care purchasers and advance the development of new quality measures; and increase the portfolio of evidence-based, consensus pediatric quality measures available to public and private purchasers of children's healthcare services, providers, and consumers. Section 1139A(b)(3) requires the Secretary to consult with a broad range of stakeholders to set these priorities. To meet the requirement for extensive stakeholder consultation, we are seeking general public comment on these draft priorities, and asking the public to identify additional priorities as needed.

DATES: Comments on this notice must be received by January 14, 2010. The

public comment period will close on January 14, 2010 at 5 p.m. EST. Any comments received after the close of the comment period will not be considered.

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

1. *Electronic Mail—CHIPRAquality measures@AHRQ.hhs.gov.*

2. *Mail*—Agency for Healthcare Research and Quality, Attention: Office of Extramural Research, Education, and Priority Populations-Public Comment, CHIPRA PQMP Priorities, 540 Gaither Rd., Rockville, MD 20850.

Comments cannot be sent by facsimile transmission, because of staff and resource limitations. Please note that all submissions may be posted without change to *http://www.AHRQ.gov/chipra,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

Denise Dougherty, PhD, Senior Advisor, Child Health and Quality Improvement, Office of Extramural Research, Education, and Priority Populations, Agency for Healthcare Research and Quality, 540 Gaither Rd., Rockville, MD. 301–427–1868. *Denise.dougherty@ahrq.hhs.gov.*

For information regarding this Notice, please contact: *CHIPRAquality measures@AHRQ.hhs.gov*.

SUPPLEMENTARY INFORMATION: On February 4, 2009, the Congress enacted the Children's Health Insurance Program Reauthorization Act (CHIPRA) of 2009 (Pub. L. 111–3)., Section 401(a) of the legislation amended title XI of the Social Security Act (the Act) to establish section 1139A (42 U.S.C. 1320b-9a). Subsection 1139A(b)(E) requires the Secretary to consult with a wide spectrum of national stakeholders to identify gaps in existing pediatric quality measures and establish priorities for development and advancement of such measures. The Secretary delegated CHIPRA implementation to the Centers for Medicare & Medicaid Services (CMS). A "Memorandum of Understanding "was entered into with the Agency for Healthcare Research and Quality (AHRQ), by which AHRQ would conduct several activities in Title IV. These included the identification of an initial, recommended core set of children's healthcare quality measures for voluntary use by Medicaid and CHIP programs and establishment of the Pediatric Quality Measures Program (PQMP), both in collaboration with CMS.

Pediatric Quality Measures Program (PQMP). The PQMP was required to be established by January 1, 2011, and authorized to award grants and contracts. The PQMP will consist of 7–9 cooperative agreement awards to successful applicants to HS11–001 (*http://grants.nih.gov/grants/guide/rfa-files/RFA–HS–11–001.html*), and a contract award to a CHIPRA Coordinating and Technical Assistance Center (*http://www.ahrg.gov/chipra/#CTAC*), both supervised by AHRQ and CMS. As required by CHIPRA, successful applicants will work on priorities for measurement methods and topics set by HHS and informed by the input of multiple stakeholders.

Multi-stakeholder consultation. Section 1139A(b)(3) requires a consultation process for establishing priorities for the pediatric quality measures program that requires consultation with multiple stakeholders, as follows:

" * * * the Secretary shall consult with:

"(A) States;

(B) pediatricians, children's hospitals, and other primary and specialized pediatric health care professionals (including members of the allied health professions) who specialize in the care and treatment of children, particularly children with special physical, mental and developmental health care needs;

(C) dental professionals, including pediatric dental professionals;

(D) health care providers that furnish primary health care to children and families who live in urban and rural medically underserved communities or who are members of distinct population sub-groups at heightened risk for poor health outcomes;

(E) national organizations representing children, including children with disabilities and children with chronic conditions;

(F) national organizations representing consumers and purchasers of children's health care;

(G) national organizations and individuals with expertise in pediatric health quality measurement; and

(H) voluntary consensus standards setting organizations and other organizations involved in the advancement of evidence-based measures of health care."

Measure topics: Section 1139A(b)(2)(E) requires that the improved core measure sets include (but not necessarily be limited to) the following topics and types of healthcare quality measures:

"(A) The duration of children's health insurance coverage over a 12-month time period.

"(B) The availability and effectiveness of a full range of—

"(i) preventive services, treatments, and services for acute conditions, including services to promote healthy birth, prevent and treat premature birth, and detect the presence or risk of physical or mental conditions that could adversely affect growth and development; and

"(ii) treatments to correct or ameliorate the effects of physical and mental conditions, including chronic conditions, in infants, young children, school-age children, and adolescents.

"(C) The availability of care in a range of ambulatory and inpatient health care settings in which such care is furnished.

"(D) The types of measures that, taken together, can be used to estimate the overall national quality of health care for children, including children with special needs, and to perform comparative analyses of pediatric health care quality and racial, ethnic, and socioeconomic disparities in child health and health care for children.

CHIPRA Section 1139A(b)(2)) requires that the measures developed under the pediatric quality measures program shall, at a minimum, be:

"(A) evidence-based and, where appropriate, risk adjusted;

"(B) designed to identify and eliminate racial and ethnic disparities in child health and the provision of health care;

"(C) designed to ensure that the data required for such measures is collected and reported in a standard format that permits comparison of quality and data at a State, plan, and provider level;

"(D) periodically updated; and

"(E) responsive to the child health needs, services, and domains of health care quality described in clauses (i), (ii), and (iii) of subsection (a)(6)(A).

Definition of healthcare quality measure. For purposes of this notice, a healthcare quality measure is defined as a mechanism that enables a user to quantify the quality of a selected aspect of care by comparing it to a criterion (adapted from *http://www.qualitymeasures.AHRQ.gov/resources/measure use.aspx*).

Definition of healthcare quality. An Institute of Medicine Committee on a Future Vision for the National Healthcare Quality and Disparities Reports has recently updated the IOM recommended framework for assessing and improving quality so that 6 components of quality care are identified (safety, timeliness, effectiveness, patient/family-centeredness, access, efficiency), as well as 2 crosscutting dimensions (equity and value), three types of care (preventive care, acute treatment, and chronic condition management), and two additional elements (care coordination, health systems infrastructure capabilities). (*http://iom.edu/Reports/2010/Future-Directions-for-the-National-Healthcare-Quality-and-Disparities-Reports.aspx*). We adopt this framework for purposes of this public notice.

Prior work to identify priorities for the POMP. The first phase of CHIPRA required a process for developing recommendations for an initial core set of quality measures for voluntary use by Medicaid and CHIP programs. As

discussed in the **Federal Register** Notice and background paper that accompanied the public posting of the initial, recommended core set (*http://www.ahrq.gov/chip/chipraact.htm#Core*), not all CHIPRA criteria were able to be met for the initial core set. Public comments on the initial, recommended core set, and an expert meeting on measure criteria for the CHIPRA PQMP (*http://www.AHRQ.gov/chipra/#Expert*) provided additional insights into potential priorities for the PQMP. The combination of these efforts and events led to the identification of the following potential priorities for measure enhancement and development of new measures:

1. Development or enhancement of methods to:

a. Standardize measures across all payers, programs, and providers, public and private, as appropriate, to ensure that comparisons are valid.

b. Assess disparities in quality by race, ethnicity, socioeconomic status, geographic region and residence, and special health care needs, for example by developing new measurement methods or enhancing existing measurement methods.

c. Adjust for risk by enrollment duration.

d. Stratify or adjust for risk by depth and breadth of coverage.

e. Stratify or adjust for risk by medical conditions, including severity and acuity.

f. Capitalize on current and coming investments in health information technology (*e.g.,* patient and procedure registries, electronic health records, health information exchanges, interoperability), including meaningful use criteria under the American Recovery and Reinvestment Act (ARRA).

g. Increase State programs' and CMS's ability to rely on non-Medicaid and CHIP data sources through improvement in public health sector measurement (*e.g.,* birth certificate data; immunization surveys).

h. Come to consensus on the meaning and application of "evidence-based" in the context of healthcare quality measurement for children.

i. Incorporate patient and family perspectives into measurement to increase understandability.

2. Development or enhancement of measures in key topic areas:

a. Most integrated healthcare settings.

b. Availability of services.

c. Duration of enrollment as a standalone measure.

d. Measures of the content (quality) of care now typically measured as broad utilization categories (*e.g.,* prenatal, postpartum, newborn care (including breastfeeding support), well-child and adolescent well-care visits, screening services, and follow-up visits for chronic conditions and related medications).

e. Specific care settings and conditions:

i. Perinatal care (*e.g.,* family planning clinics, obstetric and gynecological care, birth centers).

ii. Quality of mental/behavioral health and substance abuse services, including prevention and treatment services, across all settings.

iii. Quality of care in settings beyond traditional medical care settings (*e.g.,* for screening, diagnostic services and therapies).

iv. Inpatient settings (including specialty inpatient settings).

v. Specialty care for child conditions and diseases.

vi. Care transitions for patients transitioning within and across health care settings.

vii. Additional measures related to family experiences of care (*e.g.,* child or adolescent self-reports; perinatal experiences of care; inpatient experiences)

viii. Health outcome measures (*e.g.,* measures of patient and population health or other outcomes of healthcare).[2]

ix. Structural measures (*e.g.,* measures of system design features that are causally linked to improved healthcare processes and outcomes).

Those submitting comments are encouraged to include a summary of evidence for the readiness of a topic for quality measurement and the importance of a topic or method. Additional background information may be attached. Commenters may wish to address these issues using the following questions. Commenters may also wish to include in their comments a summary score based on a scale of 1–5, where 1 is a high score, 3 is a medium score, and 5 is a low score.

Validity/Underlying Scientific Soundness: To what extent is there a demonstrated causal relationship between the element of quality to be measured (as a structure, process, or health outcome of healthcare delivery) and another element of the healthcare delivery system (*e.g.,* structure and process; process and outcome). Commenters may wish to use as a guide to assessing underlying scientific soundness the method and criteria used by the AHRQ National Advisory Council Subcommittee on Children's Healthcare Quality Measures for Medicaid and CHIP, where appropriate *http://www.AHRQ.gov/chipra/corebackground/corebacktab.htm#note5*).

Importance: Importance has several dimensions:

- To what extent is the topic important to children's health outcomes, family functioning, or societal functioning, including but not necessarily limited to high monetary costs of poor quality healthcare to children, families, or Society?
- To what extent is the topic important to reducing disparities in the quality of care for particular racial and ethnic groups of children, socioeconomic groups, geographically underserved groups, and children with special healthcare needs?
- To what extent is the topic important as a sentinel measure that could have spillover effects to the rest of the children's healthcare delivery system?
- To what extent is the proposed methodology important for addressing current shortcoming of healthcare quality measurement?

We strongly encourage comments to be as succinct as possible (250 words or less per topic, with additional supporting data allowed).

3. Collection of Information Requirements

This voluntary request does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

4. Regulatory Impact Analysis

As this notice does not meet the significance criteria of Executive Order 12866, it was not reviewed by the Office of Management and Budget.

Dated: November 24, 2010.

Carolyn M. Clancy,

AHRQ Director.

[FR Doc. 2010–30262 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Patient Safety Organizations: Voluntary Delisting

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice of Delisting.

SUMMARY: AHRQ has accepted a notification of voluntary relinquishment from ORQA, LLC of its status as a Patient Safety Organization (PSO). The Patient Safety and Quality Improvement Act of 2005 (Patient Safety Act), Public Law 109–41, 42 U.S.C. 299b–21—b–26, provides for the formation of PSOs, which collect, aggregate, and analyze confidential information regarding the quality and safety of health care delivery. The Patient Safety and Quality Improvement Final Rule (Patient Safety Rule), 42 CFR Part 3, authorizes AHRQ, on behalf of the Secretary of HHS, to list as a PSO an entity that attests that it meets the statutory and regulatory requirements for listing. A PSO can be "delisted" by the Secretary if it is found to no longer meet the requirements of the Patient Safety Act and Patient Safety Rule, including when a PSO chooses to voluntarily relinquish its status as a PSO for any reason.

DATES: The directories for both listed and delisted PSOs are ongoing and reviewed weekly by AHRQ. The delisting was effective at 12 Midnight ET (2400) on October 13, 2010.

ADDRESSES: Both directories can be accessed electronically at the following HHS Web site: *http://www.pso.AHRQ.gov/index.html.*

FOR FURTHER INFORMATION CONTACT: Diane Cousins, RPh., Center for Quality Improvement and Patient Safety, AHRQ, 540 Gaither Road, Rockville, MD 20850; Telephone (toll free): (866) 403–3697; Telephone (local): (301) 427–1111; TTY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; E-mail: *pso@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Patient Safety Act authorizes the listing of PSOs, which are entities or component organizations whose mission and primary activity is to conduct activities to improve patient safety and the quality of health care delivery. HHS issued the Patient Safety Rule to implement the Patient Safety Act. AHRQ administers the provisions of the Patient Safety Act and Patient Safety Rule (PDF file, 450 KB. PDF Help) relating to the listing and operation of PSOs. Section 3.108(d) of the Patient Safety Rule requires AHRQ to provide public notice when it removes an organization from the list of federally approved PSOs. AHRQ has accepted a notification from ORQA, LLC, PSO number P0013, to voluntarily relinquish its status as a PSO. Accordingly, ORQA, LLC was delisted effective at 12 Midnight ET (2400) on October 13, 2010.

More information on PSOs can be obtained through AHRQ's PSO Web site at *http://www.pso.AHRQ.gov/index.html.*

Dated: November 24, 2010.

Carolyn M. Clancy,

Director.

[FR Doc. 2010–30263 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Patient Safety Organizations: Voluntary Delisting

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice of Delisting.

SUMMARY: AHRQ has accepted a notification of voluntary relinquishment from Helmet Fire, Inc. Patient Safety Group (A Component of Helmet Fire, Inc. of its status as a Patient Safety Organization (PSO). The Patient Safety and Quality Improvement Act of 2005 (Patient Safety Act), Public Law 109–41, 42 U.S.C. 299b–21—b–26, provides for the formation of PSOs, which collect, aggregate, and analyze confidential information regarding the quality and safety of health care delivery. The Patient Safety and Quality Improvement Final Rule (Patient Safety Rule), 42 CFR Part 3, authorizes AHRQ, on behalf of the Secretary of HHS, to list as a PSO an entity that attests that it meets the statutory and regulatory requirements for listing. A PSO can be "delisted" by the Secretary if it is found to no longer meet the requirements of the Patient Safety Act and Patient Safety Rule, including when a PSO chooses to voluntarily relinquish its status as a PSO for any reason.

DATES: The directories for both listed and delisted PSOs are ongoing and reviewed weekly by AHRQ. The delisting was effective at 12 Midnight ET (2400) on October 13, 2010.

ADDRESSES: Both directories can be accessed electronically at the following HHS Web site: *http://www.pso.AHRQ.gov/index.html.*

FOR FURTHER INFORMATION CONTACT: Diane Cousins, RPh., Center for Quality Improvement and Patient Safety, AHRQ, 540 Gaither Road, Rockville, MD 20850; Telephone (toll free): (866) 403–3697; Telephone (local): (301) 427–1111; TTY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; E-mail: *pso@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Patient Safety Act authorizes the listing of PSOs, which are entities or component organizations whose mission and primary activity is to conduct activities to improve patient safety and the quality of health care delivery.

HHS issued the Patient Safety Rule to implement the Patient Safety Act. AHRQ administers the provisions of the Patient Safety Act and Patient Safety Rule (PDF file, 450 KB. PDF Help) relating to the listing and operation of PSOs. Section 3.108(d) of the Patient Safety Rule requires AHRQ to provide public notice when it removes an organization from the list of federally approved PSOs. AHRQ has accepted a notification from Helmet Fire, Inc. Patient Safety Group (A Component of Helmet Fire, Inc., PSO number P0023, to voluntarily relinquish its status as a PSO. Accordingly, Helmet Fire, Inc. Patient Safety Group (A Component of Helmet Fire, Inc) was delisted effective at 12 Midnight ET (2400) on October 13, 2010.

More information on PSOs can be obtained through AHRQ's PSO Web site at *http://www.pso.AHRQ.gov/index.html.*

Dated: November 24, 2010.

Carolyn M. Clancy,

Director.

[FR Doc. 2010–30267 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Patient Safety Organizations: Voluntary Delisting

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice of Delisting.

SUMMARY: AHRQ has accepted a notification of voluntary relinquishment from Human Performance Technology Group, Inc. of its status as a Patient Safety Organization (PSO). The Patient Safety and Quality Improvement Act of 2005 (Patient Safety Act), Public Law 109–41, 42 U.S.C. 299b–21—b–26, provides for the formation of PSOs, which collect, aggregate, and analyze confidential information regarding the quality and safety of health care delivery. The Patient Safety and Quality Improvement Final Rule (Patient Safety Rule), 42 CFR Part 3, authorizes AHRQ,

on behalf of the Secretary of HHS, to list as a PSO an entity that attests that it meets the statutory and regulatory requirements for listing. A PSO can be "delisted" by the Secretary if it is found to no longer meet the requirements of the Patient Safety Act and Patient Safety Rule, including when a PSO chooses to voluntarily relinquish its status as a PSO for any reason.

DATES: The directories for both listed and delisted PSOs are ongoing and reviewed weekly by AHRQ. The delisting was effective at 12 Midnight ET (2400) on October 13, 2010.

ADDRESSES: Both directories can be accessed electronically at the following HHS Web site: *http://www.pso.AHRQ.gov/index.html.*

FOR FURTHER INFORMATION CONTACT: Diane Cousins, RPh., Center for Quality Improvement and Patient Safety, AHRQ, 540 Gaither Road, Rockville, MD 20850; Telephone (toll free): (866) 403–3697; Telephone (local): (301) 427–1111; TTY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; E-mail: *pso@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Patient Safety Act authorizes the listing of PSOs, which are entities or component organizations whose mission and primary activity is to conduct activities to improve patient safety and the quality of health care delivery. HHS issued the Patient Safety Rule to implement the Patient Safety Act. AHRQ administers the provisions of the Patient Safety Act and Patient Safety Rule (PDF file, 450 KB. PDF Help) relating to the listing and operation of PSOs. Section 3.108(d) of the Patient Safety Rule requires AHRQ to provide public notice when it removes an organization from the list of federally approved PSOs. AHRQ has accepted a notification from Human Performance Technology Group, Inc., PSO number P0003, to voluntarily relinquish its status as a PSO. Accordingly, Human Performance Technology Group, Inc. was delisted effective at 12 Midnight ET (2400) on October 13, 2010.

More information on PSOs can be obtained through AHRQ's PSO Web site at *http://www.pso.AHRQ.gov/index.html.*

Dated: November 24, 2010.

Carolyn M. Clancy,

Director.

[FR Doc. 2010–30265 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Patient Safety Organizations: Voluntary Delisting

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice of Delisting.

SUMMARY: AHRQ has accepted a notification of voluntary relinquishment from Sprixx, a component entity of Harbor Medical, Inc., of its status as a Patient Safety Organization (PSO). The Patient Safety and Quality Improvement Act of 2005 (Patient Safety Act), Public Law 109–41, 42 U.S.C. 299b–21—b–26, provides for the formation of PSOs, which collect, aggregate, and analyze confidential information regarding the quality and safety of health care delivery. The Patient Safety and Quality Improvement Final Rule (Patient Safety Rule), 42 CFR Part 3, authorizes AHRQ, on behalf of the Secretary of HHS, to list as a PSO an entity that attests that it meets the statutory and regulatory requirements for listing. A PSO can be "delisted" by the Secretary if it is found to no longer meet the requirements of the Patient Safety Act and Patient Safety Rule, including when a PSO chooses to voluntarily relinquish its status as a PSO for any reason.

DATES: The directories for both listed and delisted PSOs are ongoing and reviewed weekly by AHRQ. The delisting was effective at 12 Midnight ET (2400) on October 13, 2010.

ADDRESSES: Both directories can be accessed electronically at the following HHS Web site: *http://www.pso.AHRQ.gov/index.html.*

FOR FURTHER INFORMATION CONTACT: Diane Cousins, RPh., Center for Quality Improvement and Patient Safety, AHRQ, 540 Gaither Road, Rockville, MD 20850; Telephone (toll free): (866) 403–3697; Telephone (local): (301) 427–1111; TTY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; E-mail: *pso@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Patient Safety Act authorizes the listing of PSOs, which are entities or component organizations whose mission and primary activity is to conduct activities to improve patient safety and the quality of health care delivery.

HHS issued the Patient Safety Rule to implement the Patient Safety Act. AHRQ administers the provisions of the Patient Safety Act and Patient Safety Rule (PDF file, 450 KB. PDF Help) relating to the listing and operation of PSOs. Section 3.108(d) of the Patient Safety Rule requires AHRQ to provide public notice when it removes an organization from the list of federally approved PSOs. AHRQ has accepted a notification from Sprixx, a component entity of Harbor Medical, Inc., PSO number P0005, to voluntarily relinquish its status as a PSO. Accordingly, Sprixx, a component entity of Harbor Medical, Inc., was delisted effective at 12:00 Midnight ET (2400) on October 13, 2010.

More information on PSOs can be obtained through AHRQ's PSO Web site at *http://www.pso.AHRQ.gov/index.html.*

Dated: November 24, 2010.

Carolyn M. Clancy,

Director.

[FR Doc. 2010–30266 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–11–0775]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Carol Walker, CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques

or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Formative Research to Develop the Routine HIV Testing for Emergency Medicine Physicians, *Prevention Is Care* (*PIC*), and Partner Services Social Marketing Campaigns—Extension—(0920–0775, exp. 4/30/2011), National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

This project involves formative research to inform the development of three CDC-sponsored social marketing campaigns: Social Marketing Campaign to Make HIV Testing a Routine Part of Medical Care for Emergency Medicine Physicians (Routine HIV Testing), Prevention Is Care (PIC), and Partner Services (Partner Services). The goal of the Routine HIV Testing Campaign is to increase HIV testing rates among individuals who receive care through the emergency department and the objective of the campaign is to make HIV testing a routine part of care provided by emergency medicine physicians. PIC entails encouraging primary care physicians (PCP) and Infectious Disease Specialists who deliver care to patients living with HIV to screen their HIV patients for HIV transmission behaviors and deliver brief messages on the importance of protecting themselves and others by reducing their risky behaviors. The long-term objective of the campaign is to establish PIC as the standard of care for persons living with HIV. The goal of the Partner Services component of the PIC social marketing campaign is to make HIV partner services a routine part of medical care. Partner services will greatly enhance the detection and early referral of individuals with HIV infection and will greatly reduce the number of new infections. The study entails conducting interviews to test creative materials with a sample of emergency medicine physicians for Routine HIV Testing and with PCP and Infectious Disease Specialists for PIC and Partner Services. Findings from this study will be used by CDC and its partners to inform current and future program activities.

For Routine HIV Testing, we expect a total of 36 physicians to be screened annually for eligibility. Of the 36 physicians who are screened annually, we expect that 24 will participate in an interview annually.

For PIC, we expect a total of 81 physicians to be screened annually for eligibility. Of the 81 physicians who are screened, we expect that 54 will participate in an interview annually.

For Partner Services, we expect a total of 87 physicians to be screened annually for eligibility. Of the 87 physicians who are screened, we expect that 58 will participate in an interview annually.

There are no costs to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden response (in hours)	Total burden (in hours)
Emergency Medicine Physicians	Routine HIV Testing Screener	36	1	10/60	6
Emergency Medicine Physicians	Routine HIV Testing Interview	24	1	1	24
Emergency Medicine Physicians	Routine HIV Paper & Pencil Survey.	24	1	10/60	4
Prevention Is Care	PIC Screener	81	1	10/60	14
Prevention Is Care	PIC Interview	54	1	1	54
Prevention Is Care	PIC Paper & Pencil Survey	54	1	10/60	9
Partner Services	Screener	87	1	10/60	15
Partner Services	Interview	58	1	1	58
Partner Services	Paper & Pencil Survey	58	1	10/60	10
Total					194

Dated: November 29, 2010.

Carol Walker,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–30369 Filed 12–2–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Center for Environmental Health/Agency for Toxic Substances and Disease Registry (NCEH/ATSDR); Notice of National Conversation on Public Health and Chemical Exposures Leadership Council Meeting

Time and Date: 9 a.m.–5 p.m. EST, Wednesday, December 15, 2010.

Location: Washington Plaza Hotel, 10 Thomas Circle, NW., Washington, DC 20005.

Status: Open to the public, on a first come, first served basis, limited by the space available. An opportunity for the public to listen to the meeting by phone will be available. For information on observing the meeting in person or by phone, see "contact for additional information" below.

Purpose: This is the seventh meeting of the National Conversation on Public Health and Chemical Exposures Leadership Council, which is convened by RESOLVE, a non-profit independent facilitator. The National Conversation on Public Health and Chemical Exposures is a collaborative initiative supported by NCEH/ATSDR and through which many organizations and individuals are helping develop an action agenda for strengthening the Nation's approach to protecting the public's health from harmful chemical exposures. The Leadership Council provides overall guidance to the National Conversation project and is responsible for issuing the final action agenda. For additional information on the National Conversation on Public Health and Chemical Exposures, visit this Web site: *http://www.atsdr.cdc.gov/nationalconversation/*.

Meeting agenda: The purpose of the meeting is to discuss the draft action agenda.

Contact for additional information: If you would like to receive additional information on attending this meeting in person or listening by telephone, please

contact: *nationalconversation@cdc.gov* or Julie Fishman at 770–488–0629.

Tanja Popovic,

Deputy Associate Director for Science, Centers for Disease Control and Prevention.

[FR Doc. 2010–30165 Filed 12–2–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–437]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections 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 information collection burden.

1. *Type of Information Collection Request:* Extension of currently approved collection; *Title of Information Collection:* Psychiatric Unit Criteria Work Sheet and Supporting Regulations 412.25 and 412.27; *Use:* Certain hospital units are excluded from the Medicare Prospective Payment System (PPS). The exclusion of units is not optional on the part of the provider but is required by section 1886(d)(1)(B) of the Social Security Act. That section excludes psychiatric hospitals, rehabilitation hospitals, hospitals whose inpatients are predominantly individuals under 18 years of age (children's hospitals), and psychiatric and rehabilitation units which are a distinct part of a hospital.

CMS proposes to continue the current process of performing initial verifications and annual reverifications to determine that psychiatric units continue to comply with the regulatory criteria at 42 CFR 412.25 and 42 CFR 412.27 of the PPS regulations. These regulations state the criteria that distinct part units must meet for exclusion.

If, as a result of the regular survey process a hospital is certified as a psychiatric hospital by the State survey agency (SA), then it automatically satisfies the regulatory criteria for exclusion. Thus, no additional verification is required for psychiatric hospitals. Some verification is needed, however, to ensure that other types of hospitals and units meet the criteria for exclusion.

Consequently, CMS instructed the Fiscal Intermediaries (FIs) and SAs to perform certain verification activities, beginning in October 1983 when PPS was implemented. CMS originally developed the CMS–437 as SA Worksheet for verifying exclusions from PPS for psychiatric units.

Since April 9, 1994, PPS-excluded psychiatric units already excluded from the PPS have met CMS's annual requirement for PPS-exclusion by self-attesting that they remain in compliance with the PPS exclusion criteria. Under the current procedure, all psychiatric units applying for first-time exclusion are surveyed by the SAs. The SAs also perform surveys to investigate complaint allegations and conduct annual sample reverification surveys on 5 percent of all psychiatric units.

The aforementioned exclusions continue to exist and thus CMS proposes to continue to use the Criteria Worksheet, Forms CMS–437 for verifying first-time exclusions from the PPS, for complaint surveys, for its annual 5 percent validation sample, and for facility self-attestation. These forms are related to the survey and certification and Medicare approval of the PPS-excluded units. *Form Number:* CMS–437 (OMB#: 0938–0358); *Frequency:* Annually; *Affected Public:* Private sector businesses or other for-profits; *Number of Respondents:* 1,333; *Total Annual Responses:* 1,333; *Total Annual Hours:* 333. (For policy questions regarding this collection contact Kelley Leonette at 410–786–6664. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *February 1, 2011:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for "Comment or Submission" or "More Search Options" to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: November 24, 2010.

Martique Jones,

Director, Regulations Development Division-B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2010–30367 Filed 12–2–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0597]

Agency Information Collection Activities; Proposed Collection; Comment Request; Index of Legally Marketed Unapproved New Animal Drugs for Minor Species

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the burden hours associated with indexing of legally marketed unapproved new animal drugs for minor species.

DATES: Submit either electronic or written comments on the collection of information by February 1, 2011.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Johnny Vilela, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7651, *juanmanuel.vilela@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Index of Legally Marketed Unapproved New Animal Drugs for Minor Species—21 CFR Part 516 (OMB Control Number 0910–0620)—Extension

The Minor Use and Minor Species Animal Health Act of 2004 (MUMS Act) amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act) to authorize FDA to establish new regulatory procedures intended to make more medications legally available to veterinarians and animal owners for the treatment of minor animal species (species other than cattle, horses, swine, chickens, turkeys, dogs, and cats), as well as uncommon diseases in major animal species.

The MUMS Act added three new sections to the FD&C Act (sections 571, 572, and 573 (21 U.S.C. 360ccc, 360ccc–1, and 360ccc–2, respectively)). The final rule (72 FR 69108, December 6, 2007) implements section 572 of the FD&C Act, which provides for an index of legally marketed unapproved new animal drugs for minor species. Participation in any part of the MUMS program is optional so the associated paperwork only applies to those who choose to participate. The final rule specifies, among other things, the criteria and procedures for requesting eligibility for indexing and for requesting addition to the index as well as the annual reporting requirements for index holders.

Under the new subpart C of part 516 (21 CFR part 516, subpart C), § 516.119 provides requirements for naming a permanent-resident U.S. agent by foreign drug companies, and § 516.121 provides for informational meetings with FDA. Section 516.123 provides requirements for requesting informal conferences regarding agency administrative actions and § 516.125 provides for investigational use of new animal drugs intended for indexing. Provisions for requesting a determination of eligibility for indexing can be found under § 516.129 and provisions for subsequent requests for addition to the index can be found under § 516.145. A description of the written report required in § 516.145 can be found under § 516.143. Under § 516.141 are provisions for drug companies to nominate a qualified expert panel as well as the panel's recordkeeping requirements. This section also calls for the submission of a written conflict of interest statement to FDA by each proposed panel member. Index holders are able to modify their index listing under § 516.161 or change drug ownership under § 516.163. Requirements for records and reports are under § 516.165.

Description of Respondents: Pharmaceutical companies that sponsor new animal drugs.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
516.119	2	1	2	1	2
516.121	30	2	60	4	240
516.123	3	1	3	8	24
516.125	2	3	6	20	120
516.129	30	2	60	20	1,200
516.141	20	1	20	16	320
516.143	20	1	20	120	2,400
516.145	20	1	20	20	400
516.161	1	1	1	4	4
516.163	1	1	1	2	2
516.165	10	2	20	8	160
Total					4,872

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR Section	No. of recordkeepers	Annual frequency per recordkeeper	Total annual records	Hours per recordkeeper	Total hours
516.141	30	2	60	0.5	30
516.165	10	2	20	1	20
Total					50

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: November 29, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–30316 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0266]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Study of Clinical Efficacy Information in Professional Labeling and Direct-to-Consumer Print Advertisements for Prescription Drugs

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 3, 2011.

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 "Study of Clinical Efficacy Information in Professional Labeling and Direct-to-Consumer (DTC) Print Advertisements for Prescription Drugs." Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3792, *Elizabeth.Berbakos@fda.hhs.gov.*

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. Study of Clinical Efficacy Information in Professional Labeling and Direct-to-Consumer (DTC)

Print Advertisements for Prescription Drug—(OMB Control Number 0910–New)

Section 1701(a)(4) of the Public Health Service Act (42 U.S.C. 300u(a)(4)) authorizes FDA to conduct research relating to health information. Section 903(b)(2)(c) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 393(b)(2)(c)) authorizes FDA to conduct research relating to drugs and other FDA-regulated products in carrying out the provisions of the FD&C Act.

FDA regulations require that an advertisement that makes claims about a prescription drug include a "fair balance" of information about the benefits and risks of the advertised product, in terms of both content and presentation (21 CFR 202.1(e)(5)(ii)). In past research FDA has focused primarily on the risk component of the risk-benefit ratio. In the interest of thoroughly exploring the issue of fair balance, however, the presentation of effectiveness, or benefit, information is equally important.

The FD&C Act requires that manufacturers, packers, and distributors (sponsors) who advertise prescription human and animal drugs, including biological products for humans, disclose in advertisements certain information about the advertised product's uses and risks.[1] By its nature, the presentation of this risk information is likely to evoke active trade-offs by consumers, *i.e.,* comparisons with the perceived risks of not taking treatment, and comparisons with the perceived benefits of taking a treatment.[2] Since FDA has an interest in fostering safe and proper use of prescription drugs, an activity that engages both risks and benefits, an in-depth understanding of consumers' processing of this information is central to this regulatory task.

Research and guidance to sponsors on how to present benefit and efficacy information in prescription drug advertisements is limited. For example, "benefit claims," broadly defined, appearing in advertisements are often presented in general language that does not inform patients of the likelihood of efficacy and are often simply variants of an "intended use" statement. In a content analysis of DTC advertising,[3] the researchers classified the "promotional techniques" used in the advertisements. Emotional appeals were observed in 67 percent of the ads while vague and qualitative benefit terminology was found in 87 percent of the ads. Only 9 percent contained data. For risk information, however, half the advertisements used data to describe side-effects, typically with lists of side-effects that generally occurred infrequently.

FDA regulations require that prescription drug advertisements that make (promotional) claims about a product also include risk information in a "balanced" manner (21 CFR 202.1(e)(5)(ii)), both in terms of the content and presentation of the information. This balance applies to both the front (aka "display") page of an advertisement, as well as the brief summary page. However, beyond the "balance" requirement limited guidance and research exists to direct or encourage sponsors to present benefit claims that are informative, specific, and reflect clinical effectiveness data.

The purpose of this project is to: (1) Understand how physicians process clinical efficacy information and how

[1] For prescription drugs and biologics, the FD&C Act requires advertisements to contain "information in brief summary relating to side effects, contraindications, and effectiveness" (21 U.S.C. 352(n)).

[2] *See* Schwartz, L., S. Woloshin, W. Black, et al., "The Role of Numeracy in Understanding the Benefit of Screening Mammography," *Annals of Internal Medicine,* 127(11), 966–72, 1997.

[3] Woloshin, S. and L. Schwartz, "Direct to Consumer Advertisements for Prescription Drugs: What Are Americans Being Told," *Lancet,* 358, 1141–46, 2001.

they interpret approved product label information,[4] (2) determine physician preferences for alternative presentations of clinical efficacy information in DTC advertising, and (3) examine how different presentations of clinical efficacy information in DTC advertising affect consumers' perceptions of efficacy and safety. Specifically, we are interested in how physicians and consumers make risk/benefit assessments and particularly, how consumers make such judgments in response to variations in the efficacy presentations in the "display" (first) page of a DTC print ad. A particular concern is whether certain presentations cause consumers to form skewed perceptions or unfounded risk/benefit tradeoffs. Therefore, we will investigate to what extent consumers, when provided with efficacy information, form perceptions that correspond with clinically-based physicians' assessments of the benefits, risks, and benefit/risk tradeoffs of the same drugs. These studies will inform FDA's thinking regarding how manufacturers may provide useful and non-misleading efficacy information in DTC print advertisements.

[4] As part of this effort, a qualitative mental models procedure was completed that helped us determine how physicians think about the efficacy of potential pharmaceutical options (OMB control no. 0910–0649).

Design Overview

This study will be conducted in two concurrent, independent parts. The first part will involve 2,500 consumers in an experimental examination of variations of the display page of print DTC ads for two fictitious drugs, closely approximating existing drugs for overactive bladder (OAB) and benign prostatic hyperplasia (BPH). In the second part, 600 general practitioners will review and evaluate a fictitious "approved" label for the same conditions. This design will allow us to compare consumers' perceptions of efficacy with a more objective measure of the true efficacy of the drug as measured by physician perceptions of clinical efficacy from labeling.

Consumer experiment. In this part of the study, women who have been diagnosed with or are at risk for OAB (self-designated based on relevant symptoms) will be recruited and will view one version of a DTC ad for a drug to treat OAB. Men who have been diagnosed with or are at risk for BPH (self-designated based on relevant symptoms) will be recruited and will view one version of a DTC ad for a drug to treat BPH. Although the two conditions are somewhat specific to gender (men can suffer from OAB but it is much more prevalent in women), they share many of the same symptoms and characteristics. These medical conditions afford us the ability to maintain various realistic manipulations of placebo level and type of claim, as explained below. The graphical elements and construction of the two ads will be comparable yet still realistic.

Consumers will be randomly assigned to see 1 of 12 DTC print ads within their respective medical condition and will answer questions about the effectiveness and safety of the fictitious drug advertised in them. These twelve experimental conditions will be created by examining three independent variables in the following manner: Type of claim (2 levels: Treatment, prevention), placebo rate (3 levels: High, low, none), and framing (2 levels: Single, mixed). Please note that the numbers describing efficacy seen in the following table are for illustration only. Actual numbers used will be determined by pretesting.

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		Treatment Claim Study		Prevention Claim Study	
		Frame		Frame	
		Single	Mixed	Single	Mixed
Placebo	High	• 30/100 on Drug X reduced urinary frequency and urgency • 20/100 without Drug X reduced urinary frequency and urgency	• 30/100 on Drug X reduced urinary frequency and urgency; 70/100 saw no improvement • 20/100 without Drug X reduced urinary frequency and urgency; 80/100 saw no improvement	• Diagnosed with bladder cancer on Drug X: 4/100 • Diagnosed with bladder cancer without Drug X: 5/100	• Diagnosed with bladder cancer on Drug X: 4/100; Not diagnosed with bladder cancer on Drug X: 96/100 • Diagnosed with bladder cancer without Drug X: 5/100; Not diagnosed with bladder cancer without Drug X: 95/100
	Low	• 30/100 on Drug X reduced urinary frequency and urgency • 3/100 without Drug X reduced urinary frequency and urgency	• 30/100 on Drug X reduced urinary frequency and urgency; 70/100 saw no improvement • 3/100 without Drug X reduced urinary frequency and urgency; 97/100 saw no improvement	• Diagnosed with bladder cancer on Drug X: 4/100 • Diagnosed with bladder cancer without Drug X: 9/100	• Diagnosed with bladder cancer on Drug X: 4/100; Not diagnosed with bladder cancer on Drug X: 96/100 • Diagnosed with bladder cancer without Drug X: 9/100; Not diagnosed with bladder cancer without Drug X: 91/100
	None	• 30/100 on Drug X reduced urinary frequency and urgency	• 30/100 on Drug X reduced urinary frequency and urgency; 70/100 saw no improvement	• Diagnosed with bladder cancer on Drug X: 4/100	• Diagnosed with bladder cancer on Drug X: 4/100; Not diagnosed with bladder cancer on Drug X: 96/100
Extra High Efficacy				• Diagnosed with bladder cancer on Drug X: 4/100 • Diagnosed with bladder cancer without Drug X: 15/100	• Diagnosed with bladder cancer on Drug X: 4/100; Not diagnosed with bladder cancer on Drug X: 96/100 • Diagnosed with bladder cancer without Drug X: 15/100; Not diagnosed with bladder cancer without Drug X: 85/100

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We will investigate variations of numerical presentation in two different types of claims: treatment and prevention. Treatment claims usually involve symptoms that may be alleviated by taking a given prescription drug. This type of claim is directly observable and somewhat testable by patients. If bothersome symptoms do not go away, a patient can return to the healthcare provider with this information and pursue additional options for treatment. In general, drugs that treat symptoms typically show substantial percentages of people who experience relief.

Prevention claims are important but due to their long-term nature, potentially harder to communicate. A drug that prevents a negative future event may not alleviate any symptoms

at all. Patients may feel no benefit from the drug and must trust their healthcare provider and the data, as much as they can process it, that the drug is providing a positive benefit for them. The nature of these claims is such that the event being prevented is relatively rare, and thus the numbers used to describe them are often very small. For example, a cholesterol drug that reduces the risk of heart attack from 3 out of 100 to 2 out of 100 may not seem objectively large, but has enormous consequences for millions of people and the healthcare system in general. We chose to test this type of claim to determine whether consumers are sensitive to the magnitude of the benefit in these clinically meaningful but objectively small and usually asymptomatic outcomes. While we will examine the current issues in both treatment and prevention claims, we do not intend to make comparisons between the two.

The second variable of interest is communication of a placebo rate. Three levels will be examined. In addition to testing a control condition with no placebo information, we will utilize a high and low placebo rate to better understand if and how consumers use placebo information. We see three possibilities: (1) People use placebo numbers correctly, such that the low placebo group demonstrates higher perceived efficacy than the high placebo group; (2) people use the placebo numbers as a peripheral cue to mean "science" so there are no differences between high and low placebo groups on perceived efficacy but both are higher than the no placebo group; and (3) people do not find the numbers meaningful or cannot process them, so the high and low groups do not differ from one another and they do not differ from the no placebo group. In an attempt to make our claims as realistic as possible, we will maintain fairly low rates of prevention in the prevention conditions. For this reason, in addition to the 12 cells in the table previously illustrated in this document, we will also have an additional control cell in which the effectiveness rates are quite high—higher than could reasonably be expected but high enough to be objectively noticeable (*e.g.,* risk of bladder cancer on Drug X, 4/100; risk of bladder cancer on placebo, 15/100). This additional condition will provide confidence that our research manipulations are operating as we expect.

Finally, we will examine the addition of *mixed* framing to the traditional use of a *single positive* frame in a DTC ad. Mixed framing provides the number of people who benefited and the number of people who did not benefit, whereas positive framing provides only the number of people who benefited. Only a few studies have actually measured this mixed approach [5] although risk communication guides recommend the use of mixed framing to create more accurate perceptions.[6] Although a completely balanced design would also include a negative framing condition (which would provide only the number of people who did not benefit), we feel it is unrealistic to create an ad that would suggest, for example, that "Drug X did not work for 70 percent of people in clinical trials," so we have chosen not to include negative framing in our investigation.

In this part of the project, we are most interested in consumers' perceived efficacy and safety, which we can then compare with ratings physicians will provide based on the prescribing information, described in the next section. We will also ask consumers questions to measure their accuracy with regard to claims, their recall of the information in the ad, and demographic questions that may influence their responses, such as knowledge about their medical condition and their level of numeracy.

Physician Study. Six hundred general practitioners [7] will participate in an Internet survey lasting no longer than 20 minutes. They will complete two tasks during this time. In the first task, they will evaluate a prescription drug label (also known as the *prescribing information,* written for healthcare practitioners) for one of the two fictitious drugs described in the consumer study below. To provide a match for the variations of information in the DTC ads the consumers will observe, physicians will be randomly assigned to see prescribing information that varies in terms of claim type, placebo rates in clinical trials, and the medical condition the drug treats (OAB or BPH).

As part of this task, we will obtain timing and sequence information on which sections of the label physicians examine. This will enable us to have a deeper understanding of physicians' processing of the prescribing information. We are not aware of existing literature on this topic. Additionally, physicians will answer questions about the efficacy and safety of the drug and quantitative questions about the benefit shown in the clinical studies (as described in the label). These questions have been designed such that they can be reasonably compared with the responses of consumers who will answer the same questions after viewing a corresponding DTC ad.

In the second task, physicians will see four versions of a print DTC ad for a fictitious product for high cholesterol and will rank the ads in order of how representative of the clinical data as the physicians know it the ads are and how useful they believe the ads would be for their patients.[8] The four versions will be selected to mirror the versions of the OAB/BPH drug that consumers will see in the consumer experiment (*i.e.,* low placebo, frame).

Thus, this research will provide us with a rich data set in order to address several questions: (1) How physicians process clinical efficacy information and how they use approved product label information, (2) how physicians' interpretations of clinical efficacy information relate to their preferences for alternative DTC ad presentations, and (3) which variations of information in DTC ads bring consumers closer to or farther away from the conclusions of the physicians regarding the same drugs.

FDA estimates the burden of this collection of information as follows:

The total respondent sample for this data collection is 3,400. We estimate the response burden to be 20 minutes in the first part and 15 minutes in the second part, for a burden of 906 hours.

In the **Federal Register** of June 16, 2010 (75 FR 34142), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received on the paperwork burden.

FDA estimates the burden of this collection of information as follows:

[5] For a literature review, see Moxey, A., D. O'Connell, P. McGettigan, et al., "Describing Treatment Effects to Patients: How They Are Expressed Makes a Difference," *Journal of General Internal Medicine,* 18, 948–959, 2003.

[6] Fagerlin, A., P.A. Ubel, D.M. Smith, et al., "Making Numbers Matter: Present and Future Research in Risk Communication," *American Journal of Health Behavior,* 31, S47–S56, 2007; Schwartz, L.M., S. Woloshin, H.G. Welch, "Risk Communication in Clinical Practice: Putting Cancer in Context," *Monograph of the National Cancer Institute,* 25, 124–133, 1999.

[7] Including internists, general practitioners, and family practitioners.

[8] To reduce burden, the physician sample will be split in this task, so that half of the physicians see the four ad versions with treatment claims and the other half see the four ad versions with prevention claims. Type of claim is described in greater detail in the consumer experiment section.

TABLE 1—TOTAL ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
Physician survey—pretest	100	1	100	.33	33
Physician survey—main study	600	1	600	.33	198
Consumer experiment—pretest	200	1	200	.25	50
Consumer experiment—main study	2,500	1	2,500	.25	625
Total					906

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: November 30, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–30385 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0597]

Agency Information Collection Activities; Proposed Collection; Comment Request; Index of Legally Marketed Unapproved New Animal Drugs for Minor Species

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the burden hours associated with indexing of legally marketed unapproved new animal drugs for minor species.

DATES: Submit either electronic or written comments on the collection of information by February 1, 2011.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Johnny Vilela, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7651, *juanmanuel.vilela@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Index of Legally Marketed Unapproved New Animal Drugs for Minor Species—21 CFR Part 516 (OMB Control Number 0910–0620)—Extension

The Minor Use and Minor Species Animal Health Act of 2004 (MUMS Act) amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act) to authorize FDA to establish new regulatory procedures intended to make more medications legally available to veterinarians and animal owners for the treatment of minor animal species (species other than cattle, horses, swine, chickens, turkeys, dogs, and cats), as well as uncommon diseases in major animal species.

The MUMS Act added three new sections to the FD&C Act (sections 571, 572, and 573 (21 U.S.C. 360ccc, 360ccc–1, and 360ccc–2, respectively)). The final rule (72 FR 69108, December 6, 2007) implements section 572 of the FD&C Act, which provides for an index of legally marketed unapproved new animal drugs for minor species. Participation in any part of the MUMS program is optional so the associated paperwork only applies to those who choose to participate. The final rule specifies, among other things, the criteria and procedures for requesting eligibility for indexing and for requesting addition to the index as well as the annual reporting requirements for index holders.

Under the new subpart C of part 516 (21 CFR part 516, subpart C), § 516.119 provides requirements for naming a permanent-resident U.S. agent by foreign drug companies, and § 516.121 provides for informational meetings with FDA. Section 516.123 provides requirements for requesting informal conferences regarding agency administrative actions and § 516.125 provides for investigational use of new animal drugs intended for indexing. Provisions for requesting a determination of eligibility for indexing can be found under § 516.129 and provisions for subsequent requests for addition to the index can be found under § 516.145. A description of the

written report required in § 516.145 can be found under § 516.143. Under § 516.141 are provisions for drug companies to nominate a qualified expert panel as well as the panel's recordkeeping requirements. This section also calls for the submission of a written conflict of interest statement to FDA by each proposed panel member. Index holders are able to modify their index listing under § 516.161 or change drug ownership under § 516.163. Requirements for records and reports are under § 516.165.

Description of Respondents: Pharmaceutical companies that sponsor new animal drugs.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
516.119	2	1	2	1	2
516.121	30	2	60	4	240
516.123	3	1	3	8	24
516.125	2	3	6	20	120
516.129	30	2	60	20	1,200
516.141	20	1	20	16	320
516.143	20	1	20	120	2,400
516.145	20	1	20	20	400
516.161	1	1	1	4	4
516.163	1	1	1	2	2
516.165	10	2	20	8	160
Total					4,872

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR Section	Number of recordkeepers	Annual frequency per recordkeeper	Total annual records	Hours per recordkeeper	Total hours
516.141	30	2	60	0.5	30
516.165	10	2	20	1	20
Total					50

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: November 29, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–30335 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0566]

Draft Guidance for Industry on Residual Solvents in Animal Drug Products; Questions and Answers; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry #211 entitled "Residual Solvents in Animal Drug Products; Questions and Answers." The draft questions and answers (Q&A) guidance addresses the United States Pharmacopeia (USP) General Chapter <467> Residual Solvents that applies to both human and veterinary drugs and to compendial and non-compendial drug products. This document answers questions regarding CVM's implementation of USP <467> Residual Solvents.

DATES: Although you can comment on any guidance at any time (*see* 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by February 1, 2011.

ADDRESSES: Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. *See* the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Sudesh Kamath, Center for Veterinary Medicine (HFV–145), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8260, e-mail: *sudesh.kamath@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On July 1, 2008, the USP implemented a requirement for the control of residual solvents in drug products marketed in the United States. Once implemented, the requirement, USP General Chapter <467> Residual Solvents, became a statutory requirement under section 501(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351(b)).

FDA is announcing the availability of a draft guidance for industry #211 entitled "Residual Solvents in Animal

Drug Products; Questions and Answers." This document answers questions regarding CVM's implementation of USP <467> Residual Solvents.

II. Significance of Guidance

This level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This draft 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 (44 U.S.C. 3501–3520). The collections of information in this guidance have been approved under OMB control nos. 0910–0032 and 0910–0669.

IV. Comments

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

V. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm* or *http://www.regulations.gov.*

Dated: November 12, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–30387 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0533]

Guidance for Industry: Recommendations for Blood Establishments: Training of Back-Up Personnel, Assessment of Blood Donor Suitability, and Reporting Certain Changes to an Approved Application; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a document entitled "Guidance for Industry: Recommendations for Blood Establishments: Training of Back-Up Personnel, Assessment of Blood Donor Suitability and Reporting Certain Changes to an Approved Application" dated November 2010. The guidance document provides recommendations to blood establishments for training of back-up personnel, assessment of blood donor suitability, and how to report certain changes to an approved license application to FDA. The guidance announced in this document finalizes the draft guidance entitled "Draft Guidance for Industry: Recommendations for the Assessment of Blood Donor Suitability, Blood Product Safety, and Preservation of the Blood Supply in Response to Pandemic (H1N1) 2009 Virus" dated November 2009. The guidance announced in this document also is superseding certain recommendations in two previous guidances, the guidance document entitled "Guidance for Industry: Changes to an Approved Application: Biological Products: Human Blood and Blood Components Intended for Transfusion or for Further Manufacture" dated July 2001 and the guidance document entitled "Guidance for Industry: Streamlining the Donor Interview Process: Recommendations for Self-Administered Questionnaires" dated July 2003.

DATES: Submit either electronic or written comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. *See* the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

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.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Chacko, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled "Guidance for Industry: Recommendations for Blood Establishments: Training of Back-Up Personnel, Assessment of Blood Donor Suitability and Reporting Certain Changes to an Approved Application" dated November 2010. The guidance document provides recommendations to blood establishments for training of back-up personnel, assessment of blood donor suitability, and reporting certain changes to an approved license application to FDA.

In the **Federal Register** of November 19, 2009 (74 FR 59982), FDA announced the availability of the draft guidance entitled "Draft Guidance for Industry: Recommendations for the Assessment of Blood Donor Suitability, Blood Product Safety, and Preservation of the Blood Supply in Response to Pandemic (H1N1) 2009 Virus" (November 2009). At that time, we anticipated that the rapid spread of pandemic (H1N1) 2009 virus had the potential to cause disruptions in the blood supply and that the usual practices for ensuring blood availability in response to local disasters (*i.e.,* hurricanes) would not be applicable or sufficient under a severe pandemic scenario. Since we issued the draft guidance, the H1N1 influenza pandemic has waned in the United States and disruptions in the blood supply have not been observed. Therefore, we are not finalizing those recommendations set forth in the draft guidance that referred to blood donor deferral and blood product management specific to the pandemic (H1N1) 2009 virus. Instead, we are finalizing those recommendations contained in the draft guidance that are of general

applicability (*i.e.,* regardless of the existence of a pandemic or other emergency situation) as to training of back-up personnel, assessing blood donor suitability, and reporting certain changes to an approved application for licensed blood establishments. FDA received a few comments on the draft guidance in connection with these recommendations and those comments were considered as the guidance was finalized. In addition, editorial changes were made to improve clarity. The guidance announced in this document finalizes the draft guidance dated November 2009.

The guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

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 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 606 have been approved under OMB control number 0910–0116. The collections of information for 21 CFR part 601 have been approved under OMB control number 0910–0338.

III. Comments

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: November 24, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–30388 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, December 13, 2010, 8 a.m. to December 13, 2010, 5 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 which was published in the **Federal Register** on November 17, 2010, 75 FR 70272–70273.

The meeting will be held December 17, 2010. The meeting time and location remain the same. The meeting is closed to the public.

Dated: November 29, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–30343 Filed 12–2–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed 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, Musculoskeletal and Skin Sciences.

Date: December 13–14, 2010.

Time: 9 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: Rajiv Kumar, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7802, Bethesda, MD 20892. 301–435–1212. *kumarra@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, Urology Small Business Applications.

Date: December 14, 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.*

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: HIV Pathogenesis, Therapy and NeuroAIDS.

Date: December 15–16, 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: Shiv A Prasad, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5220, MSC 7852, Bethesda, MD 20892. 301–443–5779. *prasads@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 29, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–30342 Filed 12–2–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the Laboratories and Instrumented Initial Testing Facilities (IITF) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines). The Mandatory Guidelines were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908); September 30, 1997 (62 FR 51118); April 13, 2004 (69 FR 19644); November 25, 2008 (73 FR 71858); December 10, 2008 (73 FR 75122); and on April 30, 2010 (75 FR 22809).

A notice listing all currently certified Laboratories and Instrumented Initial Testing Facilities (IITF) is published in the **Federal Register** during the first week of each month. If any Laboratory/IITF's certification is suspended or revoked, the Laboratory/IITF will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any Laboratory/IITF has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://www.workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov*.

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh, Division of Workplace Programs, SAMHSA/CSAP, Room 2–1042, One Choke Cherry Road, Rockville, Maryland 20857; 240–276–2600 (voice), 240–276–2610 (fax).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were initially developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. The "*Mandatory Guidelines for Federal Workplace Drug Testing Programs*", as amended in the revisions listed above, requires {or set} strict standards that Laboratories and Instrumented Initial Testing Facilities (IITF) must meet in order to conduct drug and specimen validity tests on urine specimens for Federal agencies.

To become certified, an applicant Laboratory/IITF must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a Laboratory/IITF must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories and Instrumented Initial Testing Facilities (IITF) in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines. A Laboratory/IITF must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with the Mandatory Guidelines dated November 25, 2008 (73 FR 71858), the following Laboratories and Instrumented Initial Testing Facilities (IITF) meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Instrumented Initial Testing Facilities (IITF)

None.

Laboratories

ACL Laboratories, 8901 W. Lincoln Ave., West Allis, WI 53227. 414–328–7840/800–877–7016. (Formerly: Bayshore Clinical Laboratory).

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624. 585–429–2264.

Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118. 901–794–5770/888–290–1150.

Aegis Analytical Laboratories, 345 Hill Ave., Nashville, TN 37210. 615–255–2400. (Formerly: Aegis Sciences Corporation, Aegis Analytical Laboratories, Inc.).

Alere Toxicology Services, 1111 Newton St., Gretna, LA 70053. 504–361–8989/800–433–3823. (Formerly: Kroll Laboratory Specialists, Inc., Laboratory Specialists, Inc.).

Alere Toxicology Services, 450 Southlake Blvd., Richmond, VA 23236. 804–378–9130. (Formerly: Kroll Laboratory Specialists, Inc., Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.).

Baptist Medical Center-Toxicology Laboratory, 11401 I–30, Little Rock, AR 72209–7056. 501–202–2783. (Formerly: Forensic Toxicology Laboratory Baptist Medical Center).

Clinical Reference Lab, 8433 Quivira Road, Lenexa, KS 66215–2802. 800–445–6917.

Doctors Laboratory, Inc., 2906 Julia Drive, Valdosta, GA 31602. 229–671–2281.

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Road, Warminster, PA 18974. 215–674–9310.

DynaLIFE Dx *, 10150–102 St., Suite 200, Edmonton, Alberta, Canada T5J 5E2. 780–451–3702/800–661–9876. (Formerly: Dynacare Kasper Medical Laboratories).

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655. 662–236–2609.

Gamma-Dynacare Medical Laboratories*, A Division of the Gamma-Dynacare Laboratory Partnership, 245 Pall Mall Street, London, ONT, Canada N6A 1P4. 519–679–1630.

Laboratory Corporation of America Holdings, 7207 N. Gessner Road, Houston, TX 77040. 713–856–8288/800–800–2387.

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869. 908–526–2400/800–437–4986. (Formerly: Roche Biomedical Laboratories, Inc.).

Laboratory Corporation of America Holdings, 1904 Alexander Drive, Research Triangle Park, NC 27709. 919–572–6900/800–833–3984. (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group).

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671. 866–827–8042/800–233–6339. (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center).

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219. 913–888–3927/800–873–8845.(Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.,).

Maxxam Analytics*, 6740 Campobello Road, Mississauga, ON. Canada L5N 2L8. 905–817–5700. (Formerly: Maxxam Analytics Inc., NOVAMANN (Ontario), Inc.).

MedTox Laboratories, Inc., 402 W. County Road D, St. Paul, MN 55112. 651–636–7466/800–832–3244.

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232. 503–413–5295/800–950–5295.

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417. 612–725–2088.
National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304. 661–322–4250/800–350–3515.
One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504. 888–747–3774. (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory).
Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311. 800–328–6942, (Formerly: Centinela Hospital Airport Toxicology Laboratory).
Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204. 509–755–8991/800–541–7891x7.
Phamatech, Inc., 10151 Barnes Canyon Road, San Diego, CA 92121. 858–643–5555.
Quest Diagnostics Incorporated, 1777 Montreal Circle, Tucker, GA 30084. 800–729–6432. (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).
Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403. 610–631–4600/877–642–2216. (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).
Quest Diagnostics Incorporated, 8401 Fallbrook Ave., West Hills, CA 91304. 800–877–2520. (Formerly: SmithKline Beecham Clinical Laboratories).
S.E.D. Medical Laboratories, 5601 Office Blvd., Albuquerque, NM 87109. 505–727–6300/800–999–5227.
South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601. 574–234–4176 x1276.
Southwest Laboratories, 4625 E. Cotton Center Boulevard, Suite 177, Phoenix, AZ 85040. 602–438–8507/800–279–0027.
St. Anthony Hospital Toxicology Laboratory, 1000 N. Lee St., Oklahoma City, OK 73101. 405–272–7052.
STERLING Reference Laboratories, 2617 East L Street, Tacoma, Washington 98421. 800–442–0438.
Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203. 573–882–1273.
Toxicology Testing Service, Inc., 5426 N.W. 79th Ave., Miami, FL 33166. 305–593–2260.
U.S. Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235. 301–677–7085.

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on April 30, 2010 (75 FR 22809). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

Dated: November 18, 2010.

Elaine Parry,

Director, Office of Management, Technology, and Operations, SAMHSA.

[FR Doc. 2010–30209 Filed 12–2–10; 8:45 am]

BILLING CODE 4160–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–0384]

Maritime Security Directive 104–6 (Rev. 4); Guidelines for U.S. Vessels Operating in High Risk Waters

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability.

SUMMARY: The Coast Guard announces the release of Maritime Security (MARSEC) Directive 104–6 (Rev. 4). This Directive only applies to U.S. flagged vessels subject to the Maritime Transportation Security Act (MTSA) on international voyages through or in designated high risk waters, and provides additional counter-piracy guidance and mandatory measures for these vessels operating in these areas where acts of piracy and armed robbery against ships are prevalent. MARSEC Directive 104–6 (Rev. 4) also includes an annex that provides specific direction for vessels operating around the Horn of Africa. MARSEC Directives are designated Sensitive Security Information (SSI) and are not subject to public release.

DATES: MARSEC Directive 104–6 (Rev. 4) was made available on November 23, 2010. MARSEC Directive 104–6 (Rev. 3) is no longer valid after this date.

ADDRESSES: The latest MARSEC Directives are available at your local Captain of the Port (COTP) office. Phone numbers and addresses for your local COTP office can be found in the Port Directory at *http://homeport.uscg.mil.*

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call LCDR James T. Fogle, Office of Vessel Activities, Coast Guard, telephone 202–372–1038, e-mail *James.T.Fogle@uscg.mil.* If you have questions on viewing material on the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: Somali pirates operate along a 2,300 mile coast and in 2.5 million square miles of ocean. Given the size and complexity of the affected area, a combination of domestic and international efforts is necessary to curb piratical activities. The combination of piracy and weak rule of law in the region offers a potential breeding ground for other transnational threats. Accordingly, the U.S. has used existing statutory authority to develop regulations designed to protect U.S.-flagged vessels and continues to work with international partners to prevent piracy.

On February 10, 2006, the Coast Guard announced the release of MARSEC Directive 104–6 (71 FR 7054) for those owners and operators of vessels subject to 33 CFR parts 101 and 104 to provide direction to U.S. flagged vessels operating in high risk areas where acts of piracy and armed robbery against ships are prevalent.

That Directive has been superseded by four revisions updating the Directive. MARSEC Directive 104–6 (Rev. 1) provided an updated list of the high risk waters based on a biennial review of global piracy and terrorism threats.

MARSEC Directive 104–6 (Rev. 2), issued on May 11, 2009, provided additional counter-piracy guidance to U.S. flagged vessels operating in high risk waters where acts of piracy and armed robbery against ships are prevalent. It also provided a listing of additional high risk waters, updated

from the previous version of the Directive.

MARSEC Directive 104–6 (Rev. 3) encourages the use of industry best management practices that have proven to be successful in thwarting pirate attacks and incorporates lessons-learned since the issuance of Revision 2.

MARSEC Directive 104–6 (Rev. 4), the Directive that is the subject of this notice of availability, provides clarification for U.S. flagged vessels berthed or anchored in high risk waters. Vessels at anchor should operate in a manner consistent with vessels that transit through high risk waters. Whether at anchor or underway, the vessels are subjected to the same type of threats from attacking pirates. Vessels berthed in high risk waters should implement enhanced security measures as required by the MARSEC Directive. With the issuance of (Rev. 4), MARSEC Directive 104–6 (Rev. 3) is no longer valid.

To support the issuance of MARSEC Directive 104–6 (series), we have developed piracy-related Port Security Advisories (PSAs) to provide further guidance and direction to U.S. flagged vessels operating in high risk waters to help facilitate compliance with this directive. The PSAs can be found at *http://homeport.uscg.mil/piracy,* including a non-SSI version of this MARSEC Directive.

Procedural:

COTPs and District Commanders can access all MARSEC Directives on Homeport by logging in and going to Missions > Maritime Security > Maritime Transportation Security Act (MTSA) > Policy. Owners and operators of U.S. flagged vessels that travel on international voyages must contact their local COTP or cognizant District Commander to acquire a copy of MARSEC Directive 104–6 (Rev. 4). COTPs or cognizant District Commanders may provide this MARSEC Directive to appropriate vessel owners and operators via mail or fax in accordance with SSI handling procedures.

Pursuant to 33 CFR 101.405, we consulted with the Department of State, Office of the Secretary of Defense, Joint Chiefs of Staff, Department of Transportation/Maritime Administration, Office of Naval Intelligence, Department of Commerce, Department of Justice, Military Sealift Command, Global Maritime Situational Awareness, Overseas Security Advisory Council, United States Agency for International Development, Naval Criminal Investigative Service, Customs and Border Protection, Transportation Security Administration, U.S. Africa Command, U.S. Central Command, and U.S. Transportation Command prior to issuing these Directives.

All MARSEC Directives issued pursuant to 33 CFR 101.405 are marked as SSI in accordance with 49 CFR Part 1520. COTPs and District Commanders will require individuals requesting a MARSEC Directive to prove that they meet the standards for a "covered person" under 49 CFR 1520.7, have a "need to know" the information, as defined in 49 CFR 1520.11, and that they will safeguard the SSI in MARSEC Directive 104–6 (Rev. 4) as required in 49 CFR 1520.9.

Dated: November 23, 2010.

Kevin S. Cook,

Rear Admiral, USCG, Director of Prevention Policy.

[FR Doc. 2010–30314 Filed 12–2–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5375–N–47]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for "off-site use only" recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Rita, Division of Property Management, Program Support Center, HHS, room 5B–17, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers

interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.,* acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: AIR FORCE: Mr. Robert Moore, Air Force Real Property Agency, 143 Billy Mitchell Blvd. Ste. 1, San Antonio, TX 78226; (210) 395–9512; COAST GUARD: Commandant, United States Coast Guard, Attn: Jennifer Stomber, 2100 Second St., SW., Stop 7901, Washington, DC 20593–0001; (202) 475–5609; GSA: Mr. Gordon Creed, General Services Administration, Office of Property Disposal, 18th and F St., NW., Washington, DC 20405; NAVY: Mr. Albert Johnson, Department of the Navy, Asset Management Division, Naval Facilities Engineering Command, Washington Navy Yard, 1330 Patterson Ave., SW., Suite 1000, Washington, DC 20374; (202)685–9305; (These are not toll-free numbers).

Dated: November 23, 2010.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

Title V, Federal Surplus Property Program Federal Register Report for 12/03/2010

Suitable/Available Properties

Building

North Carolina

Greensboro Federal Bldg.
320 Federal Place
Geensboro NC 27401
Landholding Agency: GSA
Property Number: 54201040018
Status: Excess
GSA Number: 4–G–NC–750
Comments: 94,809 sq. ft. office bldg., major structural issues exist with exterior brick facade

Texas

FAA Outermarker
13418 Kuykendahl Rd
Houston TX 77090
Landholding Agency: GSA
Property Number: 54201040019
Status: Surplus
GSA Number: 7–U–TX–1128
Comments: 48 sq.ft, construction/alteration prohibited unless a determination of no hazard to air navigation is issued by the FAA, restrictions imposed by ordinaces of the city of Houston, possible abestos/PCBs

Unsuitable Properties

Building

Alaska

33 Bldgs.
Eielson AFB
Eielson AK 99702
Landholding Agency: Air Force
Property Number: 18201040005
Status: Excess
Directions: 5136, 5137, 5138, 5139, 5140, 5141, 5142, 5143, 5144, 5161, 5162, 5163, 5183, 5184, 5185, 5186, 5196, 5197, 5211, 5255, 5256, 5257, 5259, 5260, 5261, 5262, 5263, 5264, 5265, 5266, 5267, 5268
Reasons: Extensive deterioration Secured Area

California

Blgd. 411
Ft. MacAuthur Family Housing
San Pedro CA
Landholding Agency: Air Force
Property Number: 18201040004
Status: Unutilized
Reasons: Extensive deterioration

Vandenberg AFB
Vandenberg CA 93437
Landholding Agency: Air Force
Property Number: 18201040009
Status: Unutilized
Reasons: Secured Area

37 Bldgs.
Beale AFB
Marysville CA 95901
Landholding Agency: Air Force
Property Number: 18201040014
Status: Unutilized
Directions: 4199, 4205, 4207, 4211, 4215, 4218, 4219, 4222, 4226, 4227, 4229, 4230, 4231, 4238, 4241, 4242, 4256, 4260, 4264, 4268, 4284, 4286, 4308, 4310, 4314, 4318, 4320, 4333, 4341, 4353, 4355, 4382, 4384, 4395, 4397, 4399, 4401
Reasons: Extensive deterioration

38 Bldgs.
Beale AFB
Marysville CA 95901
Landholding Agency: Air Force
Property Number: 18201040015
Status: Unutilized
Directions: 4415, 4417, 4457, 4467, 4475, 4496, 4534, 4598, 4600, 4603, 4605, 4618, 4620, 4634, 4636, 4639, 4641, 4659, 4661, 4664, 4666, 4675, 4677, 4691, 4693, 4703, 4705, 4708, 4710, 4717, 4719, 4724, 4725, 4726, 4727, 4732, 4734, 4522
Reasons: Extensive deterioration

11 Bldgs.
Beale AFB
Marysville CA 95901
Landholding Agency: Air Force
Property Number: 18201040016
Status: Unutilized
Directions: 5205, 5216, 5223, 5228, 5236, 5238, 5277, 5278, 5279, 5294, 5297
Reasons: Extensive deterioration

36 Bldgs.
Beale AFB
Marysville CA 95901
Landholding Agency: Air Force
Property Number: 18201040017
Status: Unutilized
Directions: 3873, 3887, 3919, 3936, 3942, 3947, 3961, 4075, 4103, 4105, 4115, 4118, 4119, 4120, 4122, 4133, 4136, 4137, 4142, 4145, 4148, 4151, 4157, 4158, 4161, 4166, 4171, 4178, 4179, 4181, 4184, 4185, 4189, 4193, 4197, 4198
Reasons: Extensive deterioration

Bldg. 21144
Marine Corp. Air Station
San Diego CA
Landholding Agency: Navy
Property Number: 77201040017
Status: Excess
Reasons: Extensive deterioration

Colorado

2 Bldgs.
N. Peterson Blvd.
Colorado Springs CO 80914
Landholding Agency: Air Force
Property Number: 18201040003
Status: Excess
Directions: 670,1820
Reasons: Within 2000 ft. of flammable or explosive material Other—legal constraints-—leased from City

Illinois

Bldg. 438
2110 Luce Blvd.
Great Lakes IL 60088
Landholding Agency: Navy
Property Number: 77201040016
Status: Unutilized
Reasons: Secured Area

New Jersey

11 Bldgs.
Coast Guard Training Center
Cape May NJ 08204
Landholding Agency: Coast Guard
Property Number: 88201040006
Status: Excess
Directions: 16A, 16B, 020, 203A, 220A, 220I, 140, 203, 220, 273
Reasons: Extensive deterioration

New Mexico

Bldg. 880

1241 Moroni
Holloman NM 88330
Landholding Agency: Air Force
Property Number: 18201040001
Status: Unutilized
Reasons: Secured Area

Bldg. 825
Holloman AFB
Holloman NM 88330
Landholding Agency: Air Force
Property Number: 18201040002
Status: Unutilized
Reasons: Extensive deterioration

North Carolina

Gas Station/County Store
Weeksville Rd
Elizabeth City NC 27909
Landholding Agency: Coast Guard
Property Number: 88201040005
Status: Excess
Reasons: Extensive deterioration

North Dakota

5 Bldgs.
4128 27th Ave.
Grand Forks ND 58203
Landholding Agency: Air Force
Property Number: 18201040012
Status: Unutilized
Directions: 120,200,250,255,300
Reasons: Within 2000 ft. of flammable or explosive material

Ohio

Bldgs. OO1,OT1, OC1, OC2, OC2
US Coast Guard
Cleveland OH 44114
Landholding Agency: Coast Guard
Property Number: 88201040004
Status: Excess
Reasons: Secured Area, Extensive deterioration

Oklahoma

3 Bldgs.
Altus AFB
Altus OK 73523
Landholding Agency: Air Force
Property Number: 18201040013
Status: Excess
Directions: 296,444,503
Reasons: Within airport runway clear zone, Within 2000 ft. of flammable or explosive material

South Carolina

25 Bldgs.
JB Charleston
N. Charleston SC 29404
Landholding Agency: Air Force
Property Number: 18201040006
Status: Excess
Directions: 1501B, 1503A, 1503B, 1506A, 1508A, 1508B, 1512A, 1514A, 1520A, 1520B, 1529A, 1531A, 1531B, 1533A, 1533B, 1537A, 1539A, 1540A, 1540B, 1563A, 1563B, 1565B, 1576A, 1577A, 1577B
Reasons: Secured Area

20 Bldgs.
JB Charleston
N. Charleston SC 29404
Landholding Agency: Air Force
Property Number: 18201040007
Status: Excess
Directions: 1505A, 1505B, 1506B, 1507B, 1510A, 1510B, 1514B, 1516A, 1516B, 1518B, 1532B, 1533B, 1538B, 1539B, 1575B, 1576B, 1576B, 1578B, 1579B, 1580A, 1580B
Reasons: Secured Area

13 Bldgs.
JB Charleston
N.Charleston SC 29404
Landholding Agency: Air Force
Property Number: 18201040008
Status: Excess
Directions: 1501A, 1507A, 1509A, 1517A, 1518A, 1533A, 1535A, 1538A, 1565A, 1575A, 1578A, 1579A, 1688A
Reasons: Secured Area

4 Bldgs.
JB AFB
N. Charleston SC 29404
Landholding Agency: Air Force
Property Number: 18201040010
Status: Excess
Directions: 1515, 1530, 1536, 1571
Reasons: Secured Area

12 Bldgs.
JB Charleston
N. Charleston SC 29404
Landholding Agency: Air Force
Property Number: 18201040018
Status: Excess
Directions: 1512B, 1529B, 1537B, 1519A, 1519B, 1688B, 1690A, 1690B, 1509B, 1517B, 1521A, 1521B
Reasons: Secured Area

2 Bldgs.
Edwards AFB
Edwards SC 93524
Landholding Agency: Air Force
Property Number: 18201040019
Status: Excess
Directions: 1014, 1015
Reasons: Secured Area

Land

North Dakota

JFSE
4128 27th Ave.
Grand Forks ND 58203
Landholding Agency: Air Force
Property Number: 18201040011
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material

[FR Doc. 2010–30245 Filed 12–2–10; 8:45 am]
BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5468–N–01]

The Performance Review Board

AGENCY: Office of the Deputy Secretary, HUD.

ACTION: Notice of Appointments.

SUMMARY: The Department of Housing and Urban Development announces the appointments of Joseph F. Smith, Patricia A. Hoban-Moore, and Mary K. Kinney, as members; and Frank J. Murphy, and Clifford D. Taffett as alternate members of the Departmental Performance Review Board. The address is: Department of Housing and Urban Development, Washington, DC 20410–0050.

FOR FURTHER INFORMATION CONTACT: Persons desiring any further information about the Performance Review Board and its members may contact Gwendolyn Fleming, Deputy Director, Office of Executive Resources, Department of Housing and Urban Development, Washington, DC 20410. Telephone (202) 708–1381. (This is not a toll-free number)

Dated: November 29, 2010.

Ron Sims,

Deputy Secretary.

[FR Doc. 2010–30331 Filed 12–2–10; 8:45 am]
BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2010–N259; 20124–1113–0000–F5]

Endangered and Threatened Species Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications; request for public comment.

SUMMARY: The following applicants have applied for scientific research permits to conduct certain activities with endangered species under the Endangered Species Act of 1973, as amended (Act). The Act requires that we invite public comment on these permit applications.

DATES: To ensure consideration, written comments must be received on or before January 3, 2011.

ADDRESSES: Written comments should be submitted to the Chief, Endangered Species Division, Ecological Services, P.O. Box 1306, Room 6034,

Albuquerque, NM 87103. Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act. Documents will be available for public inspection, by appointment only, during normal business hours at the U.S. Fish and Wildlife Service, 500 Gold Ave. SW., Room 6034, Albuquerque, NM. Please refer to the respective permit number for each application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Susan Jacobsen, Chief, Endangered Species Division, P.O. Box 1306, Albuquerque, NM 87103; (505) 248–6920.

SUPPLEMENTARY INFORMATION:

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Permit TE–25946A

Applicant: Charlie Andrew, Frisco, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for American burying beetle (*Nicrophorus americana*) within Texas, Oklahoma, South Dakota, Nebraska, Kansas, and Arkansas.

Permit TE–26066A

Applicant: Rudy Bazan, Helotes, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for golden-cheeked warbler (Dendroica chrysoparia) within Texas.

Permit TE–776123

Applicant: Texas A & M University, Galveston, Texas.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct research on and provide education to the public about Kemp's ridley sea turtle (*Lepidochelys kempii*), hawksbill sea turtle (*Eretmochelys imbricate*), and leatherback sea turtle (*Dermochelys coriacea*) that are nesting and/or have been stranded along the Texas and Louisiana Gulf coastline.

Permit TE–26066A

Applicant: Patricia Downey, Oklahoma City, Oklahoma.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of American burying beetle (*Nicrophorus americanus*) within Oklahoma.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: November 23, 2010.

Joy E. Nicholopoulos,

Acting, Regional Director, Southwest Region, Fish and Wildlife Service.

[FR Doc. 2010–30322 Filed 12–2–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2010–N270; 96300–1671–0000–P5]

Endangered Species; Marine Mammals; Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have issued the following permits to conduct certain activities with endangered species, marine mammals, or both. We issue these permits under the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA).

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 558–7725; or e-mail *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION: On the dates below, as authorized by the provisions of the ESA (16 U.S.C. 1531 *et seq.*), as amended, and/or the MMPA, as amended (16 U.S.C. 1361 *et seq.*), we issued requested permits subject to certain conditions set forth therein. For each permit for an endangered species, we found that (1) The application was filed in good faith, (2) The granted permit would not operate to the disadvantage of the endangered species, and (3) The granted permit would be consistent with the purposes and policy set forth in section 2 of the ESA.

Permit No.	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
Endangered Species			
22557A	Anthony Clemenza	75 FR 62139; October 7, 2010	November 9, 2010.
21605A	Steven Louis	75 FR 57977; September 23, 2010	November 8, 2010.
23150A	Hector Bonilla	75 FR 62139; October, 7 2010	November 9, 2010.
23152A	Kevin Slaughter	75 FR 62139; October 7, 2010	November 9, 2010.
Marine Mammals			
107933	EcoHealth Alliance, Inc	75 FR 51284; August 19, 2010	November 19, 2010.

Availability of Documents

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents.

Dated: November 26, 2010.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2010–30380 Filed 12–2–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2010–N271; 96300–1671–0000–P5]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless a Federal permit is issued that allows such activities. The ESA law requires that we invite public comment before issuing these permits.

DATES: We must receive comments or requests for documents or comments on or before January 3, 2011.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or e-mail *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an e-mail or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (*see* **DATES**) or comments delivered to an address other than those listed above (*see* **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, the Endangered Species Act of 1973, section 10(a)(1)(A), as amended (16 U.S.C. 1531 *et seq.*), require that we invite public comment before final action on these permit applications.

III. Permit Applications

A. Endangered Species

Applicant: International Elephant Foundation, Fort Worth, TX; PRT–15923A

On October 25, 2010, we published a **Federal Register** notice inviting the public to comment on this application for a permit to conduct certain activities with endangered species (75 FR 65505). The applicant subsequently submitted additional information in support of their application; therefore, we are reopening the comment period. The applicant requests a permit to import biological specimens of Asian elephant (*Elephus maximus*) from wild animals in all range countries and captive-held animals in countries worldwide for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Tanganyika Wildlife Park, Goddard, KS; PRT–25482A

The applicant requests a permit to import four live Cheetahs (*Acinonyx jubatus jubatus*), Bred-in-Captivity for the purpose of conservation education and captive breeding for the enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Todd Grigsby; Baton Rouge, LA; PRT–28270A

Applicant: Leonard Grigsby; Baton Rouge, LA; PRT–28273A

Applicant: John Verlander, El Paso, TX; PRT–28293A

Applicant: Gene Yates, Ridgeland, MS; PRT–28274A

Applicant: Harold Sheets, Grasonville, MD; PRT–28344A

Applicant: Michael Moran, Baton Rouge, LA; PRT–28493A

Dated: November 26, 2010.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2010–30392 Filed 12–2–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVL0000 L51010000.FX0000 LVRWF09F1640 241A; N–82076; MO#4500014867; TAS:14X5017]

Notice of Availability of the Final Environmental Impact Statement for the One Nevada Transmission Line (ON Line Project) Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) has prepared a Final Environmental Impact Statement (EIS) for the One Nevada Transmission Line (ON Line Project) and by this notice is announcing its availability.

DATES: The BLM will not issue a final decision on the proposal for at least 30 days after the date that the Environmental Protection Agency publishes its notice of availability in the **Federal Register.**

ADDRESSES: A list of locations where the One Nevada Transmission Line (ON Line Project) Final EIS can be reviewed is in the **SUPPLEMENTARY INFORMATION** section below. The Final EIS is also available online at: *http://www.blm.gov/nv/.* Click on the Ely District map and then click on the ON Line Final EIS "In the Spotlight."

FOR FURTHER INFORMATION CONTACT: Michael Dwyer at (702) 821–7102, e-mail: *michael_dwyer@blm.gov.*

SUPPLEMENTARY INFORMATION: The One Nevada Transmission Line (ON Line Project) Final EIS is available for review at the following locations:

—BLM Ely District Office, 702 North Industrial Way, Ely, Nevada
White Pine County Library, 950 Campton Street, Ely, Nevada
BLM Nevada State Office, 1340 Financial Blvd., Reno, Nevada
BLM Caliente Field Station, U.S. Highway 93, Caliente, Nevada
Caliente Branch Library, 100 Depot Avenue, Caliente, Nevada
BLM Southern Nevada District Office, 4701 North Torrey Pines, Las Vegas, Nevada
North Las Vegas Library, 2300 Civic Center Drive, North Las Vegas, Nevada
BLM Office of Public Affairs, Room 406–LS, 1620 L Street, Washington, DC

On March 30, 2009, the BLM received a right-of-way application and Plan of Development from NV Energy for a 236-mile-long 500 kilovolt (kV) transmission line and telecommunication facilities running generally from Ely to Las Vegas, Nevada; one new substation near Ely; a loop-in of an existing 345 kV transmission line at the new substation; an expansion of one existing substation on private land near Battle Mountain, Nevada; and appurtenant facilities and access roads. The project name is the One Nevada Transmission Line Project and is referred to as the "ON Line Project."

The components of the ON Line Project had been part of the 2006 Ely Energy Center (EEC) proposal for a coal fired power-generating facility that included rail lines, transmission lines with fiber optic cable, new and expanded substations, water well-fields and pipeline delivery systems, and associated facilities to be located mostly on public lands in White Pine, Lincoln, Nye, Elko, and Clark counties, Nevada. On January 26, 2007, the BLM published a Notice of Intent to prepare an EIS for the EEC and its associated facilities and held public scoping meetings (*see* 72 FR 3871). On January 2, 2009, the BLM published a Notice of Availability initiating a 90-day public comment period on its Draft EIS (*see* 74 FR 115). In February 2009, during the public comment period, the proponent made public its intention to postpone the coal-fired power generation facilities associated with the EEC in its proposal until carbon capture technology becomes commercially feasible.

On July 29, 2009, the BLM published in the **Federal Register** a Notice of Intent to develop an EIS for the ON Line project and invited the public to submit scoping comments (*see* 74 FR 37728). An Draft EIS was developed for the following reasons: the ON Line proposed action was part of the EEC proposed action assessed in the EEC Draft EIS; removing the coal-fired power generation facilities from the application requires a change in the description of the purpose and need for the project; and the assessment of impacts in association with the power generation facilities in the Draft EIS are no longer applicable. The ON Line Draft EIS incorporated all appurtenant sections of the EEC Draft EIS along with new information such that it stands on its own. Applicable comments collected during the public comment period on the EEC Draft EIS were carried forward into the ON Line EIS process.

On November 20, 2009, the BLM published in the **Federal Register** a Notice of Availability for the Draft EIS for the ON Line project and initiated a 60-day public comment period (*see* 74 FR 60290). Public meetings on the Draft EIS were conducted in Las Vegas, Caliente, and Ely during December 2009. Nineteen comments were received and taken into consideration in the preparation of the Final EIS. Public comments identified potential conflicts with the Robinson Summit substation and resulted in an additional alternative site for the substation being added to the Final EIS.

The comments also identified the need to clarify several sections of the document.

Authority: 40 CFR 1506.6 and 1506.10.

Atanda Clark,

Acting Associate District Manager, Ely District.

[FR Doc. 2010–30307 Filed 12–2–10; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUTY01000.14300000.ES0000.241A.00; UTU–87677]

Notice of Realty Action; Recreation and Public Purposes Act Classification, San Juan County, UT

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The Bureau of Land Management (BLM) has examined and found suitable for classification for lease or conveyance to the Utah Division of Wildlife Resources (UDWR) under the provisions of the Recreation and Public Purposes (R&PP) Act, as amended, 20

acres of public land in San Juan County, Utah. The UDWR proposes to establish a public fishery in an existing reservoir.

DATES: Interested parties may submit written comments regarding this proposed classification until January 18, 2011.

ADDRESSES: Comments may be submitted to the BLM Moab Field Office, 82 East Dogwood Avenue, Moab, Utah 84532.

FOR FURTHER INFORMATION CONTACT: Jan Denney, BLM Moab Field Office, by phone at 435–259–2122 or by e-mail at *Jan_Denney@blm.gov.*

SUPPLEMENTARY INFORMATION: The BLM has examined and found the following described public land suitable for classification for lease or subsequent conveyance, under the provisions of the R&PP Act, as amended (43 U.S.C. 869 *et seq.*), and 43 CFR 2912 and 2740:

Salt Lake Meridian

T. 29 S., R. 24 E.,
Sec. 17, NW¼NE¼NW¼ and NE¼NW¼NW¼.

The area described contains 20.00 acres in San Juan County.

The land is not needed for any Federal purpose. The classification, and subsequent lease and/or conveyance, is consistent with the BLM Moab Resource Management Plan, dated October 31, 2008, Lands and Realty Decision LAR–5, Appendix G at G.1.4, and is in the public interest. An environmental assessment has been prepared that analyzes the UDWR application and proposed plans of development and management. Any lease and/or conveyance will be subject to the provisions of the R&PP Act, applicable regulations of the Secretary of the Interior, and the following reservations to the United States:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945);

2. All minerals, together with the right to prospect for, mine, and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe.

3. An appropriate indemnification clause protecting the United States from claims arising out of the lessee's/patentee's use, occupancy, or operations on the leased/patented lands.

4. A written acceptance of all maintenance responsibilities for the claim and spillway and all obligations of the owners under 33 U.S.C. 467 *et seq.*

The lease/conveyance will also be subject to valid existing rights.

Upon publication of this notice in the **Federal Register**, the land described above will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for lease or conveyance under the R&PP Act and leasing under the mineral leasing laws.

Classification Comments: Interested parties may submit comments involving the suitability of the land for a public fishery. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or whether the use is consistent with State and Federal programs.

Application Comments: Interested parties may submit comments regarding the specific use proposed in the application, whether the BLM followed proper administrative procedures in reaching the decision, or any other factors not directly related to the suitability of the land for a public fishery.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The BLM State Director will review any adverse comments. In the absence of any adverse comments, the classification will become effective February 1, 2011.

Authority: 43 CFR 2741.5 (h).

Juan Palma,

State Director.

[FR Doc. 2010–30305 Filed 12–2–10; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

National Park Service

[2280–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before October 16, 2010. Pursuant to section 60.13 of 36 CFR Part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by December 20, 2010.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

J. Paul Loether,

National Register of Historic Places/National Historic Landmarks Program.

ARIZONA

Coconino County

Chapel of the Holy Cross, 780 Chapel Rd, Sedona, 10000947

ARKANSAS

Poinsett County

Maxie Theatre, 136 AR 463 S, Trumann, 10000933

COLORADO

Grand County

Greenwood Lodge, 161 CR 451, Grand Lake, 10000948

FLORIDA

Miami-Dade County

Fulford by the Sea Entrance, Intersection of NE 172 St and NE 23 Ave, North Miami Beach, 10000937

MISSOURI

Washington County

Palmer Historic Mining District, Address Restricted, Potosi, 10000964

NEW YORK

Clinton County

Warrenrath Camp, 55 Island Dr, Dannemora, 10000943

Erie County

Calumet, The, 46–58 W Chippewa St/233 Franklin St, Buffalo, 10000958

Nassau County

Glen Cove Post Office, 51 Glen St, Glen Cove, 10000957

Onondaga County

Shepard Settlement Cemetery, Stump & Foster Rds, Shepard Settlement, 10000938

Orange County

Beakes, John G., House, 134 W Main St, Middletown, 10000939

Grace Episcopal Church, 58 N St, Middletown, 10000945

Mapes, Mortimer L., House & Seward Homestead, 35 N Main St, Florida, 10000942

St. Lawrence County

Fort la Presentation Site, Address Restricted, Ogdensburg, 10000944

Steuben County

Gold Seal Winery, West Lake Rd, Hammondsport, 10000946

Sullivan County

Greenfield Preparative Meeting House, NY 55 at Denman Mt Rd, Grahamsville, 10000956

Washington County

McNish, Alexander, House, 194 CR 30, New York, 10000959

Simonds, L.C., Adirondack Cabin, 130 Cat Den Rd, Clemons, 10000941

SOUTH DAKOTA

Brookings County

Hall, John L., House, 121 Samara Ave, Volga, 10000955

Lockhart House, 1001 6th Ave, Brookings, 10000954

Davison County

Henline, Ellis and Roberta Farmstead, 39987 252nd St, Mount Vernon, 10000950

Faulk County

Edgerton, Dr. William, House, 308 Tenth Ave S, Faulkton, 10000951

Tripp County

Wewela Hall, Lots 3 and 4, Block 34, Government Townsite of Wewela, Wewela, 10000952

Walworth County

Molstad Lake Park, (Federal Relief Construction in South Dakota MPS) 1 ¾ mi N of HWY 12 on 293rd Ave, Glenham, 10000953

TENNESSEE

Anderson County

Daugherty Furniture Building, 307 N Main St, Clinton, 10000936

Davidson County

Municipal Public Works Garage Industrial District, 33 Peabody St, Nashville, 10000949

Henderson County

Doe Creek School, Doe Creek Rd, approx ½ mi N of Dyer Rd, Sardis, 10000935

Knox County

Lebanon in the Forks Cemetery, (Knoxville and Knox County MPS) Asbury Rd N of Norfolk Southern Railroad, Knoxville, 10000934

TEXAS

Harris County

Near Northside Historic District, Roughly bounded by Little White Oak Bayou on the N; Hogan on the S; I–45 On the W and the block between N Main and Keene Houston, 10000960

Hays County

Lane, James C., House, (Rural Properties of Hays County, Texas MPS) 306 Wimberley Square, Wimberley, 10000961

Hunt County

Washington Hotel, 2612 Washington St, Greenville, 10000962

Uvalde County

Nicolas Street School, 332 Nicolas St, Uvalde, 10000963

Related Action: Request for REMOVAL has been made for the following resources:

COLORADO

Larimer County

Big Thompson River Bridge I, US 34 at milepost 65.53 Larimer, 02001144

Big Thompson River Bridge II, US 34 at milepost 66.22 Larimer, 02001141

KENTUCKY

Jefferson County

Bloedner, August, Monument, Cave Hill Cemetery, jct. of Payne St. & Lexington Rd., Louisville, 97000688

[FR Doc. 2010–30312 Filed 12–2–10; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on October 6, 2010, Mylan Technologies, Inc., 110 Lake Street, Saint Albans, Vermont 05478, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedule II:

Drug	Schedule
Methylphenidate (1724)	II
Fentanyl (9801)	II

The company plans to import the listed controlled substances in finished dosage form (FDF) from foreign sources for analytical testing and clinical trials in which the foreign FDF will be compared to the company's own domestically-manufactured FDF. This analysis is required to allow the company to export domestically-manufactured FDF to foreign markets.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration, and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 3, 2011.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: November 19, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30336 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing

a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on June 4, 2010, Clinical Supplies Management, Inc., 342 42nd Street South, Fargo, North Dakota 58103, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Sufentanil (9740), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance with the sole purpose of packaging, labeling, and distributing to customers which are qualified clinical sites conducting clinical trials under the auspices of an FDA-approved clinical study.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration, and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 3, 2011. This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: November 18, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30344 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on July 28, 2010, Fisher Clinical Services, Inc., 7554 Schantz Road, Allentown, Pennsylvania 18106, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedule II:

Drug	Schedule
Noroxymorphone (9668)	II
Tapentadol (9780)	II

The company plans to import the listed substances for analytical research and clinical trials.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may file comments or objections to the issuance of the proposed registration, and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 3, 2011.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: November 18, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30348 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on September 13, 2010, Chattem Chemicals, Inc., 3801 St. Elmo Avenue, Building 18, Chattanooga, Tennessee 37409, made application by letter to the Drug Enforcement Administration (DEA) to be registered as an importer of 4-Anilino-N-Phenethyl-4-Piperidine (ANPP) (8333), a basic class of controlled substance listed in schedule II.

The company plans to import this controlled substance in bulk for use in the manufacture of another controlled substance.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration, and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate,

to the Drug Enforcement Administration, Office of Diversion Control, **Federal Register** Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 3, 2011.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21

U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: November 19, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30350 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on October 27, 2010, Meridian Medical Technologies, 2555 Hermelin Drive, St. Louis, Missouri 63144, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Morphine (9300), a basic class of controlled substance listed in schedule II.

The company manufactures a product containing morphine in the United States. The company exports this product to customers around the world, including in Europe. The company has been asked to ensure that its product sold to European customers meets standards established by the European Pharmacopeia, which is administered by the Directorate for the Quality of Medicines (EDQM). In order to ensure that its product will meet European specifications, the company seeks to import morphine supplied by EDQM to use as reference standards. This is the sole purpose for which the company will be authorized by DEA to import morphine.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 3, 2011.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: November 19, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30347 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on October 19, 2010, Tocris Cookson, Inc., 16144 Westwoods Business Park, Ellisville, Missouri 63021–4500, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedule I and II:

Drug	Schedule
Marijuana (7360)	I
Tetrahydrocannabinols (7370)	I
4–Bromo-2,5-dimethoxyamphetamine (7391).	I
3,4–Methylenedioxymethamphetamine (7405).	I
Amphetamine (1100)	II
Phencyclidine (7471)	II
Cocaine (9041)	II
Diprenorphine (9058)	II
Fentanyl (9801)	II

The company plans to import small quantities of the above-listed controlled substances for distribution to its customers for non-clinical, laboratory-based research only.

In reference to drug code 7360 (Marijuana), the company plans to import synthetic cannabinoid agonists.

In reference to drug code 7370 (Tetrahydrocannabinols), the company will import a synthetic Delta-9–THC. No other activity for these drug codes are authorized for this registration.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, **Federal Register** Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 3, 2011.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975,

(40 FR 43745–46), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C 958(a); 21 USC 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

DATED: November 19, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30338 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated March 29, 2010, and published in the **Federal Register** on April 16, 2010, 75 FR 20000, Lipomed, Inc., One Broadway, Cambridge, Massachusetts 02142, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
N–Ethylamphetamine (1475)	I
Fenethylline (1503)	I
Methaqualone (2565)	I
Gamma Hydroxybutyric Acid (2010).	I
Lysergic acid diethylamide (7315)	I
2,5–Dimethoxy-4-(n)-propylthiophenethylamine (7348).	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
3,4,5–Trimethoxyamphetamine (7390).	I
4–Bromo-2,5-dimethoxyamphetamine (7391).	I
4–Bromo-2,5-dimethoxyphenethylamine (7392).	I
4–Methyl-2,5-dimethoxyamphetamine (7395).	I
2,5–Dimethoxyamphetamine (7396).	I
2,5–Dimethoxy-4-ethylamphetamine (7399).	I
3,4–Methylenedioxyamphetamine (7400).	I
3,4–Methylenedioxy-N-ethylamphetamine (7404).	I
3,4–Methylenedioxymethamphetamine (7405).	I
4–Methoxyamphetamine (7411)	I
Dimethyltryptamine (7435)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
N–Benzylpiperazine (7493)	I
Acetyldihydrocodeine (9051)	I
Dihydromorphine (9145)	I
Heroin (9200)	I
Normorphine (9313)	I
Pholcodine (9314)	I
Tilidine (9750)	I
3–Methylfentanyl (9813)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
Phencyclidine (7471)	II
Phenylacetone (8501)	II
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Benzoylecgonine (9180)	II
Ethylmorphine (9190)	II
Hydrocodone (9193)	II
Levorphanol (9220)	II
Meperidine (9230)	II
Methadone (9250)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273).	II
Morphine (9300)	II
Thebaine (9333)	II
Oxymorphone (9652)	II
Alfentanil (9737)	II
Sufentanil (9740)	II
Fentanyl (9801)	II

The company plans to import analytical reference standards for distribution to its customers for research and analytical purposes.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Lipomed, Inc. to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Lipomed, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: November 18, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30334 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on October 29, 2010, Siegfried (USA), Inc., 33 Industrial Park Road, Pennsville, New Jersey 08070, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Hydromorphinol (9301), a basic class of controlled substance listed in schedule I.

The company plans to manufacture small quantities of the listed controlled substance in bulk for distribution to its customers for use as reference standards.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than February 1, 2011.

Dated: November 19, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30351 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on September 13, 2010, Chattem Chemicals, Inc., 3801 St. Elmo Avenue, Building 18, Chattanooga, Tennessee 37409, made application by

letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of 4-Anilino-N-Phenethyl-4-Piperidine (ANPP) (8333), a basic class of controlled substance listed in schedule II.

The company plans to use this controlled substance in the manufacture of another controlled substance.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substance, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, **Federal Register** Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than February 1, 2011.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30360 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on July 8, 2010, Agilent Technologies, 25200 Commercentre Drive, Lake Forest, California 92630–8810, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedule II:

Drug	Schedule
Phencyclidine (7471)	II
1-piperidinocyclohex- anecarbonitrile (8603)	II
Benzoylecgonine (9180)	II

The company plans to manufacture small quantities of the listed controlled substances for use in diagnostic products.

Agilent Technologies submitted this application because, effective May 14, 2010, Varian, Inc., located at 25200 Commercentre Drive, Lake Forest, California 92630–8810, became a wholly-owned subsidiary of Agilent Technologies. Varian, Inc.'s legal existence as a corporation and as a DEA registrant as a bulk manufacturer will eventually cease and Agilent Technologies will take over all of Varian Inc.'s activities with regard to controlled substances, requiring possession of a DEA registration as a bulk manufacturer issued to Agilent Technologies. Presently, Agilent Technologies' activities with regard to controlled substances will be exactly the same as performed by Varian, Inc.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR § 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than February 1, 2011.

Dated: November 18, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30358 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated May 28, 2010 and published in the **Federal Register** on June 8, 2010, (75 FR 32506), Boehringer Ingelheim Chemicals, Inc., 2820 N. Normandy Drive, Petersburg, Virginia 23805–9372, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances:

Drug	Schedule
Amphetamine (1100)	II
Lisdexamfetamine (1205)	II
Methylphenidate (1724)	II
Methadone (9250)	II
Methadone Intermediate (9254)	II

The company plans to manufacture the listed controlled substances in bulk for sale to its customers for formulation into finished pharmaceuticals.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Boehringer Ingelheim Chemicals, Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Boehringer Ingelheim Chemicals, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: November 19, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–30352 Filed 12–2–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice.

SUMMARY: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR part 44 govern the application, processing, and disposition of petitions for modification. This notice is a summary of petitions for modification filed by the parties listed below to modify the application of existing mandatory safety standards published in Title 30 of the Code of Federal Regulations.

DATES: All comments on the petitions must be received by the Office of Standards, Regulations and Variances on or before January 3, 2011.

ADDRESSES: You may submit your comments, identified by "docket number" on the subject line, by any of the following methods:

1. *Electronic Mail: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* 1–202–693–9441.
3. *Regular Mail:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939, Attention: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances.

4. *Hand-Delivery or Courier:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939, Attention: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments. Individuals who submit comments by hand-delivery are required to check in at the receptionist desk on the 21st floor.

Individuals may inspect copies of the petitions and comments during normal business hours at the address listed above.

FOR FURTHER INFORMATION CONTACT: Barbara Barron, Office of Standards, Regulations and Variances at 202–693–9447 (Voice), *barron.barbara@dol.gov* (E-mail), or 202–693–9441 (Telefax). [These are not toll-free numbers].

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that: (1) An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or (2) that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification.

II. Petitions for Modification

Docket Number: M–2010–035–C.

Petitioner: San Juan Coal Company, P.O. Box 561, Waterflow, New Mexico 87421.

Mine: San Juan Mine 1, MSHA I.D. No. 29–02170, located in San Juan County, New Mexico.

Regulation Affected: 30 CFR 75.500(d) (permissible electric equipment).

Modification Request: The petitioner requests a modification of the existing standard to: (1) Permit the use of certain non-permissible low-voltage electronic testing, diagnostic, measurement, and survey equipment in or inby the last open crosscut; and (2) the use of other testing, diagnostic, and survey equipment under this petition for modification if that equipment is approved in advance by MSHA's District Office. The petitioner states that: (1) All non-permissible testing and diagnostic equipment used in or inby the last open crosscut will be examined by a qualified person as defined in 30 CFR 75.153 prior to being used to insure the equipment is being maintained in a safe operating condition and the examination results will be recorded in the weekly examination book and made available to an authorized representative of the Secretary and the miners at the mine; (2) a qualified person as defined in existing 30 CFR 75.151 will continuously monitor for methane immediately before and during the use of non-permissible electronic test, diagnostic, measurement, or survey equipment in or inby the last open crosscut; (3) non-permissible electronic testing, diagnostic, measurement, or survey equipment will not be used if methane is detected in concentrations at or above 1.0 percent methane; (4) when 1.0 percent or more of methane is detected while the non-permissible electronic equipment is being used, the equipment will be de-energized immediately and the non-permissible electronic equipment will be withdrawn to outby the last open crosscut; (5) all hand-held methane detectors will be MSHA approved and maintained in permissible and proper operating condition as defined in 30 CFR 75.320 and calibrated in accordance with the requirements in the approved ventilation plan; (6) except for time necessary to trouble shoot under actual mining conditions, coal production in the section will cease. However, coal may remain in or on the equipment in order to test and diagnose the equipment under "load"; (7) non-permissible electronic test, diagnostic, measurement, or survey equipment will not be used when float coal dust is in suspension in the area; (8) all electronic test, diagnostic, measurement, or survey equipment will be used in accordance with the manufacturers recommended safe use procedures; (9) qualified personnel engaged in the use of electronic test, diagnostic, measurement, or survey equipment will be properly trained to recognize the hazards and limitations associated with the use of electronic test and diagnostic equipment; (10) any piece of equipment subject to this petition will be inspected by an authorized representative of the Secretary prior to initially placing it in service underground; and (11) within 60 days after the Proposed Decision and Order becomes final, proposed revisions to the approved 30 CFR 48 training plan will be submitted to the District Manager, which will include specific initial and refresher training regarding any terms and conditions stated in the Proposed Decision and Order. The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded by the existing standard.

Docket Number: M–2010–036–C.

Petitioner: Sequoia Energy, LLC, P.O. Box 838, Middlesboro, Kentucky 40965.

Mine: Sequoia Preparation Facility, MSHA I.D. No. 15–12428, located in Harlan County, Kentucky.

Regulation Affected: 30 CFR 77.214 (Refuse piles; general).

Modification Request: The petitioner requests a modification of the existing standard to permit an additional site in the head of Upper Double Branch to be reclaimed as part of the Upper Double Branch Refuse Pile, Site I.D. No. 1211–KY7–07139–02. The petitioner proposes to cover abandoned mine openings with refuse piles. The petitioner states that: (1) The pile will be constructed of coarse refuse material from the Sequoia Preparation Facility; (2) the refuse in the pile will be placed in 2 feet lifts along an exposed surface mine highwall; (3) the material will be placed in level terraces to prevent the ponding of water; (4) the material will be compacted to reduce the possibility of water saturation and slope failure; (5) the mine openings will be plugged and proper drainage from the abandoned mine will be implemented to allow the abandoned mine to drain should any water accumulate in the mine; and (6) the abandoned mine openings will be covered with at least four feet of non-toxic, non-combustible material to separate it from the coarse refuse. The petitioner also states that there are no miners working within the mine nor is any other mine cut into the mine and there is no diminution of safety for the miners working within the mine.

Dated: November 30, 2010.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 2010–30370 Filed 12–2–10; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0052]

Material Hoists, Personnel Hoists, and Elevators Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend OMB approval of the information collection requirements specified in the Standard on Material Hoists, Personnel Hoists, and Elevators (29 CFR 1926.552).

DATES: Comments must be submitted (postmarked, sent, or received) by February 1, 2011.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2010–0052, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for the Information Collection Request (ICR) (OSHA–2010–0052). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

Paragraph (a)(2) of the Standard requires that the rated load capacities, recommended operating speeds, and special hazard warnings or instructions be posted on cars and platforms. Paragraph (b)(1)(i) requires that operating rules for material hoists be established and posted at the operator's station of the hoist. These rules shall include signal system and allowable line speed for various loads. Paragraph (c)(10) requires that cars be provided with a capacity and data plate secured in a conspicuous place on the car or crosshead.

These posting requirements are used by the operator and crew of the material and personnel hoists to determine how to use the specific machine and how much it will be able to lift as assembled in one or a number of particular configurations. If not properly used, the machine would be subject to failures, endangering the employees in the immediate vicinity.

Paragraph (c)(15) requires that a test and inspection of all functions and safety devices be made following assembly and erection of hoists. The test and inspection are to be conducted under the supervision of a competent person. A similar inspection and test is required following major alteration of an existing installation. All hoists shall be inspected and tested at three-month intervals. A certification record (the most recent) of the test and inspection is required to be kept on file, including the date the test and inspection was completed, the identification of the equipment and the signature of the person who performed the test and inspection. This certification ensures that the equipment has been tested and is in safe operating condition. The most recent certification record will be disclosed to a CSHO during an OSHA inspection.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the Standard on Material Hoists, Personnel Hoists, and Elevators (29 CFR 1926.552). The Agency is requesting a decrease in burden hours from 30,282 to 20,957 (a total decrease of 9,325 burden hours). The Agency will summarize the comments submitted in response to this

notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Material Hoists, Personnel Hoists, and Elevators (29 CFR 1926.552).

OMB Number: 1218–0231.

Affected Public: Business or other for-profits.

Number of Respondents: 18,372.

Total Responses: 90,289.

Frequency of Response: On Occasion; Quarterly.

Estimated Time per Response: Varies from 2 minutes (.03 hour) for a supervisor to disclose test and inspection certification records to 30 minutes (.50 hour) for a construction worker to obtain and post information for hoists.

Total Burden Hours: 20,957.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on this Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal;

(2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2010–0052). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 4–2010 (75 FR 55355).

Signed at Washington, DC, on November 29, 2010.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2010–30311 Filed 12–2–10; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. The majority of these meetings will take place at NSF, 4201 Wilson Blvd., Arlington, Virginia 22230.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF Web site: *http://www.nsf.gov.* This information may also be requested by telephoning, 703/292–8182.

Dated: November 30, 2010.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2010–30333 Filed 12–2–10; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

AGENCY: National Science Foundation

ACTION: Notice of permit applications received under the Antarctic Conservation Act of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at title 45 part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by January 3, 2011. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy at the above address or (703) 292–7405.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and

certain geographic areas requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

1. *Applicant:* Permit Application No. 2011–023, Joseph Levy, Department of Geology, Portland State University, PO Box 751, Portland, OR 97207–0751.

Activity for Which Permit is Requested: Take and Import into the USA. The applicant plans to enter the Garwood Valley to collect algal mats from sediment outcrops where exposed, and from the surface of ponds. The goal of the project is to define the rate of geomorphic change in Garwood Valley in response to changing climate conditions. The geomorphic record will be reconstructed over the past 1-=2- kyr to infer past climate-driven landscape alteration at the end of the LGM and examine the current episode of landscape changes, including assessing the thermal equilibrium of buried massive ice. The past and current geomorphic changes will be used as a guide for predicting landscape response in the Dry Valleys should the >130 km^2 of ice-cored terrain in the valleys also begin to melt.

Location: Garwood Valley, Dry Valleys.

Dates: January 1, 2011 to February 1, 2014.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 2010–30337 Filed 12–2–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0331]

Appointments To Performance Review Boards for Senior Executive Service

AGENCY: Nuclear Regulatory Commission.

ACTION: Appointment to Performance Review Board for Senior Executive Service.

SUMMARY: This notice announces a change in the membership of the Senior Executive Service Performance Review Board for the U.S. Nuclear Regulatory Commission (NRC).

SUPPLEMENTARY INFORMATION: On October 26, 2010 (75 FR 65673), the NRC published its list of Performance Review Board appointees pursuant to the regulations at 5 CFR 430.310 (74 FR 51261). This notice announces the appointment of Charles L. Miller to the Performance Review Board in place of Catherine Haney, who is unavailable to participate this year. The NRC Performance Review Board (PRB) is responsible for making recommendations to the appointing and awarding authorities on performance appraisal ratings and performance awards for Senior Executives and Senior Level employees. For the public's convenience, an updated membership list of the Performance Review Board is provided below:

Darren B. Ash, Deputy Executive Director for Corporate Management, Office of the Executive Director for Operations;
R. W. Borchardt, Executive Director for Operations;
Stephen G. Burns, General Counsel;
Elmo E. Collins, Jr., Regional Administrator, Region IV;
Margaret M. Doane, Director, Office of International Programs;
James E. Dyer, Chief Financial Officer;
Kathryn O. Greene, Director, Office of Administration;
Eric J. Leeds, Director, Office of Nuclear Reactor Regulation;
Charles L. Miller, Director, Office of Federal and State Materials and Environmental Management Programs;
Martin J. Virgilio, Deputy Executive Director for Reactor and Preparedness Programs, Office of the Executive Director for Operations;
Michael F. Weber, Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance Programs, Office of the Executive Director for Operations;
James T. Wiggins, Director, Office of Nuclear Security and Incident Response.

The following individuals will serve as members of the NRC PRB Panel that was established to review appraisals and make recommendations to the appointing and awarding authorities for NRC PRB members:

Marvin L. Itzkowitz, Associate General Counsel for Hearings, Enforcement, and Administration, Office of the General Counsel;
Michael R. Johnson, Director, Office of New Reactors;
Brian W. Sheron, Director, Office of Nuclear Regulatory Research.

All appointments are made pursuant to Section 4314 of Chapter 43 of Title 5 of the United States Code.

DATES: *Effective Date:* December 3, 2010.

FOR FURTHER INFORMATION CONTACT: Secretary, Executive Resources Board, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 492–2076.

Dated at Bethesda, Maryland, this 23rd day of November, 2010.

For the U.S. Nuclear Regulatory Commission,

Miriam Cohen,

Secretary, Executive Resources Board.

[FR Doc. 2010–30354 Filed 12–2–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63387; File No. S7–05–09]

Order Extending and Modifying Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request of Ice Trust U.S. LLC Related to Central Clearing of Credit Default Swaps and Request for Comment

November 29, 2010.

I. Introduction

The Securities and Exchange Commission ("Commission") has taken multiple actions designed to help foster the prompt development of credit default swap ("CDS") central counterparties ("CCP"), including granting temporary conditional exemptions from certain provisions of the Federal securities laws.[1]

[1] *See generally* Securities Exchange Act Release Nos. 60372 (Jul. 23, 2009), 74 FR 37748 (Jul. 29, 2009) and 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by ICE Clear Europe Limited); Securities Exchange Act Release Nos. 60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009) and 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by Eurex Clearing AG); Securities Exchange Act Release Nos. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009), and 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) (temporary exemptions in connection with CDS clearing by Chicago Mercantile Exchange Inc.); Securities Exchange Act Release Nos. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009) ("March 2009 ICE Trust Exemptive Order"), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009) ("December 2009 ICE Trust Exemptive Order"), and 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) ("March 2010 ICE Trust Exemptive Order," and together with the March 2009 ICE Trust Exemptive Order and December 2009 ICE Trust Exemptive Order the "ICE Trust Exemptive Orders") (temporary exemptions in connection with CDS clearing by ICE Trust U.S. LLC); Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary exemptions in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.); and other Commission actions discussed in several of these orders. In addition, the Commission has issued interim final temporary rules that provide exemptions under the Securities Act of 1933 and the Securities Exchange Act of 1934 for CDS to facilitate the operation of one or more central counterparties for the CDS market. *See* Securities Act Release Nos. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009) (initial approval), 9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009) (extension until Nov. 30, 2010), and 9158 (Nov. 30, 2010) (extension until Jul. 16, 2011).

In March 2009, the Commission issued an order providing temporary conditional exemptions to ICE Trust U.S. LLC ("ICE Trust"), and certain other parties, to permit ICE Trust to clear and settle CDS transactions.[2] In response to ICE Trust's request, the Commission temporarily extended and expanded the exemptions in December 2009 and in March 2010.[3] The current exemptions pursuant to the March 2010 ICE Trust Exemptive Order are scheduled to expire on November 30, 2010, and ICE Trust has requested that the Commission extend and modify the exemptions contained in the March 2010 ICE Trust Exemptive Order.[4]

The Commission's current authority over the OTC market for CDS is limited.[5] Specifically, Section 3A of the Securities Exchange Act of 1934 ("Exchange Act") limits the Commission's authority over swap agreements, as defined in Section 206A of the Gramm-Leach-Bliley Act.[6] For those CDS that are swap agreements, the exclusion from the definition of security in Section 3A of the Exchange Act, and related provisions, will continue to apply. The Commission's action today does not affect these CDS, and this Order does not apply to them. For those CDS that are not swap agreements ("non-excluded CDS"), the Commission's action today provides temporary conditional exemptions from certain requirements of the Exchange Act.

II. Discussion

A. Legislative Developments

Subsequent to the Commission's issuance of the March 2010 ICE Trust Exemptive Order, the President signed the Dodd-Frank Act into law.[7] The Dodd-Frank Act was enacted to, among other purposes, promote the financial stability of the United States by improving accountability and transparency in the financial system.[8] To this end, the provisions of Title VII of the Dodd-Frank Act provide for the comprehensive regulation of security-based swaps[9] by the Commission.[10] The Dodd-Frank Act amends the Exchange Act to require, among other things, that transactions in security-based swaps be cleared through a clearing agency that is registered with the Commission or that is exempt from registration if they are of a type that the Commission determines must be cleared, unless an exception or exemption from mandatory clearing applies.[11] Furthermore, Title VII of the Dodd-Frank Act provides that a depository institution that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act, such as ICE Trust, is deemed registered as a clearing agency for the purposes of clearing security-based swaps ("Deemed Registered Provision").[12] The Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.[13] As a result, ICE Trust will no longer need the exemption from registration as a clearing agency under Section 17A of the Exchange Act provided by the March 2010 ICE Trust Exemptive Order, and previous orders, to clear security-based swaps after the Deemed Registered Provision becomes effective.

B. ICE Trust's Request for Extension of March 2010 ICE Trust Exemptive Order

ICE Trust seeks an extension of the relief provided by the March 2010 ICE Trust Exemptive Order, as modified herein.[14] In ICE Trust's request for an extension of the March 2010 ICE Trust Exemptive Order, ICE Trust represents that there have been no material changes to the operations of ICE Trust, and that the representations made by ICE Trust in connection with the March 2010 ICE Trust Exemptive Order remain true in all material respects.[15] These representations are discussed in detail in our earlier ICE Trust orders.

Accordingly, consistent with our findings in the March 2010 ICE Trust Exemptive Order, and, in particular, in light of the risk management and systemic benefits in continuing to facilitate CDS clearing by ICE Trust until Title VII of the Dodd-Frank Act becomes fully effective, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to extend and modify the exemptive relief granted in the March 2010 ICE Trust Exemptive Order until July 16, 2011. Specifically, pursuant to the Commission's authority under Section 36 of the Exchange Act,[16]

[2] Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009).

[3] Securities Exchange Act Release Nos. 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009) and 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010).

[4] *See* Letter from Kevin McClear, ICE Trust, to Elizabeth Murphy, Secretary, Commission, Nov. 29, 2010 ("November 2010 Request").

[5] Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") addresses limitations on the Commission's current authority in this area. As discussed in Part II.A *infra,* provisions of Title VII of the Dodd-Frank Act generally become effective on July 16, 2011.

[6] 15 U.S.C. 78c-1. Section 3A excludes both a non-security-based and a security-based swap agreement from the definition of "security" under Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10). Section 206A of the Gramm-Leach-Bliley Act defines a "swap agreement" as "any agreement, contract, or transaction between eligible contract participants (as defined in section 1a(12) of the Commodity Exchange Act * * *) * * * the material terms of which (other than price and quantity) are subject to individual negotiation." 15 U.S.C. 78c note.

[7] Public Law 111–203 (July 21, 2010).

[8] *See* Public Law 111–203, Preamble.

[9] Section 761(a)(6) of the Dodd-Frank Act defines a "security-based swap" as any agreement, contract, or transaction that is a "swap," as defined in Section 1a(47) of the Commodity Exchange Act ("CEA"), 7 U.S.C. 1a(47), that is based on an index that is a narrow-based security index, including any interest therein or on the value thereof; a single security, or a loan, including any interest therein or on the value thereof; or the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer. *See* Section 3(a)(68) of the Exchange Act, 15 U.S.C.78c(a)(68) (as added by Section 761(a)(6) of the Dodd-Frank Act). Section 712(d) of the Dodd-Frank Act provides that the Commission and the Commodity Futures Trading Commission ("CFTC"), in consultation with the Board of Governors of the Federal Reserve System ("Federal Reserve Board"), shall, among other things, jointly further define the terms "swap" and "security-based swap." The Commission and the CFTC will jointly propose a rule to further define these terms, including with respect to credit default swaps.

[10] Section 761(a)(2) of the Dodd-Frank Act explicitly includes security-based swaps in the definition of "security" in Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c.

[11] *See* Section 763(a) of the Dodd-Frank Act (adding new Section 3C(a)(1) to the Exchange Act, 15 U.S.C. 78c-2).

[12] *See* Section 763(b) of the Dodd-Frank Act (adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q–1(1)). Under this Deemed Registered Provision, ICE Trust will be required to comply with all requirements of the Exchange Act, and the rules thereunder, applicable to registered clearing agencies to the extent it clears security-based swaps after the effective date of the Deemed Registered Provision, including, for example, the obligation to file proposed rule changes under Section 19(b) of the Exchange Act.

[13] Section 774 of the Dodd-Frank Act states, "[u]nless otherwise provided, 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."

[14] *See* November 2010 Request, *supra* note 6.

[15] *See id.* ICE Trust indicated in its November 2010 Request Letter that it intends to apply to the CFTC for registration as a derivatives clearing organization in advance of the date Title VII of the Dodd-Frank Act goes into effect in order to facilitate implementation of the Dodd-Frank Act requirements. As part of the transition to derivatives clearing organization status, ICE Trust expects to admit futures commission merchants registered with the CFTC (which may be registered broker-dealers) as clearing members for customer clearing and may introduce related changes to its rules. *See* Part II.G, *infra.*

[16] 15 U.S.C. 78mm. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order,

Continued

based on the facts presented and the representations made by ICE Trust,[17] and for the reasons discussed in this Order and subject to certain conditions, the Commission is extending, subject to the modifications discussed in this Order, each of the existing exemptions connected with CDS clearing by ICE Trust, which include: The temporary conditional exemption granted to ICE Trust from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; the temporary conditional exemption of ICE Trust and certain of its clearing members from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for certain non-excluded CDS cleared by ICE Trust; the temporary conditional exemption of certain eligible contract participants and others from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by ICE Trust; the temporary conditional exemption of ICE Trust clearing members and certain others from broker-dealer registration requirements and related requirements in connection with CDS clearing by ICE Trust (including clearing of customer CDS transactions); and the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.

C. Extended and Modified Temporary Conditional Exemption From Clearing Agency Registration Requirement

In the March 2010 ICE Trust Exemptive Order, the Commission granted a temporary conditional exemption from clearing agency registration under Section 17A of the Exchange Act to permit ICE Trust to act as a CCP for Cleared CDS[18] by novating trades of non-excluded CDS that are securities and generating money and settlement obligations for participants without having to register with the Commission as a clearing agency.

In the March 2010 ICE Trust Exemptive Order, the Commission recognized the need to ensure the prompt establishment of ICE Trust as a CCP for CDS transactions. The Commission also recognized the need to ensure that important elements of Section 17A of the Exchange Act, which sets forth the framework for the regulation and operation of the U.S. clearance and settlement system for securities, apply to the non-excluded CDS market. Accordingly, the temporary exemptions in the March 2010 ICE Trust Exemptive Order were subject to a number of conditions designed to enable Commission staff to monitor ICE Trust's clearance and settlement of CDS transactions.[19] Moreover, the temporary exemptions in the March 2010 ICE Trust Exemptive Order in part were based on ICE Trust's representation that it met the standards set forth in the Committee on Payment and Settlement Systems ("CPSS") and IOSCO report entitled: *Recommendations for Central Counterparties* ("RCCP").[20] The RCCP establishes a framework that requires a CCP to have: (i) The ability to facilitate the prompt and accurate clearance and settlement of CDS transactions and to safeguard its users' assets; and (ii) sound risk management, including the ability to appropriately determine and collect clearing fund and monitor its users' trading. This framework is generally consistent with the requirements of Section 17A of the Exchange Act.

The Commission believes that continuing to facilitate the central clearing of CDS transactions—including customer CDS transactions—through a temporary conditional exemption from Section 17A will continue to provide important risk management and systemic benefits by avoiding an interruption in those CCP clearance and settlement services pending the effective date of Title VII of the Dodd-Frank Act and the related Deemed Registered Provision. Any interruption in CCP clearance and settlement services for CDS transactions would eliminate the benefits ICE Trust provides to the non-excluded CDS market.

Our action today balances the aim of facilitating ICE Trust's continued service as a CCP for non-excluded CDS transactions with ensuring that important elements of Commission oversight are applied to the non-excluded CDS market. The temporary exemptions will permit the Commission to continue to develop direct experience with the non-excluded CDS market. During the extended exemptive period, the Commission will continue to monitor closely the impact of the CCPs on the CDS market. In particular, the Commission will continue to monitor the competitive effects of ICE Trust's rules and operations under this exemptive relief with respect to fees charged to members, the dissemination of market data, and the access to clearing services by independent CDS exchanges or CDS trading platforms.[21]

This temporary extension of the March 2010 ICE Trust Exemptive Order

to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[17] *See* November 2010 Request, *supra* note 6. The exemptions we are granting today are based on all of the representations made by ICE Trust in its request, which incorporate representations made by ICE Trust in connection with the March 2010 ICE Trust Exemptive Order, which in turn incorporates representations related to our earlier exemptive orders. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS that previously had been cleared pursuant to the exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

[18] For purposes of this Order, "Cleared CDS" means a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Trust, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the CEA as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which: (i) The reference entity, the issuer of the reference security, or the reference security is one of the following: (A) An entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available; (B) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States; (C) a foreign sovereign debt security; (D) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or (E) an asset-backed security issued or guaranteed by the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac") or the Government National Mortgage Association ("Ginnie Mae"); or (ii) the reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (i). *See* definition in paragraph III.(g)(1) of this Order. As discussed above, the Commission's action today does not affect CDS that are swap agreements under Section 206A of the Gramm-Leach-Bliley Act.

[19] *See* Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009).

[20] The RCCP was drafted by a joint task force ("Task Force") composed of representative members of IOSCO and CPSS and published in November 2004. The Task Force consisted of securities regulators and central bankers from 19 countries and the European Union. The U.S. representatives on the Task Force included staff from the Commission, the Federal Reserve Board, and the CFTC.

[21] ICE Trust has no rule requiring an executing dealer to be a clearing member. As an operational matter, ICE Trust currently has one authorized trade processing platform for submission of client CDS transactions, ICE Link. Currently, ICE Link does not have a mechanism by which a non-member dealer could submit a transaction for clearing at ICE Trust. However, ICE Trust Clearing Rule 314 provides for open access to ICE Trust's clearing systems for all reasonably qualified execution venues and trade processing platforms. ICE Trust has represented that it remains committed to work with reasonably qualified execution venues and trade processing platforms to facilitate functionality for submission of trades by non-member dealers if there is interest in such functionality. *See* Letter from Kevin McClear, ICE Trust, to Elizabeth Murphy, Secretary, Commission, Mar. 5, 2010.

also is designed to assure that—as represented in ICE Trust's request—information will continue to be available to market participants about the terms of the CDS cleared by ICE Trust, the creditworthiness of ICE Trust or any guarantor, and the clearance and settlement process for CDS.[22] The Commission believes continued operation of ICE Trust consistent with the conditions of this Order will facilitate the availability to market participants of information that should enable them to make better informed investment decisions and better value and evaluate their Cleared CDS and counterparty exposures relative to a market for CDS that is not centrally cleared.

Accordingly, and consistent with our findings in the ICE Trust Exemptive Orders and for the reasons described herein, the Commission finds pursuant to Section 36 of the Exchange Act[23] that it is necessary and appropriate in the public interest and is consistent with the protection of investors for the Commission to extend, as modified herein, until July 16, 2011, the relief provided from the clearing agency registration requirements of Section 17A by the March 2010 ICE Trust Exemptive Order.

This temporary extension of the March 2010 ICE Trust Order is subject to a number of conditions that are designed to enable Commission staff to continue to monitor ICE Trust's clearance and settlement of CDS transactions and help reduce risk in the CDS market. These conditions require that ICE Trust: (i) Make available on its Web site its annual audited financial statements; (ii) preserve records related to the conduct of its Cleared CDS clearance and settlement services for at least five years (in an easily accessible place for the first two years); (iii) provide information relating to its Cleared CDS clearance and settlement services to the Commission and provide access to the Commission to conduct on-site inspections of facilities, records, and personnel related to its Cleared CDS clearance and settlement services; (iv) notify the Commission about material disciplinary actions taken against any of its members utilizing its Cleared CDS clearance and settlement services, and about the involuntary termination of the membership of an entity that is utilizing ICE Trust's Cleared CDS clearance and settlement services; (v) provide the Commission with changes to rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services; (vi) provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements[24] and its annual audited financial statements prepared by independent audit personnel; and (vii) report all significant systems outages to the Commission.

This temporary extension of the March 2010 ICE Trust Exemptive Order is also conditioned on ICE Trust, directly or indirectly, making available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) All end-of-day settlement prices and any other prices with respect to Cleared CDS that ICE Trust may establish to calculate mark-to-market margin requirements for ICE Trust clearing members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Trust.[25]

This temporary extension of the March 2010 ICE Trust Exemptive Order is modified by adding one condition. If any ICE Trust clearing member that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons is a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof), and is permitted under the Financial Industry Regulatory Authority ("FINRA") rules to use the applicable margin pursuant to ICE Trust rules as a minimum for computing customer or broker-dealer margin, ICE Trust shall not materially change its methodology for determining Cleared CDS margin levels without prior written approval from the Commission staff, and from FINRA with respect to customer margin requirements that would apply to broker-dealers.

D. Extended Temporary Conditional Exemption From Exchange Registration Requirements

In the March 2010 ICE Trust Exemptive Order, the Commission granted a temporary conditional exemption to ICE Trust from the requirements of Sections 5 and 6 of the Exchange Act, and the rules and regulations thereunder, in connection with ICE Trust's calculation of mark-to-market prices for open positions in Cleared CDS. The Commission also temporarily exempted ICE Trust participants from the prohibitions of Section 5 to the extent that they use ICE Trust to effect or report any transaction in Cleared CDS in connection with ICE Trust's calculation of mark-to-market prices for open positions in Cleared CDS. Section 5 of the Exchange Act contains certain restrictions relating to the registration of national securities exchanges,[26] while Section 6 provides the procedures for registering as a national securities exchange.[27]

The Commission granted these temporary exemptions to facilitate the establishment of ICE Trust's end-of-day settlement price process. ICE Trust had represented that in connection with its clearing and risk management process it would calculate an end-of-day settlement price for each Cleared CDS in which an ICE Trust participant has a cleared position, based on prices submitted by the participants. As part of this mark-to-market process, ICE Trust has periodically required its clearing members to execute certain CDS trades at the price at which certain quotations of the clearing members cross. ICE Trust represents that it wishes to continue periodically requiring clearing members to execute certain CDS trades in this manner.

As discussed above, the Commission has found in general that it is necessary or appropriate in the public interest, and is consistent with the protection of

[22] The Commission believes that it is important in the CDS market, as in the market for securities generally, that parties to transactions should have access to financial information that would allow them to evaluate appropriately the risks relating to a particular investment and make more informed investment decisions. *See generally* Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets, March 13, 2008, available at: *http://www.treas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf.*

[23] *See supra* note 16.

[24] *See* Automated Systems of Self-Regulatory Organization, Exchange Act Release No. 27445 (November 16, 1989), File No. S7–29–89, and Automated Systems of Self-Regulatory Organization (II), Exchange Act Release No. 29185 (May 9, 1991), File No. S7–12–19.

[25] As a CCP, ICE Trust collects and processes information about CDS transactions, prices, and positions. Public availability of such information can improve fairness, efficiency, and competitiveness in the market. Moreover, with pricing and valuation information relating to Cleared CDS, market participants would be able to derive information about underlying securities and indices, potentially improving the efficiency and effectiveness of the securities markets.

[26] In particular, Section 5 states:

It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange * * * to effect any transaction in a security, or to report any such transactions, unless such exchange (1) is registered as a national securities exchange under section 6 of [the Exchange Act], or (2) is exempted from such registration * * * by reason of the limited volume of transactions effected on such exchange * * *. 15 U.S.C. 78e.

[27] 15 U.S.C. 78f. Section 6 of the Exchange Act also sets forth various requirements to which a national securities exchange is subject.

investors, to facilitate continued CDS clearing by ICE Trust. Consistent with that finding—and in reliance on ICE Trust's representation that the end-of-day settlement pricing process, including the periodically required trading, is integral to its risk management—the Commission further finds that it is necessary or appropriate in the public interest, and is consistent with the protection of investors that the Commission exercise its authority under Section 36 of the Exchange Act to extend, until July 16, 2011, ICE Trust's temporary exemption from Sections 5 and 6 of the Exchange Act in connection with its calculation of mark-to-market prices for open positions in Cleared CDS, and ICE Trust clearing members' temporary exemption from Section 5 with respect to such trading activity.

The temporary exemption for ICE Trust will continue to be subject to three conditions. First, ICE Trust must report the following information with respect to its calculation of mark-to-market prices for Cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise:

- The total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and
- The total unit volume and/or notional amount executed during the quarter, broken down by reference entity, security, or index.

Second, ICE Trust must establish and maintain adequate safeguards and procedures to protect participants' confidential trading information. Such safeguards and procedures shall include: (a) Limiting access to the confidential trading information of participants to those employees of ICE Trust who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (b) establishing and maintaining standards restricting the trading by employees of ICE Trust for their own accounts. ICE Trust must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed.

Third, ICE Trust must comply with the conditions to the temporary exemption from Section 17A of the Exchange Act in this Order, given that this exemption is granted in the context of our goal of continuing to facilitate ICE Trust's ability to act as a CCP for non-excluded CDS, and given ICE Trust's representation that the end-of-day settlement pricing process, including the periodically required trading, is integral to its risk management.

E. Extended Temporary Conditional General Exemption for ICE Trust, Certain ICE Trust Clearing Members, and Certain Eligible Contract Participants

As the Commission recognized when it initially provided temporary exemptions in connection with CDS clearing by ICE Trust, applying the full panoply of Exchange Act requirements to participants in transactions in non-excluded CDS likely would deter some participants from using CCPs to clear CDS transactions. The Commission also recognized that it is important that the antifraud provisions of the Exchange Act apply to transactions in non-excluded CDS, particularly given that OTC transactions subject to individual negotiation that qualify as security-based swap agreements already are subject to those provisions.[28]

As a result, the Commission concluded that it is appropriate in the public interest and consistent with the protection of investors to apply temporarily substantially the same framework to transactions by market participants in non-excluded CDS that applies to transactions in security-based swap agreements. Consistent with that conclusion, the Commission temporarily exempted ICE Trust, and certain members and eligible contract participants, from a number of Exchange Act requirements, subject to certain conditions, while excluding certain enforcement-related and other provisions from the scope of the exemption.

The Commission believes that continuing to facilitate the central clearing of CDS transactions by ICE Trust through this type of temporary exemption will provide important risk management benefits and systemic benefits. The Commission also believes that facilitating the central clearing of customer CDS transactions, subject to the conditions in this Order, will provide an opportunity for the customers of ICE Trust clearing members to control counterparty risk.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to extend the relief provided by the March 2010 ICE Trust Exemptive Order, until July 16, 2011, related to ICE Trust's, and certain members' and eligibility contract participants' exemption from certain requirements under the Exchange Act, as modified herein.

This temporary conditional exemption applies to ICE Trust and to any eligible contract participants [29]—including any ICE Trust clearing member—other than eligible contract participants that are self-regulatory organizations, registered brokers or dealers, or futures commission merchants registered pursuant to Section 4f(a)(1) of the CEA that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons.[30]

As before, under this temporary conditional exemption, and solely with respect to Cleared CDS, those persons generally are exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements. Thus, those persons would still be subject to those Exchange Act

[28] While Section 3A of the Exchange Act excludes "swap agreements" from the definition of "security," certain antifraud and insider trading provisions under the Exchange Act explicitly apply to security-based swap agreements. *See* (a) paragraphs (2) through (5) of Section 9(a), 15 U.S.C. 78i(a), prohibiting the manipulation of security prices; (b) Section 10(b), 15 U.S.C. 78j(b), and underlying rules prohibiting fraud, manipulation or insider trading (but not prophylactic reporting or recordkeeping requirements); (c) Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices; (d) Sections 16(a) and (b), 15 U.S.C. 78p(a) and (b), which address disclosure by directors, officers and principal stockholders, and short-swing trading by those persons, and rules with respect to reporting requirements under Section 16(a); (e) Section 20(d), 15 U.S.C. 78t(d), providing for antifraud liability in connection with certain derivative transactions; and (f) Section 21A(a)(1), 15 U.S.C. 78u–1(a)(1), related to the Commission's authority to impose civil penalties for insider trading violations.

"Security-based swap agreement" is defined in Section 206B of the Gramm-Leach Bliley Act as a swap agreement in which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.

[29] This exemption in general applies to eligible contract participants, as defined in Section 1a(12) of the CEA as in effect on the date of this Order, other than persons that are eligible contract participants under paragraph (C) of that section.

[30] A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers (including broker-dealers that are also registered as futures commission merchants pursuant to Section 4f(a)(1) of the CEA). *See* Part II.H, *infra*. Solely for purposes of this Order, a registered broker-dealer, or a broker or dealer registered under Section 15(b) of the Exchange Act, does not refer to someone that would otherwise be required to register as a broker or dealer solely as a result of activities in Cleared CDS in compliance with this Order. In addition, a separate temporary exemption addresses the Cleared CDS activities of a futures commission merchant registered pursuant to Section 4f(a)(1) of the CEA (but that is not registered as a broker-dealer under Section 15(b) of the Exchange Act (other than paragraph 11 thereof)) that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons. *See* Part II.G, *infra*.

requirements that explicitly are applicable in connection with security-based swap agreements.[31] In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions would remain applicable.[32] In this way, the temporary conditional exemption would apply the same Exchange Act requirements in connection with non-excluded CDS as apply in connection with OTC credit default swaps.

Consistent with the March 2010 ICE Trust Exemption Order, this temporary conditional exemption does not extend to: the exchange registration requirements of Exchange Act Sections 5 and 6;[33] the clearing agency registration requirements of Exchange Act Section 17A; the requirements of Exchange Act Sections 12, 13, 14, 15(d), and 16;[34] the broker-dealer registration requirements of Section 15(a)(1)[35] and the other requirements of the Exchange Act, including paragraphs (4) and (6) of Section 15(b),[36] and the rules and regulations thereunder that apply to a broker or dealer that is not registered with the Commission; or certain provisions related to government securities.[37]

As before, any ICE Trust clearing member relying on this temporary conditional exemption from Exchange Act requirements must be in material compliance with ICE Trust rules to be eligible for this exemption. In addition, any ICE Trust clearing member relying on this exemption that participates in the clearing of Cleared CDS transactions on behalf of other persons annually must provide a certification to ICE Trust that attests to whether the clearing member is relying on the temporary conditional exemption from broker-dealer related requirements described below.[38]

F. Extended Conditional Temporary Exemption from Broker-Dealer Related Requirements for Certain Clearing Members of ICE Trust and Others

In the March 2010 ICE Trust Exemptive Order, the Commission granted a conditional temporary exemption from particular Exchange Act requirements to certain clearing members of ICE Trust, and to certain eligible contract participants, in connection with CDS cleared on ICE Trust. Absent an exception or exemption, persons that effect transactions in non-excluded CDS that are securities may be required to register as broker-dealers pursuant to Section 15(a)(1) of the Exchange Act.[39] Certain reporting and other requirements of the Exchange Act could apply to such persons, as broker-dealers, regardless of whether they are registered with the Commission.

In granting that exemption, the Commission noted that it is consistent with our investor protection mandate to require securities intermediaries that receive or hold funds and securities on behalf of others to comply with standards that safeguard the interests of their customers.[40] The Commission recognized, however, that requiring intermediaries that receive or hold funds and securities on behalf of customers in connection with transactions in non-excluded CDS to register as broker-dealers may deter the use of CCPs in customer CDS transactions, to the detriment of the markets and market participants generally. The Commission concluded that those factors, along with certain representations of ICE Trust,[41] argued in favor of flexibility in applying the requirements of the Exchange Act to these intermediaries, conditioned on requiring the intermediaries to take reasonable steps to help increase the likelihood that their customers would be protected in the event the intermediary became insolvent, even if those safeguards are not as strong as those required of registered broker-dealers.

As a result, and solely with respect to Cleared CDS, the Commission provided a temporary conditional exemption from the broker-dealer registration requirements of Section 15(a)(1), and the other requirements of the Exchange Act (other than paragraphs (4) and (6) of Section 15(b)[42]) and the rules and

[31] *See* note 28, *supra.*

[32] Thus, for example, the Commission retains the ability to investigate potential violations and bring enforcement actions in the Federal courts as well as in administrative proceedings, and to seek the full panoply of remedies available in such cases.

[33] This Order includes a separate temporary exemption from Sections 5 and 6 in connection with the mark-to-market process of ICE Trust, discussed above, at Section II.D.

[34] 15 U.S.C. 78*l,* 78m, 78n, 78o(d), 78p. Eligible contract participants and other persons instead should refer to the interim final temporary rules issued by the Commission.

[35] 15 U.S.C. 78o(a)(1).

[36] Exchange Act Sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission authority to take action against broker-dealers and associated persons in certain situations.

[37] This exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in Section 15C, 15 U.S.C. 78o–5, and its underlying rules and regulations. The exemption also does not extend to related definitions found at paragraphs (42) through (45) of Section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under Section 36 to issue exemptions in connection with those provisions. *See* Exchange Act Section 36(b), 15 U.S.C. 78mm(b).

[38] This condition requiring clearing members to convey information to ICE Trust as a repository for regulators, and other conditions of this Order that require clearing members or others to convey information (*e.g.,* an audit report related to the clearing member's compliance with exemptive conditions) to ICE Trust, does not impose upon ICE Trust any independent duty to audit or otherwise review that information. These conditions also do not impose on ICE Trust any independent fiduciary or other obligation to any customer of a clearing member.

[39] 15 U.S.C. 78o(a)(1). This section generally provides that, absent an exception or exemption, a broker or dealer that uses the mails or any means of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, any security must register with the Commission.

Section 3(a)(4) of the Exchange Act generally defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others," but excludes certain bank securities activities. 15 U.S.C. 78c(a)(4). Section 3(a)(5) of the Exchange Act generally defines a "dealer" as "any person engaged in the business of buying and selling securities for his own account," but includes exceptions for certain bank activities. 15 U.S.C. 78c(a)(5). Exchange Act Section 3(a)(6) defines a "bank" as a bank or savings association that is directly supervised and examined by State or Federal banking authorities (with certain additional requirements for banks and savings associations that are not chartered by a Federal authority or a member of the Federal Reserve System). 15 U.S.C. 78c(a)(6).

[40] Registered broker-dealers are required to segregate assets held on behalf of customers from proprietary assets, because segregation will assist customers in recovering assets in the event the intermediary fails. Absent such segregation, collateral could be used by an intermediary to fund its own business, and could be attached to satisfy the intermediary's debts were it to fail. Moreover, the maintenance of adequate capital and liquidity protects customers, CCPs, and other market participants. Adequate books and records (including both transactional and position records) are necessary to facilitate day to day operations as well as to help resolve situations in which an intermediary fails and either a regulatory authority or receiver is forced to liquidate the firm. Appropriate records also are necessary to allow examiners to review for improper activities, such as insider trading or fraud.

[41] We noted that in granting the temporary exemption, we also relied on ICE Trust's representation that before offering the Non-Member Framework, it will adopt a requirement that non-U.S. clearing members subject to the framework are regulated by: (i) A signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, or (ii) a signatory to a bilateral arrangement with the Commission for enforcement cooperation. We further noted that non-U.S. clearing members that do not meet these criteria would not be eligible to rely on this exemption.

[42] As noted above, *see* note 36, *supra,* Exchange Act Sections 15(b)(4) and 15(b)(6) grant the Commission authority to take action against broker-dealers and associated persons in certain situations. Accordingly, while the exemption we granted from broker-dealer requirements generally extended to persons that act as broker-dealers in the market for Cleared CDS (potentially including inter-dealer brokers that do not hold funds or securities for others), such persons may be subject to actions under Sections 15(b)(4) and (b)(6) of the Exchange Act.

In addition, such persons may be subject to actions under Exchange Act Section 15(c)(1), 15

Continued

regulations thereunder that apply to a broker or dealer that is not registered with the Commission, to: (i) ICE Trust clearing members other than registered broker-dealers; and (ii) any eligible contract participant, other than a registered broker-dealer, that does not receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons.[43]

That exemption was subject to a number of conditions. For ICE Trust clearing members that receive or hold funds or securities of U.S. persons (or who receive or hold funds or securities of any person in the case of a U.S. clearing member)—other than for an affiliate that controls, is controlled by, or is under common control with the clearing member—in connection with Cleared CDS, these included a condition requiring the clearing member, as promptly as practicable after receipt, to transfer such funds and securities (other than those promptly returned to such other persons) to either the Custodial Client Omnibus Margin Account at ICE Trust or to an account held by a third-party custodian. Additional related conditions addressed the types of permissible arrangements for holding collateral at a third-party custodian, and permissible custodians.[44] These conditions requiring customer collateral to be segregated from clearing members address only the initial margin that customers post in connection with Cleared CDS.

As before, the Commission is required to balance the goals of promoting the central clearing of customer CDS transactions against the goal of protecting customers, and to be mindful that these conditions cannot provide legal certainty that customer collateral in fact would be protected in the event an ICE Trust clearing member were to become insolvent. The Commission believes that the segregation framework set forth in the earlier orders represents a reasonable step to help protect the collateral posted by customers of ICE Trust's clearing members from the threat of loss in the event of clearing member insolvency.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to extend, as modified herein, until July 16, 2011, relief provided from certain Exchange Act requirements related to broker-dealers by the March 2010 ICE Trust Exemption Order.[45]

This exemption is available to ICE Trust clearing members other than registered broker-dealers or futures commission merchants registered pursuant to Section 4f(a)(1) of the CEA that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons.[46] As before, this relief is also available to any eligible contract participant, other than a registered broker-dealer, that does not receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons.[47] As before, and solely with respect to Cleared CDS, those persons temporarily will be exempt from the broker-dealer registration requirements of Section 15(a)(1), and the other requirements of the Exchange Act (other than paragraphs (4) and (6) of Section 15(b)) and the rules and regulation thereunder that apply to a broker or dealer that is not registered with the Commission.

As before, for all ICE Trust clearing members—regardless of whether they receive or hold customer collateral in connection with Cleared CDS—this temporary exemption is conditioned on the clearing member being in material compliance with ICE Trust's rules, as well as on the clearing member being in compliance with applicable laws and regulations relating to capital, liquidity, and segregation of customers' funds and securities (and related books and records provisions) with respect to Cleared CDS.

Additional conditions apply to ICE Trust clearing members that receive or hold funds or securities of U.S. persons (or that receive or hold funds or securities of any person in the case of a U.S. clearing member)—other than for an affiliate that controls, is controlled by, or is under common control with the clearing member—in connection with Cleared CDS. For those ICE Trust clearing members, this temporary exemption is conditioned on the customer not being a natural person, and on the clearing member providing certain risk disclosures to the customer.[48]

In addition, such clearing members must, as promptly as practical after receipt, transfer such funds and securities—other than those promptly returned to such other person—to either the Custodial Client Omnibus Margin Account at ICE Trust[49] or an account held by a third-party custodian, as described below.

As before, collateral that is held at a third-party custodian must either be held: (1) In the name of the customer, subject to an agreement in which the customer, the clearing member and the custodian are parties, acknowledging

U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices. As noted above, Section 15(c)(1) explicitly applies to security-based swap agreements. Sections 15(b)(4), 15(b)(6) and 15(c)(1), of course, would not apply to persons subject to this exemption who do not act as broker-dealers or associated persons of broker-dealers.

[43] In some circumstances, an eligible contract participant that does not hold customer funds or securities nonetheless may act as a dealer in securities transactions, or as a broker (such as an inter-dealer broker).

[44] Other conditions of this exemption precluded the clearing of CDS transaction for natural persons, required certain risk disclosures to customers, required the clearing member also must annually provide ICE Trust with a self-assessment that it is in compliance with the requirements along with a report by the clearing member's independent third-party auditor that attests to that assessment, and required the clearing member to agree to provide the Commission with access to information related to Cleared CDS transactions.

[45] As before, in granting this relief we are relying on representations by ICE Trust that non-U.S. clearing members that provide their customers with access to CDS clearing on ICE Trust are regulated by: (i) a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, or (ii) a signatory to a bilateral arrangement with the Commission for enforcement cooperation. Non-U.S. clearing members that do not meet these criteria would not be eligible to rely on this exemption.

[46] Only registered broker-dealers were excluded in the March 2010 ICE Trust Exemptive Order.

[47] In some circumstances, an eligible contract participant that does not hold customer funds or securities nonetheless may act as a dealer in securities transactions, or as a broker (such as an inter-dealer broker).

Solely for purposes of this requirement, an eligible contract participant would not be viewed as receiving or holding funds or securities for purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons, if the other persons involved in the transaction would not be considered "customers" of the eligible contract participant under the analysis used for determining whether certain persons would be considered "customers" of a broker-dealer under Exchange Act Rule 15c3–3(a)(1). For these purposes, and for the purpose of the definition of "Cleared CDS," the terms "purchasing" and "selling" mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing the rights or obligations under, a Cleared CDS, as the context may require. This is consistent with the meaning of the terms "purchase" or "sale" under the Exchange Act in the context of security-based swap agreements. *See* Exchange Act Section 3A(b)(4).

[48] The clearing member must disclose that it is not regulated by the Commission and that U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply, that the insolvency law of the applicable jurisdiction may affect the customer's ability to recover funds and securities or the speed of any such recovery, and (if applicable) that non-U.S. members may be subject to an insolvency regime that is materially different from that applicable to U.S. persons.

[49] Cash collateral transferred to ICE Trust may be invested in "Eligible Custodial Assets," as defined in ICE Trust's "Custodial Asset Policies." Also, collateral transferred to ICE Trust may be held at a subcustodian.

that the assets held therein are customer assets used to collateralize obligations of the customer to the clearing member, and that the assets held in the account may not otherwise be pledged or rehypothecated by the clearing member or the custodian; or (2) in an omnibus account for which the clearing member maintains daily records as to the amount owing to each customer, and which is subject to an agreement between the clearing member and the custodian specifying: (i) That all account assets are held for the exclusive benefit of the clearing member's customers and are being kept separate from any other accounts that the clearing member maintains with the custodian; (ii) that the account assets may not be used as security for a loan to the clearing member by the custodian, and shall be subject to no right, charge, security interest, lien, or claim of any kind in favor of the custodian or any person claiming through the custodian; and (iii) that the assets may not otherwise be pledged or rehypothecated by the clearing member or the custodian.[50] Under either approach, the third-party custodian cannot be affiliated with the clearing member.[51] Moreover, if the third-party custodian is a U.S. entity, it must be a bank (as that term is defined in Section 3(a)(6) of the Exchange Act), have total regulatory capital of at least $1 billion,[52] and have been approved to engage in a trust business by an appropriate regulatory agency. A custodian that is not a U.S. entity must have regulatory capital of at least $1 billion,[53] and must provide the clearing member, the customer and ICE Trust with a legal opinion providing that the account assets are subject to regulatory requirements in the custodian's home jurisdiction designed to protect, and provide for the prompt return of, custodial assets in the event of the custodian's insolvency, and that the assets held in that account reasonably could be expected to be legally separate from the clearing member's assets in the event of the clearing member's insolvency. Also, cash collateral posted with the third-party custodian may be invested in other assets, consistent with the investment policies that govern collateral held at ICE Trust.[54] Finally, a clearing member that uses a third-party custodian to hold customer collateral must notify ICE Trust of that use.

As before, to the extent there is any delay in the clearing member transferring such funds and securities to ICE Trust or a third-party custodian,[55] the clearing member must effectively segregate the collateral in a way that, pursuant to applicable law, could reasonably be expected to effectively protect the collateral from the clearing member's creditors. The clearing member may not permit customers to "opt out" of such segregation even if applicable regulations or laws otherwise would permit such "opt out."

Also, as before, this temporary exemption is conditioned on clearing member compliance with a self-assessment and audit requirement,[56] and on the clearing member's agreement to provide the Commission with access to information related to Cleared CDS transactions.[57]

As the Commission discussed in the March 2010 ICE Trust Exemptive Order, requiring clearing members that receive or hold customer collateral to satisfy such conditions will not guarantee that a customer would receive the return of its collateral in the event of a clearing member's insolvency, particularly in light of the fact-specific nature of the insolvency process and the multiplicity of insolvency regimes that may apply to ICE Trust's members clearing for U.S. customers. The Commission believes, however, that these steps will increase the likelihood that customers would be able to access collateral in such an insolvency event. The Commission also recognizes that these customers generally may be expected to be sophisticated market participants that should be able to weigh the risks associated with entering into arrangements with intermediaries that are not registered broker-dealers, particularly in light of the disclosure required as a condition to this temporary exemption.

[50] We do not contemplate that either of these approaches involving the use of a third-party custodian would interfere with the ability of a clearing member and its customer to agree as to how any return or losses earned on those assets would be distributed between the clearing member and its customer.

Also, the restriction in both approaches on the clearing member's and the custodian's ability to rehypothecate these customer funds and securities does not preclude that collateral from being transferred to ICE Trust as necessary to satisfy variation margin requirements in connection with the customer's CDS position.

[51] For purposes of the Order, an "affiliated person" of a clearing member mean any person who directly or indirectly controls a clearing member or any person who is directly or indirectly controlled by or under common control with a clearing member; ownership of 10 percent or more of an entity's common stock will be deemed prima facie control of that entity. *See* definition in paragraph III.(g)(2) of this Order. This standard is analogous to the standard used to identify affiliated persons of broker-dealers under Exchange Act Rule 15c3–3(a)(13), 17 CFR 240.15c3–3(a)(13).

[52] In particular, custodians that are U.S. entities must have total capital, as calculated to meet the applicable requirements imposed by the entity's appropriate regulatory agency of at least $1 billion. The term "appropriate regulatory agency" is defined in Section 3(a)(34) of the Exchange Act, 15 U.S.C. 78c(a)(34).

[53] Custodians that are non-U.S. entities must have total capital, as calculated to meet the applicable requirements imposed by the foreign financial regulatory authority of at least $1 billion. The term "foreign financial regulatory authority" is defined in Section 3(a)(52) of the Exchange Act, 15 U.S.C. 78c(a)(52).

[54] *See* note 49, *supra.*

[55] This provision is intended to address short-term technology or operational issues. ICE Trust rules require collateral to be transferred promptly on receipt, with the expectation that margin would be transferred on the same business day.

[56] In particular, to facilitate compliance with the segregation practices that are required as a condition to this temporary exemption, the clearing member must annually provide ICE Trust with a self-assessment that it is in compliance with the requirements, along with a report by the clearing member's independent third-party auditor that attests to that assessment. The report must be dated the same date as the clearing member's annual audit report (but may be separate from it), and must be produced in accordance with the standards that the auditor follows in auditing the clearing member's financial statements.

As the self-assessment is intended to serve as the basis for the third-party auditor's report, we expect the self-assessment to be generally contemporaneous with that report.

[57] Specifically, to support these segregation practices and enhance the ability to detect and deter circumstances in which clearing members fail to segregate customer collateral consistent with the exemption, this temporary exemption is conditioned on the clearing member agreeing to provide the Commission with access to information related to Cleared CDS transactions. This requirement is consistent with a requirement in Exchange Act Rule 15a–6(a)(3)(i)(B), which exempts certain foreign broker-dealers from registering with the Commission. *See* Exchange Act Rule 15a–6(a)(3)(i)(B).

Under this condition, the clearing member would provide the Commission (upon request and subject to agreements reached between the Commission or the U.S. Government and an appropriate foreign securities authority, *see* Section 3(a)(50) of the Exchange Act, 15 U.S.C. 78c(a)(50)), with information or documents within the clearing member's possession, custody, or control, as well as testimony of clearing member personnel and assistance in taking the evidence of other persons, that relates to Cleared CDS transactions. If, after the clearing member has exercised its best efforts to provide this information (including requesting the appropriate governmental body and, if legally necessary, its customers), the clearing member nonetheless is prohibited from providing the information by applicable foreign law or regulations, this temporary conditional exemption would no longer be available to the clearing member.

Consistent with the discussion above as to the loss of an exemption due to an underlying representation no longer being accurate, *see* note 17, *supra,* if a clearing member were to lose the benefit of this exemption due to the failure to provide information to the Commission as the result of a prohibition by an applicable foreign law or regulation, the legal status of existing open positions in non-excluded CDS associated with those clearing members and its customers would remain unchanged, but the clearing member could not establish new CDS positions pursuant to the exemption.

G. Conditional Temporary Exemption for Certain Clearing Members of ICE Trust That Are Registered Futures Commission Merchants

Absent an exception or exemption, futures commission merchants that effect transactions in non-excluded CDS that are securities may be required to register as broker-dealers pursuant to Section 15(a)(1) of the Exchange Act.[58] Moreover, certain reporting and other requirements of the Exchange Act could apply to such persons, as broker-dealers, regardless of whether they are registered with the Commission.

It is consistent with our investor protection mandate to require that intermediaries in securities transactions that receive or hold funds and securities on behalf of others comply with standards that safeguard the interests of their customers. At the same time, requiring intermediaries that receive or hold funds and securities on behalf of customers in connection with transactions in non-excluded CDS, prior to the effective date of the Dodd-Frank Act, to register as broker-dealers may deter the use of CCPs in CDS transactions, to the detriment of the markets and market participants generally.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant a conditional exemption until July 16, 2011 from certain Exchange Act requirements. In general, the Commission is providing a temporary exemption, subject to the conditions discussed below, to any ICE Trust clearing member registered as a futures commission merchant pursuant to Section 4f(a)(1) of the CEA (but that is not registered as a broker-dealer under Section 15(b) of the Exchange Act (other than paragraph (11) thereof)) that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling or holding Cleared CDS positions for other persons. Solely with respect to Cleared CDS, those members generally will be exempt from those provisions of the Exchange Act and the underlying rules and regulations that do not apply to security-based swap agreements. This exemption does not extend to Exchange Act provisions that explicitly apply in connection with security-based swap agreements,[59] or to related enforcement authority provisions.[60]

This temporary exemption also does not extend to: The exchange registration requirements of Exchange Act Sections 5 and 6;[61] the clearing agency registration requirements of Exchange Act Section 17A; the requirements of Exchange Act Sections 12, 13, 14, 15(d), and 16;[62] the Commission's administrative proceeding authority under Sections 15(b)(4) and (b)(6);[63] or certain provisions related to government securities.[64]

This temporary exemption is subject to the clearing member complying with conditions that are important for protecting customer funds and securities. Any ICE Trust clearing member relying on this temporary exemption must be in material compliance with the rules of ICE Trust, and in material compliance with applicable laws and regulations relating to capital, liquidity, and segregation of customers' funds and securities (and related books and records provisions) with respect to Cleared CDS.[65] In addition, the customers for whom the clearing member receives or holds such funds or securities may not be natural persons, and the clearing member must make certain risk disclosures to those customers.[66]

This temporary exemption is further conditioned on funds or securities received or held by the clearing member for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for those customer being held: (i) In an account established pursuant to Section 4d of the CEA; or (ii) in the absence of a 4d Order from the CFTC, in an account that is part of a separate account class, specified by CFTC Bankruptcy Rules,[67] established for a futures commission merchant to hold its customers' positions and collateral in cleared OTC derivatives.

To facilitate compliance with these segregation conditions, the clearing member—regardless of the type of account discussed above that it uses—also must annually provide ICE Trust with a self-assessment that it is in compliance with the requirements, along with a report by the clearing member's independent third-party auditor that attests to that assessment.[68] Finally, an ICE Trust clearing member that receives or holds funds or securities of customers for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions shall segregate such funds and securities of customers from the ICE Trust clearing member's own assets (*i.e.,* the member may not permit the customers to "opt out" of applicable segregation requirements for such funds and securities even if regulations or laws would permit the customer to "opt out").

H. Extended and Modified Temporary General Exemption for Certain Registered Broker-Dealers

The March 2010 ICE Trust Exemptive Order included limited exemptions from Exchange Act requirements to registered broker-dealers in connection with their activities involving Cleared CDS. In crafting these temporary exemptions, the Commission balanced the need to avoid creating disincentives to the prompt use of CCPs against the critical role that certain broker-dealers

[58] 15 U.S.C. 78o(a)(1). This section generally provides that, absent an exception or exemption, a broker or dealer that uses the mails or any means of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, any security must register with the Commission.

[59] *See* note 28, *supra.*

[60] Thus, for example, the Commission retains the ability to investigate potential violations and bring enforcement actions in the Federal courts as well as in administrative proceedings, and to seek the full panoply of remedies available in such cases.

[61] This Order also includes a separate temporary exemption from Sections 5 and 6 in connection with the settlement price calculation methodology of ICE Trust. *See* Part II.D, *supra.*

[62] 15 U.S.C. 78*l,* 78m, 78n, 78o(d), 78p. Futures commission merchants instead should refer to the interim final temporary rules issued by the Commission. *See* note 1, *supra.*

[63] Exchange Act Sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission authority to take action against broker-dealers and associated persons in certain situations.

[64] This exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in Section 15C, 15 U.S.C. 78o–5, and its underlying rules and regulations; nor does the exemption extend to related definitions found at paragraphs (42) through (45) of Section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under Section 36 to issue exemptions in connection with those provisions. *See* Exchange Act Section 36(b), 15 U.S.C. 78mm(b).

[65] The term "customer," solely for purposes of Part III.(e) and (f)2, *infra,* and corresponding references in this Order, means a "customer" as defined under CFTC Regulation 1.3(k). 17 CFR 1.3(k).

[66] The clearing member must disclose that it is not regulated by the Commission, that U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to any funds or securities held by the clearing member to collateralize Cleared CDS, and that the applicable insolvency law may affect such customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding.

[67] 17 CFR 190.01 *et seq.*

[68] The report must be dated the same date as the clearing member's annual audit report (but may be separate from it), and must be produced in accordance with the standards that the auditor follows in auditing the clearing member's financial statements.

This condition requiring the clearing member to convey a third-party audit report to ICE Trust as a repository for regulators does not impose upon ICE Trust any independent duty to audit or otherwise review that information. This condition also does not impose on ICE Trust any independent fiduciary or other obligation to any customer of a clearing member.

play in promoting market integrity and protecting customers (including broker-dealer customers that are not involved with CDS transactions). In light of the risk management and systemic benefits in continuing to facilitate CDS clearing by ICE Trust through targeted exemptions to registered broker-dealers prior to the effective date of the Dodd-Frank Act, the Commission finds pursuant to Section 36 of the Exchange Act that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to extend this temporary registered broker-dealer exemption from certain Exchange Act requirements until July 16, 2011, subject to certain modifications discussed below.[69]

Consistent with the temporary exemptions discussed above, and solely with respect to Cleared CDS, the Commission is temporarily exempting registered broker-dealers, including registered broker-dealers that are also registered as futures commission merchants pursuant to Section 4f(a)(1) of the CEA ("BD–FCMs"), from provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements, subject to certain conditions. The Commission is not excluding registered broker-dealers, including BD–FCMs, from Exchange Act provisions that explicitly apply in connection with security-based swap agreements or from related enforcement authority provisions.[70] As above, and for similar reasons, the Commission is not exempting registered broker-dealers, including BD–FCMs, from: Sections 5, 6, 12(a) and (g), 13, 14, 15(b)(4), 15(b)(6), 15(d), 16 and 17A of the Exchange Act.[71]

Further the Commission is not exempting registered broker-dealers, including BD–FCMs (except as discussed below), from the following additional provisions under the Exchange Act: (1) Section 7(c),[72] regarding the unlawful extension of credit by broker-dealers; (2) Section 15(c)(3),[73] regarding the use of unlawful or manipulative devices by broker-dealers; (3) Section 17(a),[74] regarding broker-dealer obligations to make, keep and furnish information; (4) Section 17(b),[75] regarding broker-dealer records subject to examination; (5) Regulation T,[76] a Federal Reserve Board regulation regarding extension of credit by broker-dealers; (6) Exchange Act Rule 15c3–1,[77] regarding broker-dealer net capital; (7) Exchange Act Rule 15c3–3,[78] regarding broker-dealer reserves and custody of securities; (8) Exchange Act Rules 17a–3 through 17a–5,[79] regarding records to be made and preserved by broker-dealers and reports to be made by broker-dealers; and (9) Exchange Act Rule 17a–13,[80] regarding quarterly security counts to be made by certain exchange members and broker-dealers.[81] Registered broker-dealers, including BD–FCMs (except as discussed below), must comply with these provisions in connection with their activities involving non-excluded CDS because these provisions are especially important to helping protect customer funds and securities, ensure proper credit practices, and safeguard against fraud and abuse.[82]

ICE Trust clearing members that are BD–FCMs and that receive or hold customer funds or securities for the purpose of purchasing, selling, clearing, settling, or holding CDS positions cleared by ICE Trust in a futures account (as that term is defined in Rule 15c3–3(a)(15)) [83] also shall be exempt from Exchange Act Rule 15c3–3, subject to conditions that are similar to those—discussed above—that are applicable to ICE Trust clearing members that are FCMs but are not registered broker-dealers and that hold customer funds and securities in connection with Cleared CDS transactions. Thus, such BD–FCMs must be in material compliance with ICE Trust rules, as well as applicable laws and regulations relating to capital, liquidity, and segregation of customers' funds and securities (and related books and records provisions) with respect to Cleared CDS. A BD–FCM may not receive or hold funds or securities relating to Cleared CDS transactions and positions for customers who are natural persons. In addition, the BD–FCM must make certain risk disclosures to each such customer.[84] Further, the BD–FCM must hold the customer funds or securities in the same type of account as is required for other futures commission merchants that hold customer funds and securities in connection with Cleared CDS transactions.[85] The BD–FCM also must segregate the funds and securities of customers from the ICE Trust clearing member's own assets (*i.e.,* the member may not permit the customers to "opt out" of applicable segregation requirements for such funds and securities even if regulations or laws would permit the customer to "opt out"). In addition, the BD–FCM also must annually provide ICE Trust with a self-assessment that it is in compliance with the requirements, along with a report by the clearing member's independent

[69] The temporary exemptions addressed above—with regard to ICE Trust, certain clearing members and certain eligible contract participants—are not available to persons that are registered as broker-dealers with the Commission (other than those that are notice registered pursuant to Exchange Act Section 15(b)(11)). Exchange Act Section 15(b)(11) provides for notice registration of certain persons that effect transactions in security futures products. 15 U.S.C. 78o(b)(11).

[70] *See* note 28, *supra.* As noted above, broker-dealers also would be subject to Section 15(c)(1) of the Exchange Act, which prohibits brokers and dealers from using manipulative or deceptive devices, because that provision explicitly applies in connection with security-based swap agreements. In addition, to the extent the Exchange Act and any rule or regulation thereunder imposes any other requirement on a broker-dealer with respect to security-based swap agreements (*e.g.,* requirements under Rule 17h–1T to maintain and preserve written policies, procedures, or systems concerning the broker or dealer's trading positions and risks, such as policies relating to restrictions or limitations on trading financial instruments or products), these requirements would continue to apply to broker-dealers' activities with regard to Cleared CDS.

[71] *See* notes 33 and 34, *supra,* and accompanying text. We also are not exempting those members from provisions related to government securities, as discussed above. *See* note 37, *supra.*

[72] 15 U.S.C. 78g(c).

[73] 15 U.S.C. 78o(c)(3).

[74] 15 U.S.C. 78q(a).

[75] 15 U.S.C. 78q(b).

[76] 12 CFR 220.1 *et seq.*

[77] 17 CFR 240.15c3–1.

[78] 17 CFR 240.15c3–3.

[79] 17 CFR 240.17a–3 through 240.17a–5.

[80] 17 CFR 240.17a–13.

[81] Solely for purposes of this temporary exemption, in addition to the general requirements under the referenced Exchange Act sections, registered broker-dealers shall only be subject to the enumerated rules under the referenced Exchange Act sections.

[82] Indeed, Congress directed the Commission to promulgate broker-dealer financial responsibility rules, including rules relating to custody, the use of customer securities, the use of customers' deposits or credit balances, and the establishment of minimum financial requirements.

[83] 17 CFR 240.15c3–3(a)(15).

[84] The BD–FCM must disclose that U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to any funds or securities held by the clearing member to collateralize Cleared CDS positions, and that the applicable insolvency law may affect such customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding.

This BD–FCM condition differs from the analogous disclosure conditions related to other ICE Trust clearing members that hold customer funds and securities, in that the other conditions also require disclosure that the clearing member is not regulated by the Commission.

[85] As with the exemption applicable to those other ICE Trust clearing members, in the absence of a 4d order from the CFTC, the BD–FCM may hold the funds and securities in an account that is part of a separate account class, specified by CFTC Bankruptcy Rules, established for a futures commission merchant to hold its customers' positions in cleared OTC derivatives (and funds and securities posted to margin, guarantee, or secure such positions). *See* Part II.G, *supra.*

third-party auditor that attests to that assessment.[86]

Finally—and in addition to the conditions that are applicable to ICE Trust clearing members that are not broker-dealers and that hold customer funds and securities in connection with Cleared CDS transactions—the ICE Trust clearing member must comply with the margin rules for Cleared CDS of the self-regulatory organization that is its designated examining authority[87] (*e.g.,* FINRA).

I. Solicitation of Comments

When the Commission granted the March 2010 ICE Trust Exemptive Order extending the exemptions granted in connection with CDS clearing by ICE Trust, it requested comment on all aspects of the exemptions. The Commission received one comment in response to this request.[88]

In connection with this Order extending the exemptions granted in connection with CDS clearing by ICE Trust, the Commission reiterates the request for comments on all aspects of the exemptions.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml);* or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–05–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov/*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–05–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.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.

III. Conclusion

It is hereby ordered, pursuant to Section 36(a) of the Exchange Act, that, until July 16, 2011:

(a) Exemption from Section 17A of the Exchange Act.

ICE Trust U.S. LLC (ICE Trust U.S. LLC and any successor entity thereto is hereinafter referred to as "ICE Trust")[89] shall be exempt from Section 17A of the Exchange Act solely to perform the functions of a clearing agency for Cleared CDS (as defined in paragraph (g)(1) of this Order), subject to the following conditions:

(1) ICE Trust shall make available on its Web site its annual audited financial statements.

(2) ICE Trust shall keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it relating to its Cleared CDS clearance and settlement services. These records shall be kept for at least five years and for the first two years shall be held in an easily accessible place.

(3) ICE Trust shall supply information and periodic reports relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission, and shall provide access to the Commission to conduct on-site inspections of all facilities (including automated systems and systems environment), records, and personnel related to ICE Trust's Cleared CDS clearance and settlement services.

(4) ICE Trust shall notify the Commission, on a monthly basis, of any material disciplinary actions taken against any of its members utilizing its Cleared CDS clearance and settlement services, including the denial of services, fines, or penalties. ICE Trust shall notify the Commission promptly when ICE Trust involuntarily terminates the membership of an entity that is utilizing ICE Trust's Cleared CDS clearance and settlement services. Both notifications shall describe the facts and circumstances that led to ICE Trust's disciplinary action.

(5) ICE Trust shall notify the Commission of all changes to rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, including its fee schedule and changes to risk management practices, the day before effectiveness or implementation of such rule changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. All such rule changes will be posted on ICE Trust's Web site. Such notifications will not be deemed rule filings that require Commission approval.

(6) ICE Trust shall provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements. ICE Trust shall provide the Commission (beginning in its first year of operation) with its annual audited financial statements prepared by independent audit personnel.

(7) ICE Trust shall report all significant systems outages to the Commission. If it appears that the outage may extend for 30 minutes or longer, ICE Trust shall report the systems outage immediately. If it appears that the outage will be resolved in less than 30 minutes, ICE Trust shall report the systems outage within a reasonable time after the outage has been resolved.

(8) ICE Trust, directly or indirectly, shall make available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that ICE Trust may establish to calculate mark-to-market margin requirements for ICE Trust clearing members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Trust.

[86] The report must be dated the same date as the clearing member's annual audit report (but may be separate from it), and must be produced in accordance with the standards that the auditor follows in auditing the clearing member's financial statements. *See* text accompanying note 68, *supra.*

[87] *See* 17 CFR 240.17d–1 for a description of a designated examining authority.

[88] *See* Comment from Alessandro Cocco, Managing Director and Associate General Counsel, JP Morgan, Mar. 2, 2010, suggesting that customers' variation margin should not be required to be held in a segregated account. We also solicited comments earlier as part of the December 2009 ICE Trust Order and the March 2009 ICE Trust Order. We received one comment in response to our request to the December 2009 ICE Trust Order, *see* Comment from Kristie L. Lovelady, Dec. 9, 2009, requesting stronger restrictions generally, and no comments in response to our request to the March 2009 ICE Trust Order.

[89] ICE Trust has stated it intends to apply to the CFTC for registration as a derivatives clearing organization ("DCO") in advance of the Dodd-Frank Act implementation date to facilitate implementation of the Dodd-Frank Act requirements. ICE Trust has also indicated it may accomplish this transition by establishing a new entity registered as a DCO and either merging ICE Trust into the new DCO entity or transferring the assets and liabilities of ICE Trust to the new DCO entity. *See* November 2010 Request, *supra* note 4.

(9) If any ICE Trust clearing member that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons is a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof), and is permitted under FINRA rules to use the applicable margin pursuant to ICE Trust rules as a minimum for computing customer or broker-dealer margin, ICE Trust shall not materially change its methodology for determining Cleared CDS margin levels without prior written approval from the Commission staff, and from FINRA with respect to customer margin requirements that would apply to broker-dealers.

(b) Exemption from Sections 5 and 6 of the Exchange Act.

(1) ICE Trust shall be exempt from the requirements of Sections 5 and 6 of the Exchange Act and the rules and regulations thereunder in connection with its calculation of mark-to-market prices for open positions in Cleared CDS, subject to the following conditions:

(i) ICE Trust shall report the following information with respect to the calculation of mark-to-market prices for Cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise:

(A) The total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and

(B) The total unit volume and/or notional amount executed during the quarter, broken down by reference entity, security, or index;

(ii) ICE Trust shall establish and maintain adequate safeguards and procedures to protect clearing members' confidential trading information. Such safeguards and procedures shall include:

(A) Limiting access to the confidential trading information of clearing members to those employees of ICE Trust who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and

(B) Establishing and maintaining standards controlling employees of ICE Trust trading for their own accounts. ICE Trust must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed; and

(iii) ICE Trust shall satisfy the conditions of the temporary exemption from Section 17A of the Exchange Act set forth in paragraphs (a)(1)–(9) of this Order.

(2) Any ICE Trust clearing member shall be exempt from the requirements of Section 5 of the Exchange Act to the extent such ICE Trust clearing member uses any facility of ICE Trust to effect any transaction in Cleared CDS, or to report any such transaction, in connection with ICE Trust's clearance and risk management process for Cleared CDS.

(c) Exemption for ICE Trust, certain ICE Trust clearing members, and certain eligible contract participants.

(1) Persons eligible. The exemption in paragraph (c)(2) is available to:

(i) ICE Trust; and

(ii) Any eligible contract participant (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), including any ICE Trust clearing member, other than:

(A) An eligible contract participant that is a self-regulatory organization, as that term is defined in Section 3(a)(26) of the Exchange Act;

(B) A broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof); or

(C) A futures commission merchant registered pursuant to Section 4f(a)(1) of the Commodity Exchange Act that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons.

(2) Scope of exemption.

(i) In general. Subject to the conditions specified in paragraph (c)(3) of this subsection, such persons generally shall, solely with respect to Cleared CDS, be exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply in connection with security-based swap agreements. Accordingly, under this exemption, those persons remain subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements (*i.e.,* paragraphs (2) through (5) of Section 9(a), Section 10(b), Section 15(c)(1), paragraphs (a) and (b) of Section 16, Section 20(d) and Section 21A(a)(1) and the rules thereunder that explicitly are applicable to security-based swap agreements). All provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions also remain applicable.

(ii) Exclusions from exemption. The exemption in paragraph (c)(2)(i), however, does not extend to the following provisions under the Exchange Act:

(A) Paragraphs (42), (43), (44), and (45) of Section 3(a);

(B) Section 5;

(C) Section 6;

(D) Section 12 and the rules and regulations thereunder;

(E) Section 13 and the rules and regulations thereunder;

(F) Section 14 and the rules and regulations thereunder;

(G) The broker-dealer registration requirements of Section 15(a)(1), and the other requirements of the Exchange Act (including paragraphs (4) and (6) of Section 15(b)) and the rules and regulations thereunder that apply to a broker or dealer that is not registered with the Commission;

(H) Section 15(d) and the rules and regulations thereunder;

(I) Section 15C and the rules and regulations thereunder;

(J) Section 16 and the rules and regulations thereunder; and

(K) Section 17A (other than as provided in paragraph (a)).

(3) Conditions for ICE Trust clearing members.

(i) Any ICE Trust clearing member relying on this exemption must be in material compliance with the rules of ICE Trust.

(ii) Any ICE Trust clearing member relying on this exemption that participates in the clearing of Cleared CDS transactions on behalf of other persons must annually provide a certification to ICE Trust that attests to whether the clearing member is relying on the exemption from broker-dealer related requirements set forth in paragraph (d) of this Order.

(d) Exemption from broker-dealer related requirements for certain ICE Trust clearing members and certain eligible contract participants.

(1) Persons eligible. The exemption in paragraph (d)(2) is available to:

(i) Any ICE Trust clearing member (other than one that is registered as a broker or dealer under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) or one that is registered as a futures commission merchant pursuant to Section 4f(a)(1) of the Commodity Exchange Act that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons); and

(ii) Any eligible contract participant that does not receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons (other than one that is registered as a broker or dealer under Section 15(b) of

the Exchange Act (other than paragraph (11) thereof)).

(2) Scope of exemption. The persons described in paragraph (d)(1) shall, solely with respect to Cleared CDS, be exempt from the broker-dealer registration requirements of Section 15(a)(1) and the other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)) and the rules and regulations thereunder that apply to a broker or dealer that is not registered with the Commission, subject to the conditions set forth in paragraph (d)(3) with respect to ICE Trust clearing members.

(3) Conditions for ICE Trust clearing members.

(i) General condition for ICE Trust clearing members. An ICE Trust clearing member relying on this exemption must be in material compliance with the rules of ICE Trust, and also must be in material compliance with applicable laws and regulations relating to capital, liquidity, and segregation of customers' funds and securities (and related books and records provisions) with respect to Cleared CDS.

(ii) Additional conditions for ICE Trust clearing members that receive or hold customer funds or securities. Any ICE Trust clearing member that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for U.S. persons (or for any person if the clearing member is a U.S. clearing member)—other than for an affiliate that controls, is controlled by, or is under common control with the clearing member—also shall comply with the following conditions with respect to such activities:

(A) The U.S. person (or any person if the clearing member is a U.S. clearing member) for whom the clearing member receives or holds such funds or securities shall not be natural persons;

(B) The clearing member shall disclose to such U.S. person (or to any such person if the clearing member is a U.S. clearing member) that the clearing member is not regulated by the Commission and that U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to any funds or securities held by the clearing member, that the insolvency law of the applicable jurisdiction may affect such person's ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding, and, if applicable, that non-U.S. clearing members may be subject to an insolvency regime that is materially different from that applicable to U.S. persons;

(C) As promptly as practicable after receipt, the clearing member shall transfer such funds and securities (other than those promptly returned to such other person) to:

(I) The clearing member's Custodial Client Omnibus Margin Account at ICE Trust; or

(II) An account held by a third-party custodian, subject to the following requirements:

(*a*) The funds and securities must be held either:

(*1*) In the name of a customer, subject to an agreement to which the customer, the clearing member and the custodian are parties, acknowledging that the assets held therein are customer assets used to collateralize obligations of the customer to the clearing member, and that the assets held in that account may not otherwise be pledged or rehypothecated by the clearing member or the custodian; or

(*2*) In an omnibus account for which the clearing member maintains a daily record as to the amount held in the account that is owed to each customer, and which is subject to an agreement between the clearing member and the custodian specifying that:

(*i*) All assets in that account are held for the exclusive benefit of the clearing member's customers and are being kept separate from any other accounts maintained by the clearing member with the custodian;

(*ii*) The assets held in that account shall at no time be used directly or indirectly as security for a loan to the clearing member by the custodian and shall be subject to no right, charge, security interest, lien, or claim of any kind in favor of the custodian or any person claiming through the custodian; and

(*iii*) The assets held in that account may not otherwise be pledged or rehypothecated by the clearing member or the custodian;

(*b*) The custodian may not be an affiliated person of the clearing member (as defined at paragraph (g)(2)); and

(*1*) If the custodian is a U.S. entity, it must be a bank (as that term is defined in section 3(a)(6) of the Exchange Act), have total capital, as calculated to meet the applicable requirements imposed by the entity's appropriate regulatory agency (as defined in section 3(a)(34) of the Exchange Act), of at least $1 billion, and have been approved to engage in a trust business by its appropriate regulatory agency;

(*2*) If the custodian is not a U.S. entity, it must have total capital, as calculated to meet the applicable requirements imposed by the foreign financial regulatory authority (as defined in section 3(a)(52) of the Exchange Act) responsible for setting capital requirements for the entity, equating to at least $1 billion, and provide the clearing member, the customer and ICE Trust with a legal opinion providing that the assets held in the account are subject to regulatory requirements in the custodian's home jurisdiction designed to protect, and provide for the prompt return of, custodial assets in the event of the insolvency of the custodian, and that the assets held in that account reasonably could be expected to be legally separate from the clearing member's assets in the event of the clearing member's insolvency;

(*c*) Such funds may be invested in Eligible Custodial Assets as that term is defined in ICE Trust's Custodial Asset Policies; and

(*d*) The clearing member must provide notice to ICE Trust that it is using the third-party custodian to hold customer collateral.

(D) To the extent there is any delay in transferring such funds and securities to the third-parties identified in paragraph (C), the clearing member shall effectively segregate the collateral in a way that, pursuant to applicable law, is reasonably expected to effectively protect such funds and securities from the clearing member's creditors. The clearing member shall not permit such persons to "opt out" of such segregation even if regulations or laws otherwise would permit such "opt out."

(E) The clearing member annually must provide ICE Trust with

(I) An assessment by the clearing member that it is in compliance with all the provisions of paragraphs (d)(3)(ii)(A) through (D) in connection with such activities, and

(II) A report by the clearing member's independent third-party auditor that attests to, and reports on, the clearing member's assessment described in paragraph (d)(3)(ii)(E)(I) and that is

(*a*) Dated as of the same date as, but which may be separate and distinct from, the clearing member's annual audit report;

(*b*) Produced in accordance with the auditing standards followed by the independent third party auditor in its audit of the clearing member's financial statements.

(F) The clearing member shall provide the Commission (upon request or pursuant to agreements reached between the Commission or the U.S. Government and any foreign securities authority (as defined in Section 3(a)(50) of the Exchange Act)) with any information or documents within the possession, custody, or control of the

clearing member, any testimony of personnel of the clearing member, and any assistance in taking the evidence of other persons, wherever located, that the Commission requests and that relates to Cleared CDS transactions, except that if, after the clearing member has exercised its best efforts to provide the information, documents, testimony, or assistance, including requesting the appropriate governmental body and, if legally necessary, its customers (with respect to customer information) to permit the clearing member to provide the information, documents, testimony, or assistance to the Commission, the clearing member is prohibited from providing this information, documents, testimony, or assistance by applicable foreign law or regulations, then this exemption shall no longer be available to the clearing member.

(e) Exemption for certain ICE Trust clearing members registered as futures commission merchants.

Any ICE Trust clearing member registered as a futures commission merchant pursuant to Section 4f(a)(1) of the Commodity Exchange Act (but that is not registered as a broker or dealer under Section 15(b) of the Exchange Act (other than paragraph (11) thereof)) that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons shall be exempt from the provisions of the Exchange Act and the rules and regulations thereunder specified in paragraph (c)(2), and from the broker-dealer registration requirements of Section 15(a)(1) and the other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)) and the rules and regulations thereunder that apply to a broker or dealer that is not registered with the Commission, solely with respect to Cleared CDS, subject to the following conditions:

(1) The clearing member shall be in material compliance with the rules of ICE Trust and also shall be in material compliance with applicable laws and regulations, relating to capital, liquidity, and segregation of customers' funds and securities (and related books and records provisions) with respect to Cleared CDS;

(2) The customers for whom the clearing member receives or holds such funds or securities shall not be natural persons;

(3) The clearing member shall disclose to such customers that the clearing member is not regulated by the Commission, that U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to any funds or securities held by the clearing member to collateralize Cleared CDS positions, and that the applicable insolvency law may affect such customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding;

(4) Customer funds and securities received or held by the clearing member for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for such customers shall be held in one of the following manners:

(i) In an account established in accordance with section 4d of the Commodity Exchange Act and CFTC Rules 1.20 through 1.30 and 1.32 [17 CFR 1.20 through 1.30 and 1.32] thereunder; or

(ii) In the absence of an Order from the Commodity Futures Trading Commission ("CFTC") permitting the use of an account specified in subparagraph (e)(4)(i) for holding such funds and securities, in an account that is part of a separate account class, specified by CFTC Bankruptcy Rules [17 CFR 190.01 *et seq.*], established for a futures commission merchant to hold its customers' positions in cleared OTC derivatives (and funds and securities posted to margin, guarantee, or secure such positions);

(5) The clearing member annually shall provide ICE Trust with

(i) An assessment by the clearing member that it is in compliance with subparagraph (e)(4) in connection with such activities, and

(ii) A report by the clearing member's independent third-party auditor that attests to, and reports on, the clearing member's assessment described in subparagraph (e)(5)(i) and that is:

(A) Dated as of the same date as, but which may be separate and distinct from, the clearing member's annual audit report; and

(B) Produced in accordance with the auditing standards followed by the independent third-party auditor in its audit of the clearing member's financial statements.

(6) To the extent that the clearing member receives or holds funds or securities of customers for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions, the clearing member shall segregate such funds and securities of customers from the clearing member's own assets (*i.e.,* the member may not permit such customers to "opt out" of applicable segregation requirements for such funds and securities even if regulations or laws would permit the customer to "opt out").

(f) Exemption for certain registered broker-dealers.

(1) In general. A broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) shall be exempt from the provisions of the Exchange Act and the rules and regulations thereunder specified in paragraph (c)(2), solely with respect to Cleared CDS, except:

(i) Section 7(c);

(ii) Section 15(c)(3);

(iii) Section 17(a);

(iv) Section 17(b);

(v) Regulation T, 12 CFR 200.1 *et seq.;*

(vi) Rule 15c3–1;

(vii) Rule 15c3–3;

(viii) Rule 17a–3;

(ix) Rule 17a–4;

(x) Rule 17a–5; and

(xi) Rule 17a–13.

(2) Broker-dealers that also are futures commission merchants. An ICE Trust clearing member that is a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) and that is also registered as a futures commission merchant pursuant to Section 4f(a)(1) of the Commodity Exchange Act and that receives or holds customer funds and securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS in a futures account (as that term is defined in Rule 15c3–3(a)(15) [17 CFR 240.15c3–3(a)(15)]) also shall be exempt from Exchange Act Rule 15c3–3, subject to the following conditions:

(i) The clearing member shall comply with the conditions set forth in paragraphs (e)(1), (2), (4), (5), and (6) above;

(ii) The clearing member shall disclose to Cleared CDS customers that the U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to funds or securities held by the clearing member to collateralize Cleared CDS positions, and that the applicable insolvency law may affect such customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding; and

(iii) The clearing member shall collect from each customer the amount of margin that is not less than the amount required for Cleared CDS under the margin rule of the self-regulatory organization that is its designated examining authority.

(g) Definitions.

(1) For purposes of this Order, the term "Cleared CDS" shall mean a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Trust, that is offered only to, purchased only by, and sold only to eligible contract

participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which:

(i) The reference entity, the issuer of the reference security, or the reference security is one of the following:

(A) An entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available;

(B) A foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States;

(C) A foreign sovereign debt security;

(D) An asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or

(E) An asset-backed security issued or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae; or

(ii) The reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (1).

(2) For purposes of this Order, the term "Affiliated Person of the Clearing Member" shall mean any person who directly or indirectly controls a clearing member or any person who is directly or indirectly controlled by or under common control with the clearing member. Ownership of 10 percent or more of the common stock of the relevant entity will be deemed *prima facie* control of that entity.

IV. Paperwork Reduction Act

Certain provisions of this Order contain "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995.[90] The Commission has submitted the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. 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.

A. Collection of Information

The Commission found it to be necessary or appropriate in the public interest and consistent with the protection of investors to grant the conditional temporary exemptions discussed in this Order until July 16, 2011. Among other things, the Order would require certain ICE Trust clearing members that receive or holds customers' funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions to: (i) Provide ICE Trust with certain certifications/notifications, (ii) make certain disclosures to cleared CDS customers, (iii) enter into certain agreements to protect customer assets, (iv) maintain a record of each customer's share of assets maintained in an omnibus account, and (v) obtain a separate report, as part of its annual audit report, as to its compliance with the conditions of the ICE Trust Order regarding protection of customer assets. The Order also would require certain ICE Trust clearing members that receive or hold customers' funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions to: (a) Make certain disclosures to those customers; and (b) provide ICE Trust with a self-assessment as to its compliance with certain exemptive conditions, and obtain a separate report, as part of its annual audit report, as to its compliance with the conditions of the Order regarding protection of customer assets.

B. Proposed Use of Information

These collection of information requirements are designed, among other things, to inform cleared CDS customers that their ability to recover assets placed with the clearing member are dependent on the applicable insolvency regime, provide Commission staff with access to information regarding whether clearing members are complying with the conditions of the ICE Trust order, and provide documentation helpful for the protection of cleared CDS customers' funds and securities.

C. Respondents

Based on conversations with industry participants, the Commission understands that approximately 14 firms may be presently engaged as CDS dealers and thus may seek to be a clearing member of ICE Trust. In addition, 6 more firms may enter into this business. Consequently, the Commission estimates that ICE Trust, like the other CCPs that clear CDS transactions, may have up to 20 clearing members.

D. Total Annual Reporting and Recordkeeping Burden

Paragraph III.(c)(3)(ii) of this Order requires any ICE Trust clearing member relying on the exemptive relief specified in paragraph (c) that participates in the clearing of cleared CDS transactions on behalf of other persons to annually provide a certification to ICE Trust that attests to whether the clearing member is relying on the exemption from broker-dealer related requirements set forth in paragraph (d) of that Order. The Commission estimates that it would take a clearing member approximately one half hour each year to complete the certification and provide it to ICE Trust, resulting in an aggregate burden of 10 hours per year for all 20 clearing members to comply with this requirement on an annual basis.[91]

Paragraph III.(d)(3)(ii)(C)(II)(*d*) of this Order requires that a clearing member notify ICE Trust if it is using a third-party custodian to hold customer collateral. The Commission estimates that it would take a clearing member approximately one half hour each year to draft a notification and provide it to ICE Trust, which would result in an aggregate burden of 10 hours per year for all 20 clearing members to comply with this requirement on an annual basis.[92]

Paragraph III.(d)(3)(ii)(B) of this Order requires an ICE Trust clearing member to disclose to its U.S. customers[93] that it is not regulated by the Commission and that U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to any funds or securities it holds, that the insolvency law of the applicable jurisdiction may affect the customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding, and, if it is not a U.S. entity, that it may be subject to an insolvency regime that is materially different from that applicable to U.S. persons. The Commission believes that clearing members could use the language in the ICE Trust order that describes the disclosure that must be made as a template to draft the disclosure. Consequently the Commission estimates, based on staff experience, that it would take a clearing member approximately one hour to draft the disclosure. Further, the Commission believes clearing members will include this disclosure with other documents or agreements provided to cleared CDS customers and a clearing member may take approximately one half hour to

[90] 44 U.S.C. 3501 *et seq.*

[91] 10 hours = (20 clearing members × ½ hour per clearing member). This estimate is based on burden estimates published with respect to other Commission actions that contained similar certification requirements (*see e.g.,* Exchange Act Release No. 41661 (Jul 27, 1999) (64 FR 42012 (Aug. 3, 1999)), and the burden associated with the Year 2000 Operational Capability Requirements, including notification and certifications required by Rule 15b7–3T(e).

[92] *Id.*

[93] If the clearing member is a U.S. entity, it must make this disclosure to all of its customers.

determine how the disclosure should be integrated into those other documents or agreements, resulting in a one-time aggregate burden of 30 hours for all 20 clearing members to comply with this requirement.[94]

Paragraph III.(d)(3)(ii)(C)(II)(*a*)(*1*) of this Order requires that, if an ICE Trust clearing member chooses to segregate each of its customers' funds and securities in a separate account, it must obtain a tri-party agreement for each such account acknowledging that the assets held in the account are customer assets used to collateralize obligations of the customer to the clearing member, and that the assets held in the account may not otherwise be pledged or re-hypothecated by the clearing member or the custodian. Paragraph III.(d)(ii)(C)(II)(*a*)(*2*) of the ICE Trust order requires that, if an ICE Trust clearing member chooses to segregate its customers' funds and securities on an omnibus basis, it must obtain an agreement with the custodian with respect to the omnibus account acknowledging that the assets held in the account (i) are customer assets and are being kept separate from any other accounts maintained by the clearing member with the custodian, (ii) may at no time be used directly or indirectly as security for a loan to the clearing member by the custodian and shall be subject to no right, charge, security interest, lien, or claim of any kind in favor of the custodian or any person claiming through the custodian, and (iii) may not otherwise be pledged or re-hypothecated by the clearing member or the custodian. Opening a bank account generally includes discussions regarding the purpose for the account and a determination as to the terms and conditions applicable to such an account. The Commission understands that most banks presently maintain omnibus and other similar types of accounts that are designed to recognize legally that the assets in the account may not be attached to cover debts of the account holder. Thus the standard agreement for this type of account used by banks should contain the representations and disclosures required by the proposed amendment. However, a small percentage of clearing members may need to work with a bank to modify its standard agreement. The Commission estimates that 5% of the 20 clearing members, or 1 firm, may use a bank with a standard agreement that does not contain the required language.[95] The Commission further estimates each clearing member that uses a bank with a standard agreement that does not contain the required language would spend approximately 20 hours of employee resources working with the bank to update its standard agreement template. Therefore, the Commission estimates that the total one-time burden to the industry as a result of this proposed requirement would be approximately 20 hours.[96]

Paragraph III.(d)(3)(ii)(C)(II)(*a*)(*2*) of this Order further requires that the clearing member maintain a daily record as to the amount held in the omnibus account that is owed to each customer. The Commission included this requirement in the ICE Trust order to stress the importance of such a record. However it believes that a prudent clearing member likely would create and maintain such a record for business purposes. Consequently, the Commission believes this requirement would not create any additional paperwork burden.

Paragraph III.(d)(3)(ii)(E) of this Order requires ICE Trust clearing members that receive or hold customers' funds or securities for the purpose of purchasing, selling, clearing, settling, or holding cleared CDS positions annually to provide ICE Trust with an assessment that it is in compliance with all the provisions of paragraphs III.(d)(3)(ii)(A) through (D) of that order in connection with such activities, and a report by the clearing member's independent third-party auditor, as of the same date as the firm's annual audit report,[97] that attests to, and reports on, the clearing member's assessment. Paragraph III.(e)(5) of this Order requires ICE Trust clearing members that receive or hold customers' funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions annually to provide ICE Trust with an assessment that it is in compliance with all the provisions of paragraphs III.(e)(4)(i) through (iii) of that order in connection with such activities, and a report by the clearing member's independent third-party auditor, as of the same date as the firm's annual audit report,[98] that attests to, and reports on, the clearing member's assessment. Each clearing member will have to comply with either Paragraph III.(d)(3)(ii)(E) of this Order or Paragraph III.(e)(5) of this Order but not both. The Commission estimates that it will take each clearing member approximately five hours each year to assess its compliance with the requirements of the order relating to segregation of customer assets and attest that it is in compliance with those requirements.[99] Further, the Commission estimates that it will cost each clearing member approximately $200,000 more each year to have its auditor prepare this special report as part of its audit of the clearing member.[100] Consequently, the Commission estimates that compliance with this requirement will result in an aggregate annual burden of 100 hours for all 20 clearing members, and that the total additional cost of this requirement will be approximately $4,000,000 each year.[101]

Paragraph III.(e)(3) of the Order requires that any ICE Trust clearing

[94] 30 hours = (1 hour per clearing member to draft the disclosure + ½ hour per clearing member to determine how the disclosure should be integrated into those other documents or agreements) × 20 clearing members.

[95] This estimate is based on burden estimates published with respect to other Commission actions that contained similar certification requirements (*see e.g.,* Exchange Act Release No. 55431 (Mar. 9, 2007) (72 FR 12862 (Mar. 19, 2007)), and the burden associated with the amendments to the financial responsibility rules, including language required in securities lending agreements).

[96] 20 hours = (20 clearing members × 5%) × 20 hours to work with a bank to update its standard agreement template to include the necessary language.

[97] The Commission intends for this requirement to be performed in conjunction with the firm's annual audit report.

[98] The Commission intends for this requirement to be performed in conjunction with the firm's annual audit report.

[99] This estimate is based on burden estimates published with respect to other Commission actions that contained similar certification requirements (*see e.g.,* Securities Act Release No. 8138 (Oct. 9, 2002) (67 FR 66208 (Oct. 30, 2002)), and the burden associated with the Disclosure Required by the Sarbanes-Oxley Act of 2002, including requirements relating to internal control reports).

[100] This estimate is based on staff conversations with an audit firm. That firm suggested that the cost of such an audit report could range from $10,000 to $1 million, depending on the size of the clearing member, the complexity of its systems, and whether the work included a review of other systems already being reviewed as part of audit work the firms is already providing to the clearing member. The staff understands that it would be less costly to perform this type of audit if the clearing member chooses to forward all customer collateral to ICE Trust (an option allowed by this Order) and does not use any third party. The staff understands that most ICE Trust clearing members are large dealers whose audits likely include internal control reviews and SAS 70 reports regarding custody of customer assets, which would require a review of the same or similar systems used to comply with the audit report requirement in this order. Finally, the staff notes that if the clearing member were a futures commission merchant complying with Paragraph III.(e)(5) of this Order, an auditor already must review custody of customer assets pursuant to CFTC Rule 17 CFR 1.16(d)(1). Consequently, the Commission believes the cost of this requirement for FCMs may be lower than it would be for other types of entities that are not subject to a specific audit requirement to review custody of customer assets.

[101] 100 hours = (5 hours for each clearing member to assess its compliance with the requirements of the order relating to segregation of customer assets and attest that it is in compliance with those requirements × 20 clearing members). $4 million = $200,000 per clearing member × 20 clearing members.

member holding customer collateral in connection with cleared customer CDS transactions that seeks to rely on the exemptive relief specified in paragraph III.(e) of the Order to disclose to those customers that the clearing member is not regulated by the Commission, that U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to any funds or securities it holds, and that the applicable insolvency law may affect the customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding. The Commission believes that clearing members could use the language in the Order that describes the disclosure that must be made as a template to draft the disclosure. Consequently the Commission estimates, based on staff experience, that it would take a clearing member approximately one hour to draft the disclosure. Further, the Commission believes clearing members will include this disclosure with other documents or agreements provided to cleared CDS customers, and estimates (based on staff experience) that a clearing member may take approximately one half hour to determine how the disclosure should be integrated into those other documents or agreements, resulting in a one-time aggregate burden of 30 hours for all 20 clearing members to comply with this requirement.[102]

E. Collection of Information Is Mandatory

The collections of information contained in the conditions to this Order are mandatory for any entity wishing to rely on the exemptions granted by this Order.

F. Confidentiality

Certain of the conditions of this Order that address collections of information require ICE Trust clearing members to make disclosures to their customers, or to provide other information to ICE Trust (and in some cases also to customers). Apart from those requirements, the provisions of this Order that address collections of information do not address or restrict the confidentiality of the documentation prepared by ICE Trust clearing members under the exemptive conditions. Accordingly, ICE Trust clearing members would have to make the applicable information available to regulatory authorities or other persons to the extent otherwise provided by law.

G. Request for Comment on Paperwork Reduction Act

The Commission requests, pursuant to 44 U.S.C. 3506(c)(2)(B), comment on the collections of information contained in this Order to:

(i) Evaluate whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;

(ii) Evaluate the accuracy of the Commission's estimates of the burden of the collections of information;

(iii) Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

(iv) Evaluate whether there are ways to minimize the burden of the collections of information on those required to respond, including through the use of automated collection techniques or other forms of information technology.

Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, and refer to File No. S7–05–09. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this document in the **Federal Register**; therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. The Commission has submitted the proposed collections of information to OMB for approval. Requests for the materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–05–09, and be submitted to the Securities and Exchange Commission, Records Management Office, 100 F Street, NE., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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[102] 30 hours = (1 hour per clearing member to draft the disclosure + ½ hour per clearing member to determine how the disclosure should be integrated into those other documents or agreements) × 20 clearing members.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63390; File No. S7–17–09]

Order Extending Temporary Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of Eurex Clearing AG Related to Central Clearing of Credit Default Swaps and Request for Comment

November 29, 2010.

I. Introduction

The Securities and Exchange Commission ("Commission") has taken multiple actions designed to help foster the prompt development of credit default swap ("CDS") central counterparties ("CCP"), including granting temporary conditional exemptions from certain provisions of the federal securities laws.[1]

In July 2009, the Commission issued an order providing temporary conditional exemptions to Eurex Clearing AG ("Eurex"), and certain other parties, to permit Eurex to clear and settle CDS transactions.[2] In response to Eurex's request, the Commission temporarily extended and expanded the exemptions in April 2010.[3] The current

[1] *See generally* Securities Exchange Act Release Nos. 60372 (Jul. 23, 2009), 74 FR 37748 (Jul. 29, 2009) and 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by ICE Clear Europe Limited); Securities Exchange Act Release Nos. 60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009) and 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by Eurex Clearing AG); Securities Exchange Act Release Nos. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009), and 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) (temporary exemptions in connection with CDS clearing by Chicago Mercantile Exchange Inc.); Securities Exchange Act Release Nos. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009), and 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) (temporary exemptions in connection with CDS clearing by ICE Trust U.S. LLC); Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary exemptions in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.); and other Commission actions discussed in several of these orders. In addition, the Commission has issued interim final temporary rules that provide exemptions under the Securities Act of 1933 and the Securities Exchange Act of 1934 for CDS to facilitate the operation of one or more central counterparties for the CDS market. *See* Securities Act Release Nos. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009) (initial approval), 9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009) (extension until Nov. 30, 2010), and 9158 (Nov. 30, 2010) (extension until Jul. 16, 2011).

[2] Securities Exchange Act Release No. 60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009) ("July 2009 Eurex Exemptive Order").

[3] Securities Exchange Act Release No. 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) ("April 2010 Eurex Exemptive Order").

exemptions pursuant to the April 2010 Eurex Exemptive Order are scheduled to expire on November 30, 2010, and Eurex has requested that the Commission extend the exemptions contained in the April 2010 Eurex Exemptive Order.[4]

II. Discussion

A. Legislative Developments

Subsequent to the Commission's issuance of the April 2010 Eurex Exemptive Order, the President signed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") into law.[5] The Dodd-Frank Act was enacted to, among other purposes, promote the financial stability of the United States by improving accountability and transparency in the financial system.[6] To this end, the provisions of Title VII of the Dodd-Frank Act provide for the comprehensive regulation of security-based swaps [7] by the Commission.[8] The Dodd-Frank Act amends the Exchange Act to require, among other things, that transactions in security-based swaps be cleared through a clearing agency that is registered with the Commission or that is exempt from registration if they are of a type that the Commission determines must be cleared, unless an exception or exemption from mandatory clearing applies.[9] Specifically, Section 763(b) of the Dodd-Frank Act adds a new Section 17A(g) to the Exchange Act which states: "It shall be unlawful for a clearing agency, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to a security-based swap." [10] This new registration provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.[11] As a result, the Commission anticipates that Eurex would need to apply and become registered as a clearing agency under Section 17A of the Exchange Act when relevant provisions of the Dodd-Frank Act become effective in order to clear security-based swaps.

B. Eurex's Request for Extension of April 2010 Eurex Exemptive Order

Eurex seeks an extension of the temporary exemptions of the April 2010 Eurex Exemptive Order under the same terms and conditions contained in the April 2010 Eurex Exemptive Order.[12] Eurex's request for an extension of the April 2010 Eurex Exemptive Order incorporates the representations made in its request preceding the April 2010 Eurex Exemptive Order and its request preceding the July 2009 Eurex Exemptive Order.[13] These representations are discussed in detail in our earlier Eurex orders. Eurex represents that these representations remain valid.[14]

Accordingly, consistent with our findings in the April 2010 Eurex Exemptive Order, and, in particular, in light of the risk management and systemic benefits in continuing to facilitate CDS clearing by Eurex until Title VII of the Dodd-Frank Act becomes fully effective, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to extend the exemptive relief granted in the April 2010 Eurex Exemptive Order until July 16, 2011. Specifically, pursuant to the Commission's authority under Section 36 of the Exchange Act,[15] based on the facts presented and the representations made by Eurex,[16] the Commission is extending until July 16, 2011, under the same terms and conditions in the April 2010 Eurex Exemptive Order, each of the existing exemptions connected with CDS clearing by Eurex, which include: The temporary conditional exemption granted to Eurex from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; the temporary conditional exemption of Eurex and certain of its clearing members from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for certain non-excluded CDS cleared by Eurex; the temporary conditional exemption of Eurex and certain eligible contract participants from certain Exchange Act

[4] *See* Letter from Paul Architzel, Alston & Bird, to Elizabeth Murphy, Secretary, Commission, Nov. 29, 2010 ("November 2010 Request").

[5] Public Law 111–203 (July 21, 2010).

[6] *See* Public Law 111–203, Preamble.

[7] Section 761(a)(6) of the Dodd-Frank Act defines a "security-based swap" as any agreement, contract, or transaction that is a "swap," as defined in Section 1a(47) of the Commodity Exchange Act, 7 U.S.C. 1a(47), that is based on an index that is a narrow-based security index, a single security, or a loan, including any interest therein or on the value thereof; or the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer. *See* Section 3(a)(68) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C.78c(a)(68) (as added by Section 761(a)(6) of the Dodd-Frank Act). Section 712(d) of the Dodd-Frank Act provides that the Commission and the Commodity Futures Trading Commission ("CFTC"), in consultation with the Board of Governors of the Federal Reserve System, shall, among other things, jointly further define the terms "swap" and "security-based swap."

[8] Section 761(a)(2) of the Dodd-Frank Act explicitly includes security-based swaps in the definition of "security" in Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c.

[9] *See* Section 763(a) of the Dodd-Frank Act (adding new Section 3C to the Exchange Act, 15 U.S.C. 78c–2).

[10] While Title VII of the Dodd-Frank Act provides that certain entities that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act are deemed registered as a clearing agency for the purposes of clearing security-based swaps ("Deemed Registered Provision"), Eurex would not qualify for the Deemed Registered Provision. *See* Section 763(b) of the Dodd-Frank Act (adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q–1(1)). A clearing agency must be a depository institution that cleared swaps as a multilateral clearing organization or a derivative clearing organization that cleared swaps pursuant to an exemption from registration as a clearing agency. *Id.* Since Eurex is not a depository institution and is not a derivative clearing organization, it does not qualify for the Deemed Registered Provision.

[11] Section 774 of the Dodd-Frank Act states, "[u]nless otherwise provided, 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."

[12] See November 2010 Request, *supra* note 4.

[13] *See id.*

[14] In the April 2010 Eurex Exemptive Order, the Commission described Eurex's proposed activity to clear CDS transactions of its members' customers. Under this proposed activity, Eurex intended to provide customer clearing capability for: (i) customers that would enter into a tri-party agreement with Eurex and the clearing member, in which the clearing member agrees to guarantee the customer's position and the customer agrees to be bound by Eurex's Clearing Conditions ("Registered Customer") and (ii) customers that do not enter into such an agreement. Eurex indicated in its November 2010 Request that it now intends to provide customer clearing capability only for Registered Customers under the exemptive relief.

[15] 15 U.S.C. 78mm. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class of classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[16] *See* November 2010 Request, *supra* note 4. The exemptions we are granting today are based on all of the representations made by Eurex in its request, which incorporate representations made by Eurex in its request for relief granted in the April 2010 Eurex Exemptive Order and its request for relief granted in the July 2009 Eurex Exemptive Order. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS (as defined in the April 2010 Eurex Exemptive Order) that previously had been cleared pursuant to the exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

requirements with respect to certain non-excluded CDS cleared by Eurex; the temporary conditional exemption of Eurex clearing members and certain others from broker-dealer registration requirements and related requirements in connection with CDS clearing by Eurex (including clearing of customer CDS transactions); and the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.[17]

C. Solicitation of Comments

When we granted the April 2010 Eurex Exemptive Order, we requested comment on all aspects of the exemptions. We received no comments in response this request.

In connection with this Order extending exemptions granted in connection with CDS clearing by Eurex, we reiterate our request for comments on all aspects of the exemptions.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–17–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov/).* Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–17–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on the Commission's Internet website (*http://www.sec.gov/rules/other.shtml).* Comments are also available for website 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.

III. Conclusion

It is hereby ordered, pursuant to Section 36(a) of the Exchange Act, that, until July 16, 2011, the following exemptions connected with CDS clearing by Eurex contained in the April 2010 Eurex Exemptive Order are extended: (i) The temporary conditional exemption granted to Eurex from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; (ii) the temporary conditional exemption of Eurex and certain of its clearing members from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for certain non-excluded CDS cleared by Eurex; (iii) the temporary conditional exemption of Eurex and certain eligible contract participants from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by Eurex; (iv) the temporary conditional exemption of Eurex clearing members and certain others from broker-dealer registration requirements and related requirements in connection with CDS clearing by Eurex (including clearing of customer CDS transactions); and (v) the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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BILLING CODE 8011–01–P

[17] *See* April 2010 Eurex Exemptive Order, *supra* note 4.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63389; File No. S7–16–09]

Order Extending Temporary Conditional Exemptions Under The Securities Exchange Act of 1934 in Connection With Request on Behalf of Ice Clear Europe, Limited Related to Central Clearing of Credit Default Swaps and Request for Comment

November 29, 2010.

I. Introduction

The Securities and Exchange Commission ("Commission") has taken multiple actions designed to help foster the prompt development of credit default swap ("CDS") central counterparties ("CCP"), including granting temporary conditional exemptions from certain provisions of the federal securities laws.[1]

In July 2009, the Commission issued an order providing temporary conditional exemptions to ICE Clear Europe Limited ("ICE Clear Europe"), and certain other parties, to permit ICE Clear Europe to clear and settle CDS transactions.[2] In response to ICE Clear Europe's request, the Commission temporarily extended and expanded the exemptions in April 2010.[3] The current exemptions pursuant to the April 2010 ICE Clear Europe Exemptive Order are scheduled to expire on November 30, 2010, and ICE Clear Europe has requested that the Commission extend the exemptions contained in the April 2010 ICE Clear Europe Exemptive Order.[4]

II. Discussion

A. Legislative Developments

Subsequent to the Commission's issuance of the April 2010 ICE Clear Exemptive Order, the President signed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") into law.[5] The

[1] *See generally* Securities Exchange Act Release Nos. 60372 (Jul. 23, 2009), 74 FR 37748 (Jul. 29, 2009) and 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by ICE Clear Europe Limited); Securities Exchange Act Release Nos. 60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009) and 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by Eurex Clearing AG); Securities Exchange Act Release Nos. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009), and 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) (temporary exemptions in connection with CDS clearing by Chicago Mercantile Exchange Inc.); Securities Exchange Act Release Nos. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009), and 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) (temporary exemptions in connection with CDS clearing by ICE Trust U.S. LLC); Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary exemptions in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.); and other Commission actions discussed in several of these orders. In addition, the Commission has issued interim final temporary rules that provide exemptions under the Securities Act of 1933 and the Securities Exchange Act of 1934 for CDS to facilitate the operation of one or more central counterparties for the CDS market. *See* Securities Act Release Nos. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009) (initial approval), 9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009) (extension until Nov. 30, 2010), and 9158 (Nov. 30, 2010) (extension until Jul. 16, 2011).

[2] Securities Exchange Act Release No. 60372 (Jul. 23, 2009), 74 FR 37748 (Jul. 29, 2009) ("July 2009 ICE Clear Europe Exemptive Order").

[3] Securities Exchange Act Release No. 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) ("April 2010 ICE Clear Europe Exemptive Order").

[4] *See* Letter from Russell D. Sacks, ICE Clear Europe, to Elizabeth Murphy, Secretary, Commission, Nov. 29, 2010 ("November 2010 Request").

[5] Public Law 111–203 (July 21, 2010).

Dodd-Frank Act was enacted to, among other purposes, promote the financial stability of the United States by improving accountability and transparency in the financial system.[6] To this end, the provisions of Title VII of the Dodd-Frank Act provide for the comprehensive regulation of security-based swaps [7] by the Commission.[8] The Dodd-Frank Act amends the Exchange Act to require, among other things, that transactions in security-based swaps be cleared through a clearing agency that is registered with the Commission or that is exempt from registration if they are of a type that the Commission determines must be cleared, unless an exception or exemption from mandatory clearing applies.[9] Furthermore, Title VII of the Dodd-Frank Act provides that a derivatives clearing organization registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act, such as ICE Clear Europe, is deemed registered as a clearing agency for the purposes of clearing security-based swaps ("Deemed Registered Provision").[10] The Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.[11] As a result, ICE Clear Europe will no longer need the exemption from registration as a clearing agency under Section 17A of the Exchange Act provided by the April 2010 ICE Clear Europe Exemptive Order, and previous orders, to clear security-based swaps after the Deemed Registered Provision becomes effective.

B. ICE Clear Europe's Request for Extension of April 2010 ICE Clear Europe Exemptive Order

ICE Clear Europe seeks an extension of the temporary exemptions of the April 2010 ICE Clear Europe Exemptive Order under the same terms and conditions contained in the April 2010 ICE Clear Europe Exemptive Order.[12] In ICE Clear's request for an extension of the April 2010 ICE Clear Exemptive Order, ICE Clear represents that there have been no material changes to the operations of ICE Clear, and that the representations made by ICE Clear in connection with the April 2010 ICE Clear Exemptive Order remain true in all material respects.[13] These representations are discussed in detail in our earlier ICE Clear orders.

Accordingly, consistent with our findings in the April 2010 ICE Clear Europe Order, and, in particular, in light of the risk management and systemic benefits in continuing to facilitate CDS clearing by ICE Clear Europe until Title VII of the Dodd-Frank Act becomes fully effective, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to extend the exemptive relief granted in the April 2010 ICE Clear Europe Exemptive Order until July 16, 2011. Specifically, pursuant to the Commission's authority under Section 36 of the Exchange Act,[14] based on the facts presented and the representations made by ICE Clear Europe,[15] the Commission is extending until July 16, 2011, under the same terms and conditions in the April 2010 ICE Clear Europe Exemptive Order each of the existing exemptions connected with CDS clearing by ICE Clear Europe, which include: The temporary conditional exemption granted to ICE Clear Europe from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; the temporary conditional exemption of ICE Clear Europe and certain of its clearing members from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for certain non-excluded CDS cleared by ICE Clear Europe; the temporary conditional exemption of ICE Clear Europe and certain eligible contract participants from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by ICE Clear Europe; and the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.[16]

C. Solicitation of Comments

When we granted the April 2010 ICE Clear Europe Order, we requested comment on all aspects of the exemptions. We received no comments in response. In connection with this Order extending the exemptions granted in connection with CDS clearing by ICE Clear Europe, we reiterate our request for comments on all aspects of the exemptions.

Comments may be submitted by any of the following methods:

[6] *See* Public Law 111–203, Preamble.

[7] Section 761(a)(6) of the Dodd-Frank Act defines a "security-based swap" as any agreement, contract, or transaction that is a "swap," as defined in Section 1a(47) of the Commodity Exchange Act, 7 U.S.C. 1a(47), that is based on an index that is a narrow-based security index, a single security, or a loan, including any interest therein or on the value thereof; or the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer. *See* Section 3(a)(68) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78c(a)(68) (as added by Section 761(a)(6) of the Dodd-Frank Act). Section 712(d) of the Dodd-Frank Act provides that the Commission and the Commodity Futures Trading Commission ("CFTC"), in consultation with the Board of Governors of the Federal Reserve System, shall, among other things, jointly further define the terms "swap" and "security-based swap."

[8] Section 761(a)(2) of the Dodd-Frank Act explicitly includes security-based swaps in the definition of "security" in Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c.

[9] *See* Section 763(a) of the Dodd-Frank Act (adding new Section 3C to the Exchange Act, 15 U.S.C. 78c–2).

[10] *See* Section 763(b) of the Dodd-Frank Act (adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q–1(1)). Under this Deemed Registered Provision, ICE Clear Europe will be required to comply with all requirements of the Exchange Act, and the rules thereunder, applicable to registered clearing agencies to the extent it clears security-based swaps after the effective date of the Deemed Registered Provision, including, for example, the obligation to file proposed rule changes under Section 19(b) of the Exchange Act.

[11] Section 774 of the Dodd-Frank Act states, "[u]nless otherwise provided, 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."

[12] *See* November 2010 Request, *supra* note 4.

[13] *See id.* ICE Clear Europe notes that it has created a set of amendments to its rulebook and procedures for technical improvements to the process for dealing with restructuring credit events and to facilitate the imminent introduction of clearing of non-U.S., non-U.K. sovereign CDS contracts.

[14] 15 U.S.C. 78mm. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class of classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[15] *See* November 2010 Request, *supra* note 4. The exemptions we are granting today are based on all of the representations made by ICE Clear Europe in its request, which incorporate representations made by ICE Clear Europe in connection with the April 2010 ICE Clear Europe Exemptive Order, which in turn incorporate representations related to our earlier exemptive orders. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS (as defined in the April 2010 ICE Clear Europe Exemptive Order) that previously had been cleared pursuant to the exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

[16] *See* April 2010 ICE Clear Europe Exemptive Order, *supra* note 3.

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–16–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov/).* Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–16–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.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.

III. Conclusion

It is hereby ordered, pursuant to Section 36(a) of the Exchange Act, that, until July 16, 2011, the following exemptions connected with CDS clearing by ICE Clear Europe contained in the April 2010 ICE Clear Europe Exemptive Order are extended: (i) The temporary conditional exemption granted to ICE Clear Europe from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; (ii) the temporary conditional exemption of ICE Clear Europe and certain of its clearing members from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for certain non-excluded CDS cleared by ICE Clear Europe; (iii) the temporary conditional exemption of ICE Clear Europe and certain eligible contract participants from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by ICE Clear Europe; and (iv) the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30375 Filed 12–2–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63388; File No. S7–06–09]

Order Extending Temporary Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Request of Chicago Mercantile Exchange Inc. Related to Central Clearing of Credit Default Swaps and Request for Comment

November 29, 2010.

I. Introduction

The Securities and Exchange Commission ("Commission") has taken multiple actions designed to help foster the prompt development of credit default swap ("CDS") central counterparties ("CCP"), including granting temporary conditional exemptions from certain provisions of the federal securities laws.[1]

In March 2009, the Commission issued an order providing temporary conditional exemptions to the Chicago Mercantile Exchange Inc. ("CME"), and certain other parties, to permit CME to clear and settle CDS transactions.[2] In response to CME's request, the Commission temporarily extended and expanded the exemptions in December 2009 and in March 2010.[3] The current exemptions pursuant to the March 2010 CME Exemptive Order are scheduled to expire on November 30, 2010, and CME has requested that the Commission extend the exemptions contained in the March 2010 CME Exemptive Order.[4]

II. Discussion

A. Legislative Developments

Subsequent to the Commission's issuance of the March 2010 CME Exemptive Order, the President signed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") into law.[5] The Dodd-Frank Act was enacted to, among other purposes, promote the financial stability of the United States by improving accountability and transparency in the financial system.[6] To this end, the provisions of Title VII of the Dodd-Frank Act provide for the comprehensive regulation of security-based swaps[7] by the Commission.[8] The Dodd-Frank Act amends the Exchange Act to require, among other things, that

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[1] *See generally* Securities Exchange Act Release Nos. 60372 (Jul. 23, 2009), 74 FR 37748 (Jul. 29, 2009) and 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by ICE Clear Europe Limited); Securities Exchange Act Release Nos. 60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009) and 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by Eurex Clearing AG); Securities Exchange Act Release Nos. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009), and 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) (temporary exemptions in connection with CDS clearing by Chicago Mercantile Exchange Inc.); Securities Exchange Act Release Nos. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009), and 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) (temporary exemptions in connection with CDS clearing by ICE Trust U.S. LLC); Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary exemptions in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.); and other Commission actions discussed in several of these orders. In addition, the Commission has issued interim final temporary rules that provide exemptions under the Securities Act of 1933 and the Securities Exchange Act of 1934 for CDS to facilitate the operation of one or more central counterparties for the CDS market. *See* Securities Act Release Nos. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009) (initial approval), 9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009) (extension until Nov. 30, 2010), and 9158 (Nov. 30, 2010) (extension until Jul. 16, 2011).

[2] Securities Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009) ("March 2009 CME Exemptive Order").

[3] Securities Exchange Act Release Nos. 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009) ("December 2009 CME Exemptive Order"); 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) ("March 2010 CME Exemptive Order").

[4] *See* Letter from Ann K. Shuman, Managing Director and Deputy General Counsel, CME, to Elizabeth Murphy, Secretary, Commission, Nov. 29, 2010 ("November 2010 Request").

[5] Public Law 111–203 (July 21, 2010).

[6] *See* Public Law 111–203, Preamble.

[7] Section 761(a)(6) of the Dodd-Frank Act defines a "security-based swap" as any agreement, contract, or transaction that is a "swap," as defined in Section 1a(47) of the Commodity Exchange Act, 7 U.S.C. 1a(47), that is based on an index that is a narrow-based security index, a single security, or a loan, including any interest therein or on the value thereof; or the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer. *See* Section 3(a)(68) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78c(a)(68) (as added by Section 761(a)(6) of the Dodd-Frank Act). Section 712(d) of the Dodd-Frank Act provides that the Commission and the Commodity Futures Trading Commission ("CFTC"), in consultation with the Board of Governors of the Federal Reserve System, shall, among other things, jointly further define the terms "swap" and "security-based swap."

[8] Section 761(a)(2) of the Dodd-Frank Act explicitly includes security-based swaps in the definition of "security" in Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c.

transactions in security-based swaps be cleared through a clearing agency that is registered with the Commission or that is exempt from registration if they are of a type that the Commission determines must be cleared, unless an exception or exemption from mandatory clearing applies.[9] Furthermore, Title VII of the Dodd-Frank Act provides that a derivatives clearing organization registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act, such as CME, is deemed registered as a clearing agency for the purposes of clearing security-based swaps ("Deemed Registered Provision").[10] The Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.[11] As a result, CME will no longer need the exemption from registration as a clearing agency under Section 17A of the Exchange Act provided by the March 2010 CME Exemptive Order, and previous orders, to clear security-based swaps after the Deemed Registered Provision becomes effective.

B. CME's Request for Extension of March 2010 CME Exemptive Order

CME seeks an extension of the temporary exemptions of the March 2010 CME Exemptive Order under the same terms and conditions contained in the March 2010 CME Exemptive Order.[12] CME's request for an extension of the March 2010 CME Exemptive Order incorporates representations made in the requests preceding the March 2010 CME Exemptive Order, the December 2009 CME Exemptive Order, and the March 2009 CME Exemptive Order,[13] which are discussed in detail in our earlier CME orders. CME represents that there have been no material changes to the statements made in the previous requests, apart from CME's adoption of substantive rules for the treatment of customer cleared OTC derivatives.[14] Furthermore, CME represents that it will implement policies and procedures designed to ensure compliance with the terms of the Exemptive Orders and conduct an internal review related to its compliance program.

Accordingly, consistent with our findings in the March 2010 CME Exemptive Order, and, in particular, in light of the risk management and systemic benefits in continuing to facilitate CDS clearing by CME until Title VII of the Dodd-Frank Act becomes fully effective, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to extend the exemptive relief granted in the March 2010 CME Exemptive Order until July 16, 2011. Specifically, pursuant to the Commission's authority under Section 36 of the Exchange Act,[15] based on the facts presented and the representations made by CME,[16] the Commission is extending until July 16, 2011, under the same terms and conditions in the March 2010 CME Exemptive Order, each of the existing exemptions connected with CDS clearing by CME, which include: The temporary conditional exemption granted to CME from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; the temporary conditional exemption of CME and certain of its clearing members from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for certain non-excluded CDS cleared by CME; the temporary conditional exemption of CME and certain eligible contract participants from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by CME; the temporary conditional exemption of certain CME clearing members that receive customer collateral in connection with certain non-excluded CDS cleared by CME from certain Exchange Act requirements;[17] and the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.[18]

C. Solicitation of Comments

When we granted the March 2010 CME Exemptive Order, we requested comment on all aspects of the exemptions. We received one comment in response to this request, the content of which is outside of the scope of the Commission's jurisdiction.[19]

In connection with this Order extending the exemptions granted in connection with CDS clearing by CME, we reiterate our request for comments on all aspects of the exemptions.

[9] *See* Section 763(a) of the Dodd-Frank Act (adding new Section 3C to the Exchange Act, 15 U.S.C. 78c–2).

[10] *See* Section 763(b) of the Dodd-Frank Act (adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q–1(1)). Under this Deemed Registered Provision, CME will be required to comply with all requirements of the Exchange Act, and the rules thereunder, applicable to registered clearing agencies to the extent it clears security-based swaps after the effective date of the Deemed Registered Provision, including, for example, the obligation to file proposed rule changes under Section 19(b) of the Exchange Act.

[11] Section 774 of the Dodd-Frank Act states, "[u]nless otherwise provided, 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."

[12] *See* November 2010 Request, *supra* note 4.

[13] *See id.*

[14] *See infra* note 17. CME also notes that it is evaluating the creation of a separate guaranty fund for its CDS and futures business. *See* November 2010 Request, *supra* note 4.

[15] 15 U.S.C. 78mm. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class of classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[16] *See* November 2010 Request, *supra* note 4. The exemptions we are granting today are based on all of the representations made by CME in its request, which incorporate representations made by CME in its requests for relief in connection with the March 2010 CME Exemptive Order, the December 2009 CME Exemptive Order, and the March 2009 CME Exemptive Order. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS (as defined in the March 2010 CME Exemptive Order) that previously had been cleared pursuant to the exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

[17] The March 2010 CME Exemptive Order required CME clearing members relying on this exemption to hold customer collateral in one of three types of accounts: (i) in an account established pursuant to Section 4d of the Commodity Exchange Act; (ii) in the absence of a 4d Order from the CFTC, in an account that is part of a separate account class, specified by CFTC Bankruptcy Rules (*see* 17 CFR 190.01 *et seq.*), established for a futures commission merchant ("FCM") to hold its customers' positions and collateral in cleared OTC derivatives; or (iii) if both of those alternatives are not available, in an account established in accordance with CFTC Rule 30.7 (with additional disclosures to be made to the customer). The CFTC has taken final action on proposed rules to establish a new account class that is applicable to positions in "Cleared OTC Derivatives," which became effective on May 6, 2010. *See* 75 FR 17297 (Apr. 6, 2010). On October 4, 2010, CME implemented rules with substantive requirements for the treatment of customer cleared OTC derivatives, and as of that date all CME cleared customer CDS positions and related collateral previously held in CFTC Rule 30.7 accounts are required to be held in "cleared OTC Derivatives Customer Sequestered Accounts." Given these developments, the terms of the March 2010 CME Exemptive Order, and this Order, require customer collateral to be held in an account established pursuant to a 4d Order or an account that is part of a separate account class established for an FCM to hold its customers' positions and collateral in Cleared OTC Derivatives.

[18] *See* March 2010 CME Exemptive Order, *supra* note 3.

[19] *See* Comment from Richard Gaib, Apr. 5, 2010, commenting on the farm credit system.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–06–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov/).* Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–06–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.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.

III. Conclusion

It is hereby ordered, pursuant to Section 36(a) of the Exchange Act, that, until July 16, 2011, the following exemptions connected with CDS clearing by CME contained in the March 2010 CME Exemptive Order are extended: (i) The temporary conditional exemption granted to CME from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; (ii) the temporary conditional exemption of CME and certain of its clearing members from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for certain non-excluded CDS cleared by CME; (iii) the temporary conditional exemption of CME and certain eligible contract participants from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by CME; (iv) the temporary conditional exemption of certain CME clearing members that receive customer collateral in connection with certain non-excluded CDS cleared by CME from certain Exchange Act requirements; and (v) the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30374 Filed 12–2–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63381; File No. SR–NYSEAMEX–2010–106]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC Amending NYSE Amex Equities Rule 5190 To Correspond With Rule Changes Filed by the Financial Industry Regulatory Authority, Inc.

November 29, 2010.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 19, 2010, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the NYSE Amex. The Exchange has designated the proposed rule change as constituting a "non-controversial" rule change under Section 19(b)(3)(A) of the Act,[4] and Rule 19b–4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Amex Equities Rule 5190 to correspond with rule changes filed by the Financial Industry Regulatory Authority, Inc. ("FINRA") and approved by the Commission. 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, NYSE Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule changes is to amend NYSE Amex Equities Rule 5190 (Notification Requirements for Offering Participants) to correspond with rule changes filed by FINRA and approved by the Commission.

Background:

On July 30, 2007, FINRA's predecessor, the National Association of Securities Dealers, Inc. ("NASD"), and NYSE Regulation, Inc. ("NYSER") consolidated their member firm regulation operations into a combined organization, FINRA. Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934, as amended (the "Act"), NYSE, NYSER and FINRA entered into an agreement (the "Agreement") to reduce regulatory duplication for their members by allocating to FINRA certain regulatory responsibilities for certain NYSE rules and rule interpretations ("FINRA Incorporated NYSE Rules"). NYSE Amex LLC ("NYSE Amex") became a party to the Agreement effective December 15, 2008.[6]

As part of its effort to reduce regulatory duplication and relieve firms that are members of FINRA, NYSE, and NYSE Amex of conflicting or unnecessary regulatory burdens, FINRA

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

[6] *See* Securities Exchange Act Release Nos. 56148 (July 26, 2007); 72 FR 42146 (Aug. 1, 2007) (order approving the Agreement), 56147 (July 26, 2007); 72 FR 42166 (Aug. 1, 2007) (SR–NASD–2007–054) (order approving the incorporation of certain NYSE Rules as "Common Rules"), and 60409 (July 30, 2009); 74 FR 39353 (Aug. 6, 2009) (order approving the amended and restated Agreement, adding NYSE Amex LLC as a party). Paragraph 2(b) of the Agreement sets forth procedures regarding proposed changes by FINRA, NYSE, or NYSE Amex to the substance of any of the Common Rules.

is now engaged in the process of reviewing and amending the NASD and FINRA Incorporated NYSE Rules in order to create a consolidated FINRA rulebook.[7]

Proposed Conforming Amendments to NYSE Amex Equities Rules:

FINRA recently amended FINRA Rule 5190 to amend the notice requirements applicable to distributions of securities that are considered "actively traded" and thus are not subject to a restricted period under Rule 101 of Regulation M.[8] As approved, the substance of the information that must be provided in the notice did not change, only the timing of the notice.

The Exchange previously adopted NYSE Amex Equities Rule 5190 to harmonize the notification requirements for offering participants with FINRA Rule 5190.[9] In order to harmonize the NYSE Amex Equities Rules with the approved FINRA Rules, the Exchange proposes to amend NYSE Amex Equities Rule 5190 to conform to the recently approved amendments to FINRA Rule 5190.[10] Accordingly, the Exchange similarly proposes to amend NYSE Amex Equities Rule 5190(d) to provide that member organizations will be required to provide a single notice under subparagraphs (1) and (2) of Rule 5190(d).

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with Section 6(b) of the Act,[11] in general, and further the objectives of Section 6(b)(5) of the Act,[12] in particular, in that they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule changes support the objectives of the Act by providing greater harmonization among NYSE Rules, NYSE Amex Equities Rules, and FINRA Rules (including Common Rules) of similar purpose, resulting in less burdensome and more efficient regulatory compliance for Dual Members. To the extent the Exchange has proposed changes that differ from the FINRA version of the Rules, such changes are technical in nature and do not change the substance of the proposed NYSE Amex Equities Rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[15] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[16] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission notes that the proposed rule change would bring NYSE Amex Equity Rule 5190 into harmony with FINRA Rule 5190. For this reason, the Commission believes that waiving the 30-day operative delay[17] is consistent with the protection of investors and the public interest. Therefore, the Commission designates the proposal operative upon filing.

At any time within the 60-day period beginning on the date of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEAMEX–2010–106 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAMEX–2010–106. 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

[7] FINRA's rulebook currently has three sets of rules: (1) NASD Rules, (2) FINRA Incorporated NYSE Rules, and (3) consolidated FINRA Rules. The FINRA Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"), while the consolidated FINRA Rules apply to all FINRA members. For more information about the FINRA rulebook consolidation process, *see* FINRA Information Notice, March 12, 2008.

[8] *See* Securities Exchange Act Release No. 62970 (Sept. 22, 2010); 75 FR 59771 (Sept. 28, 2010) (SR–FINRA–2010–37).

[9] *See* Securities Exchange Act Release No. 59975 (May 26, 2009); 74 FR 26449 (June 2, 2009) (SR–NYSEALTR–2009–26).

[10] NYSE has submitted a companion rule filing amending its rules in accordance with FINRA's rule changes. *See* SR–NYSE–2010–73.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] 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).

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 NYSE's principal office and on its Internet Web site at *http://www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMEX–2010–106 and should be submitted on or before December 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30317 Filed 12–2–10; 8:45 am]

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[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63385; File No. SR–BATS–2010–035]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Penny Pilot Program

November 29, 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 19, 2010, BATS Exchange, Inc. (the "Exchange" or "BATS") 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.

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal for the BATS Exchange Options Market ("BATS Options") to extend the Penny Pilot Program ("Penny Pilot") in options classes in certain issues ("Pilot Program") previously approved by the Commission through December 31, 2011.[3]

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, 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 purpose of this filing is to extend the Penny Pilot Program ("Penny Pilot") in options classes in certain issues ("Pilot Program") previously approved by the Commission through December 31, 2011, and to provide revised dates for adding replacement issues to the Pilot Program. The Exchange proposes that the semi-annual dates to replace issues that have been delisted be revised to the second trading day following January 1, 2011 and July 1, 2011. The Exchange also wishes to clarify that the replacement issues will be selected based on trading activity for the six month period beginning June 1, 2010 and ending November 30, 2010 for the January 2011 replacement and the six month period beginning December 1, 2010 and May 31, 2011 for the July 2011 replacement.

In the Exchange's filing to propose the rules to govern BATS Options,[4] the Exchange proposed commencing operations for BATS Options by trading all options classes that were, as of such date, traded by other options exchanges pursuant to the Penny Pilot and then expanding the Penny Pilot on a quarterly basis, 75 classes at a time, through August 2010. Consistent with this proposal, since it commenced operations the Exchange has twice expanded the options classes subject to the Penny Pilot.[5] The Exchange represents that the Exchange has the necessary system capacity to continue to support operation of the Penny Pilot.

The Exchange agrees to provide reports that will analyze the impact of the Pilot Program on market quality and options capacity. These reports will include: (1) Data and analysis on the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Pilot Program on the capacity of the Exchange's automated systems; (4) data reflecting the size and depth of markets, and (5) any capacity problems or other problems that arose related to the operation of the Pilot Program and how the Exchange addressed them.

The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

2. Statutory Basis

The Exchange believes that its proposal 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(b) of the Act.[6] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[7] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market

[3] The rules of BATS Options, including rules applicable to BATS Options' participation in the Penny Pilot, were approved on January 26, 2010. *See* Securities Exchange Act Release No. 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (SR–BATS–2009–031). BATS Options commenced operations on February 26, 2010.

[4] *See* Securities Exchange Act Release No. 61097 (December 2, 2009), 74 FR 64788 (December 8, 2009) (SR–BATS–2009–031) (Notice of Filing of Proposed Rule Change To Establish Rules Governing the Trading of Options on the BATS Options Exchange).

[5] *See* Securities Exchange Act Release No. 62595 (July 29, 2010), 75 FR 47043 (August 4, 2010) (SR–BATS–2010–019); Securities Exchange Act Release No. 62033 (May 4, 2010), 75 FR 26301 (May 11, 2010) (SR–BATS–2010–009).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

and a national market system. The Exchange believes that the Pilot Program promotes just and equitable principles of trade by enabling public customers and other market participants to express their true prices to buy and sell options.

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 on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and Rule 19b–4(f)(6) thereunder.[9]

At any time within 60 days of the filing of such 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–2010–035 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–BATS–2010–035. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–BATS–2010–035 and should be submitted on or before December 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30320 Filed 12–2–10; 8:45 am]

BILLING CODE 8011–01–P

[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 that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63376; File No. SR–NYSEArca–2010–104]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Option Trading Rules in Order To Extend the Penny Pilot in Options Classes in Certain Issues Through December 31, 2011

November 24, 2010.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 19, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its option trading rules in order to extend the Penny Pilot in options classes in certain issues ("Pilot Program") previously approved by the Securities and Exchange Commission ("Commission") through December 31, 2011. The text of the proposed rule change is available at the Exchange, *http://www.nyse.com,* the Commission's Public Reference Room, and on the Commission's Web site at *http://www.sec.gov.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange hereby proposes to extend the time period of the Pilot Program [4] which is currently scheduled to expire on December 31, 2010, through December 31, 2011, and to provide revised dates for adding replacement issues to the Pilot. The Exchange proposes that the semi-annual dates to replace issues that have been delisted be revised to the second trading day following January 1, 2011 and July 1, 2011. The Exchange also wishes to clarify that the replacement issues will be selected based on trading activity for the six month period beginning June 1, 2010, and ending November 30, 2010 for the January 2011 replacement, and the six month period beginning December 1, 2010 and ending May 31, 2011 for the July 2011 replacements. This filing does not propose any substantive changes to the Pilot Program: all classes currently participating will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

The Exchange agrees to [sic] reports that will analyze the impact of the Pilot Program on market quality and options systems capacity. These reports will include, but are not limited to: (1) Data and written analysis on the number of quotations generated for options selected for the Pilot Program; (2) an assessment of the quotation spreads for the options selected for the Pilot Program; (3) an assessment of the impact of the Pilot Program on the capacity of the NYSE Arca's automated systems; (4) any capacity problems or other problems that arose related to the operation of the Pilot Program and how the Exchange addressed them; and (5) an assessment of trade through complaints that were sent by the Exchange during the operation of the Pilot Program and how they were addressed.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) [5] of the Act, in general, and furthers the objectives of Section 6(b)(5) [6] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that the Pilot Program promotes just and equitable principles of trade by enabling public customers and other market participants to express their true prices to buy and sell options.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [7] and Rule 19b–4(f)(6) thereunder.[8] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

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–NYSEArca–2010–104 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–2010–104. 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 NYSE Arca's principal office and on its Internet Web site at *http://www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–104 and should be submitted on or before December 27, 2010.

[4] *See* Securities Exchange Act Release No. 34–60711 (September 23, 2009), 74 FR 49419 (September 28, 2009); Securities Exchange Act Release No. 34–61061 (November 24, 2009), 74 FR 62857 (December 1, 2009).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(6).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30329 Filed 12–2–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63383; File No. SR–FINRA–2010–062]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Proposed Implementation Period for the Rule Changes Approved in SR–FINRA–2010–042 (Verification of Assets)

November 29, 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 18, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by 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

FINRA is adopting a proposed rule change to extend by 30 days the proposed implementation period for the rule changes approved in SR–FINRA–2010–042.[4] The proposed rule change would not make any new changes to the text of FINRA rules.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 4, 2010, FINRA filed SR–FINRA–2010–042, a proposed rule change to adopt FINRA Rule 4160 (Verification of Assets). The proposed rule provided that a member, when notified by FINRA, may not continue to custody or retain record ownership of assets, whether such assets are proprietary or customer assets, at a non-member financial institution, which, upon FINRA staff's request, fails promptly to provide FINRA with written verification of assets maintained by the member at such financial institution. In SR–FINRA–2010–042, FINRA stated that it would announce the effective date of the proposed rule change in a *Regulatory Notice* to be published "no later than 60 days following Commission approval" and to establish the effective date "no later than 30 days following publication" of the *Regulatory Notice* announcing Commission approval.

The proposed rule change was published for notice and comment.[5] On October 1, 2010, FINRA filed Amendment No. 1 to SR–FINRA–2010–042 to respond to comments and to propose amendments in response to such comments (hereinafter, SR–FINRA–2010–042 and Amendment No. 1 thereto are, together, the "Verification of Assets filing").[6] The Commission approved the Verification of Assets filing on October 5, 2010.[7]

As stated in the Verification of Assets filing, FINRA will publish a *Regulatory Notice* no later than 60 days following Commission approval of the Verification of Assets filing. However, in this proposed rule change, FINRA proposes to make the effective date 60 days, rather than "no later than 30 days", following the publication of the *Regulatory Notice* announcing Commission approval of the filing.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, such that FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[8] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that a 30-day extension of the effective date of SR–FINRA–2010–042 is appropriate to provide firms sufficient advance notice of the new Verification of Assets rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[11] However, Rule 19b–4(f)(6)(iii)[12] permits the Commission to

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 63044 (October 5, 2010), 75 FR 62911 (October 13, 2010) (Order Approving File No. SR–FINRA–2010–042).

[5] *See* Securities Exchange Act Release No. 62655 (August 5, 2010), 75 FR 48731 (August 11, 2010) (Notice of Filing of File No. SR–FINRA–2010–042).

[6] *See supra* note 4.

[7] *See supra* note 4.

[8] 15 U.S.C. 78*o*–3(b)(6).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days

Continued

designate a shorter time if such action is consistent with the protection of investors and the public interest. Because FINRA is delaying the implementation of the rule only, FINRA has requested that the Commission waive the 30-day operative delay so that the proposal may become operative upon filing. For these reasons, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay, and hereby grants such waiver.[13]

At any time within 60 days of the filing of such 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, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2010–062 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2010–062. 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 FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions.

You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2010–062 and should be submitted on or before December 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30319 Filed 12–2–10; 8:45 am]

BILLING CODE 8011–01–P

prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that FINRA has satisfied the five-day pre-filing notice requirement.

[13] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63382; File No. SR–NYSE–2010–73]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending NYSE Rule 5190 To Correspond With Rule Changes Filed by the Financial Industry Regulatory Authority, Inc.

November 29, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 19, 2010, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a "non-controversial" rule change under Section 19(b)(3)(A) of the Act,[4] and Rule 19b–4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 5190 to correspond with rule changes filed by the Financial Industry Regulatory Authority, Inc. ("FINRA") and approved by the Commission. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule changes is to amend NYSE Rule 5190 (Notification Requirements for Offering Participants) to correspond with rule changes filed by FINRA and approved by the Commission.

Background:

On July 30, 2007, FINRA's predecessor, the National Association of Securities Dealers, Inc. ("NASD"), and NYSE Regulation, Inc. ("NYSER") consolidated their member firm regulation operations into a combined organization, FINRA. Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934, as amended (the "Act"), NYSE, NYSER and FINRA entered into an agreement (the "Agreement") to reduce regulatory duplication for their members by allocating to FINRA certain regulatory responsibilities for certain NYSE rules and rule interpretations ("FINRA Incorporated NYSE Rules").

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

NYSE Amex LLC ("NYSE Amex") became a party to the Agreement effective December 15, 2008.[6]

As part of its effort to reduce regulatory duplication and relieve firms that are members of FINRA, NYSE, and NYSE Amex of conflicting or unnecessary regulatory burdens, FINRA is now engaged in the process of reviewing and amending the NASD and FINRA Incorporated NYSE Rules in order to create a consolidated FINRA rulebook.[7]

Proposed Conforming Amendments to NYSE Rules:

FINRA recently amended FINRA Rule 5190 to amend the notice requirements applicable to distributions of securities that are considered "actively traded" and thus are not subject to a restricted period under Rule 101 of Regulation M.[8] As approved, the substance of the information that must be provided in the notice did not change, only the timing of the notice.

The Exchange previously adopted NYSE Rule 5190 to harmonize the notification requirements for offering participants with FINRA Rule 5190.[9] In order to harmonize the NYSE Rules with the approved FINRA Rules, the Exchange proposes to amend NYSE Rule 5190 to conform to the recently approved amendments to FINRA Rule 5190.[10] Accordingly, the Exchange similarly proposes to amend NYSE Rule 5190(d) to provide that member organizations will be required to provide a single notice under subparagraphs (1) and (2) of Rule 5190(d).

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with Section 6(b) of the Act,[11] in general, and further the objectives of Section 6(b)(5) of the Act,[12] in particular, in that they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule changes support the objectives of the Act by providing greater harmonization among NYSE Rules, NYSE Amex Equities Rules, and FINRA Rules (including Common Rules) of similar purpose, resulting in less burdensome and more efficient regulatory compliance for Dual Members. To the extent the Exchange has proposed changes that differ from the FINRA version of the Rules, such changes are technical in nature and do not change the substance of the proposed NYSE Rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[15] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[16] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission notes that the proposed rule change would bring NYSE Rule 5190 into harmony with FINRA Rule 5190. For this reason, the Commission believes that waiving the 30-day operative delay[17] is consistent with the protection of investors and the public interest. Therefore, the Commission designates the proposal operative upon filing.

At any time within the 60-day period beginning on the date of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2010–73 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2010–73. This file

[6] *See* Securities Exchange Act Release Nos. 56148 (July 26, 2007); 72 FR 42146 (Aug. 1, 2007) (order approving the Agreement), 56147 (July 26, 2007); 72 FR 42166 (Aug. 1, 2007) (SR–NASD–2007–054) (order approving the incorporation of certain NYSE Rules as "Common Rules"), and 60409 (July 30, 2009); 74 FR 39353 (Aug. 6, 2009) (order approving the amended and restated Agreement, adding NYSE Amex LLC as a party). Paragraph 2(b) of the Agreement sets forth procedures regarding proposed changes by FINRA, NYSE, or NYSE Amex to the substance of any of the Common Rules.

[7] FINRA's rulebook currently has three sets of rules: (1) NASD Rules, (2) FINRA Incorporated NYSE Rules, and (3) consolidated FINRA Rules. The FINRA Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"), while the consolidated FINRA Rules apply to all FINRA members. For more information about the FINRA rulebook consolidation process, *see* FINRA Information Notice, March 12, 2008.

[8] *See* Securities Exchange Act Release No. 62970 (Sep. 22, 2010); 75 FR 59771 (Sep. 28, 2010) (SR–FINRA–2010–37).

[9] *See* Securities Exchange Act Release No. 59965 (May 21, 2009); 74 FR 25783 (May 29, 2009) (SR–NYSE–2009–25).

[10] NYSE Amex has submitted a companion rule filing amending its rules in accordance with FINRA's rule changes. *See* SR–NYSEAmex–2010–106.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] 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).

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 NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2010–73 and should be submitted on or before December 27, 2010.[18]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30318 Filed 12–2–10; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 7234]

Shipping Coordinating Committee; Notice of Committee Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 a.m. on Tuesday, January 18, 2011, in Room 6103 of the United States Coast Guard Headquarters Building, 2100 Second Street, SW., Washington, DC 20593–0001. The primary purpose of the meeting is to prepare for the forty-second Session of the International Maritime Organization's (IMO) Standards of Training and Watchkeeping (STW) to be held at the IMO headquarters in London, United Kingdom, from January 24 to January 28, 2011.

The primary matters to be considered include:

—Adoption of the agenda;
—Decisions of other IMO bodies;
—Validation of model training courses;
—Unlawful practices associated with certificates of competency;
—Casualty analysis;
—Development of an e-navigation strategy implementation plan;
—Revision of the Recommendations for entering enclosed spaces aboard ships;
—Development of model procedures for executing shipboard emergency measures;
—Development of training standards for recovery systems;
—Development of unified interpretations for the term "approved seagoing service";
—Work program and provisional agenda for STW 43;
—Election of Chairman and Vice-Chairman for 2012;
—Any other business;
—Report to the Marine Safety Committee.

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, Ms. Zoe Goss, by e-mail at *zoe.a.goss@uscg.mil,* by phone at (202) 372–1425, by fax at (202) 372–1926, or in writing at Commandant (CG–5221), U.S. Coast Guard, 2100 2nd Street, SW., Stop 7126, Washington, DC 20593–7126 not later than January 11th, 2011, 7 days prior to the meeting. Requests made after January 11th might not be able to be accommodated. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Headquarters building. The Headquarters building is accessible by taxi and privately owned conveyance (public transportation is not generally available). However, parking in the vicinity of the building is extremely limited. Additional information regarding this and other IMO SHC public meetings may be found at: *http://www.uscg.mil/imo.*

Dated: November 24, 2010.

Jon Trent Warner,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 2010–30378 Filed 12–2–10; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–2010–0151]

Surface Transportation Project Delivery Pilot Program; Caltrans Audit Report

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice; request for comment.

SUMMARY: Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) established the Surface Transportation Project Delivery Pilot Program, codified at 23 U.S.C. 327. To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) mandates semiannual audits during each of the first 2 years of State participation. This notice announces and solicits comments on the fifth audit report for the California Department of Transportation (Caltrans).

DATES: Comments must be received on or before January 3, 2011.

ADDRESSES: Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590. You may also submit comments electronically at *http://www.regulations.gov,* or fax comments to (202) 493–2251.

All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, (Volume 65, Number 70, Pages 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Ruth Rentch, Office of Project Development and Environmental Review, (202)–366–2034, *Ruth.Rentch@dot.gov,* or Mr. Michael Harkins, Office of the Chief Counsel,

(202) 366–4928, *Michael.Harkins@dot.gov,* Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. 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

Section 6005 of SAFETEA–LU (codified at 23 U.S.C. 327) established a pilot program to allow up to five States to assume the Secretary of Transportation's responsibilities for environmental review, consultation, or other actions under any Federal environmental law pertaining to the review or approval of highway projects. In order to be selected for the pilot program, a State must submit an application to the Secretary.

On June 29, 2007, Caltrans and FHWA entered into a Memorandum of Understanding (MOU) that established the assignments to and assumptions of responsibility to Caltrans. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under the National Environmental Policy Act, as well as the FHWA's responsibilities under other Federal environmental laws for most highway projects in California.

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) requires the Secretary to conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The results of each audit must be presented in the form of an audit report and be made available for public comment. This notice announces the availability of the fifth audit report for Caltrans and solicits public comment on same.

Authority: Section 6005 of Pub. L. 109–59; 23 U.S.C. 315 and 327; 49 CFR 1.48.

Issued on: November 24, 2010.

Victor M. Mendez,

Administrator.

Surface Transportation Project Delivery Pilot Program

Federal Highway Administration Audit of California Department of Transportation

July 26–30, 2010

Overall Audit Opinion

Based on the information reviewed, it is the Federal Highway Administration (FHWA) audit team's opinion that as of July 30, 2010, the California Department of Transportation (Caltrans) continued to make progress toward meeting all responsibilities assumed under the Surface Transportation Project Delivery Pilot Program (Pilot Program), as specified in the Memorandum of Understanding (MOU) [1] with FHWA and in Caltrans' Application for Assumption (Application).

The FHWA commends Caltrans for its implementation of corrective actions in response to previous FHWA audit report findings. The FHWA also observed that Caltrans continued to identify and implement on a statewide Pilot Program basis best practices in use at individual Caltrans Districts (Districts).

With the completion of FHWA's fifth audit, Caltrans has now operated under the Pilot Program for 3 years. In compliance with the time specifications for the required audits, FHWA completed four semiannual audits in the first 2 years of State participation and has begun the annual audit cycle, beginning with this audit, which was completed July 30, 2010. Collectively, the FHWA audits have included on-site audits to 9 of the 12 Districts and to the Caltrans Regional Offices supporting the remaining 3 Districts. The audit team continues to identify significant differences across the Districts in terms of implementing Pilot Program policies, procedures, and responsibilities. Examples of such differences include: resource availability and allocation; methods of implementation; methods of process evaluation and improvement; and levels of progress in meeting all assumed responsibilities. It is the audit team's opinion that the highly decentralized nature of operations across Districts continues to be a major contributing factor to the variations observed in the Pilot Program. As a result of this organizational structure, clear, consistent, and ongoing oversight by Caltrans Headquarters (HQ) over Districts' implementation and operation of the Pilot Program responsibilities is necessary. A robust oversight program will help foster the exchange of information and the sharing of best practices and resources between Districts and will put the entire organization in a better position to more fully implement all assumed responsibilities and to meet all Pilot Program commitments.

Due to the multiyear timeframes associated with more complex and controversial projects, the full lifecycle of the environmental review aspect of project development (proceeding from initiation of environmental studies and concluding with the issuance of a Record of Decision or equivalent decision document) has yet to be realized within the Pilot Program to date. Caltrans continues to gain experience in understanding the resource requirements and processes necessary to administer its Program. It is the audit team's opinion that Caltrans needs to maintain this continuous process improvement to refine its approaches and use of resources to meet all Pilot Program commitments, especially given the increasing resource demands associated with managing ever-more complex and controversial projects under the Pilot Program.

Caltrans staff and management continue to request feedback from the FHWA audit team regarding program successes, best practices, and areas in need of improvement. By addressing all findings in this report, Caltrans will continue to move toward full compliance with all assumed responsibilities and Pilot Program commitments.

As of the conclusion of the fifth FHWA audit, Caltrans has participated in the Pilot Program for 3 years. It is FHWA's opinion that Caltrans has continued to improve its processes and procedures and has benefited from participation in the Pilot Program. However, it also is FHWA's opinion that while Caltrans participation in the Pilot Program has been successful thus far, it is still functioning in a development context and has yet to reach full maturity. Ongoing repeat findings and program areas still in the process of being developed or improved contributed to this opinion.

Requirement for Transition Plan

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) Section 6005(a) established the Pilot Program, codified at 23 U.S.C. 327. Under the provisions of 23 U.S.C. 327(i)(1), "the program shall terminate

[1] Caltrans MOU between FHWA and Caltrans available at: *http://environment.fhwa.dot.gov/strmlng/safe_cdot_pilot.asp.*

on the date that is 6 years after the date of enactment of this section" which will be August 10, 2011. Additionally, in accordance with the MOU between FHWA and Caltrans, Caltrans and FHWA must jointly "develop a plan to transition the responsibilities that Caltrans has assumed back to the FHWA so as to minimize disruption to the project, minimize confusion to the public, minimize burdens to other affected Federal, State, and local agencies, and, ensure, to the maximum extent possible, Caltrans will be able to complete by August 10, 2011, all anticipated environmental approvals." The transition plan must be completed and approved by both Caltrans and FHWA no later than March 10, 2011. New legislation is required in order for the Pilot Program to be extended.

Effective Practices

The FHWA audit team observed the following effective practices during the fifth audit:

1. Caltrans HQ has sought out, shared, and implemented (or is implementing) best practices in use at the District level to use on a statewide basis. Examples include:

(a) Use of a standard form to document Class of Action determination;

(b) Use of the File Maker Pro environmental database system to track projects and milestones; and

(c) Creation of a Section 4(f) point of contact in each District to serve as a technical resource for District staff.

2. Use of monthly newsletters and e-mails from HQ environmental coordinators to inform District environmental staff of key issues, timely topics, and changes in practices.

3. The Sacramento Legal Office permanently assumed responsibility for all environmental law issues in two Districts where staff turnover resulted in limited expertise to support legal sufficiency reviews. As the number of legal sufficiency reviews performed under the Pilot Program has not been significant, concentrating reviews amongst a key group of attorneys should assist with a consistent level of review of environmental documents and the development of expertise under the Pilot Program.

4. Development of an on-line training course on Section 4(f) determinations that is nearing completion.

5. Expansion of the scope of the Caltrans self-assessment process to include review of Pilot Program areas identified as potential weaknesses by HQ Environmental Coordinators.

6. A variety of approaches are being used by individual Districts to capture, track, and ensure that environmental commitments identified in environmental documents are being met. Identified District specific approaches used to accomplish this include:

(a) Training environmental staff in environmental commitments tracking;

(b) Dedicating resources to track commitments, ensuring that the commitments are circulated at key stages of the project cycle, and checking that the commitments have been met at the completion of a project;

(c) Using dedicated formats to capture, describe, and ensure that environmental commitments are transferred and incorporated into contract documents;

(d) Requiring environmental awareness training for construction personnel prior to the start of construction; and

(e) Training appropriate staff on incorporation of environmental commitments into plan, specification, and estimate packages.

Background

The Pilot Program allows the Secretary of Transportation (Secretary) to assign, and the State to assume, the Secretary's responsibilities under the National Environmental Policy Act (NEPA) for one or more highway projects. Upon assigning NEPA responsibilities, the Secretary may further assign to the State all or part of the Secretary's responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review of a specific highway project. When a State assumes the Secretary's responsibilities under this program, the State becomes solely responsible and is liable for carrying out the responsibilities it has assumed, in lieu of the FHWA.

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) mandates that FHWA, on behalf of the Secretary, conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The focus of the FHWA audit process is four-fold: (1) To assess a Pilot State's compliance with the required MOU and applicable Federal laws and policies; (2) to collect information needed to evaluate the success of the Pilot Program; (3) to evaluate Pilot State progress in meeting its performance measures; and (4) to collect information for use in the Secretary's annual Report to Congress on the administration of the Pilot Program. Additionally, 23 U.S.C. 327(g) requires FHWA to present the results of each audit in the form of an audit report published in the **Federal Register**. This audit report must be made available for public comment, and FHWA must respond to public comments received no later than 60 days after the date on which the period for public comment closes.

Caltrans published its draft Application to participate in the Pilot Program on March 14, 2007, and made it available for public comment for 30 days. After considering public comments, Caltrans submitted its Application to FHWA on May 21, 2007, and FHWA, after soliciting the views of Federal agencies, reviewed and approved the Application. Then on June 29, 2007, Caltrans and FHWA entered into an MOU that established the assignments to and assumptions of responsibility to Caltrans, which became effective July 1, 2007. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under NEPA, as well as FHWA's responsibilities under other Federal environmental laws for most highway projects in California.

Scope of the Audit

This is the fifth FHWA audit of Caltrans participation in the Pilot Program. The on-site portion of the audit was conducted in California from July 26 through July 30, 2010. As required in SAFETEA–LU, each FHWA audit must assess compliance with the roles and responsibilities assumed by the Pilot State in the MOU. The audit also includes recommendations to assist Caltrans in successful participation in the Pilot Program.

The audit primarily focused on assessing compliance with assumed responsibilities. Key Pilot Program areas evaluated during this audit included:

- Section 4(f) process determination and documentation;
- The reevaluation process;
- The impact of furloughs and loss of staff;
- Project files;
- Resource agency consultation and coordination;
- Training;
- Quarterly reports;
- Quality Assurance Quality Control (QA/QC) process; and
- NEPA process documentation.

Prior to the on-site audit, FHWA completed telephone interviews with Federal resource agency staff at the U.S. Army Corps of Engineers (USACE), the National Park Service, the National Oceanic and Atmospheric Administration, the Advisory Council on Historic Preservation, and the Environmental Protection Agency. The

on-site audit included visits to the Caltrans Offices in District 3/North Region (Marysville), District 4 (Oakland), District 5 (San Luis Obispo), District 7 (Los Angeles), District 8 (San Bernardino), and District 12 (Irvine). Additionally, FHWA auditors visited the Sacramento offices of the USACE and U.S. Fish and Wildlife Service (FWS) to interview staff.

This report documents findings within the scope of the audit as of the completion date of the on-site audit on July 30, 2010.

Audit Process and Implementation

The intent of each FHWA audit completed under the Pilot Program is to ensure that each Pilot State complies with the commitments in its MOU with FHWA. The FHWA does not evaluate specific project-related decisions made by the State because these decisions are the sole responsibility of the Pilot State. However, the FHWA audit scope does include the review of the processes and procedures (including documentation) used by the Pilot State to reach project decisions in compliance with MOU Section 3.2.

In addition, Caltrans committed in its Application (incorporated by reference in MOU Section 1.1.2) to implement specific processes to strengthen its environmental procedures in order to assume the responsibilities assigned by FHWA under the Pilot Program. The FHWA audits review how Caltrans is meeting each commitment and assesses Pilot Program performance in the core areas specified in the *Scope of the Audit* section of this report.

The Caltrans' Pilot Program commitments address:

- Organization and Procedures under the Pilot Program.
- Expanded QC Procedures.
- Independent Environmental Decisionmaking.
- Determining the NEPA Class of Action.
- Consultation and Coordination with Resource Agencies.
- Issue Identification and Conflict Resolution Procedures.
- Record Keeping and Retention.
- Expanded Internal Monitoring and Process Reviews.
- Performance Measures to Assess the Pilot Program.
- Training to Implement the Pilot Program.
- Legal Sufficiency Review.

The FHWA team for the fifth audit included representatives from the following offices or agencies:

- FHWA Office of Project Development and Environmental Review.
- FHWA Office of the Chief Counsel.
- FHWA Alaska Division Office.
- FHWA Resource Center Environmental Team.
- Volpe National Transportation Systems Center.
- FWS.

During the onsite audit, FHWA interviewed more than 70 staff from 6 District offices and the USACE and FWS. The audit team also reviewed project files and records for over 80 projects managed by Caltrans under the Pilot Program.

The FHWA acknowledges that Caltrans identified specific issues during its fifth self-assessment performed under the Pilot Program (required by MOU section 8.2.6), and is working on corrective actions to address the identified issues. Some issues described in the Caltrans self-assessment may overlap with FHWA findings identified in this audit report.

In accordance with MOU Section 11.4.1, FHWA provided Caltrans with a 30-day comment period to review this draft audit report. The FHWA reviewed comments received from Caltrans and revised sections of the draft report, where appropriate, prior to publishing it in the **Federal Register** for public comment.

Limitations of the Audit

The conclusions presented in this report are opinions based upon interviews of selected persons knowledgeable about past and current activities related to the execution of the Pilot Program at Caltrans, and a review of selected documents over a limited time period. The FHWA audit team's ability to conduct each audit and make determinations of Caltrans' compliance with assumed responsibilities and commitments under the Pilot Program has been further limited by the following:

- Select Districts visited by FHWA audit team. The FHWA audit team has not visited each District during the audit process. Each audit (including this audit) has consisted of visits to Districts with significant activity under the Pilot.
- Caltrans staff availability during audits. Some Caltrans staff selected to be interviewed by the audit team were out of the office and unavailable to participate in the onsite audit. This limited the extent of information gathering.
- Incomplete project files. Project files and associated project documentation have, when reviewed by the audit team, not always been complete. This is especially true for projects where the project or related studies were initiated prior to commencement of the Pilot Program. A full assessment of compliance with Pilot Program policies and procedures is not possible unless all required documents are available for review.
- Limited scope of Pilot Program project development activity. Caltrans has not operated under the Pilot Program for a sufficient period of time to manage the full lifecycle of most Environmental Impact Statements (EIS) and other complex projects. Therefore, FHWA is not yet able to fully determine how Caltrans will comply with its responsibilities assumed under the Pilot Program for these project situations.
- Insufficient data to determine time savings reported by Caltrans in the completion of environmental documents. Due to the short period of time that the Pilot Program has been in place, a sufficient number of projects of varying complexities have not been completed to adequately support a determination on the potential time savings resulting from participation in the Pilot Program.
- Distinction between the two Categorical Exclusion (CE) assumption processes—Section 6004 and Section 6005. Since the assumption by Caltrans of the SAFETEA–LU Section 6004 CE process is not a part of these audits, it is not possible to validate the correctness of determinations placing individual CEs under the aegis of each assumed responsibility.
- Continued errors in the quarterly reports. The quarterly reports prepared by Caltrans listing all environmental approvals and decisions made under the Pilot Program continue to contain omissions and errors. As a result, it is difficult for FHWA to exercise full oversight on Pilot Program projects unless a complete accounting of all NEPA documents produced under the Pilot is available and taken into account during the FHWA audit.

Status of Findings Since Last Audit (July 2009)

As part of the fifth audit, FHWA evaluated the corrective actions implemented by Caltrans in response to the "Deficient" and "Needs Improvement" findings in the fourth FHWA audit report.

1. *Quarterly Reports*—The quarterly reports Caltrans provided to FHWA under MOU Section 8.2.7 continued to include inaccuracies related to environmental document approvals and decisions made under the Pilot Program. The FHWA does acknowledge that Caltrans is in the process of implementing the File Maker Pro environmental database system on a statewide basis to assist in the

developing of a comprehensive database of environmental projects and milestones to improve the accuracy of the information reported in the quarterly reports.

2. *QA/QC Certification Process*—Project file reviews completed during the fifth audit continued to identify incorrect and incomplete QC certification forms. Caltrans continues to address inadequacies in this process through staff specific training when inconsistencies are identified, most notably during the self-assessment process.

3. *QA/QC Assurance*—Under the Pilot Program, NEPA documentation must clearly identify that FHWA has no role in the environmental review and decisionmaking process for assigned projects. However, environmental document reviews continued to identify instances when FHWA was referenced as being involved in the decisionmaking process.

"Needs Improvement" audit findings status:

1. *Inadequate Guidance in the Standard Environmental Reference (SER)*—Caltrans updated the SER to address FHWA's concerns regarding several instances where guidance provided was unclear, misleading, or incomplete. However, additional instances were observed during the fifth audit regarding unclear, misleading, or incomplete information in the SER.

2. *Procedural and Substantive Requirements*—The identified areas of confusion regarding implementation of the Endangered Species Act (ESA) Section 7 process have been addressed and the process of consulting with the FWS under ESA Section 7 has been improved.

3. *Section 4(f) Issues:*

(a) Documentation—Project file reviews and interviews with Caltrans staff confirmed continuing inconsistencies in the documentation required to meet the Section 4(f) provisions.

(b) Circulation of a Draft Section 4(f) Evaluation—Project file reviews and interviews with Caltrans staff identified confusion regarding the requirement to circulate Section 4(f) Evaluations to the Department of the Interior for review.

(c) Section 4(f) Implementation—Project file reviews and interviews with Caltrans staff identified several inconsistencies with the implementation and general understanding required in carrying out Section 4(f) provisions.

Caltrans is continuing to address each issue. For example, Caltrans requested and received two FHWA-led Section 4(f) trainings, each 2 days in length, with specific requests to address areas that FHWA has identified as problematic during the Pilot Program audit. Caltrans is also completing an on-line Section 4(f) training that will be posted on the "Training on Demand" Web site.

4. *Legal Division Staff*—Significant variability existed in the Federal environmental law experience of the attorneys in the four Caltrans legal offices. Most notably, the retirement of a highly experienced attorney near the end of 2008 resulted in two of Caltrans' legal offices serving some of Caltrans' largest and busiest Districts with no attorneys on staff with substantial experience in Federal environmental law. Since October 2009, the Sacramento Legal Division assumed permanent responsibility for all environmental law issues in the legal office affected by the retirement of the experienced attorney in 2008.

5. *Training*—In the past, inconsistencies in training were identified in the areas of Section 4(f) and Section 7 processes. There were also observed inconsistencies in the use of tools to identify training needs and to track employees' training histories, as well as no method for employees to track completion of any online training available on the Caltrans Web site. A method to record the completion of on-line trainings by Caltrans staff is now available with implementation of its use underway.

6. *Maintenance of Project and General Administrative Files*—Caltrans has instituted specific procedures for maintaining project files in accordance with the Uniform Filing System (UFS) and has provided training on these procedures. Inconsistencies in the application of these procedures, reported in previous audit findings, were also identified in this audit.

Findings Definitions

The FHWA audit team carefully examined Pilot Program areas to assess compliance in accordance with established criteria in the MOU and Application. The time period covered by this audit report is from the start of the Caltrans Pilot Program (July 1, 2007) through completion of the fifth onsite audit (July 30, 2010) with the focus of the audit on the most recent 12 month period. This report presents audit findings in three areas:

- *Compliant*—Audit verified that a process, procedure or other component of the Pilot Program meets a stated commitment in the Application and/or MOU.
- *Needs Improvement*—Audit determined that a process, procedure or other component of the Pilot Program as specified in the Application and/or MOU is not fully implemented to achieve the stated commitment or the process or procedure implemented is not functioning at a level necessary to ensure the stated commitment is satisfied. *Action is recommended to ensure success.*
- *Deficient*—Audit was unable to verify if a process, procedure or other component of the Pilot Program met the stated commitment in the Application and/or MOU. *Action is required to improve the process, procedure or other component prior to the next audit;*

or

Audit determined that a process, procedure or other component of the Pilot Program did not meet the stated commitment in the Application and/or MOU. *Corrective action is required prior to the next audit.*

or

Audit determined that for a past Needs Improvement finding, the rate of corrective action has not proceeded in a timely manner; is not on the path to timely resolution of the finding.

Summary of Findings—July 2010

Compliant

Caltrans was found to be compliant in meeting the requirements of the MOU for the key Pilot Program areas within the scope and the limitations of the audit, with the exceptions noted in the Deficient and Needs Improvement findings in this audit report set forth below. Caltrans continues to provide FHWA with all required oversight reports, per MOU Section 8.2 (*e.g.,* Quarterly Reports listing project approvals and decisions made under the authority of the Pilot Program and the Self-assessment Summary Reports) and has fully cooperated with FHWA during the audit process. Even with the loss of staff, furloughs, and budget constraints Caltrans continues to be compliant in their commitment of resources needed to carry out the responsibilities assumed under the Pilot Program.

Needs Improvement

(N1) *Maintenance of Project and General Administrative Files*—MOU Section 8.2.4 requires that Caltrans maintains project and general administrative files pertaining to its discharge of the responsibilities assumed under the Pilot Program. Caltrans has instituted specific procedures for maintaining project files in accordance with the UFS and has provided training on these procedures. Inconsistencies in the application of these procedures, which have been reported in previous audit findings,

were also identified throughout the Districts visited in this audit. Examples of inconsistencies observed in 10 of the approximately 80 project files reviewed during the audit included:

(a) Instances where required documentation was missing in project files but was produced by Caltrans staff at the request of the auditors. Examples of such missing documents included a letter documenting the State Historic Preservation Officer's concurrence on effect determination; correspondence between Caltrans and FWS regarding a Biological Opinion for a project; and project level conformity determinations by FHWA; and

(b) Missing, out of order, or incomplete UFS tabs.

(N2) *Performance Measure*—"*Monitor relationships with agencies and the general public*"—MOU Section 10.2.1.C requires Caltrans to "assess change in communication among Caltrans, Federal and State resource agencies, and the public." Caltrans conducted the first annual resource agency survey in 2009 and a second survey in February 2010. The Second Annual Resource Agency Survey Report was delivered in May 2010. Each report lists an average rating for each survey question and a comparison is made from the previous report average ratings. The Survey Report does not report each agency's rankings separately, which would produce a more accurate assessment of Caltrans' individual relationship with Federal and State agencies. It is FHWA's recommendation that the specific agencies' rating information be shared with FHWA so that agency specific relationship issues could be identified and corrective actions could be discussed.

(N3) *Coordination with Resource Agencies*—Through interviews with resource agency staff, the audit team learned the following:

(a) Under MOU Section 7.1.1, Caltrans "agrees to seek early and appropriate coordination with all appropriate Federal, State, and local agencies in carrying out any of the responsibilities and highway projects assumed under Part 3 of this MOU." Based on information obtained during audit interviews with representatives from a USACE District office, the audit team learned that Caltrans is not conducting pre-application coordination with this office nor engaging in appropriate coordination on NEPA reviews which is limiting the agencies' flexibility to develop project alternatives and mitigation options.

(b) MOU Section 7.1.2, Caltrans "agrees to make all reasonable and good faith efforts to identify and resolve conflicts with all appropriate Federal, State, and local agencies during the consultation and review process in carrying out any of the responsibilities assumed under Part 3 of this MOU." Interviews with representatives from a Caltrans District Office, a USACE District Office, and a FWS Field Office, determined that longstanding conflicts (*i.e.* insufficient information provided, lack of compliance with environmental commitments and disagreements on regulatory timeframes, action areas and compensative mitigation requirements) are not being addressed and "good faith" efforts to resolve conflicts between these Federal agencies and a few Districts are lacking. These agencies reported that due to these conflicts, efforts to carry out responsibilities under applicable Federal laws are not being implemented to the fullest extent.

(N4) *Procedural and Substantive Requirements*—MOU Section 5.1.4 states that Caltrans will work with all other appropriate Federal agencies concerning the laws, guidance, and policies that such other Federal agencies are responsible for administering. Project file reviews and staff interviews identified the following inconsistencies:

(a) The Section 7 consultation was incomplete and the Section 7 finding was not included in the NEPA documentation of a project's Finding of No Significant Impacts (FONSI); and

(b) An Environmental Assessment (EA) document did not identify that the project was in a 100-year flood zone and therefore, a "practicability" finding was not made in the FONSI. As a result, the project was not in compliance with Executive Order 11988 Floodplain Management and 23 CFR 650.

(N5) *Compliance with Procedural and Substantive Requirements*—MOU Section 5.1 requires Caltrans to be subject to the same procedural and substantive requirements that apply to the U.S. Department of Transportation (DOT) in carrying out the responsibilities assumed under the Pilot Program. Such procedural and substantive requirements include compliance with Federal laws, Federal regulations, Executive Orders, DOT Orders, FHWA Orders, official guidance and policy issued by DOT or FHWA, and any applicable Federal Court decisions, and interagency agreements such as programmatic agreements, memoranda of agreement, and other similar documents that relate to the environmental review process. Documentation errors during the NEPA process were noted in 11 of approximately 80 project files reviewed during the audit. Project file reviews identified incomplete or inaccurate NEPA documents and other related project materials. Some of these instances included:

(a) A FONSI that did not include a response to comments received on the EA regarding traffic operations and their impacts on the project;

(b) A FONSI that did not include a statement that the Section 7 consultation had been performed in compliance with the ESA;

(c) Two CE determinations failed to reference the most current noise studies performed prior to the approvals of the CEs;

(d) One CE determination failed to reference the most current traffic analysis performed prior to the approval of the CE and;

(e) A project file contained a fact sheet for the project that contained incorrect information on the level of environmental documentation. Even if this fact sheet was not released to the public, it is part of the project file and would become part of the administrative record, and thus contain incorrect information.

(N6) *Re-evaluation Process*—MOU Section 5.1 requires Caltrans to be subject to the same procedural and substantive requirements that apply to DOT in carrying out the responsibilities assumed under the Pilot Program. This includes the process and documentation for conducting NEPA re-evaluations to comply with 23 CFR 771.129. Additionally, SER Chapter 33 discusses re-validations and re-evaluations. Project file reviews and staff interviews identified varying degrees of compliance with these procedures. Project file reviews completed in some Districts determined that the re-evaluations completed complied with SER Chapter 33. However, in other Districts project files identified the following inconsistencies:

(a) A re-evaluation was used to combine portions of two EISs. The FHWA re-evaluation process does not accommodate such an approach. Other elements of this re-evaluation that appeared to deviate from established procedures included: (1) A change was made to the project that was not evaluated in either of the original EISs or the subsequent re-evaluations performed on the respective projects and (2) a previous conformity determination was relied on for the segment covered by one of the EISs, whereas a new conformity determination was done on the segment from the second EIS. There was no conformity determination for the combined project;

(b) In another project file review, no evidence was found that a Section 106

Area of Potential Effect (APE) was revised after a post-final environmental document change occurred that expanded the footprint of the proposed project outside of the original APE. No documents in the project file were identified to support that Caltrans had performed an evaluation to determine if the change had an effect on the validity of the original environmental document or the Section 106 determination of effects;

(c) A re-evaluation of an original CE determination contained, as a part of the re-evaluation, the addition of another project CE determination. The District concurrently issued a Section 6005 CE for the "combined" project, without including a new project description. The project file contained the new CE with the re-evaluation attached. Documentation in the file indicated that the second project was not to be added to the original CE, since that would make the first project ineligible for a Federal funding category;

(d) A re-evaluation did not include documentation of an affirmative determination that the NEPA document was still valid; and

(e) Instances were observed by the audit team that re-evaluations were approved without the original project file or approved environmental document being in the District Office. In one instance, a re-evaluation was approved by a District without reviewing the project file or final environmental document. According to information provided to the audit team, the project file had been removed from the office and could not be located.

The audit team feels that additional clarification and guidance needs to be provided by Caltrans to the environmental staff as to the purpose and use of the re-evaluation process. A re-evaluation is done to determine if the approved environmental document or the CE designation remains valid. In the re-evaluation process, the original decision and analysis needs to be reviewed for its validity. The process is not intended to be used to change the scope of projects.

(N7) *Section 4(f) and "Locally Significant" Historic Resources*—MOU Section 5.1.1 affirms that Caltrans is subject to the same procedural and substantive requirements that apply to the DOT in carrying out the responsibilities assumed under the Pilot Program. The SER Chapter 20, *Section 4(f) and Related Requirements,* sets forth procedures for documenting impacts to Section 4(f) properties in Caltrans-assigned environmental documents, while the *Forms and Templates* section of the SER contains annotated outlines for such documents. However, the SER does not address how Caltrans should determine whether a historic resource which is significant at the local level should be considered eligible for protection under Section 4(f). In the case of one project reviewed by the audit team, it was unclear from review of the project file and from interviews with Caltrans staff what process was used for making the determination and what internal and external coordination and consultation was required. It is the audit team's opinion that the SER should include a process to ensure consistency in the determination of the historic significance of local resources.

(N8) *Training: Inconsistent Level of Training for Staff*—MOU Section 12.1.1 requires Caltrans to ensure that its staff is properly trained and that training will be provided "in all appropriate areas with respect to the environmental responsibilities Caltrans has assumed." Section 4.2.2 of the MOU also requires that Caltrans maintain adequate staff capability to effectively carryout the responsibilities it has assumed.

The audit team found an inconsistent application of the training plan for generalists in two Districts. Interviews with several SEPs in two Districts indicated that oversight or tracking of training for generalists is not uniform and identified the need for a more systematic approach. The interviews found that training attended by generalists is not consistently monitored by their SEPs, nor is the training plan consistency applied or tracked to ensure employees attend the proper training given to support the generalist's responsibilities. While the audit team did learn that a more systematic training plan for generalists (*i.e.,* the generalist roadmap) had recently been developed, it remains an important issue to ensure that staff attends the training prescribed by the plan to ensure they have the proper skill set to effectively carry out responsibilities under the Pilot Program.

(N9) *Training: Inconsistent Understanding of Required Processes*—MOU Section 4.2.2 requires Caltrans to maintain adequate organizational and staff capacity to effectively carry out the responsibilities it has assumed under MOU Section 3. The following inconsistencies were noted during interviews with Caltrans staff:

(a) Interviews with two SEPs and project file reviews indicated a lack of understanding of the Section 4(f) process and options available for implementation and documentation of the Section 4(f) process. A lack of understanding and knowledge was identified in the areas of the determination of *de minimis* impacts findings, the use of established Section 4(f) programmatic agreements, and the required documentation, evaluation, and explanation to be included in the environmental documents;

(b) Interviews with one HQ Environmental Coordinator and one SEP reflected a lack of awareness of any policy or guidance for the use the Statute of Limitations notice and;

(c) Interviews with SEPs in two Districts reflected a lack of awareness and knowledge of the "Blanket" CE for approval of design exceptions. While the use of this may be limited, a general understanding and awareness is expected by Caltrans staff. Several SEPs either did not know of the "Blanket" CE or were unaware of how and when to use it.

Deficient

(D1) *Reports Listing Approvals and Decisions (i.e., Quarterly Reports)*—MOU Section 8.2.7 requires Caltrans to submit a report listing all Pilot Program approvals and decisions made with respect to responsibilities assumed under the MOU with FHWA (each quarter for the first 2 years; after the first 2 years no less than every 6 months). Caltrans has chosen to continue to provide quarterly reports to FHWA. Inaccurate project reporting continues to be an ongoing issue affecting the quarterly report process and has been identified in every previous FHWA audit report. Among the reporting errors identified in this audit were:

(a) Omission of two EAs;

(b) Omission of one FONSI;

(c) Omission of a biological opinion;

(d) Incorrect approval date for a CE determination;

(e) Incorrect listing of a re-evaluation/revalidation for a Section 6004 CE determination as Section 6005 CE determination; and

(f) Incorrectly included a re-evaluation/revalidation of a project with no Federal funding or required approvals, and therefore not a part of the Pilot Program.

The current Caltrans approach to developing the quarterly reports continues to be deficient. The accuracy of the reports on project approvals and decisions affects the FHWA oversight of the Pilot Program. The FHWA acknowledges that Caltrans is in the initial stages of statewide implementation of the File Maker Pro environmental database. It is anticipated that the implementation of this database system will improve the accuracy of information provided in the quarterly reports to FHWA.

(D2) *Section 4(f) Documentation*—MOU Section 5.1.1 affirms that Caltrans is subject to the same procedural and substantive requirements that apply to DOT in carrying out the responsibilities assumed under the Pilot Program. The SER Chapter 20, *Section 4(f) and Related Requirements,* sets forth procedures for documenting impacts to Section 4(f) properties in Caltrans-assigned environmental documents, while the *Forms and Templates* section of the SER contains annotated outlines for such documents, including appropriate language for addressing *de minimis* impacts (49 U.S.C. 303(d); 23 U.S.C. 139(b); 23 CFR 774.17). As was also noted in the fourth FHWA audit of the Pilot Program, project file reviews and interviews with staff during this audit identified inconsistencies in the documentation requirements for carrying out the Section 4(f) provisions. These included:

(a) For a bridge replacement project located within a National Forest, no documentation was provided in the EA document or in the project file regarding the Section 4(f) status of the recreational facilities in the immediate project vicinity or any possible project impacts to those resources;

(b) A project file contained a letter from the official with jurisdiction over the Section 4(f) recreational resource stating the impacts to the resource would be *de minimis.* Neither the EA document nor the project file contained the supporting documentation for that determination, as required under 23 CFR 774.7(b).

(c) The Section 4(f) discussion in the environmental document of another project (for which no NEPA approval had been made at the time of the audit) was unclear as to which type of Section 4(f) documentation and approval was being contemplated. The applicable section of the EA included the discussion of four different types of Section 4(f) approvals:

1. The EA described the project as qualifying for a Nationwide Programmatic Section 4(f) evaluation, but did not reach a conclusion pursuant to the applicable Programmatic.

2. The document then included a discussion similar to what is used in an individual Section 4(f) Evaluation, including impacts to Section 4(f) properties, avoidance alternatives, and measures to minimize harm, ending by stating that no preferred alternative had been identified for the project.

3. The EA also contained a Section 4(f) constructive use discussion, which reached no conclusion.

4. Finally, the project file contained an e-mail stating that although the EA was missing expected language regarding *de minimis* impacts and a concurrence letter from the officials with jurisdiction, the Caltrans Branch Chief would sign the QA/QC sheets "with the assurance that the above items will be completed."

(D3) *QA/QC Certification Process*—MOU Section 8.2.5 and SER Chapter 38 require Caltrans staff to review each environmental document in accordance with the policy memorandum titled, "Environmental Document Quality Control Program under the NEPA Pilot Program" (July 2, 2007). Incomplete and incorrectly completed QC certification forms continue to be identified. During project file reviews by the audit team, the following instances of incomplete or incorrect QC certification forms since the July 2009 audit were observed:

(a) An Environmental Assessment and Section 4(f) Evaluation was approved contingent on changes that still needed to be made to the document;

(b) One QC certification form was approved by the Quality Control Reviewer, Preparer, and Branch Chief without the technical reviewer's signature due to pending comments;

(c) Five other QC certification forms contained undated review signatures or the signatures were not obtained in the proper sequence in accordance with the Caltrans established QA/QC processes;

(d) Two QC certification forms were missing the signatures of required reviewers. In those cases, a memo was included in the files documenting this oversight. One memo noted that the NEPA document that was approved for the project had been incomplete. No additional explanation was provided; and

(e) Two external QC certification forms contained signatures that were obtained after the internal QC certification form signatures. The SER Chapter 38 process requires the QC external certification form to be completed before the internal certification review can be initiated.

(D4) *Maintenance of Project and General Administrative Files*—MOU Section 8.2.4 requires Caltrans to maintain project and general administrative files pertaining to its discharge of the responsibilities assumed under the Pilot Program. Caltrans has instituted specific procedures for maintaining project files and has provided training on these procedures. Previous audits identified inconsistencies with the application of these procedures (*i.e.,* missing required documents, missing UFS tabs) and inconsistencies throughout the Districts visited in this audit were also identified. This audit also identified inconsistencies with file maintenance in at least 15 of the approximately 80 project files reviewed. Examples of these include:

(a) Various types of required project documentation were missing from project files. Examples of missing documents included:

- Signed final environmental documents;
- Noise abatement decision report;
- Historic Properties Survey Report;
- Environmental Commitment Records;
- Internal and external QC certification forms (some signed but undated);
- Signed copies of the PEAR/PES forms;
- Section 106 Memorandum of Agreement; and
- Information on the types of Section 4(f) resources and the projects' impacts upon them.

(b) Two instances in which the project files were not available for review; in one case, the file has been improperly disposed, while in the other case, it was uncertain whether the project file had been misplaced or had never been set up.

[FR Doc. 2010–30326 Filed 12–2–10; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0380]

Agency Information Collection Activities; Revision of a Currently-Approved Information Collection Request: Training Certification for Drivers of Longer Combination Vehicles

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval. The FMCSA requests approval to revise and extend an information collection request (ICR) entitled, "*Training Certification for Drivers of Longer Combination Vehicles*." This ICR is necessary because the training certificates drivers are required to present to prospective employers serve as proof the drivers have successfully completed the

training to operate Longer Combination Vehicles (LCVs) safely on the Nation's highways. Motor carriers are required to maintain a copy of the training certification in each LCV driver's qualification file, which may be reviewed by Federal or State enforcement officials. This ICR is being revised due to an anticipated increase in the estimated number of LCV drivers submitting training certificates to employers resulting in a change to the estimated information collection burden for this training task. On September 9, 2010, FMCSA published a **Federal Register** notice allowing for a 60-day comment period on the ICR. No comment was received.

DATES: Please send your comments by January 3, 2011. OMB must receive your comments by this date in order to act quickly on the ICR.

ADDRESSES: All comments should reference Federal Docket Management System (FDMS) Docket Number FMCSA–2010–0380. Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/Federal Motor Carrier Safety Administration, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, Driver and Carrier Operations Division, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–4325; e-mail *tom.yager@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Training Certification for Drivers of Longer Combination Vehicles.

OMB Control Number: 2126–0026.

Type of Request: Revision of a currently-approved information collection.

Respondents: Drivers who complete LCV training each year, current LCV drivers who submit the LCV Driver-Training Certificate to a prospective employer, and motor carriers receiving and filing the certificates.

Estimated Number of Respondents: 31,500 drivers and motor carriers (700 new LCV drivers plus 15,050 current LCV drivers plus 15,750 motor carriers).

Estimated Number of Responses: 31,500 (700 new LCV drivers plus 15,050 current LCV drivers plus 15,750 motor carriers).

Estimated Time per Response: 10 minutes for preparation of LCV Driver-Training Certificate and an additional 10 minutes for the use of the LCV Driver-Training Certificate during the hiring process each year.

Expiration Date: February 28, 2011.

Frequency of Response: At various times during the year.

Estimated Total Annual Burden: 2,742 hours. The total number of drivers per year for whom this activity will occur consists of newly-trained LCV drivers (700) and current LCV drivers changing employers (15,050), a total of 15,750 drivers. The total annual information collection burden is estimated to be 2,742 hours: Preparation of LCV Driver-Training Certificate [700 newly trained LCV drivers × 10 minutes ÷ 60 minutes], and use of the certificate during the hiring process [15,750 total LCV drivers × 10 minutes ÷ 60 minutes].

Background: Section 4007(b) of the Motor Carrier Act of 1991 (Title IV of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Public Law 102–240, 105 Stat. 1914, 2152; 49 U.S.C. 31307) requires the Secretary of Transportation to establish Federal minimum training requirements for drivers of LCVs. The responsibility for implementing the statutory requirement was subsequently delegated to FMCSA (49 CFR 1.73). The FMCSA, in a final rule entitled, "Minimum Training Requirements for Longer Combination Vehicle (LCV) Operators and LCV Driver-Instructor Requirements" adopted implementing regulations for minimum training requirements for the operators of LCVs (March 30, 2004; 69 FR 16722).

The 2004 final rule created an information collection burden concerning the certification of new, current and non-grandfathered LCV drivers. An LCV is any combination of a truck-tractor and two or more semi-trailers or trailers, which operates on the National System of Interstate and Defense Highways (as defined in 23 CFR 470.107) and has a gross vehicle weight greater than 80,000 pounds. The purpose of this rule is to enhance the safety of LCV operations on our nation's highways.

By regulation, motor carriers cannot allow a driver to operate an LCV without ensuring that the driver has been properly trained in accordance with the requirements of 49 CFR 380.113. LCV drivers must present their LCV Driver-Training Certificate to prospective employers as proof of qualification to drive LCVs. Motor carriers must maintain a copy of the LCV Training Certificate in order to be able to show Federal, State or local officials that drivers operating LCVs are certified to do so.

Definitions: The LCV training regulations under 49 CFR part 380 are applicable only to drivers of "longer combination vehicles," defined as "any combination of a truck-tractor and two or more trailers or semi-trailers, which operate[s] on the National System of Interstate and Defense Highways (defined in 23 CFR 470.107) with a gross vehicle weight greater than 80,000 pounds" (49 CFR 380.105).

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The Agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued on: November 23, 2010.

Kelly Leone,

Associate Administrator, Research and Information Technology.

[FR Doc. 2010–30382 Filed 12–2–10; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0387]

Identification of Interstate Motor Vehicles: The Port Authority of New York and New Jersey's Drayage Truck Registry Sticker Display Requirements; Petition for Determination

AGENCY: Federal Motor Carrier Safety Administration, Department of Transportation.

ACTION: Notice of petition for determination; request for comments.

SUMMARY: FMCSA invites all interested persons to comment on a petition that the New Jersey Motor Truck Association (NJMTA) submitted requesting that FMCSA declare the Port Authority of New York and New Jersey's (Port Authority) Drayage Truck Registry

(DTR) sticker display requirement preempted by Federal law. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) prohibits States and their political subdivisions from requiring motor carriers to display in or on commercial motor vehicles (CMVs) any form of identification other than forms required by the Secretary of Transportation, with certain exceptions. NJMTA requests that FMCSA determine that the Port Authority's DTR sticker display requirement is preempted by SAFETEA–LU. FMCSA seeks comment on whether the Port Authority's display requirement described below is preempted or whether it qualifies for the relevant exception codified at 49 U.S.C. 14506(b)(3).

DATES: Initial comments are due on or before January 3, 2011. In order to allow adequate time and notice for commenters to prepare reply comments, initial comments received after the deadline will not be considered. Reply comments are due on or before January 18, 2011. The Agency will only consider reply comments responding directly to issues raised in the initial round of comments. Commenters may not use reply comments to raise new issues.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Number in the heading of this document by any of the following methods. To allow effective public participation before the comment deadline, however, the Agency encourages use of the Web site that is listed first. It will provide the most efficient and timely method of receiving and processing your comments. Do not submit the same comments by more than one method.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.
- *Hand Delivery:* Ground floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number for this action. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Refer to the Privacy Act heading on *http://www.regulations.gov* for further information.

Public Participation: The regulations.gov system is generally available 24 hours each day, 365 days each year. You can find electronic submission and retrieval help and guidelines under the "help" section of the Web site. For notification that FMCSA received the comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments on line. Copies or abstracts of all documents referenced in this notice are in this docket. For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. All comments received before the close of business on the initial comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the closing date will not be considered. FMCSA will continue to file in the public docket relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

FOR FURTHER INFORMATION CONTACT: Genevieve D. Sapir, Office of the Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–7056.

SUPPLEMENTARY INFORMATION:

Background

Effective October 1, 2010, the Port Authority amended its marine tariff (PAMT FMC No. 10) to require trucks entering marine terminal facilities to display a sticker showing compliance with its new Drayage Truck Registry (DTR). In response, the NJMTA has petitioned the Secretary of Transportation (Secretary) for a determination that the Port Authority's sticker display requirement is preempted by Federal law. Effective October 15, 2010, and in response to the NJMTA's petition, the Port Authority amended its tariff to clarify that the compliance stickers are a voluntary way to demonstrate compliance with the DTR and that no truck will be denied access to marine terminal facilities for failure to display a sticker. In a letter to the Secretary dated November 2, 2010, the NJMTA disagreed that the compliance sticker would be voluntary and amended its petition to request the Secretary to determine that the substantive provisions of the DTR are preempted under 49 U.S.C. 14501(c). FMCSA will consider the NJMTA's request for a preemption determination on the substantive provisions of the DTR as a separate matter, but will make its decision available in this docket for inspection.

The NJMTA is a non-profit trade association that represents over 500 trucking companies with operations in New Jersey. NJMTA states that its mission is to foster and promote sound economical and efficient service by motor carrier transportation; to promote safety and courtesy in highway transportation; to foster and support beneficial laws and regulations affecting the motor carrier industry and highway transportation; to promote and encourage the construction and maintenance of an adequate system of safely engineered highways; to foster and promote sound and reasonable taxation at the State and Federal levels on highway users; and to engage in any and all activities that will advance the interests of highway transportation and highway users generally.

The Port Authority conceives, builds, operates and maintains infrastructure critical to the New York/New Jersey region's trade and transportation network. These facilities include the New York/New Jersey airport system, marine terminals and ports, the PATH rail transit system, six tunnels and bridges between New York and New Jersey, the Port Authority Bus Terminal in Manhattan, and the World Trade Center.

In an effort to reduce Port-related diesel and greenhouse gas emissions, the Port Authority is implementing a truck phase-out plan that will deny old drayage trucks access to its marine terminal facilities. Under this plan, the Port Authority will deny drayage trucks with pre-1994 model year engines access to Port Authority marine terminal facilities effective January 1, 2011. Effective January 1, 2017, the Port Authority will deny drayage trucks equipped with engines that fail to meet or exceed 2007 model year Federal heavy-duty, diesel-fueled, on-road emission standards access to marine terminal facilities. In order to implement the truck phase-out plan, the Port Authority will require drayage trucks accessing Port Authority marine terminal facilities to be registered in the DTR. The Port Authority will issue compliance stickers to drayage trucks that are compliant with the elements of the phase-out plan to facilitate and expedite transit of those trucks onto,

through and out of marine terminal facilities. As noted above, the Port Authority has amended its tariff to clarify that the compliance stickers are a voluntary way to demonstrate compliance with the DTR and that no truck will be denied access to marine terminal facilities for failure to display a sticker.

Section 4306(a) of SAFETEA–LU, codified at 49 U.S.C. 14506, prohibits States from requiring motor carriers to display in or on commercial motor vehicles any form of identification other than forms required by the Secretary of Transportation. Section 14506(b)(3) authorizes the Secretary to make an exception for display requirements that he "determines are appropriate."

FMCSA seeks comment on whether the Port Authority's sticker display requirement is preempted by Federal law. Specifically, the Agency seeks comment on whether the Port Authority's sticker display requirement should qualify for the Secretary's exception in 49 U.S.C. 14506(b)(3). NJMTA's petition, the Port Authority's October 21, 2010 submission to FMCSA in response to the petition, NJMTA's November 2, 2010 amended petition and the relevant portions of the Port Authority's October 1 and October 15, 2010 marine terminal tariffs are available in the docket for inspection.

Request for Comments

FMCSA invites the Port Authority, as well as any other interested party, to comment on the limited issue of whether the Port Authority's sticker display requirement is preempted by 49 U.S.C. 15406. Interested parties are requested to limit their comments to this issue. FMCSA will not consider NJMTA's request to preempt substantive provisions of the DTR as a part of this docket. FMCSA encourages commenters to submit data or legal authorities supporting their positions.

Issued on: November 19, 2010.

Anne S. Ferro,

Administrator.

[FR Doc. 2010–30315 Filed 12–2–10; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7165; FMCSA–2000–8398; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2008–0266]

Qualification of Drivers; Exemption Renewals; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 21 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, without the exemptions for these commercial motor vehicle (CMV) drivers.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. The comment period ended on October 27, 2010 (75 FR 59327).

Discussion of Comments

FMCSA received no comments in this proceeding.

Conclusion

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 21 renewal applications, FMCSA renews the Federal vision exemptions for Paul G. Albrecht, Elijah A. Allen, Jr., David W. Brown, Monty G. Calderon, Awilda S. Colon, David M. Hagadorn, Zane G. Harvey, Jr., Jeffrey M. Keyser, Donnie A. Kildow, Daniel A. McNabb, David G. Meyers, Thomas L. Oglesby, Michael J. Paul, Russell A. Payne, Rodney M. Pegg, Raymond E. Peterson, Zbigniew P. Pietranik, John C. Rodriguez, Terrance L. Trautman, Charles E. Wood, and Joseph F. Wood.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: November 20, 2010.

Larry W. Minor,

Associate Administrator, Office of Policy.

[FR Doc. 2010–30384 Filed 12–2–10; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Albany Port Railroad Corporation

[Waiver Petition Docket Number FRA–2010–0164]

The Albany Port Railroad (APRR) and the United Transportation Union (UTU) (together referred to as "Petitioners") jointly seek a waiver from compliance of a certain provision of the Federal Hours of Service Laws (49 U.S.C. Chapter 211; HSL). Specifically, APRR and UTU request relief from 49 U.S.C. 21103(a)(4), which states that a train employee may not be required, or allowed to remain, or go on duty after that employee has initiated an on-duty period each day for 6 consecutive days unless that employee has had at least 48 consecutive hours off-duty at the employee's home terminal. In support of the request for relief, the petitioners explain that UTU is the sole

representing authority for all train employees on APRR.

Further, the petitioner's explain that APRR currently has four train employees of which three work a single regular assignment Monday through Friday, beginning at 6:00 a.m. and usually ending at 1:00 p.m. The remaining employee holds a relief position and works for the other three employees when they require a day off. The work is always performed within the confines of the Albany Port, which consists of 5 miles per hour yard tracks. The crew will occasionally work on Saturdays when a train is delivered and needs to be switched, thus the request for relief from 49 U.S.C. 21103(a)(4). On these occasions, when the crew is required to work Saturday, they usually receive at least 36 hours or more off prior to reporting for duty on Monday.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2010–0164) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.—5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on November 29, 2010.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2010–30308 Filed 12–2–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2010–0105]

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 *SEAGRASS.*

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–2010–0105 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 January 3, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2010–0105. 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.govhttp://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 *SEAGRASS* is:

Intended Commercial Use Of Vessel: "tourist sailing cruises." Geographic Region: "coast of Maine."

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).

By Order of the Maritime Administrator.

Dated: November 29, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–30341 Filed 12–2–10; 8:45 am]

BILLING CODE 4910–81–M

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2010–0104]

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 *SITARA.*

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–2010–0104 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 January 3, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2010–0104. 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.govhttp://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 *SITARA* is:

Intended Commercial Use of Vessel: "Demise and crew charter coastwise trade (passengers only)."

Geographic Region: "Florida."

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).

By Order of the Maritime Administrator.

Dated: November 29, 2010.

Christine Gurland,

Secretary, Maritime Administrator.

[FR Doc. 2010–30355 Filed 12–2–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2010 0106]

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 *WORK N GIRL.*

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–2010–0106 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 January 3, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2010–0106. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel *WORK N GIRL* is:

Intended Commercial Use of Vessel: "This vessel will be used for sport charter fishing."

Geographic Region: "Virginia, North Carolina."

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).

By Order of the Maritime Administrator.

Dated: November 29, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–30345 Filed 12–2–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2010–0107]

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 *FAMILY TIME.*

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–2010–0107 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 January 3, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2010–0107. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel *FAMILY TIME* is:

Intended Commercial Use of Vessel: "Seattle area "Yacht Experience" tours and private charter."

Geographic Region: "Washington State."

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).

By Order of the Maritime Administrator

Dated: November 29, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–30330 Filed 12–2–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35444]

New York New Jersey Rail, LLC–Acquisition and Operation Exemption–Line of Railroad in Hudson County, NJ

New York New Jersey Rail, LLC (NYNJ),[1] a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire and operate approximately 2.4 miles of rail line located in the Greenville section in Jersey City, Hudson County, NJ. According to NYNJ, the rail line has no milepost numbers.

NYNJ states that it will shortly enter into an Asset Purchase Agreement with Port Jersey Railroad Company (PJR) to acquire a significant portion of the operating assets of PJR to enable NYNJ to provide freight services to shippers within the Greenville section of Jersey City. NYNJ states that it currently interchanges with and will continue to interchange with Consolidated Rail Corporation (Conrail) at its junction with Conrail's Greenville "A" Yard track located in Jersey City.

NYNJ also states that the proposed transaction does not contain any language that would limit its ability to interchange traffic with other carriers. According to NYNJ, the line only connects with lines of Conrail.

NYNJ certifies that its projected annual revenues as a result of the transaction will not result in NYNJ becoming a Class II or Class I rail carrier and will not exceed $5 million annually.

NYNJ states that it expects the transaction to be consummated on or shortly after the effective date of this exemption. The earliest this transaction may be consummated is December 19, 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 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 effectiveness of the exemption. Petitions for stay must be filed no later than December 10, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35444, 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 James H.M. Savage, John D. Heffner, PLLC, 1750 K Street, NW., Suite 200, Washington, DC 20006.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 26, 2010.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–30275 Filed 12–2–10; 8:45 am]

BILLING CODE 4915–01–P

[1] NYNJ is a wholly owned subsidiary of The Port Authority of New York and New Jersey.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35448]

CSX Transportation, Inc.—Corporate Family Merger Exemption—Atlanta, Knoxville & Northern Railway Company, Cincinnati Inter-Terminal Railroad Company, and Tylerdale Connecting Railroad Company

CSX Transportation, Inc. (CSXT), and its wholly owned subsidiaries—Atlanta,

Knoxville & Northern Railway Company (AKNR), Cincinnati Inter-Terminal Railroad Company (CIT), and Tylerdale Connecting Railroad Company (TCR)—have jointly filed a verified notice of exemption under 49 CFR 1180.2(d)(3) for a corporate family transaction. CSXT is a Class I rail carrier that directly controls and operates AKNR, CIT, and TCR. The transaction involves the merger of AKNR, CIT, and TCR with and into CSXT with CSXT being the surviving corporation.

The transaction is scheduled to be consummated on or after December 19, 2010, the effective date of the exemption. The purpose of the transaction is to simplify the corporate structure and reduce overhead costs and duplication by eliminating 3 corporations while retaining the same assets to serve customers. CSXT will obtain certain other savings as a result of this transaction.

This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). The parties state that the transaction will not result in adverse changes in service levels, significant operational changes, or any change in the competitive balance with carriers outside the corporate family.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. As a condition to the use of this exemption, any employees adversely affected by this transaction will be protected by the conditions set forth in *New York Dock Railway—Control—Brooklyn District Eastern Terminal,* 360 I.C.C. 60 (1979).

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Petitions for stay must be filed no later than December 10, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to FD 35448, must be filed with the Surface Transportation Board, 395 E Street, NW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Louis E. Gitomer, Esq., Law Offices of Louis E. Gitomer, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 29, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–30365 Filed 12–2–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Financial Management Service; Privacy Act of 1974, as Amended; System of Records

AGENCY: Financial Management Service, Treasury.

ACTION: Notice of proposed new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Financial Management Service gives notice of a proposed new Privacy Act system of records entitled "Treasury/FMS .008–Mailing List Records."

DATES: Comments must be received no later than January 3, 2011. The proposed new system of records will become effective January 3, 2011 unless comments are received which would result in a contrary determination.

ADDRESSES: You should send your comments to Peter Genova, Deputy Chief Information Officer, Financial Management Service, 401 14th Street, SW., Washington, DC 20227. Comments received will be available for inspection at the same address between the hours of 9 a.m. and 4 p.m. Monday through Friday. You may send your comments by electronic mail to *peter.genova@fms.treas.gov* or *http://regulations.gov.* All comments, including attachments and other supporting materials, received are subject to public disclosure. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Peter Genova, Deputy Chief Information Officer, (202) 874–1736.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act of 1974, as amended, 5 U.S.C. 552a, the Financial Management Service (FMS) is proposing to establish a new system of records entitled "Mailing List Records—Treasury/FMS .008." FMS proposes to obtain and use mailing list records from commercial database providers for the purpose of mailing information to potential Federal payment recipients about the benefits of electronic payments and types of accounts available for the receipt of Federal electronic payments. Commercial database providers obtain information from publicly available records or through means that we understand to be compliant with applicable privacy laws.

FMS, a bureau within the U.S. Department of the Treasury (Treasury), is responsible for disbursing public money by paper check and electronic funds transfer (EFT). Payments made by electronic funds transfer (EFT), rather than by paper check, benefits both recipients and the Government. Direct deposit and other EFT payments are credited to recipients' accounts on the day payment is due, so the funds generally are available sooner than with check payments. Individuals receiving Federal payments electronically rarely have any delays or problems with their payments. In contrast, based on payment claims filed with FMS, nine out of ten problems with FMS-disbursed payments are related to paper checks even though checks constitute only 18 percent of all FMS-disbursed payments made by the Government.

The potential benefits of EFT payments for the Government and taxpayers are significant. For example, in fiscal year 2010, FMS mailed more than 130 million Federal benefit checks to approximately 11 million benefit recipients, resulting in extra costs to taxpayers of more than $117 million that would not have been incurred had those payments been made by EFT. In the same fiscal year, only 63% of taxpayers received their tax refund payment electronically, with approximately 44 million tax refund payments being delivered by paper check.

Over the past three decades, FMS has developed numerous programs to enable agencies to make EFT payments. Treasury's Go Direct® educational campaign, sponsored with the Federal Reserve Banks, highlights the advantages to a Federal benefit recipient who opens an account at a financial institution, or a Direct Express® Debit MasterCard® card account, and elects to receive his or her benefits via direct deposit to the account. In addition to media and other public outreach, Treasury mails check stuffers and letters encouraging check recipients to receive Federal payments electronically.

Typically, FMS mails information to check recipients based on name and address information contained in its payment records (see "Treasury/FMS .002–Payment Issue Records for Regular Recurring Benefit Payments" and "Treasury/FMS .016–Payment Records for Other Than Regular Recurring Benefit Payments"). In some cases, however, FMS may decide to use commercial database providers for names and mailing addresses of individuals who meet certain criteria

when the information is not otherwise available from FMS's records. The data may be used for the purpose of mailing information to potential Federal payment recipients about the benefits of electronic payments and accounts available for the receipt of Federal electronic payments.

FMS continues to implement various programs to increase the number of payments made by EFT. Among other things, FMS intends to increase the use of direct deposit throughout the United States and to expand the ways in which Federal payees may receive their payments electronically. As FMS expands the ways in which payees may receive their payments electronically, FMS needs to inform the public about available options. The mailing of individual letters using mailing lists obtained from commercial database providers offers an opportunity to directly reach potential check recipients, rather than only those individuals who have already received FMS-disbursed payments and whose information already exists in FMS's records. In some cases, FMS may use mailing lists obtained from commercial database providers to further identify individuals who could benefit from the program and services. The records covered by the proposed system are necessary to allow FMS to offer electronic payment options to a wide variety of potential Federal payment recipients. The records may be received directly by FMS, its fiscal or financial agents, and/or contractors. The records include names and mailing addresses only as necessary to deliver information to individuals about the benefits of electronic payments and account options for receiving payments electronically, and to assess the effectiveness of these outreach methods. Without such information, FMS would have significant difficulty in reaching individuals who have never received a Federal payment, but may in the future, or those who do not receive regular, recurring payments.

In addition to the purposes cited above, the information contained in the covered records will be used for collateral purposes related to the offering of account options to individuals, such as collection of aggregate statistical information on the success and benefits of direct mail and the use of commercial database providers.

FMS recognizes the sensitive nature of the confidential information it obtains when collecting individuals' names and addresses, and has many safeguards in place to protect the information from theft or inadvertent disclosure. When appropriate, FMS's arrangements with its fiscal and financial agents and contractors include requirements that preclude them from retaining, disclosing, and using the information for any purpose other than mailing of information about the benefit of electronic payments and account options and assessing the effectiveness of the outreach. In addition to various procedural and physical safeguards, access to computerized records is limited, through the use of access codes, encryption techniques and/or other internal mechanisms. Access to records is granted only as authorized by a business line manager at FMS or FMS's fiscal or financial agent to those whose official duties require access solely for the purposes outlined in the proposed system.

The new system of records report, as required by 5 U.S.C. 552a(r) of the Privacy Act, has been submitted to the Committee on Government Reform of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget, pursuant to Appendix I to OMB Circular A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated November 30, 2000.

For the reasons set forth in the preamble, FMS proposes a new system of records Treasury/FMS .008–Mailing List Records, which is published in its entirety below.

Dated: November 26, 2010.

Melissa Hartman,

Deputy Assistant Secretary for Privacy, Transparency, and Records.

Treasury/FMS .008

SYSTEM NAME:

Mailing List Records—Treasury/Financial Management Service.

SYSTEM LOCATION:

Records are located at the offices of Financial Management Service, 401 14th Street, SW., Washington, DC 20227, or its fiscal or financial agents at various locations. The addresses of the fiscal or financial agents may be obtained by contacting the System Manager below.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who are eligible, or may in the future be eligible, to receive Federal payments from the Federal Government.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records may contain identifying information, such as an individual's name(s) and address.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 321; 31 U.S.C. chapter 33; 31 U.S.C. 3332; Title XII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, Jul. 21, 2010).

PURPOSE(S):

The purpose of this system is to maintain limited records (names and addresses) about individuals who are eligible, or may become eligible, to receive Federal payments. The records are used to make individuals aware of the benefits of electronic payments and the account options for receiving payments electronically. Without the information, FMS, its fiscal or financial agents and contractors, would not be able to directly notify prospective payment recipients about the benefits of electronic payments and account options for the receipt of Federal payments electronically.

The information will also be used for collateral purposes related to providing information about account options for receiving electronic Federal payments, such as the collection of aggregate statistical information on the success and benefits of direct mail and the use of commercial database providers.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be used to disclose information to:

(1) The U.S. Department of Justice ("DOJ") for its use in providing legal advice to the Department or in representing the Department in a proceeding before a court, adjudicative body, or other administrative body before which the Department is authorized to appear, where the use of such information by the DOJ is deemed by the Department to be relevant and necessary to the litigation, and such proceeding names as a party or interests: (a) The Department or any component thereof; (b) Any employee of the Department in his or her official capacity; (c) Any employee of the Department in his or her individual capacity where DOJ has agreed to represent the employee; or (d) The United States, where the Department determines that litigation is likely to affect the Department or any of its components.

(2) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains.

(3) Fiscal agents, financial agents, and contractors for the purpose of mailing information to individuals about the benefits of electronic Federal payments and options for receipt of federal

payments electronically, including, but not limited to, processing direct mail or performing other marketing functions; investigating and rectifying possible erroneous information; and creating and reviewing statistics to improve the quality of services provided.

(4) Federal agencies, their agents and contractors for the purposes of implementing and studying options for encouraging current and prospective Federal payment recipients to receive their Federal payments electronically.

(5) Representatives of the National Archives and Records Administration (NARA) who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906.

(6) Appropriate agencies, entities, and persons when (a) FMS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) FMS has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by FMS or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with FMS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in paper and electronic media.

RETRIEVABILITY:

Records are retrieved by name, address, or other alpha/numeric identifying information.

SAFEGUARDS:

All official access to the system of records is on a need-to-know basis only, as authorized by a business line manager at FMS or FMS's fiscal or financial agent. Procedural and physical safeguards, such as personal accountability, audit logs, and specialized communications security, are utilized. Each user of computer systems containing records has individual passwords (as opposed to group passwords) for which he or she is responsible. Thus, a security manager can identify access to the records by user. Access to computerized records is limited, through use of access codes, encryption techniques, and/or other internal mechanisms, to those whose official duties require access. Storage facilities are secured by various means such as security guards, badge access, and locked doors with key entry.

RETENTION AND DISPOSAL:

Electronic and paper records for mail operations based on the use of the mailing list records will be retained in accordance with FMS's record retention requirements or as otherwise required by statute or court order. FMS disposes, or arranges for the disposal of records in electronic media using industry-accepted techniques, and in accordance with applicable FMS policies regarding the retention and disposal of fiscal or financial agency records. Paper records are destroyed in accordance with fiscal or financial agency archive and disposal procedures and applicable FMS policies regarding the retention and disposal of fiscal agency records.

SYSTEM MANAGER(S) AND ADDRESS:

Agency Enterprise Solutions Division, Payment Management, Financial Management Service, 401 14th Street, SW., Washington, DC 20227.

NOTIFICATION PROCEDURE:

Inquiries under the Privacy Act of 1974, as amended, shall be addressed to the Disclosure Officer, Financial Management Service, 401 14th Street, SW., Washington, DC 20227. All individuals making inquiries should provide with their request as much descriptive matter as is possible to identify the particular record desired. The system manager will advise as to whether FMS maintains the records requested by the individual.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act of 1974, as amended, concerning procedures for gaining access to or contesting records should write to the Disclosure Officer. All individuals are urged to examine the rules of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, and appendix G, concerning requirements of this Department with respect to the Privacy Act of 1974, as amended.

CONTESTING RECORD PROCEDURES:

See "Record access procedures" above.

RECORD SOURCE CATEGORIES:

Information in this system is provided by commercial database providers based on publicly available information.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–30297 Filed 12–2–10; 8:45 am]

BILLING CODE 4810–35–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–57: OTS Nos. H–4750, H–4082, and 17978]

SI Financial Group, Inc., Willimantic, CT; Approval of Conversion Application

Notice is hereby given that on November 10, 2010, the Office of Thrift Supervision approved the application of SI Bancorp, MHC, Willimantic, Connecticut, the federal mutual holding company for the Savings Institute Bank and Trust Company, Willimantic, Connecticut, 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 24, 2010.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. 2010–30200 Filed 12–2–10; 8:45 am]

BILLING CODE 6720–01–M

Federal Register

Friday,
December 3, 2010

Part II

Department of Defense

Defense Acquisition Regulations System

48 CFR Parts 215, 234, 242, et al.

Defense Federal Acquisition Regulation Supplement; Business Systems—Definition and Administration (DFARS Case 2009–D038); Proposed Rule

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 234, 242, 244, 245, and 252

RIN 0750–AG58

Defense Federal Acquisition Regulation Supplement; Business Systems—Definition and Administration (DFARS Case 2009–D038)

AGENCY: Defense Acquisition Regulations System, Department of Defense.

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to improve the effectiveness of DoD oversight of contractor business systems.

DATES: *Comment Date:* Interested parties should submit comments in writing to the address shown below on or before January 3, 2011.

ADDRESSES: You may submit comments, identified by DFARS Case 2009–D038, using any of the following methods:

○ *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting "DFARS Case 2009–D038" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2009–D038." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2009–D038" on your attached document.

E-mail: dfars@osd.mil. Include DFARS Case 2009–D038 in the subject line of the message.

Fax: 703–602–0350.

Mail: Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov*, including any personal information provided. To confirm receipt of your comment, please check *http://www.regulations.gov* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, 703–602–0302.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule for Business Systems—Definition and Administration (DFARS Case 2009–D038) in the **Federal Register** on January 15, 2010 (75 FR 2457). The public comment period closed March 16, 2010. Based on the comments received and subsequent revisions to the proposed rule, DoD is publishing this rule again as a proposed rule with request for comments.

Contractor business systems and internal controls are the first line of defense against waste, fraud, and abuse. Weak control systems increase the risk of unallowable and unreasonable costs on Government contracts. To improve the effectiveness of Defense Contract Management Agency (DCMA) and Defense Contract Audit Agency (DCAA) oversight of contractor business systems, DoD is considering a rule to clarify the definition and administration of contractor business systems as follows:

1. DoD is proposing to define contractor business systems as accounting systems, estimating systems, purchasing systems, earned value management systems (EVMS), material management and accounting systems (MMAS), and property management systems.

2. DoD is proposing to implement compliance enforcement mechanisms in the form of a business systems clause which includes payment withholding that allows contracting officers to withhold a percentage of payments, under certain conditions, when a contractor's business system contains deficiencies. Payments could be withheld on—

- Interim payments under—
  - ○ Cost-reimbursement contracts;
  - ○ Incentive-type contracts;
  - ○ Time-and-materials contracts;
  - ○ Labor-hour contracts;
  - ○ Construction contracts that include FAR clause 52.232–27, Prompt Payment for Construction Contracts.
- Progress payments; and
- Performance-based payments.

II. Discussion and Analysis

A. Analysis of Public Comments

The 370 comments received from 25 respondents have been dispositioned as discussed below. The comments received were grouped under 46 general topics. A summary of the comments follows:

1. 100 Percent Withholds

Comment: Respondents suggested that the proposed rule provides administrative contracting officers (ACOs) insufficient standards to make 100 percent withhold determinations, and does not provide adequate provisions for contractor responses.

Response: DoD notes the concerns expressed by the respondents, and has revised the rule to remove the language from clause 252.242–7XXX, which set forth procedures for withholding up to 100 percent.

2. Accounting System

Comment: A number of respondents expressed concern about the criteria to be used to determine if a contractor has an acceptable accounting system.

Response: The language at clause 252.242–7YYY has been revised to clarify the criteria to be used to determine if a contractor has an acceptable accounting system and to delete vague criteria modifiers such as "including but not limited to" and "as applicable."

3. Applicability of Rule

Comment: A number of respondents questioned the application of this rule against certain cost-type contracts. Additionally, some respondents expressed concern about the application of the rule to commercial contracts. Other respondents suggested the rule be applied to only a single contract instead of against all contracts that are dependent upon the deficient business system, and that the rule establish a minimum dollar threshold for the rule to be applicable.

Response: The Government may be at risk when a contractor's business systems contain deficiencies, regardless of contract type. Accordingly, it is appropriate for the ACO to withhold payments to protect the interest of the Government. Contracts awarded under FAR part 12 regulations will generally be exempt from the requirements of this rule. A system deficiency will result in application of a withhold against all contracts that contain the business system clause. However, DoD agrees with the recommendation for the establishment of a $50 million threshold for application of the business system clause.

4. Arbitrary Withhold Percentages

Comment: A number of respondents expressed concern that the rule invokes mandatory withholds on payments to Government contractors that are arbitrary and punitive and have no relationship with actual harm to the Government.

Response: When contractors fail to maintain business systems, as is required by the terms and conditions of

their contracts, the withhold provisions help to protect the Government from the risks of overpayment, increased property losses, or nonconforming goods, among others, against which business systems are designed to ensure. The proposed rule would protect the Government by reducing contract payments temporarily during performance in an amount sufficient to mitigate the Government's risk. DoD is relying on the percentage withhold amount, not as a penalty for a deficiency, but as representing a good-faith estimate of the potential loss that is at risk where the actual amounts are difficult to estimate or quantify.

5. Assignment of Payments

Comment: If the contractor has assigned the right to receive payments to a financial institution under the Assignment of Claims Act, will payments be withheld from the assignee financial institution? If so, this would severely hamper the ability of small- to medium-sized businesses from obtaining financing to bid on contracts.

Response: This rule does not change any rights of the assignee of the assignment of claims provision at FAR subpart 32.8 or FAR clause 52.232–23. Assignees will continue to have the same rights and obligations that they had prior to the implementation of this rule. Therefore, if the contractor has assigned the right to receive payments, and deficiencies in the contractor's business systems necessitate the implementation of withholds, in accordance with the contract, payments will be withheld from the assignee. The mitigation of the impact on small businesses is discussed under comment topic number 42.

6. Audits

Comment: A number of respondents expressed concern that DCAA lacks the resources to perform required audits timely and adequately; that the proposed rule does not establish a business system approval duration, which essentially declares perpetual open-season on all contractor business system internal controls, and that the DCAA follow-up audit is not limited or otherwise focused upon the previously identified specific deficiency and the specific corrective actions, and therefore, will result in an endless cycle of deficiency reports and follow-up audits; that DCAA audit guidance on the reporting of internal control deficiencies, which requires all deficiencies to be considered significant, effectively ensures that all contractor business systems subject to audit will be found inadequate; that audit reports are not informative enough to help the contracting officer make effective decisions, and that DCAA needs to expand its audit reports to go beyond rendering a pass/fail opinion, and include an analysis of the materiality of any deficiency.

Response: DCAA has committed to making follow-up business system audits a priority. However, DCAA recognizes that resources are limited, and has taken steps to address staffing challenges. A business system approval duration and/or narrowly focused DCAA follow-up audit would not be appropriate since, at any time after approval, contractor conditions could change, rendering the previously-reported opinion as not current. DCAA policy is to report only deficiencies determined to be significant deficiencies or material weaknesses in accordance with generally accepted Government auditing standards. The proposed rule language has been revised to state that "the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies and potential adverse impact to the Government."

7. Breach of Contract

Comment: One respondent believed that the failure of the United States Government to pay for goods and services provided could be a material breach of contract that would permit the contractor to stop work. The respondent stated that the requirement to compensate contractors for providing goods and services flows from the United States Constitution itself in the Fifth Amendment, and viewing failure to pay as a breach of contract has been recognized by the courts.

Response: DoD does not agree that failure to pay amounts withheld would be a breach of contract, and that the Fifth Amendment to the Constitution is implicated. The proposed rule would create an explicit contract term, and withholding will be authorized pursuant to that term. Execution of that contract term would not be a breach of contract. Similarly, there is no "taking" of property that could implicate the Fifth Amendment when a contractor is paid the amount it is entitled to under the clear terms of a valid contract.

8. Cash Flow

Comment: A number of respondents were concerned that the withholds would negatively impact cash flow for contractors, and are also likely to remain in effect for periods long beyond completion of any corrective action performed by contractors.

Response: The application of the payment withhold will impact and reduce a contractor's cash flow. However, the proposed rule would protect the Government by temporarily reducing contract payments during performance in an amount sufficient to mitigate the Government's risk when contractors fail to maintain business systems, as is required by the terms and conditions of their contracts. The revised language provides for the contracting officer, in consultation with the auditor or functional specialist, to discontinue withholding payments prior to audit verification if the contractor submits evidence that the deficiencies have been corrected. The sooner the contractor corrects the deficiencies, the sooner the cash flow will be restored.

9. Compliance Criteria

Comment: A number of respondents believe the compliance criteria in the proposed rule are subjective. These respondents believe that the proposed rule prematurely defines business systems without resolving the most critical component, which is the actual criteria against which contractor compliance will be measured, and that such criteria should be vetted with the public. The respondents assert that the proposed rule should define objective measurements by which to judge a system as deficient, and limit the criteria to a few well-defined metrics that cannot be embellished by subjective interpretation.

Response: DoD partially agrees with the respondents. The rule incorporates criteria that are already used by the Government under existing authority to evaluate the adequacy of contractor business systems. Furthermore, to reduce the subjectivity of the criteria, phrases such as "including but not limited to" and "as applicable" have been removed. The public is encouraged to comment on these criteria.

10. Consistency: Correction of All Deficiencies or Substantial Correction of Deficiencies

Comment: A number of respondents pointed out that some sections of the proposed rule indicate that a finding of system noncompliance will be withdrawn when the contractor has "substantially corrected" the system deficiencies. However, elsewhere, the proposed rule also states that the withhold will not be released until "all deficiencies have been corrected." The respondents suggested that the proposed rule should be revised so that it is consistent.

Response: DoD concurs with the respondents' recommendation, and has

revised the rule to state that the withholds will not be released until "all deficiencies have been corrected."

11. Contracting Officer Discretion

Comment: One respondent believed that the proposed rule inappropriately and unnecessarily limits the discretion of the contracting officer to make critical determinations about these systems specifically, and about the relationship of these systems determinations to overall contract performance generally.

Response: The rule does not in any way limit the authority of contracting officers. Although the auditor is required to document the deficiencies in a report, the contracting officer has the authority to make all initial and final determinations of system deficiencies, implement and remove withholds, make determinations to approve, disapprove, and reapprove systems, and to take any other appropriate actions deemed in the best interests of the Government.

12. Contractor Appeal

Comment: A number of respondents expressed concern that there is no provision in the proposed rule to provide contractors with due process or alternative resolution, such as negotiation or alternate disputes resolution procedures, and that withholds are at the sole discretion of the ACO.

Response: DoD agrees that the final deficiency determination is at the sole discretion of the contracting officer. However, DoD disagrees that additional due process remedies are necessary. Contractors are afforded an opportunity to respond in writing within 30 days to an initial determination of deficiencies from the ACO that identifies deficiencies in any of the contractor's business systems. Furthermore, DoD does not believe there is a need, or is it appropriate, to develop a dispute resolution process beyond that which is already available by statute and regulation. Additionally, other avenues of dispute resolution outside of the Contract Disputes Act are available for resolving disputes that may arise over determinations of system deficiencies. The policy set forth in FAR 33.204 still applies, so that informal negotiation and alternate disputes resolution remain available, and, in fact, are encouraged as alternative methods of resolving disputes.

13. DCAA/DCMA Policies

Comment: One respondent believed that the ultimate impact of this rule is dependent on current and future DCAA/DCMA policies that are not subject to the public comment process. According to the respondent, because the DCMA and DCAA policies will have a significant cost or administrative impact on contractors, a strong argument can be made that such policies are not just internal agency policies, but policies that must be published for public comment, pursuant to the requirements of the Office of Federal Procurement Policy (OFPP) Act. Another respondent stated that DCAA's current position on reporting system results is that if a system opinion is more than three years old, DCAA reports that there is "no audit on file," and that DCAA has no opinion on the system. This respondent believed that procurement contracting officers and ACOs should be permitted to decide for themselves what they consider to be "too old" or "not relevant" for purposes of these system reviews, rather than permitting DCAA to simply avoid reporting on known information.

Response: DoD does not agree. The OFPP Act (41 U.S.C. 418b) is applicable to procurement policy, regulation, procedure, or form relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, *et al.,* and (2) a significant increased cost or administrative impact on contractors or offerors. DCAA/DCMA internal policies and procedures that are referenced in this rule are internal policies and procedures and are not regulatory. Therefore, the OFPP Act public comment process is not applicable. DoD believes that contracting officers must rely on current and relevant information in order to make an appropriate determination as to whether to notify a contractor of a system deficiency and possible payment withhold. DoD does not believe that an audit report noting a deficiency that is in excess of three years old would constitute current information.

14. DCMA/DCAA Oversight

Comment: A number of respondents believe that the Commission on Wartime Contracting (CWC) hearings demonstrated that greater cooperation must be achieved between DCMA and DCAA to oversee Government contractors properly, and that this issue should be addressed before imposing more regulations on contractors, especially as severe and broad as those proposed.

Response: DoD is currently taking measures to improve coordination between DCMA and DCAA. Concurrent with these measures, DoD is issuing this rule to further improve the effectiveness of DCMA and DCAA oversight of business systems as recommended by the Commission on Wartime Contracting.

15. DCMA/DCAA Resources

Comment: A couple of respondents suggested that DCMA and DCAA are under-resourced to execute the requirements of the rule, and that ACOs do not have the training to determine if a deficiency makes a system inadequate.

Response: The need to have effective oversight mechanisms is unrelated to resources. This rule does not add additional oversight responsibilities onto DCAA and DCMA; it merely provides provisions to help protect the Government from the risks of loss due to a contractor's failure to maintain business systems, as is required by the terms and conditions of their contracts. DoD has confidence that contracting personnel will make appropriate determinations in accordance with this rule.

16. Deficiency Correction

Comment: A number of respondents expressed concern that the proposed rule provides incomplete guidance for ACOs to approve systems when deficiencies previously have been identified. These respondents question whether the ACO's determination to reduce or discontinue the withholding of payments is discretionary, even if the contractor has corrected all deficiencies. One respondent is concerned that there is no measurable standard for the Government to decide to increase or decrease the payment withholds based on the monitoring of the contractor's progress in correcting deficiencies.

Response: The revised rule language states that the contracting officer shall discontinue the withholding of payments and release any payments previously withheld when the contracting officer determines that the contractor has corrected all system deficiencies after receipt of auditor or functional specialist verification. Furthermore, the revised language provides for the contracting officer, in consultation with the auditor or functional specialist, to discontinue withholding payments prior to audit verification if the contractor submits evidence that the deficiencies have been corrected. DoD relies on the judgment of the ACO to make determinations to decrease or subsequently increase the withholding of payments, in accordance with the rule language, on a case-by-case basis.

17. Definition of Business System

Comment: Two respondents requested that the rule include a precise definition of an acceptable business system.

Response: The definition of the term "acceptable business systems" in clause 252.242–7XXX has been revised for clarity. The precise criteria for determining the acceptability of the six business systems are contained in the individual business systems clauses.

18. Definition of Deficiency

Comment: A number of respondents encouraged DoD to provide a clear and precise definition of a "deficiency."

Response: The definition of "deficiency" used throughout the rule means a failure to maintain one or more system criteria of an acceptable business system. The criteria for each business system have been revised to provide more specificity.

19. Definition of Standards and System Requirements

Comment: One respondent noted that 242.7502 requires that the audit report contain sufficient information so that the ACO will be able to understand what the contractor must do to comply with the applicable "standard or system requirement." The respondent was unsure what "standard" means in this context, since clause 252.242–7YYY (relating to accounting system administration) only refers to "system requirements," and does not mention any standards.

Response: The language in 242.7502 has been revised to require the audit report to "describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies and the potential impact to the Government." Additionally, the language in both 242.7502 and clause 252.242–7YYY has been revised to refer to "system criteria" to be consistent.

20. Estimating System

Comment: A number of respondents questioned whether contracting officers had the authority to make determinations on whether system deficiencies warrant withholds and to consider the impact of deficiencies on contractor proposals. Other respondents expressed concern with the criteria against which contractor estimating system compliance will be measured. One respondent expressed concern with the requirements that the estimating system include comparisons of projected results to actual results and an analysis of any differences.

Response: This rule is very clear that contracting officers have the authority to make determinations on whether system deficiencies warrant withholds and shall consider the impact of deficiencies on contractor proposals. This revised proposed rule sets forth specific criteria for maintaining an acceptable estimating system. DoD does not believe it is unreasonable for a contractor to establish and maintain an acceptable estimating system that would include controls for the contractor to compare projected results to actual results and analyze any differences. This existing requirement was relocated from 215.407–5–70 into clause 252.215–7002.

21. Earned Value Management System (EVMS)

Comment: A number of respondents questioned how non-compliance with ANSI/EIA–748 fits into this rule because deficiencies in EVMS do not result in the billing of unallowable costs to the Government.

Response: A key DoD concern is the reliability of the contractor's EVMS monthly reports. Even though the EVMS system may not directly result in the billing of unallowable costs to the Government, it does provide important information to senior-level Government officials to use when making management decisions regarding major weapon systems. Consequently, EVMS was included in the rule to ensure that DoD is receiving accurate and reliable EVMS information used to identify current and potential cost overruns, etc.; and if there are deficiencies with the contractors' EVMS, that they are promptly corrected.

22. Failure To Follow Corrective Action Plan

Comment: One respondent recommended that the contracting officer be given the discretion to increase the amount of the withhold under the contract if the contractor inexcusably fails to follow the corrective action plan accepted by the Government or an acceptable alternative to that plan.

Response: The contracting officer has the discretion in determining whether the contractor is following its corrective action plan, and whether to increase the withholding percentage in accordance with clause 252.242–7XXX. The reason the contracting officer may decrease the withholding percentage from five percent to two percent (one percent for small businesses) is that an approved corrective action plan mitigates the Government's risk by increasing the probability that system deficiencies will be corrected in a timely manner. Conversely, the reason for increasing the withhold back to five percent (two percent for small businesses) is to reinstate the appropriate protection for the Government, since the contractor has not adhered to its corrective action plan. The contracting officer has complete discretion to make these determinations.

23. Financial Impact

Comment: Several respondents expressed concern that the proposed rule will increase administrative costs (to correct deficiencies) significantly and destabilize contractor cash management, which could have such financial impacts as to affect how the industrial base can support the warfighter and national security.

Response: DoD acknowledges that the application of the payment withhold will impact and reduce a contractor's cash flow. Further, DoD acknowledges that the initial administrative costs to ensure business system compliance may increase. However, in the long run, both the contractor's and Government's administrative costs should be reduced with the reliance on efficient contractor business systems. Based on comments received, DoD has removed the 100 percent withhold from the rule and lowered the compounding of deficiency percentages to a maximum of 20 percent. However, DoD does not anticipate that the rule will cause long-term harm to the industrial base supporting our warfighter and national security. The intent of the proposed rule is to strengthen contractor business systems and provide a protection for the Government from the risks of deficient systems while contractors resolve their system deficiencies.

24. Formatting of Rule Language

Comment: A number of respondents believe the language of the proposed rule needs clarifying for more uniform application.

Response: DoD acknowledges the respondents' comment and has clarified the language of the rule in accordance with public comments received.

25. General Agreement

Comment: A number of respondents expressed agreement with the rule, citing the necessity for contractors to maintain adequate business systems.

Response: DoD acknowledges the respondents' support of the rule.

26. General Disagreement

Comment: A number of respondents expressed concern with the rule and requested it be withdrawn, citing claims that the rule (a) is biased against DoD contractors, (b) does not address problems with business system oversight with Government agencies, (c) will have unfavorable consequences to industry and Government agencies, and (d) is an unnecessary intrusion on the contractual relationship between

industry and Government. Specifically, respondents suggested that adequacy of business systems should be addressed as part of the preaward contracting phase rather than through payment withholds, and that many of the problems or deficiencies identified in supplier systems are traceable to ill-defined contracts, unstable funding, and individual interpretations of policy or guidance by inexperienced audit personnel. Finally, one respondent was concerned that this proposed rule uses a broad-brush approach to what appears to be a narrow problem growing out of battlefield contingency contracting and that, contrary to its intended purpose, this proposed rule will do little or nothing to assist the Government in achieving its goal of reducing fraud, waste, and abuse.

Response: DoD acknowledges the respondents' concern with the rule. However, the need to mitigate the Government's risk when contractors fail to comply with the terms and conditions of their contracts by failing to maintain adequate business systems necessitates this rule. DoD partially agrees that the adequacy of business systems should be addressed as part of the preaward contracting phase. However, this fact does not relieve the contractors' contractual obligations to maintain adequate business systems throughout the life of the contract. DoD disagrees with the respondent that system deficiencies are traceable to ill-defined contracts, unstable funding, and individual interpretations of policy or guidance. Business systems are company-wide or segment-wide systems with established policies and procedures that are applied across multiple contracts. This rule mitigates the Government's risk when contractors fail to maintain adequate business systems after contract award. While DoD acknowledges that issues with contractor business systems were discovered through reviews of contractors involved with battlefield contingency contracting, DoD does not believe that these issues are strictly confined therein. However, DoD notes that contractors outside of the contingency contracting arena will not be impacted by withholds implemented under this rule if failure to maintain adequate business systems, in accordance with the terms and conditions of their Government contracts, is limited to being a narrow problem growing out of battlefield contingency contracting, as the respondent suggests.

27. Impact on Government Systems

Comment: One respondent believed that the proposed rule will require additional resources at Defense Finance and Accounting Service and modifications of the Mechanization of Contract Administration Services system because all payments for contracts with withholds must be processed manually. Furthermore, one respondent suggested that contracting officers be granted the authority to release withholds under situations where funds are at risk of expiring or being canceled, or the contract is being closed.

Response: The Government is fully capable of modifying its automated systems to implement the rule. Contracting officers are the only ones granted the authority to release withholds. Withholds will be released once the system deficiency has been corrected, or a final audit has determined which costs are allowable under the contract.

28. Increased Litigation

Comment: A number of respondents believe the withholds will result in increased litigation that will drain the resources of both contractors and the Government, especially since the proposed rule states that Prompt Payment Act interest does not accrue on the withhold, and prudent contractors will immediately appeal the withhold pursuant to the Contract Disputes Act, where interest would accrue on the withhold if the Government's position is not sustained. Furthermore, most of the issues with deficient business systems could be resolved through the exercise of reasonable contracting officer discretion if the rule allowed it.

Response: DoD is uncertain whether the rule, in its final form, will lead to increased litigation. It would be unwieldy to establish a separate informal process for handling disagreements involving alleged system deficiencies, given that the Contract Disputes Act already is an established methodology for resolving disagreements, large and small. Furthermore, not every claim presented to the contracting officer under the Contract Disputes Act results in litigation. In fact, FAR 33.204 establishes the Government's policy to try to resolve all contractual issues in controversy by mutual agreement, even prior to the submission of a claim. The contracting officer has the authority to make all initial and final determinations of system deficiencies, implement and remove withholds, make determinations to approve, disapprove, and reapprove systems, and to take any other appropriate actions deemed in the best interests of the Government.

29. Information Collection

Comment: One respondent believed that the information collection estimate that DoD included with the proposed rule is understated substantially.

Response: DoD does not agree with the respondent's comment. DoD notes that the supporting data referenced by the respondent exceeds the information collection requirements established under this rule. DoD believes the Paperwork Reduction Act estimates published with the proposed rule accurately reflect the contractors' costs to fulfill the information collection requirements of this rule. The hours and costs cited by the respondent with regard to EVMS do not reflect the Paperwork Reduction Act requirements of this rule.

30. Interest on Withholds

Comment: One respondent disagreed that the withholdings under clause 252.242–7XXX, Business Systems, are not subject to the interest penalty provisions of the Prompt Payment Act. While contract financing payments are generally not subject to the interest penalty, the Prompt Payment Act specifically makes the interest penalty applicable to interim vouchers under cost–reimbursement contracts for services. This statutory provision is implemented in FAR 52.232–25, Alternate I. Similarly, FAR 52.232–7 explicitly makes the interest penalty applicable to interim vouchers under time-and-materials and labor-hour contracts for services. Another respondent suggested that the rule allow for Prompt Payment Act interest on amounts withheld if later it is determined that the Government incorrectly applied the withhold.

Response: FAR 52.232–25(a)(5)(ii) states "The prompt payment regulations at 5 CFR 1315.10(c) do not require the Government to pay interest penalties if payment delays are due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract." Since amounts withheld pursuant to clause 252.242–7XXX are temporarily withheld in accordance with the terms of the contract, they are not subject to the interest penalty provisions of the Prompt Payment Act.

31. Internal Audits and Management Reviews

Comment: A number of respondents recommended that the Government be provided complete access to contractors' internal control systems, including internal audit reports and management reviews, to ensure a contractor has implemented appropriate corrections in response to audits and reviews. Further, one respondent suggested that this requirement should be based on the comprehensive internal control framework of the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

Response: Auditors have access to contractors' records, as provided for under the FAR, to ensure contractors have implemented internal audits and management reviews. DoD does not agree with implementing the COSO internal control framework since COSO is a voluntary private-sector organization. It would be inappropriate to tie Government regulations to the COSO internal control framework since such policies are not subject to the Government's rulemaking process.

32. Legality of Withholds

Comment: Respondents believe the withholds set forth in the rule are arbitrary, punitive, contrary to public policy that requires the Government withholds to be reasonably related to Government risk, and could lead to a cessation of contract payments without any showing of actual harm to the Government. The respondents believe the rule would not survive legal challenge.

Response: Contract terms explicitly require contractors to maintain the business systems in question as a condition of contracting responsibility and, in some cases, eligibility for award. Contract prices are negotiated on the basis that contractors will maintain such systems, so that the Government does not need to maintain far more extensive inspection and audit functions than it already does. Failure of the contractor to maintain acceptable systems during contract performance deprives the Government of assurances for which it pays fair value. While not "deliverable" services under specific contract line items, these business systems are material terms, performance of which is required to ensure contracts will be performed on time, within cost estimates, and with appropriate standards of quality. The withholding remedy provides a measure of the overall contract performance of which the Government is deprived during the performance period, and for which the contractor should not receive the full financing payments. DoD is relying on the temporary percentage withhold amount, not as a penalty for a deficiency, but as representing a good-faith estimate sufficient to mitigate the Government's risk, where the actual amounts are difficult to estimate or quantify.

33. Materiality of Deficiencies

Comment: Some respondents believe the quality and utility of contractor business system information could be greatly enhanced by requiring a clear segregation between system conditions that relate solely to policy enhancements, especially when the contractor has agreed to the policy enhancements or has already made the policy enhancements but DCAA has not yet reviewed them, and those system conditions that relate to unallowable or unreasonable costs being charged to Government contracts. Other respondents are concerned that the proposed rule does not make a distinction between minor deficiencies that likely pose no threat of significant harm to the Government, and material deficiencies that potentially pose such a threat. These respondents are concerned that current DCAA guidance requires reporting of any perceived deficiency that could directly or indirectly result in any amount, no matter how small, of unallowable costs being charged to a contract. To avoid such circumstances, it is absolutely necessary to impose a materiality requirement in regard to system deficiencies. One respondent stated that, although the rule requires the auditor or other cognizant functional specialist to assess the potential magnitude of the risk to the Government posed by the deficiency, the rule fails to establish objective criteria for such an assessment, including the need for evidence demonstrating a logical nexus between the deficiency and the risk. Finally, one respondent suggested the rule should focus on risk management rather than risk avoidance. As such, the pass–or–fail assessment of business systems in the rule does not adequately address relative degrees of impact or risk.

Response: DoD does not believe that it would be in the Government's best interest to attempt to segregate between system deficiencies that relate solely to system policy and those system deficiencies that relate directly to unallowable or unreasonable costs. Deficiencies that do not directly relate to unallowable or unreasonable costs still pose risks to the Government, and may lead to harm that may not be calculated readily when the deficiencies are discovered. Furthermore, DoD disagrees with the assertion that business systems will be deemed inadequate and payments withheld for minor deficiencies. The intent of the rule is to withhold payments when a deficiency exists that impairs the Government's ability to rely on the system's outputs. DoD has revised the rule to set forth objective business system criteria. DoD believes there is a logical nexus between system deficiencies and risk to the Government. The intent of the rule is to withhold payments when a deficiency exists that impairs the Government's ability to rely on the system's outputs. A system must provide reasonable assurance that the relevant system criteria are satisfied and that the risk of material misstatements caused by error or fraud is low. The rule has been revised to clarify that the contracting officer has the discretion to determine whether withholding is warranted to protect the Government. Accordingly, DoD disagrees that the rule is based on pass–fail criteria.

34. Material Management and Accounting System (MMAS)

Comment: Three respondents questioned the language at clause 252.242–7004 which requires a contractor's MMAS to have adequate internal controls to ensure system and data integrity. The respondents contend that internal controls (*i.e.,* policies and procedures) cannot provide absolute assurance as required here; the standard is reasonable assurance. The respondents cited the requirement that a contractor's MMAS shall have adequate internal controls to ensure system and data integrity, and shall "establish and maintain adequate levels of record accuracy, and include reconciliation of recorded inventory quantities to physical inventory by part number on a periodic basis." The respondents question what is an adequate level.

Response: The proposed rule does not require absolute assurance of compliance with any of the business system standards or criteria. The intent of the rule is to provide reasonable assurance that the system criteria are satisfied and that the risk of material misstatements caused by error or fraud is low. DoD further notes that this existing language in clause 252.242–7004 sets forth a desired 95 percent accuracy level.

35. Multiple Withholdings

Comment: The respondent stated that many of the contractor systems covered by this rule are, appropriately, implemented on a corporate-wide basis.

As a result, the respondent believed that that a deficiency finding would impact all proposals and contracts held by that company, including those that are not directly affected by the "deficient" system, and those that are outside DoD and not covered by this rule.

Response: This payment withholding requirement set forth in this rule applies only to contracts that contain clause 252.242–7XXX, Business Systems. The withholding is not necessarily limited to a single contract, but would apply to multiple contracts that are covered by clause 252.242–7XXX. A contractor's respective business systems are relied upon by the Government for all contracts that contain the respective clauses pertaining to the individual business systems. Therefore, it is appropriate for withholds to be applied to multiple contracts that rely on the fidelity of the contractor's respective business systems.

36. Property Management System

Comment: One respondent believed that withholding against all of a contractor's financing payments would be grossly out of proportion with the damage because FAR also already protects the Government's interest for deficiencies in a property management system by specifically addressing remediation for individual pieces of lost, damaged, destroyed, or stolen Government property.

Response: FAR 45.105 provides that if the contractor does not correct property management system deficiencies, the contracting officer may revoke the Government's assumption of risk for loss, damage, destruction, or theft; and/or the exercise of other rights or remedies available to the contracting officer. However, these remedies do not mitigate the Government's risk that the contractor could fail to perform on the contract. The proposed rule further mitigates the Government's risk by withholding payments temporarily when the contractor's property management system has deficiencies.

37. Purchasing System

Comment: A number of respondents expressed concern with the purchasing system criteria against which contractor compliance will be measured. A number of respondents questioned the criteria in the proposed rule that required a purchasing system that procures materials "at the most economical cost." One respondent asserted that the DoD purchasing system requirement should be limited to verification that FAR/DFARS required flow downs from the prime or higher-tier contract have been included in the purchase order or subcontract. One respondent questioned whether it is possible to grant system approval while corrective actions are being pursued, and whether withholds would apply in this circumstance.

Response: This revised proposed rule sets forth specific criteria for maintaining an acceptable purchasing system. DoD has revised the language under clause 252.244–7XXX to require "An organizational and administrative structure that ensures effective and efficient procurement of required quality materials and parts at the best value from responsible and reliable sources," consistent with current Federal acquisition policy. Compliance with the policy and procedures requirements in clause 252.244–7XXX is necessary to provide reasonable assurance to the contracting officer that the purchasing system does not contain any deficiencies. The contracting officer is responsible for determining whether all required flow-down clauses, including terms and conditions, and any other clauses needed to meet the requirements of the prime contract, are included in the contractor's purchasing system policies and procedures for letting subcontracts. Additionally, the Government reviews the contractor's purchasing system to ensure that subcontract clauses required under the contractor's purchasing system policies are not contrary to Government law or regulation. Deficiencies that may result in a withhold may not be significant enough to result in a system disapproval. In a scenario in which a system has been disapproved and withholds have been implemented, all deficiencies must be corrected before the temporary withholds are discontinued. For system reapproval, the deficiencies must be corrected substantially in the judgment of the contracting officer. The contracting officer has the discretion to make both system approval and withhold determinations separately on a case-by-case basis.

38. Resolution Timing

Comment: Respondents believe that the Government should have a time limitation requirement to follow up on corrective actions, make system approval decisions, and remove withholds.

Response: DoD acknowledges the respondents' concern regarding the timing of follow-up audits. Therefore, the rule has been revised so that "If, prior to the receipt of verification, the contractor submits evidence that the deficiencies have been corrected, and the contracting officer, in consultation with the auditor or functional specialist, determines that there is a reasonable expectation that the corrective actions have been implemented, the contracting officer may discontinue withholding payments pending receipt of verification and release any payments previously withheld."

39. Risk-based Withholding

Comment: A number of respondents suggested that any reductions in payment should be in proportion to the potential damage/risk to the Government and should be imposed only after demonstrating a reasonable basis for the actual damage suffered by the Government.

Response: The intent of the rule is to authorize payment withholding when the contracting officer determines there are one or more system deficiencies that adversely affect a contractor's business system, leading to a potential risk of harm to the Government. The potential risk of harm may be a risk that cannot be quantified in terms of dollars, such as a deficiency that would compromise contract performance. Contract terms explicitly require contractors to maintain the business systems in question as a condition of contracting responsibility and, in some cases, eligibility for award. Contract prices are negotiated on the basis that contractors will maintain such systems, so that the Government does not need to maintain far more extensive inspection and audit functions than it already does. Failure of the contractor to maintain acceptable systems during contract performance deprives the Government of assurances for which it pays fair value. While not "deliverable" services under specific contract line items, these business systems are material terms, performance of which is required to ensure contracts will be performed on time, within cost estimates, and with appropriate standards of quality. The withholding remedy provides a measure of the overall contract performance of which the Government is deprived during the performance period, and for which the contractor should not receive the full financing payments. DoD is relying on the temporary percentage withhold amount, not as a penalty for a deficiency, but as representing a good-faith estimate sufficient to mitigate the Government's risk where the actual amounts are difficult to estimate or quantify.

40. Roles of DCAA/DCMA

Comment: A number of respondents were concerned that most contracting officers will not have the requisite training and expertise to reach independent conclusions relative to

auditor/contractor disagreements over internal controls. The respondents expect contracting officers will, more often than not, simply concur with auditor conclusions out of expediency and safety to avoid being reported to the DoD IG for investigation, which will greatly endanger equity and fairness. These respondents suggested that DoD first addresses the adjudication process and the independence of DCAA. The respondent stated that DFARS must be absolutely clear with regard to the roles and authority of the ACO and the auditor.

Response: The DoD memo dated December 4, 2009, "Resolving Contract Audit Recommendations," clearly defines the roles and responsibilities of DCAA and DCMA and provides procedures for adjudicating differences. DoD has confidence that contracting officers possess the technical knowledge, skills, and experience necessary to reach independent determinations on business systems based on sound judgment as required by FAR 1.602–2, Responsibilities.

41. Rule Application

Comment: Two respondents suggested that since the information cited in the CWC testimony concerned companies that were involved with contingency contracting in Afghanistan and Iraq, that the proposed rule is overly broad and should be limited only to contingency contracting.

Response: DoD notes that while the issues surrounding contractor business systems came to light under the findings of the CWC hearings, it is a longstanding DoD policy to rely upon effective and efficient contractor business systems beyond the realm of the contingency contracting arena. DoD does not believe that these issues are limited strictly to contingency contracting.

42. Small Business Impact

Comment: Several respondents commented that the proposed rule imposes potentially burdensome requirements on small businesses, since with the exception of EVMS and estimating system requirements, business system requirements apply to all contractors and contracts, regardless of size. Thus, small businesses would be required to implement and maintain the same business systems as those systems implemented by the largest contractors. The respondents recommended the rule impose reasonable limitations on the applicability of the requirements for contractor business systems based on the size of the contractor or contract.

Response: DoD agrees that the rule could potentially have an adverse impact on small business and has established thresholds designed to limit the impact on small business. Additionally, the rule has been revised to reduce the percentage of payments withheld if a small business has a deficiency that poses a potential risk of harm to the Government.

43. Withhold Alternatives

Comment: A number of respondents believe the proposed rule is unnecessary because the Government already has a number of enforcement mechanisms to ensure that material deficiencies in contractor systems do not result in unchecked fraud, waste, or abuse in Government contracting and to provide contractors with appropriate incentives to quickly address any deficiencies. Some of the respondents recommended that the rule be revised to state that contracting officers should not impose duplicative remedies or sanctions.

Response: The existing regulatory remedies are not an effective substitute for a contract clause that will mitigate the Government's risk while contractors correct business system deficiencies. The proposed rule is required to supplement existing enforcement mechanisms and protect the Government's interests while the contractor completes correction of system deficiencies. DoD does not wish to limit the contracting officer's discretion to apply any and all regulatory measures, as warranted by the circumstances. For example, if a contractor has a deficiency in its property management system, the contracting officer may implement a withhold to protect the Government's risk of the contractor failing to perform on the contract, and may also revoke the Government's assumption of liability to protect the Government from risk of loss of the Government's furnished property.

44. Withhold Impacts

Comment: Several respondents believe the proposed rule would have unintended consequences such as establishing a barrier to entry for new contractors, harming the cash flow of existing contractors and hurting their ability to obtain financing, prompting unnecessary administrative cost and improvements to business systems, adversely impacting financial performance metrics of return on investment and return on sales, and impacting the ability of contractors to attract debt and equity investment at beneficial rates. One respondent believed that the unintended consequences could directly result in loss of jobs and would be contrary to supporting our warfighters and our national security, both of which depend on a healthy industrial base.

Response: DoD does not believe that the rule will cause long–term harm to the defense industrial base or national security. DoD recognizes that there may be a short-term financial impact on a contractor who fails to maintain adequate business systems in accordance with the terms of its contract. However, the Government has the responsibility to protect the taxpayers. DoD believes that contractors who maintain adequate systems will not be impacted by this rule and, in fact, will benefit from effective business systems.

45. Withhold Impacts on Government Oversight Costs

Comment: One respondent recommended that DoD abandon the proposed clause 252.242–7XXX because it will increase the Government's oversight and enforcement costs.

Response: DoD appreciates the respondent's concern. However, acceptable contractor business systems are the first line of defense against fraud, waste, and abuse. As such, it is in the Government's, and ultimately the taxpayers', best interest to ensure contractors maintain adequate business systems.

46. Withhold Percentages

Comment: A number of respondents expressed concern over the percentages to be withheld, that the rule does not establish a maximum dollar amount that may be withheld, and that cumulative withholds of up to 50 percent per contract are inappropriate.

Response: DoD appreciates the respondents' concerns regarding the withhold percentages. Accordingly, the proposed rule has been revised to reduce the amount that can be withheld for business system deficiencies from ten percent to five percent (two percent for small business). If the Contractor submits an acceptable corrective action plan, the contracting officer will, as appropriate, reduce the withholding to two percent (one percent for small businesses). The contracting officer will authorize the contractor to bill for amounts previously withheld when the contracting officer determines all deficiencies have been corrected. Additionally, DoD has revised the rule to reduce the cumulative percentage of payments that can be withheld on one or more business systems to 20 percent (10 percent for small businesses). This limitation refers to the amount that can be withheld on any payment if deficiencies exist in one or more business systems. The establishment of

a maximum dollar amount that may be withheld across multiple contracts would be inappropriate.

B. Summary of Proposed Rule Changes

As a result of the public comments received, the following changes were made to the proposed rule:

1. To the extent practicable, the rule has been reorganized to provide consistency across each of the business systems. Additionally, throughout the rule, the term "ACO" has been replaced by "contracting officer" for accuracy.

2. The definition of "deficiency" used throughout the rule means a failure to maintain one or more system criteria of an acceptable business system. This definition has been set forth within each of the specific business system clauses 252.215–7002, 252.234–7002, 252.242–7004, 252.242–7XXX, 252.242–7YYY, 252.244–7XXX, and 252.245–7XXX.

3. The system criteria for each of the business systems have been set forth in clause 252.242–7XXX, Business Systems, as well as in each of the individual business system clauses, 252.215–7002, 252.234–7002, 252.242–7004, 252.242–7YYY, 252.244–7XXX, and 252.245–7XXX.

4. In the "policy" paragraphs for each of the business systems, 215.407–5–70(c)(2), 234.201(5), 242.7203(c), 242.7502(b), 244.305–70(a), and 245.105(b), cognizant contracting officers, in consultation with the auditor and, where applicable, the functional specialist, shall determine the acceptability of the contractor's business systems and approve or disapprove the system.

5. The "disposition of findings" paragraphs for each of the business systems, 215.407–5–70(e)(2), 234.201(7), 242.7203(c), 242.7502(d), 244.305–70(c), and 245.105(d), have been reorganized and revised to set forth procedures for reporting of findings, and making initial and final determinations as follows:

(a) If there are system deficiencies, the auditor's or functional specialist's report to the contracting officer shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies and the potential adverse impact to the Government; and

(b) Revised initial and final determination procedures have been set forth.

6. The business system approval paragraphs, 215.407–5–70(f), 234.201(8), 242.7203(d), 242.7502(e), 244.305–70(d), and 245.105(e), are established to provide procedures for contracting officers to promptly approve a previously unapproved business system and notify the contractor when the contracting officer determines, in consultation with the auditor and/or functional specialist, that the contractor has substantially corrected the system deficiencies, removing any potential risk of harm to the Government.

7. The contracting officer notifications paragraphs, 215.407–5–70(g), 234.201(9), 242.7203(e), 242.7502(f), 244.305–70(e), and 245.105(f), are established to provide procedures for contracting officers to promptly distribute copies of a determination to withhold, remove withholds, and approve or disapprove a system to the auditor, payment office, contracting officers at the buying activities, and cognizant contracting officers in contract administration activities.

8. Paragraphs 242.7502(g) and 244.305–70(f), on mitigating risk of accounting system and purchasing system deficiencies on specific proposals, are established to provide contracting officers with procedures for evaluating whether a deficiency impacts the negotiations, and if so, what alternatives the contracting officer should consider.

9. Section 245.105 is rewritten in its entirety as previously noted, and for consistency with the other business systems covered under this rule.

10. Section 242.70X1 Business system deficiencies, has been revised in its entirety to set forth policy and procedures for contracting officers to make a determination to withhold payments; provide appropriate notifications; monitor and verify the correction of contractor deficiencies; and implement, reduce, increase, and discontinue payment withholding.

11. Section 242.70X2 Contract clause, has been revised to set forth a $50 million threshold and revise the companion clauses that set forth the requirements for the use of clause 252.242–7XXX, Business Systems.

12. In each of the clauses revised under this rule, 252.215–7002, 252.234–7002, 252.242–7004, 252.242–7YYY, and 252.244–7XXX, the language has been revised to replace the phrase and paragraph headings entitled "system requirements" with "system criteria," and to delete from the clauses the phrases "but is not limited to" and "but not limited to."

13. The "System deficiencies" paragraphs in each of the individual business systems clauses, 252.215–7002(e), 252.234–7002(i), 252.242–7004(e), 252.242–7YYY(d), and 252.244–7XXX(d), have been revised for consistency and clarity.

14. In each of the individual business system clauses revised under this rule, the following language has been added under paragraphs 252.215–7002(f), 252.234–7002(i)(4), 252.242–7004(f), 252.242–7YYY(e), and 252.244–7XXX(e): "If the Contractor receives the Contracting Officer's final determination of system deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies."

15. In each of the individual business system clauses revised under this rule, the "Withholding payments" paragraphs, 252.215–7002(g), 252.234–7002(k), 252.242–7004(g), 252.242–7YYY(f), and 252.244–7XXX(f), are revised as follows: "If the Contracting Officer determines that there are one or more system deficiencies that adversely affect the Contractor's purchasing system, leading to a potential risk of harm to the Government, and the contract includes the clause at 252.242–7XXX, Business Systems, the Contracting Officer will withhold payments in accordance with that clause."

16. Clause 252.215–7002 is revised as follows:

(a) The definition of an "estimating system" has been revised to include the phrase "budgeting and planning controls," and under subparagraph (5), to add the phrase "budgeting and planning" and the phrase "and budgets."

(b) Minor revisions to paragraph (d) system criteria, include the addition of the phrase "and budgets" in subparagraphs (i), (ii), and (v); the addition of the phrase "and budgeting" in subparagraphs (iii), (iv), and (xii); replacement of the word "appropriate" with "adequate" in subparagraph (v); deletion of the phrase "where appropriate" in subparagraph (xi); replacement of the phrase "comply with this regulation" with "ensure timely follow-up actions are taken on the management review recommendations" in subparagraph (xii); replacement of the phrase "the comparison" with "budgetary data supporting indirect cost estimates and comparisons" in subparagraph (xiii); addition of the phrase "and notify the Contracting Officer" in subparagraph (xiv); deletion of subparagraph (xv) and its replacement with new subparagraphs (xv), (xvi), and (xvii).

17. Clause 252.234–7002 is revised as follows:

(a) Definitions of "acceptable earned value management system" and "earned value management system" are added.

(b) Paragraph (c) is revised as follows: "If this contract has a value of $50 million or more, the Contractor shall use

an EVMS that has been determined to be acceptable by the cognizant Federal agency." The phrase "to be in compliance with the EVMS guidelines as stated in paragraph (a)(1) of this clause" is hereby deleted.

(c) Paragraphs (c) and (g) are revised to replace the references to paragraph (a)(1) with references to paragraph (b)(1).

(d) Paragraph (j), System disapproval, is hereby added to set forth when a contracting officer will disapprove a contractor's EVMS.

(e) Paragraph (h) is renumbered as paragraph (l) and is revised to provide the following qualifying phrase: "With the exception of paragraphs (i) through (k) of this clause * * *" Additionally, the reference to paragraph (b) is replaced by a reference to paragraph (c).

18. Clause 252.242–7002 is revised to add the definition of "acceptable material management and accounting system."

19. Clause 252.242–7XXX is revised as follows:

(a) The definition of "acceptable business systems" has been revised to delete the words "this contract" such that acceptable business systems "means business systems that comply with the terms and conditions of the applicable business system clauses listed in the definition of "business systems" in this clause."

(b) The definition of "business systems" has been revised to update the references to the applicable clauses for the property management system, 252.245–7XXX, Contractor Property Management System Administration, and purchasing system, 252.244–7XXX, Contractor Purchasing System Administration.

(c) Paragraph (c), System deficiencies, has been revised for clarity to state under subparagraph (1) that "The Contractor shall respond in writing within 30 days to an initial determination that there are one or more system deficiencies that adversely affect the Contractor's business system leading to a potential risk of harm to the Government." Furthermore, the phrase "that adversely affect the Contractor's business system leading to a potential risk of harm to the Government" is also added for clarity.

(d) Paragraph (d) is revised for clarity, as well, to—

(i) Reduce the withhold percentage from 10 percent to five percent (two percent for small businesses) and from five percent to two percent (one percent for small businesses) if the Contractor submits an acceptable corrective action plan within 45 days of a notice of the Contracting Officer's intent to withhold payments;

(ii) Set forth procedures for Contracting Officers to withhold payments from progress payments and performance-based payments, or issue a contract modification requiring the Contractor to implement the withholding on interim cost vouchers on cost, labor-hour, and time-and-materials contracts;

(iii) Reduce the cumulative percentage of payments withheld on one or more business systems from 50 percent to 20 percent (10 percent for small businesses);

(iv) Delete the potential 100 percent withhold for deficiencies that are highly likely to lead to improper contract payments or represent an unacceptable risk of loss to the Government;

(v) Add construction contracts that include FAR clause 52.232–27 to the list of interim payments applicable to this clause; and

(vi) Add subparagraph (5) to set forth that "Payment withholding shall not apply to payments on fixed-price line items where performance is complete and the items were accepted by the Government."

(e) Paragraph (e) is revised for clarity, as well, to—

(i) Revise procedures for Contracting Officers to discontinue withhold payments from progress payments and performance-based payments, and unilaterally issue a contract modification to discontinue the payment withholding from billings on interim cost vouchers, and authorize the Contractor to appropriately bill for any monies previously withheld if the Contracting Officer determines the Contractor has corrected all deficiencies in a business system; and

(ii) Revise procedures for Contracting Officers to continue to withhold payments from progress payments and performance-based payments, or require the Contractor to continue the withholding from its billings on interim cost vouchers if the Contracting Officer determines the Contractor has not corrected all deficiencies in a business system.

20. Clause 252.242–7YYY is revised as follows:

(a) The definition of "acceptable accounting system" is revised to replace the phrase "requirements under" with the phrase "system criteria in," and replace the word "invoice" with the word "billing."

(b) The definition of "accounting system" is revised to replace "reporting data" with "reporting" and to add the phrase "and may include subsystems for specific areas such as indirect and other direct costs, compensation, billing, labor, and general information technology."

(c) Paragraph (b), General, is revised to clarify that "Failure to maintain an acceptable accounting system, as defined in this clause, shall result in the withholding of payments if the contract includes the clause at 252.242–7XXX, Business Systems, and also may result in disapproval of the system."

21. Clause 252.244–7XXX is revised as follows:

(a) The definition of an "acceptable purchasing system" is added.

(b) The definition of "purchasing system" is revised to delete the purchasing system criteria language in subparagraphs (1) through (6), which has been relocated to the system criteria paragraph (c).

22. New clause 252.245–7XXX, Contractor Property System Administration, has been added for consistency with the other business system clauses, 252.215–7002, 252.234–7002, 252.242–7004, 252.242–7YYY, and 252.244–7XXX.

III. Executive Order 12866

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

IV. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

The objective of the rule is to establish a definition for contractor business systems and implement compliance mechanisms to improve DoD oversight of those contractor business systems. The requirements of the rule will apply to entities contractually required to maintain one or more of the defined contractor business systems. While DoD did not receive comments with specific impacts on small businesses, based on comments received, DoD has revised the proposed rule to establish a $50 million threshold designed to limit the impact on small business. Additionally, the rule has been revised to reduce the percentage of payment withholding if a small business has a deficiency that poses a potential risk of harm to the Government.

At this time, DoD is unable to estimate the number of small entities to which this rule will apply. Therefore, DoD invites comments from small

business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2009–D038) in correspondence.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies because the proposed rule contains information collection requirements. In accordance with 5 CFR 1320.8, DoD invited comments regarding the information collection estimate that DoD included with the initial proposed rule published on January 15, 2010, at 75 FR 2457. In response, DoD received one comment. The respondent asserted that DoD's estimates are substantially understated. However, the supporting data referenced by the respondent exceeds the information collection requirements established under this rule. The hours and costs cited by the respondent with regard to EVMS do not reflect the Paperwork Reduction Act requirements of this rule. With no further specific Paperwork Reduction Act comments received, and no further revisions in this proposed rule to the information collection requirements, DoD believes the estimates published with the proposed rule accurately reflect the contractors' costs to fulfill the information collection requirements of this rule.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or e-mail *Jasmeet_K._Seehra@omb.eop.gov,* with a copy to the Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060, or e-mail *dfars@osd.mil.* Include DFARS Case 2009–D038 in the subject line of the message.

List of Subjects in 48 CFR Parts 215, 234, 242, 244, 245, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 215, 234, 242, 244, 245, and 252 as follows:

1. The authority citation for 48 CFR parts 215, 234, 242, 244, 245, and 252 continues to read as follows:

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

PART 215—CONTRACTING BY NEGOTIATION

2. Amend section 215.407–5–70 by:

a. Adding introductory text to paragraph (a);

b. Revising paragraph (a)(4);

c. Revising the heading of paragraph (c);

d. Revising paragraphs (c)(2) and (c)(3);

e. Removing paragraph (c)(4);

f. Redesignating paragraphs (d)(1), (d)(2), and (d)(3) as paragraphs (c)(4), (c)(5), and (c)(6);

g. Revising newly designated paragraphs (c)(4) and (c)(5);

h. Removing the heading of paragraph (d);

i. Removing paragraphs (e), and (f);

j. Redesignating paragraph (g) as paragraph (d); and

k. Adding new paragraphs (e) through (g) to read as follows:

215.407–5–70 Disclosure, maintenance, and review requirements.

(a) *Definitions.* As used in this subsection—

* * * * *

(4) Deficiency is defined in 252.215–7002, Cost Estimating System Requirements.

(b) * * *

(c) *Policy.*

* * * * *

(2) The cognizant contracting officer, in consultation with the auditor, for contractors subject to paragraph (b)(2) of this subsection shall—

(i) Determine the acceptability of the disclosure and approve or disapprove the system; and

(ii) Pursue correction of any deficiencies.

(3) The auditor conducts estimating system reviews.

(4) An acceptable system shall provide for the use of appropriate source data, utilize sound estimating techniques and good judgment, maintain a consistent approach, and adhere to established policies and procedures.

(5) In evaluating the acceptability of a contractor's estimating system, the contracting officer, in consultation with the auditor, shall determine whether the contractor's estimating system complies with the system criteria for an acceptable estimating system as prescribed in 252.215–7002, Cost Estimating System Requirements.

* * * * *

(e) *Disposition of findings*—(1) *Reporting of findings.* The auditor shall document findings and recommendations in a report to the contracting officer. If the auditor identifies any estimating system deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies and the potential adverse impact to the Government.

(2) *Initial determination.* (i) The contracting officer shall review all findings and recommendations and, if there are no deficiencies that adversely affect the system, shall promptly notify the contractor in writing that the contractor's estimating system is acceptable and approved; or

(ii) If the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's estimating system, leading to a potential risk of harm to the Government, the contracting officer shall——

(A) Promptly make an initial determination on any system deficiencies and notify the contractor, in writing, providing a description of the deficiency in sufficient detail to allow the contractor to understand the deficiency and its potential harm to the Government;

(B) Request the contractor to respond in writing to the initial determination within 30 days; and

(C) Promptly evaluate the contractor's responses to the initial determination, in consultation with the auditor or functional specialist, and make a final determination.

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor in writing that—

(A) The contractor's estimating system is acceptable and approved, or

(B) System deficiencies still remain. The notice shall indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(*1*) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(*2*) Disapprove the system in accordance with 252.215–7002, Cost Estimating System Requirements, if the contracting officer determines that one or more deficiencies warrant system disapproval based on the risk to the Government; and

(*3*) Withhold payments in accordance with 252.242–7XXX, Business Systems, if the clause is included in the contract and the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's estimating system, leading to a potential risk of harm to the Government.

(ii) Follow the procedures relating to a correction of system deficiencies in PGI 215.407–5–70(e)(3).

(f) *System approval.* The contracting officer shall promptly approve a previously disapproved estimating system and notify the contractor when the contracting officer determines that the contractor has substantially corrected the system deficiencies removing the potential risk of harm to the Government.

(g) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to withhold, remove withholds, and approve or disapprove a system to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

PART 234—MAJOR SYSTEM ACQUISITION

2A. Add section 234.001 to read as follows:

234.001 Definition.

As used in this subpart—

Acceptable earned value management system and *earned value management system* are defined in 252.234–7002, Earned Value Management System.

Deficiency is defined in 252.234–7002, Earned Value Management System, and is synonymous with *noncompliance.*

3. Amend section 234.201 by adding paragraphs (5) through (9) to read as follows:

234.201 Policy.

* * * * *

(5) The cognizant contracting officer, in consultation with the functional specialist and auditor, shall—

(i) Determine the acceptability of the contractor's earned value management system and approve or disapprove the system; and

(ii) Pursue correction of any deficiencies.

(6) In evaluating the acceptability of a contractor's earned value management system, the contracting officer, in consultation with the functional specialist and auditor, shall determine whether the contractor's earned value management system complies with the system criteria for an acceptable earned value management system as prescribed in 252.234–7002, Earned Value Management System.

(7) *Disposition of findings*—(i) *Reporting of findings.* The functional specialist or auditor shall document findings and recommendations in a report to the contracting officer. If the functional specialist or auditor identifies any deficiencies in the contractor's earned value management system, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies and the potential adverse impact to the Government.

(ii) *Initial determination.* (A) The contracting officer shall review all findings and recommendations and, if there are no deficiencies that adversely affect the system, shall promptly notify the contractor, in writing, that the contractor's earned value management system is acceptable and approved; or

(B) If the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's earned value management system, leading to a potential risk of harm to the Government, the contracting officer shall—

(*1*) Promptly make an initial determination on any system deficiencies and notify the contractor, in writing, providing a description of the deficiency in sufficient detail to allow the contractor to understand the deficiencies and the potential adverse impact to the Government;

(*2*) Request the contractor to respond in writing to the initial determination within 30 days; and

(*3*) Evaluate the contractor's response to the initial determination, in consultation with the auditor or functional specialist, and make a final determination.

(iii) *Final determination.* (A) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(*1*) The contractor's earned value management system is acceptable and approved, or

(*2*) Systems deficiencies still remain. The notice shall indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(*i*) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(*ii*) Disapprove the system in accordance with 252.234–7002, Earned Value Management System, when initial validation is not successfully completed within a 16 month period from contract award, or the existing earned value management system contains one or more deficiencies in high-risk guidelines in ANSI/EIA–748 standards (guidelines 1, 3, 6, 7, 8, 9, 10, 12, 16, 21, 23, 26, 27, 28, 30, or 32). For the remaining 16 guidelines in ANSI/EIA–748 standards, the contracting officer shall use discretion to disapprove the system based on input received from functional specialists and the auditor; and

(*iii*) Withhold payments in accordance with 252.242–7XXX, Business Systems, if the clause is included in the contract and the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's earned value management system, leading to a potential risk of harm to the Government.

(B) Follow the procedures relating to correction of system deficiencies at PGI 234.201(7)(iii).

(8) *System approval.* The contracting officer shall promptly approve a previously disapproved earned value management system and notify the contractor when the contracting officer determines that the contractor has substantially corrected the system deficiencies, removing the potential risk of harm to the Government.

(9) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to withhold, remove withholds, and approve or disapprove a system to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

4. Add subpart 242.70 to read as follows:

Subpart 242.70—Business Systems

Sec.
242.70X1 Business system deficiencies.
242.70X2 Contract clause.

Subpart 242.70—Business Systems

242.70X1 Business system deficiencies.

(a) *Definition.* As used in this subpart——

Acceptable business systems and *business systems* are defined in 252.242–7XXX, Business Systems.

Deficiency is defined in 252.242–7XXX, Business Systems.

(b) *Determination to withhold payments.* If the contracting officer determines that one or more system deficiencies adversely affect the contractor's business systems included in 252.242–7XXX, Business Systems, that lead to a potential risk of harm to the Government, the contracting officer will—

(1) Promptly notify the contractor, in writing, of the contracting officer's determination to implement payment withholding in accordance with 252.242–7XXX, Business Systems. The notice of payment withhold shall be included in the contracting officer's written final determination for the business system and shall inform the contractor that—

(i) Payments shall be withheld in accordance with 252.242–7XXX, Business Systems, until the contracting officer determines that all system deficiencies have been corrected; and

(ii) The contracting officer reserves the right to take other actions within the terms and conditions of the contract.

(2) Provide all contracting officers administering contracts containing 252.242–7XXX, Business Systems, a copy of the determination and instructions for issuing unilateral contract modifications to withhold payments on those contracts, and reducing progress payments and performance-based payments, as applicable. The contracting officer shall also provide a copy of the determination to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

(3) Contracting officers shall use a format substantially the same as the following for unilateral modifications for making an initial payment withholding, reducing the payment withholding, and discontinuing the payment withholding in accordance with 252.242–7XXX, Business Systems:

(i) Use this format for unilateral modifications for implementing payment withholding:

Payment Withholding

(A) The purpose of this unilateral modification is to implement a payment withholding per the terms of 252.242–7XXX, Business Systems, and as a result of the Contracting Officer's determination, dated YYYY/MM/DD, with respect to the deficiencies found in the Contractor's system(s).

(B) Effective immediately, five percent (two percent for small businesses) of each request for payment under this contract will be withheld as described below. Upon receipt of an acceptable corrective action plan from the Contractor, a determination will be made with respect to reducing the percentage being withheld to two percent (one percent for small businesses) until the Contracting Officer determines that the Contractor has corrected all system deficiencies, as identified in the Contracting Officer's determination. Failure to follow the accepted corrective action plan will result in an increase in the percentage withheld against each payment under this contract to five percent (two percent for small businesses). Such reduction or increase will be made by contract modification.

(C) For payments under cost, labor-hour, or time-and-materials contracts: The Contractor shall apply a five percent (two percent for small businesses) withhold to the amount being billed and prepare a cost voucher in Wide Area WorkFlow (WAWF) for the net amount due. The Contractor shall show the amount withheld on the current billing, as well as the cumulative amount withheld to date on this contract in accordance with 252.242–7XXX, in the Comments block of the Miscellaneous Info Tab in WAWF.

(D) For progress payments: The Contractor shall prepare the request in WAWF without applying any withhold percentage. The Contracting Officer will reduce the approved amount by five percent (two percent for small businesses) and record the amount being withheld on the progress payment request, as well as the cumulative amount withheld on this contract in accordance with 252.242–7XXX, in the Comments block of the Miscellaneous Info Tab in WAWF.

(E) For performance-based payments: The Contractor shall prepare the request in WAWF without applying any withhold percentage to the performance-based payment event schedule amounts. The Contracting Officer will reduce the amount approved by five percent (two percent for small businesses)and record the amount being withheld on the performance-based payment, as well as the cumulative amount withheld on this contract, in accordance with 252.242–7XXX, in the Comments block of the of the Miscellaneous Info Tab in WAWF.

(F) These payment withhold amounts will not be recorded in Mechanization of Contract Administration Services as withholds and there is no ACTION required on the part of the payment office to effect the withhold.

(ii) Use this format for unilateral modifications for reducing payment withholding:

Reduction of Temporary Payment Withholding

(A) The purpose of this unilateral modification is to reduce the payment withholding percentage per the terms of 252.242–7XXX, Business Systems, as a result of receiving an acceptable corrective action plan from the contractor, dated YYYY/MM/DD, for resolving deficiencies in its system(s) as identified in the Contracting Officer's determination, dated YYYY/MM/DD. This reduction is prospective and previous amounts withheld will not be reduced or released at this time.

(B) Effective immediately, two percent (one percent for small businesses) of each request for payment under this contract will be withheld as described below. The two percent (one percent for small businesses) being withheld will remain in effect until the Contracting Officer determines that the Contractor has corrected all system deficiencies as identified in the Contracting Officer's determination. Failure to follow the accepted corrective action plan will result in an increase in the percentage withheld against each payment under this contract to five percent (two percent for small businesses). Such increase will be made by contract modification.

(C) For payments under cost, labor-hour, or time-and-materials contracts: The Contractor shall apply a two percent (one percent for small businesses) withhold to the amount being billed and prepare a cost voucher in Wide Area WorkFlow (WAWF) for the net amount due. The Contractor shall show the amount withheld on the current billing, as well as the cumulative amount withheld to date on this contract in accordance with 252.242–7XXX, in the Comments block of the Miscellaneous Info Tab in WAWF.

(D) For progress payments: The Contractor shall prepare the request in WAWF without applying any withhold percentage. The Contracting Officer will reduce the approved amount by two percent (one percent for small

businesses) and record the amount being withheld on the progress payment request, as well as the cumulative amount withheld on this contract, in accordance with 252.242–7XXX, in the Comments block of the Miscellaneous Info Tab in WAWF.

(E) For performance-based payments: The Contractor shall prepare the request in WAWF without applying any withhold percentage to the performance-based payment event schedule amounts. The Contracting Officer will reduce the amount approved by two percent (one percent for small businesses) and record the amount being withheld on the performance-based payment, as well as the cumulative amount withheld on this contract, in accordance with 252.242–7XXX, in the Comments block of the of the Miscellaneous Info Tab in WAWF.

(F) These payment withhold amounts will not be recorded in Mechanization of Contract Administration Services as withholds and there is no ACTION required on the part of the payment office to effect the withhold.

(iii) Use the format below if payment withholding is discontinued pending receipt of auditor or functional specialist verification and based on evidence that the contractor has corrected all system deficiencies, in accordance with 252.242–7XXX, Business Systems:

Discontinuation of Payment Withholding

(A) The purpose of this unilateral modification is to discontinue the payment withhold as identified in Modification XXXXX and release previous amounts withheld on this contract, in accordance with 252.242–7XXX, Business Systems.

(B) The discontinuation of the payment withhold is made pending receipt of verification and based on evidence submitted by the Contractor that all the Contractor's system(s) deficiencies identified in the Contracting Officer's determination, dated YYYY/MM/DD, have been corrected.

(C) The Contractor is authorized to submit a bill in the amount of $XXXXXXXX. The billed amount should be submitted on the same type of invoice as the withhold was originally taken, as appropriate.

(iv) Use the format below if payment withholding is discontinued after auditor or functional specialist verification that the contractor has corrected all system deficiencies, in accordance with 252.242–7XXX, Business Systems:

Discontinuation of Payment Withholding

(A) The purpose of this unilateral modification is to discontinue the payment withhold as identified in Modification XXXXX and release previous amounts withheld on this contract, in accordance with 252.242–7XXX, Business Systems.

(B) The discontinuation of the payment withhold is made based on verification that all the contractor's system(s) deficiencies identified in the Contracting Officer's final determination, dated YYYY/MM/DD, have been corrected.

(C) The Contractor is authorized to submit a bill in the amount of $XXXXXXXX. The billed amount should be submitted on the same type of invoice as the withhold was originally taken, as appropriate.

(c) If the contracting officer determines that none of the system deficiencies adversely affect any of the contractor's business systems included in 252.242–7XXX, Business Systems, that lead to potential risk of harm to the Government, the contracting officer shall promptly notify the contractor in writing of the contracting officer's determination not to implement payment withholds in accordance with 252.242–7XXX, Business Systems.

(d) *Monitoring contractor's corrective action.* The contracting officer, in consultation with the auditor or functional specialist, shall monitor the contractor's progress in correcting the deficiencies. The contracting officer shall notify the contractor of any decision to decrease or increase the amount of payment withholding in accordance with 252.242–7XXX, Business Systems.

(e) *Correction of system deficiencies.* (1) If the contractor notifies the contracting officer that the contractor has corrected the system deficiencies, the contracting officer shall request the auditor or functional specialist to review the correction to verify that the deficiencies have been corrected. If, after receipt of verification, the contracting officer determines that the contractor has corrected all system deficiencies, the contracting officer shall discontinue the withholding of payments and release any payments previously withheld.

(2) Prior to the receipt of verification, the contracting officer may discontinue withholding payments pending receipt of verification, and release any payments previously withheld, if the contractor submits evidence that the deficiencies have been corrected, and the contracting officer, in consultation with the auditor or functional specialist, determines that there is a reasonable expectation that the corrective actions have been implemented.

242.70X2 Contract clause.

Use the clause at 252.242–7XXX, Business Systems, in solicitations and contracts when the expected contract value is equal to or greater than $50 million, and when the solicitation or contract includes any of the following clauses:

(a) 252.215–7002, Cost Estimating System Requirements.

(b) 252.234–7002, Earned Value Management System.

(c) 252.242–7004, Material Management and Accounting System.

(d) 252.242–7YYY, Accounting System Administration.

(e) 252.244–7XXX, Contractor Purchasing System Administration.

(f) 252.245–7XXX, Contractor Property Management System Administration.

5. Revise section 242.7201 to read as follows:

242.7201 Definitions.

As used in this subpart—

Acceptable material management and accounting system, material management and accounting system, and *valid time-phased requirements* are defined in 252.242.7004, Material Management and Accounting System.

Deficiency is defined in 252.242.7004, Material Management and Accounting System.

6. Amend section 242.7202 by:

a. Redesignating the introductory text as paragraph (a);

b. Redesignating existing paragraphs (a) through (c) as paragraphs (a)(1) through (a)(3), respectively; and

c. Adding new paragraphs (b) and (c) to read as follows:

242.7202 Policy.

* * * * *

(b) The cognizant contracting officer, in consultation with the auditor and functional specialist, shall—

(1) Determine the acceptability of the contractor's MMAS and approve or disapprove the system; and

(2) Pursue correction of any deficiencies.

(c) In evaluating the acceptability of the contractor's MMAS, the contracting officer, in consultation with the auditor and functional specialist, shall determine whether the contractor's MMAS complies with the system criteria for an acceptable MMAS as prescribed in 252.242–7004, Material Management and Accounting System.

7. Amend section 242.7203 by:

a. Removing paragraph (c);

b. Redesignating paragraph (d) as paragraph (c);

c. Revising newly designated paragraph (c); and

d. Adding new paragraphs (d) and (e) to read as follows:

242.7203 Review procedures.

* * * * *

(c) *Disposition of findings*—(1) *Reporting of findings.* The auditor or functional specialist shall document findings and recommendations in a report to the contracting officer. If the auditor or functional specialist identifies any MMAS deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies and the potential adverse impact to the Government.

(2) *Initial determination.* (i) The contracting officer shall review findings and recommendations and if there are no deficiencies that adversely affect the system, shall promptly notify the contractor, in writing, that the contractor's MMAS is acceptable and approved; or

(ii) If the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's MMAS, leading to a potential risk of harm to the Government, the contracting officer shall—

(A) Promptly make an initial determination on any system deficiencies and notify the contractor, in writing, providing a description of deficiencies in sufficient detail to allow the contractor to understand the deficiencies and the potential adverse impact to the Government;

(B) Request the contractor to respond in writing to the initial determination within 30 days; and

(C) Promptly evaluate the contractor's response to the initial determination in consultation with the auditor or functional specialists, and make a final determination.

(3) *Final determination.* (i) The ACO shall make a final determination and notify the contractor that—

(A) The contractor's MMAS is acceptable and approved, or

(B) System deficiencies still remain. The notice shall indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(*1*) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(*2*) Make a determination to disapprove the system in accordance with 252.242–7004, Material Management and Accounting System, if the contracting officer determines that one or more deficiencies warrant system disapproval based on the risk to the Government; and

(*3*) Withhold payments in accordance with 252.242–7XXX, Business Systems, if the clause is included in the contract and the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's MMAS, leading to a potential risk of harm to the Government.

(ii) Follow the procedures relating to correction of system deficiencies in PGI 242.7203.

(d) *System approval.* The contracting officer shall promptly approve a previously disapproved MMAS and notify the contractor when the contracting officer determines that the contractor has substantially corrected the system deficiencies, removing the potential risk of harm to the Government.

(e) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to withhold, remove withholds, and approve or disapprove a system to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

8. Revise subpart 242.75 to read as follows:

Subpart 242.75—Contractor Accounting Systems

Sec.
242.7501 Definitions.
242.7502 Policy.
242.7503 Contract clause.

Subpart 242.75—Contractor Accounting Systems

242.7501 Definitions.

As used in this subpart—

Acceptable accounting system, and *accounting system* are defined in 252.242–7YYY, Accounting System Administration.

Deficiency is defined in 252.242–7YYY, Accounting System Administration.

242.7502 Policy.

(a) Contractors receiving cost-reimbursement, incentive-type, time-and-materials, or labor-hour contracts, contracts which provide for progress payments based on costs or on a percentage or stage of completion, or construction contracts that include the clause at FAR 52.232–27, Prompt Payment for Construction Contracts, shall maintain an acceptable accounting system.

(b) The cognizant contracting officer, in consultation with the auditor, shall—

(1) Determine the acceptability of a contractor's accounting system and approve or disapprove the system; and

(2) Pursue correction of any deficiencies.

(c) In evaluating the acceptability of a contractor's accounting system, the contracting officer, in consultation with the auditor, shall determine whether the contractor's accounting system complies with the system criteria for an acceptable accounting system as prescribed in 252.242–7YYY, Accounting System Administration.

(d) *Disposition of findings*—(1) *Reporting of findings.* The auditor shall document findings and recommendations in a report to the contracting officer. If the auditor identifies any accounting system deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies and the potential adverse impact to the Government. Follow the procedures at PGI 242.70X1(b) for reporting of deficiencies.

(2) *Initial determination.* (i) The contracting officer shall review findings and recommendations and, if there are no deficiencies that adversely affect the system, shall promptly notify the contractor, in writing, that the contractor's accounting system is acceptable and approved; or

(ii) If the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's accounting system, leading to a potential risk of harm to the Government, the contracting officer shall—

(A) Promptly make an initial determination on any system deficiencies and notify the contractor, in writing;

(B) Request the contractor to respond in writing to the initial determination within 30 days; and

(C) Evaluate the contractor's response to the initial determination, in consultation with the auditor or functional specialist and make a final determination.

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(A) The contractor's accounting system is acceptable and approved, or

(B) System deficiencies still remain. The notice shall indicate the adequacy

of any proposed or completed corrective action. The contracting officer shall—

(*1*) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(*2*) Make a determination to disapprove the system in accordance with 252.242–7YYY, Accounting System Administration, if the contracting officer determines that one or more deficiencies warrant system disapproval based on the risk to the Government; and

(*3*) Withhold payments in accordance with 252.242–7XXX, Business Systems, if the clause is included in the contract and the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's accounting system, leading to a potential risk of harm to the Government.

(ii) Follow the procedures relating to correction of system deficiencies in PGI 242.7502.

(e) *System approval.* The contracting officer shall promptly approve a previously disapproved accounting system and notify the contractor when the contracting officer determines that the contractor has substantially corrected the system deficiencies, removing the potential risk of harm to the Government.

(f) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to withhold, remove withholds, and approve or disapprove a system to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

(g) *Mitigating the risk of accounting system deficiencies on specific proposals.* (1) Field pricing teams shall discuss identified accounting system deficiencies and their impact in all reports on contractor proposals until the deficiencies are resolved.

(2) The contracting officer responsible for negotiation of a proposal generated by an accounting system with an identified deficiency shall evaluate whether the deficiency impacts the negotiations. If it does not, the contracting officer should proceed with negotiations. If it does, the contracting officer should consider other alternatives, e.g.—

(i) Allowing the contractor additional time to correct the accounting system deficiency and submit a corrected proposal;

(ii) Considering another type of contract, *e.g.,* a fixed-price incentive (firm target) contract instead of a firm-fixed price;

(iii) Using additional cost analysis techniques to determine the reasonableness of the cost elements affected by the accounting system's deficiency;

(iv) Segregating the questionable areas as a cost-reimbursable line item;

(v) Reducing the negotiation objective for profit or fee; or

(vi) Including a contract (reopener) clause that provides for adjustment of the contract amount after award.

(3) The contracting officer who incorporates a reopener clause into the contract is responsible for negotiating price adjustments required by the clause. Any reopener clause necessitated by an accounting system deficiency should—

(i) Clearly identify the amounts and items that are in question at the time of negotiation;

(ii) Indicate a specific time or subsequent event by which the contractor will submit a supplemental proposal, including cost or pricing data, identifying the cost impact adjustment necessitated by the deficient accounting system;

(iii) Provide for the contracting officer to unilaterally adjust the contract price if the contractor fails to submit the supplemental proposal; and

(iv) Provide that failure of the Government and the contractor to agree to the price adjustment shall be a dispute under the Disputes clause.

242.7503 Contract clause.

Use the clause at 252.242–7YYY, Accounting System Administration, in solicitations and contracts when contemplating—

(a) A cost-reimbursement, incentive-type, time-and-materials, or labor-hour contract;

(b) A fixed-price contract with progress payments made on the basis of costs incurred by the contractor or on a percentage or stage of completion; or

(c) A construction contract that includes the clause at FAR 52.232–27, Prompt Payment for Construction Contracts.

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

9. Add subpart 244.1 to read as follows:

Subpart 244.1—General

Sec.
244.101 Definitions.

Subpart 244.1—General

244.101 Definitions.

As used in this subpart—

Acceptable purchasing system, and *purchasing system* are defined in 252.244–7XXX, Purchasing System Administration.

Deficiency is defined in 252.244–7XXX, Purchasing System Administration.

10. Revise section 244.305–70 to read as follows:

244.305–70 Policy.

Use the procedures of this subsection instead of FAR 44.305–2(c) and 44.305–3(b).

(a) The cognizant contracting officer, in consultation with the purchasing system analyst or auditor, shall—

(1) Determine the acceptability of the contractor's purchasing system and approve or disapprove the system; and

(2) Pursue correction of any deficiencies.

(b) In evaluating the acceptability of the contractor's purchasing system, the contracting officer, in consultation with the purchasing system analyst and auditor, shall determine whether the contractor's purchasing system complies with the system criteria for an acceptable purchasing system as prescribed in 252.244–7XXX, Contractor Purchasing System Administration.

(c) *Disposition of findings*—(1) *Reporting of findings.* The purchasing system analyst or auditor shall document findings and recommendations in a report to the contracting officer. If the purchasing system analyst or auditor identifies any purchasing system deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies and the potential adverse impact to the Government.

(2) *Initial determination.* (i) The contracting officer shall review all findings and recommendations and, if there are no deficiencies that adversely affect the system, shall promptly notify the contractor that the contractor's purchasing system is acceptable and approved; or

(ii) If the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's purchasing system, leading to a potential risk of harm to the Government, the contracting officer shall—

(A) Promptly make an initial determination on any system deficiencies and notify the contractor, in writing, providing a description of the deficiencies in sufficient detail to allow

the contractor to understand the deficiencies and the potential adverse impact to the Government;

(B) Request the contractor to respond in writing to the initial determination within 30 days; and

(C) Evaluate the contractor's response to the initial determination in consultation with the auditor or functional specialist, and make a final determination.

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(A) The contractor's purchasing system is acceptable and approved, or

(B) System deficiencies still remain. The notice shall indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(*1*) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(*2*) Make a determination to disapprove the system in accordance with 252.244–7XXX, Contractor Purchasing System Administration, if the contracting officer determines that one or more deficiencies warrant system disapproval based on the risk to the Government; and

(*3*) Withhold payments in accordance with 252.242–7XXX, Business Systems, if the clause is included in the contract and the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's purchasing system, leading to a potential risk of harm to the Government.

(ii) Follow the procedures in accordance with 252.244–7XXX, Contractor Purchasing System Administration, and PGI 244.305–70 for disposition of report findings.

(d) *System approval.* The contracting officer shall promptly approve a previously disapproved purchasing system and notify the contractor when the contracting officer determines that the contractor has substantially corrected the system deficiencies, removing the potential risk of harm to the Government.

(e) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to withhold, remove withholds, and approve or disapprove a system to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

(f) *Mitigating the risk of purchasing system deficiencies on specific proposals.* (1) Source selection evaluation teams shall discuss identified purchasing system deficiencies and their impact in all reports on contractor proposals until the deficiencies are resolved.

(2) The contracting officer responsible for negotiation of a proposal generated by a purchasing system with an identified deficiency shall evaluate whether the deficiency impacts the negotiations. If it does not, the contracting officer should proceed with negotiations. If it does, the contracting officer should consider other alternatives, e.g.—

(i) Allowing the contractor additional time to correct the purchasing system deficiency and submit a corrected proposal;

(ii) Considering another type of contract, e.g., a fixed-price incentive (firm target) contract instead of firm-fixed price;

(iii) Using additional cost analysis techniques to determine the reasonableness of the cost elements affected by the purchasing system's deficiency;

(iv) Segregating the questionable areas as a cost-reimbursable line item;

(v) Reducing the negotiation objective for profit or fee; or

(vi) Including a contract (reopener) clause that provides for adjustment of the contract amount after award.

(3) The contracting officer who incorporates a reopener clause into the contract is responsible for negotiating price adjustments required by the clause. Any reopener clause necessitated by a purchasing system deficiency should—

(i) Clearly identify the amounts and items that are in question at the time of negotiation;

(ii) Indicate a specific time or subsequent event by which the contractor will submit a supplemental proposal, including cost or pricing data, identifying the cost impact adjustment necessitated by the deficient purchasing system;

(iii) Provide for the contracting officer to unilaterally adjust the contract price if the contractor fails to submit the supplemental proposal; and

(iv) Provide that failure of the Government and the contractor to agree to the price adjustment shall be a dispute under the Disputes clause.

11. Add new section 244.305–7X to read as follows:

244.305–7X Contract clause.

Use the clause at 252.244–7XXX, Contractor Purchasing System Administration, in solicitations and contracts containing the clause at FAR 52.244–2, Subcontracts.

PART 245—GOVERNMENT PROPERTY

12. Revise section 245.105 to read as follows:

245.105 Contractor's property management system compliance.

(a) *Definitions*—(1) *Acceptable property management system* and *property management system* are defined in 252.242–7XXX, Contractor Property Management System Administration.

(2) *Deficiency* is defined in 252.242–7XXX, Contractor Property Management System Administration.

(b) *Policy.* The cognizant contracting officer, in consultation with the property administrator, shall—

(1) Determine the acceptability of the system and approve or disapprove the system; and

(2) Pursue correction of any deficiencies.

(c) In evaluating the acceptability of a contractor's property management system, the contracting officer, in consultation with the property administrator, shall determine whether the contractor's property management system complies with the system criteria for an acceptable property management system as prescribed in 252.242–7XXX, Contractor Property Management System Administration.

(d) *Disposition of findings*—(1) *Reporting of findings.* The property administrator shall document findings and recommendations in a report to the contracting officer. If the property administrator identifies any property system deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies and the potential adverse impact to the Government.

(2) *Initial determination.* (i) The contracting officer shall review findings and recommendations and, if there are no deficiencies that adversely affect the system, shall promptly notify the contractor, in writing, that the contractor's property management system is acceptable and approved; or

(ii) If the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's property management system, leading to a potential risk of harm to the Government, the contracting officer shall—

(A) Promptly make an initial determination on any system deficiencies and notify the contractor, in writing, providing a description of

deficiencies in sufficient detail to allow the contractor to understand the deficiencies and the potential adverse impact to the Government;

(B) Request the contractor to respond in writing to the initial determination within 30 days and;

(C) Evaluate the contractor's response to the initial determination, in consultation with the property administrator and make a final determination;

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(A) The contractor's property management system is acceptable and approved, or

(B) System deficiencies still remain. The notice shall indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(*1*) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(*2*) Promptly make a determination to disapprove the system if the contracting officer determines that one or more deficiencies warrant the system disapproval based on the risk to the Government; and

(*3*) Withhold payments in accordance with 252.242–7XXX, Business Systems, if the clause is included in the contract and the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's property system, leading to a potential risk of harm to the Government.

(ii) Follow the procedures in PGI 245.105 for disposition of report findings.

(e) *System Approval.* The contracting officer shall promptly approve a previously unapproved property management system and notify the contractor when the contracting officer determines, in consultation with the property administrator, that the contractor has substantially corrected the system deficiencies, removing the potential risk of harm to the Government.

(f) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to withhold, remove withholds, and approve or disapprove a system to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

12A. Add new section 245.105–7X to read as follows:

245.105–7X Contract clause.

Use the clause at 252.245–7XXX, Contractor Property System Administration, in solicitations and contracts containing the clause at FAR 52.245–1, Government Property.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

13. Revise section 252.215–7002 to read as follows:

252.215–7002 Cost estimating system requirements.

As prescribed in 215.408(2), use the following clause:

COST ESTIMATING SYSTEM REQUIREMENTS (DATE)

(a) *Definitions.* As used in this clause—

Acceptable estimating system means an estimating system that complies with the system criteria in paragraph (d) of this clause, and provides for a system that—

(1) Is maintained, reliable, and consistently applied;

(2) Produces verifiable, supportable, and documented cost estimates that are an acceptable basis for negotiation of fair and reasonable prices;

(3) Is consistent with and integrated with the Contractor's related management systems; and

(4) Is subject to applicable financial control systems.

Deficiency means a failure to meet one or more system criteria of an acceptable estimating system.

Estimating system means the Contractor's policies, procedures, and practices for budgeting and planning controls, and generating estimates of costs and other data included in proposals submitted to customers in the expectation of receiving contract awards. Estimating system includes the Contractor's—

(1) Organizational structure;

(2) Established lines of authority, duties, and responsibilities;

(3) Internal controls and managerial reviews;

(4) Flow of work, coordination, and communication; and

(5) Budgeting, planning, and estimating methods, techniques, accumulation of historical costs, and other analyses used to generate cost estimates and budgets.

(b) *General.* The Contractor shall establish, maintain, and comply with an acceptable estimating system.

(c) *Applicability.* Paragraphs (d) and (e) of this clause apply if the Contractor is a large business and either—

(1) In its fiscal year preceding award of this contract, received Department of Defense (DoD) prime contracts or subcontracts, totaling $50 million or more for which cost or pricing data were required; or

(2) In its fiscal year preceding award of this contract—

(i) Received DoD prime contracts or subcontracts totaling $10 million or more (but less than $50 million) for which cost or pricing data were required; and

(ii) Was notified in writing by the Contracting Officer that paragraphs (d) and (e) of this clause apply.

(d) *System criteria.* (1) The Contractor shall disclose its estimating system to the Administrative Contracting Officer (ACO) in writing. If the Contractor wishes the Government to protect the information as privileged or confidential, the Contractor must mark the documents with the appropriate legends before submission.

(2) An estimating system disclosure is acceptable when the Contractor has provided the ACO with documentation that—

(i) Accurately describes those policies, procedures, and practices that the Contractor currently uses in preparing cost proposals; and

(ii) Provides sufficient detail for the Government to reasonably make an informed judgment regarding the acceptability of the Contractor's estimating practices.

(3) The Contractor shall—

(i) Comply with its disclosed estimating system; and

(ii) Disclose significant changes to the cost estimating system to the ACO on a timely basis.

(4) The Contractor's estimating system shall provide for the use of appropriate source data, utilize sound estimating techniques and good judgment, maintain a consistent approach, and adhere to established policies and procedures. An acceptable estimating system shall accomplish the following functions—

(i) Establish clear responsibility for preparation, review, and approval of cost estimates and budgets;

(ii) Provide a written description of the organization and duties of the personnel responsible for preparing, reviewing, and approving cost estimates and budgets;

(iii) Ensure that relevant personnel have sufficient training, experience, and guidance to perform estimating and budgeting tasks in accordance with the contractor's established procedures;

(iv) Identify and document the sources of data and the estimating methods and rationale used in developing cost estimates and budgets;

(v) Provide for adequate supervision throughout the estimating and budgeting process;

(vi) Provide for consistent application of estimating and budgeting techniques;

(vii) Provide for detection and timely correction of errors;

(viii) Protect against cost duplication and omissions;

(ix) Provide for the use of historical experience, including historical vendor pricing information, where appropriate;

(x) Require use of appropriate analytical methods;

(xi) Integrate information available from other management systems;

(xii) Require management review, including verification of the company's estimating and budgeting policies, procedures, and practices;

(xiii) Provide for internal review of, and accountability for, the acceptability of the estimating system, including the budgetary data supporting indirect cost estimates and comparisons of projected results to actual results, and an analysis of any differences;

(xiv) Provide procedures to update cost estimates and notify the Contracting Officer in a timely manner throughout the negotiation process;

(xv) Provide procedures that ensure subcontract prices are reasonable based on a documented review and analysis;

(xvi) Provide estimating and budgeting practices that consistently generate sound proposals that are compliant with the provisions of the solicitation and are adequate to serve as a basis to reach a fair and reasonable price; and

(xvii) Have an adequate system description, including policies, procedures, and estimating and budgeting practices that comply with the Federal Acquisition Regulation and Defense Federal Acquisition Regulation Supplement.

(e) *System deficiencies.* (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, on any system deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency and its potential harm to the Government.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies deficiencies in the Contractor's estimating system. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing.

(3) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval, if the Contracting Officer determines that one or more deficiencies warrant system disapproval based on the risk to the Government.

(f) If the Contractor receives the Contracting Officer's final determination of system deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(g) *Withholding payments.* If the Contracting Officer determines that there are one or more system deficiencies that adversely affect the Contractor's estimating system, leading to a potential risk of harm to the Government, and the contract includes 252.242–7XXX, Business Systems, the Contracting Officer will withhold payments in accordance with that clause.

(End of clause)

14. Revise section 252.234–7002 to read as follows:

252.234–7002 Earned Value Management System.

As prescribed in 234.203(2), use the following clause:

EARNED VALUE MANAGEMENT SYSTEM (DATE)

(a) *Definitions.* As used in this clause—

Acceptable earned value management system means an earned value management system that generally complies with system criteria in paragraph (b) of this clause.

Deficiency means a failure to meet one or more system criteria of an acceptable earned value management system.

Earned value management system means an earned value management system that complies with the earned value management system guidelines in the ANSI/EIA–748.

(b) *System Criteria.* In the performance of this contract, the Contractor shall use—

(1) An Earned Value Management System (EVMS) that complies with the EVMS guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA–748); and

(2) Management procedures that provide for generation of timely, reliable, and verifiable information for the Contract Performance Report (CPR) and the Integrated Master Schedule (IMS) required by the CPR and IMS data items of this contract.

(c) If this contract has a value of $50 million or more, the Contractor shall use an EVMS that has been determined to be acceptable by the cognizant Federal agency. If, at the time of award, the Contractor's EVMS has not been determined by the cognizant Federal agency to be in compliance with the EVMS guidelines as stated in paragraph (b)(1) of this clause, the Contractor shall apply its current system to the contract and shall take necessary actions to meet the milestones in the Contractor's EVMS plan.

(d) If this contract has a value of less than $50 million, the Government will not make a formal determination that the Contractor's EVMS complies with the EVMS guidelines in ANSI/EIA–748 with respect to the contract. The use of the Contractor's EVMS for this contract does not imply a Government determination of the Contractor's compliance with the EVMS guidelines in ANSI/EIA–748 for application to future contracts. The Government will allow the use of a Contractor's EVMS that has been formally reviewed and determined by the cognizant Federal agency to be in compliance with the EVMS guidelines in ANSI/EIA–748.

(e) The Contractor shall submit notification of any proposed substantive changes to the EVMS procedures and the impact of those changes to the cognizant Federal agency. If this contract has a value of $50 million or more, unless a waiver is granted by the cognizant Federal agency, any EVMS changes proposed by the Contractor require approval of the cognizant Federal agency prior to implementation. The cognizant Federal agency will advise the Contractor of the acceptability of such changes as soon as practicable (generally within 30 calendar days) after receipt of the Contractor's notice of proposed changes. If the cognizant Federal agency waives the advance approval requirements, the Contractor shall disclose EVMS changes to the cognizant Federal agency at least 14 calendar days prior to the effective date of implementation.

(f) The Government will schedule integrated baseline reviews as early as practicable, and the review process will be conducted not later than 180 calendar days after contract award, the exercise of significant contract options, and the incorporation of major modifications. During such reviews, the Government and the Contractor will jointly assess the Contractor's baseline to be used for performance measurement to ensure complete coverage of the statement of work, logical scheduling of the work activities, adequate resourcing, and identification of inherent risks.

(g) The Contractor shall provide access to all pertinent records and data requested by the Contracting Officer or duly authorized representative as necessary to permit Government surveillance to ensure that the EVMS complies, and continues to comply, with the performance criteria referenced in paragraph (b) of this clause.

(h) When indicated by contract performance, the Contractor shall submit a request for approval to initiate an over-target baseline or over-target schedule to the Contracting Officer. The request shall include a top-level projection of cost and/or schedule growth, a determination of whether or not performance variances will be retained, and a schedule of implementation for the rebaselining. The Government will acknowledge receipt of the request in a timely manner (generally within 30 calendar days).

(i) *System deficiencies.* (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, on any system deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency and its potential harm to the Government.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies deficiencies in the Contractor's EVMS. If the Contractor disagrees with the initial determination, the Contractor shall state in writing its rationale for disagreeing.

(3) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System non-compliance, when the Contractor's existing EVMS contains one or more deficiencies in any of the 32 foundational guidelines in ANSI/EIA–748.

(4) If the Contractor receives the Contracting Officer's final determination of system deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(j) *System disapproval.* The Contracting Officer will disapprove the Contractor's EVMS when—

(1) Initial validation is not successfully completed within a 16 month period from contract award; or

(2) The existing EVMS contains one or more deficiencies in high-risk guidelines in ANSI/EIA–748 standards (guidelines 1, 3, 6,

7, 8, 9, 10, 12, 16, 21, 23, 26, 27, 28, 30 or 32). For the remaining 16 guidelines in ANSI/EIA–748 standards, the Contracting Officer will use discretion to disapprove the system based on input received from functional specialists and the auditor.

(k) *Withholding payments.* If the Contracting Officer determines that there are one or more system deficiencies that adversely affect the Contractor's EVMS, leading to a potential risk of harm to the Government, and the contract includes 252.242–7XXX, Business Systems, the Contracting Officer will withhold payments in accordance with that clause.]

(l) With the exception of paragraphs (i) through (k) of this clause, the Contractor shall require its subcontractors to comply with EVMS requirements as follows:

(1) For subcontracts valued at $50 million or more, the following subcontractors shall comply with the requirements of this clause:

[*Contracting Officer to insert names of subcontractors (or subcontracted effort if subcontractors have not been selected) designated for application of the EVMS requirements of this clause.*]

_____

_____

_____

_____

(2) For subcontracts valued at less than $50 million, the following subcontractors shall comply with the requirements of this clause, excluding the requirements of paragraph (c) of this clause:

[*Contracting Officer to insert names of subcontractors (or subcontracted effort if subcontractors have not been selected) designated for application of the EVMS requirements of this clause.*]

_____

_____

_____

_____

(End of clause)

15. Amend section 252.242–7004 by:

a. Revising the section heading, clause title, and the clause date;

b. Adding paragraphs (a)(4) and (a)(5);

c. Removing paragraph (d);

d. Redesignating existing paragraph (e) as paragraph (d); and

e. Adding new paragraphs (e) through (g) to read as follows:

252.242–7004 Material management and accounting system (MMAS).

* * * * *

MATERIAL MANAGEMENT AND ACCOUNTING SYSTEM (MMAS) (DATE)

(a) * * *

(4) *Acceptable material management and accounting system* means a MMAS that generally complies with the system criteria in paragraph (d) of this clause.

(5) *Deficiency* means a failure to meet one or more system criteria of an acceptable material management and accounting system.

* * * * *

(e) *System deficiencies.* (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, on any system deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency and its potential harm to the Government.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies deficiencies in the Contractor's MMAS. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing.

(3) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval if the Contracting Officer determines that one or more deficiencies warrants system disapproval based on the risk to the Government.

(f) If the Contractor receives the Contracting Officer's final determination of system deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(g) *Withholding payments.* If the Contracting Officer determines that there are one or more system deficiencies that adversely affect the Contractor's MMAS, leading to a potential risk of harm to the Government, and the contract includes 252.242–7XXX, Business Systems, the Contracting Officer will withhold payments in accordance with that clause.

(End of clause)

16. Add section 252.242–7XXX to read as follows:

252.242–7XXX Business systems.

As prescribed in 242.70X2, use the following clause:

BUSINESS SYSTEMS (DATE)

(a) *Definitions.* As used in this clause—

Acceptable business systems means business systems that comply with the terms and conditions of the applicable business system clauses listed in the definition of "Business Systems" in this clause.

Business systems means—

(1) Accounting system, if this contract includes 252.242–7YYY, Accounting System Administration;

(2) Earned value management system, if this contract includes 252.234–7002, Earned Value Management System;

(3) Estimating system, if this contract includes 252.215–7002, Cost Estimating System Requirements;

(4) Material management and accounting system, if this contract includes 252.242–7004, Material Management and Accounting System;

(5) Property management system, if this contract includes 252.245–7XXX, Contractor Property System Administration; and

(6) Purchasing system, if this contract includes 252.244–7XXX, Contractor Purchasing System Administration.

Deficiency means a failure to meet one or more system criteria of an acceptable business system.

(b) *General.* The Contractor shall establish and maintain acceptable business systems in accordance with the terms and conditions of this contract.

(c) *System deficiencies.* (1) The Contractor shall respond, in writing, within 30 days to an initial determination that there are one or more system deficiencies that adversely affect the Contractor's business system leading to a potential risk of harm to the Government.

(2) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the final determination as to whether the business system contains deficiencies that adversely affect the Contractor's business system leading to a potential risk of harm to the Government. If the Contracting Officer determines that the Contractor's business system contains such deficiencies, the final determination will include a notice to withhold payments.

(d) *Withholding of payments.* (1) If the Contracting Officer issues the final determination with a notice to withhold payments for deficiencies in a business system required under this contract, the Contracting Officer will, as applicable, withhold five percent (two percent for small businesses) of amounts due from progress payments and performance-based payments, and unilaterally issue a contract modification requiring the Contractor to withhold five percent (two percent for small businesses) from its billings on interim cost vouchers on cost, labor-hour, and time-and-materials contracts until all deficiencies have been corrected. The Contractor shall, within 45 days of receipt of the notice, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(2) If the Contractor submits an acceptable corrective action plan within 45 days of receipt of a notice of the Contracting Officer's intent to withhold payments, the Contracting Officer will, as appropriate, reduce withholding to two percent (one percent for small businesses) from progress payments and performance-based payments, and issue a unilateral modification to reduce the percentage withheld on interim cost vouchers to two percent (one percent for small businesses) until the Contracting Officer determines that the Contractor has corrected all deficiencies identified in the final determination. However, if at any time, the Contracting Officer determines that the Contractor has failed to follow the accepted corrective action plan, the Contracting Officer will issue a unilateral modification to increase the percentage withheld to the percentage initially withheld, until the Contracting Officer determines that the Contractor has corrected all deficiencies identified in the final determination.

(3) The total percentage of payments withheld on amounts due under each progress payment, performance-based payment, or interim cost voucher, for deficiencies on one or more business systems, shall not exceed 20 percent (10 percent for small businesses) on this contract.

(4) For the purpose of this clause, payment means any of the following payments authorized under this contract:

(i) Interim payments under—

(A) Cost-reimbursement contracts;

(B) Incentive-type contracts;

(C) Time-and-materials contracts;

(D) Labor-hour contracts;

(E) Construction contracts that include the clause at Federal Acquisition Regulation 52.232–27, Prompt Payment for Construction Contracts.

(ii) Progress payments.

(iii) Performance-based payments.

(5) Payment withholding shall not apply to payments on fixed-price line items where performance is complete and the items were accepted by the Government.

(6) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights or remedies the Government has under this contract.

(7) Notwithstanding the provisions of any clause in this contract providing for interim, partial, or other payment withholding on any basis, the Contracting Officer may withhold payment in accordance with the provisions of this clause.

(8) The payment withholding authorized in this clause is not subject to the interest-penalty provisions of the Prompt Payment Act.

(e) *Correction of deficiencies.* (1) The Contractor shall notify the Contracting Officer, in writing, when the Contractor has corrected the business system's deficiencies.

(2) Once the Contractor has notified the Contracting Officer that all deficiencies have been corrected, the Contracting Officer shall take one of the following actions:

(i) If the Contracting Officer determines the Contractor has corrected all deficiencies in a business system, the Contracting Officer will, as appropriate, discontinue the withholding of progress payments and performance-based payments, and unilaterally issue a contract modification to discontinue the payment withholding from billings on interim cost vouchers under this contract associated with that business system, and authorize the contractor to bill for any monies previously withheld that are not also being withheld due to deficiencies on other business systems under this contract. Any payment withholding in effect on other business systems under this contract will remain in effect until the deficiencies for those business systems are corrected.

(ii) If the Contracting Officer determines the Contractor has not corrected all system deficiencies, the Contracting Officer will continue the withholding of progress payments and performance-based payments, and the Contractor shall continue withholding amounts from its billings on interim cost vouchers in accordance with paragraph (d) of this clause, and not bill for any monies previously withheld.

(End of clause)

17. Add section 252.242–7YYY to read as follows:

252.242–7YYY Accounting system administration.

As prescribed in 242.7503, use the following clause:

ACCOUNTING SYSTEM ADMINISTRATION (DATE)

(a) *Definitions.* As used in this clause—

(1) *Acceptable accounting system* means a system that complies with the system criteria in paragraph (c) of this clause to provide reasonable assurance that—

(i) Applicable laws and regulations are complied with;

(ii) The accounting system and cost data are reliable;

(iii) Risk of misallocations and mischarges are minimized; and

(iv) Contract allocations and charges are consistent with billing procedures.

(2) *Accounting system* means the Contractor's system or systems for accounting methods, procedures, and controls established to gather, record, classify, analyze, summarize, interpret, and present accurate and timely financial data for reporting in compliance with applicable laws, regulations, and management decisions, and may include subsystems for specific areas such as indirect and other direct costs, compensation, billing, labor, and general information technology.

(3) *Deficiency* means a failure to meet one or more system criteria of an acceptable accounting system.

(b) *General.* The Contractor shall establish and maintain an acceptable accounting system. Failure to maintain an acceptable accounting system, as defined in this clause, shall result in the withholding of payments if the contract includes 252.242–7XXX, Business Systems, and also may result in disapproval of the system.

(c) *System criteria.* The Contractor's accounting system shall provide for—

(1) A sound internal control environment and accounting framework and organizational structure that is adequate for producing accounting data that is reliable and costs that are recorded, accumulated, and billed on Government contracts in accordance with contract terms;

(2) Proper segregation of direct costs from indirect costs;

(3) Identification and accumulation of direct costs by contract;

(4) A logical and consistent method for the accumulation and allocation of indirect costs to intermediate and final cost objectives;

(5) Accumulation of costs under general ledger control;

(6) Reconciliation of subsidiary cost ledgers and cost objectives to general ledger;

(7) Approval and documentation of adjusting entries;

(8) Periodic monitoring of the system;

(9) A timekeeping system that identifies employees' labor by intermediate or final cost objectives;

(10) A labor distribution system that charges direct and indirect labor to the appropriate cost objectives;

(11) Interim (at least monthly) determination of costs charged to a contract through routine posting of books of account;

(12) Exclusion from costs charged to Government contracts of amounts which are not allowable in terms of Federal Acquisition Regulation (FAR) part 31, Contract Cost Principles and Procedures, and other contract provisions;

(13) Identification of costs by contract line item and by units (as if each unit or line item were a separate contract), if required by the contract;

(14) Segregation of preproduction costs from production costs, as applicable;

(15) Cost accounting information, as required—

(i) By contract clauses concerning limitation of cost (FAR 52.232–20), limitation on payments (FAR 52.216–16), or allowable cost and payment (FAR 52.216–7); and

(ii) To readily calculate indirect cost rates from the books of accounts;

(16) Billings that can be reconciled to the cost accounts for both current and cumulative amounts claimed and comply with contract terms;

(17) Adequate, reliable data for use in pricing follow-on acquisitions; and

(18) Accounting practices in accordance with standards promulgated by the Cost Accounting Standards Board, if applicable, otherwise, Generally Accepted Accounting Principles.

(d) *System deficiencies.* (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, on any system deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency and its potential harm to the Government.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies deficiencies in the Contractor's accounting system. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing.

(3) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval, if the Contracting Officer determines that one or more deficiencies warrant system disapproval based on the risk to the Government.

(e) If the Contractor receives the Contracting Officer's final determination of system deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(f) *Withholding payments.* If the Contracting Officer determines that there are one or more system deficiencies that adversely affect the Contractor's accounting system, leading to a potential risk of harm to the Government, and the contract includes 252.242–7XXX, Business Systems, the Contracting Officer shall withhold payments in accordance with that clause.

(End of clause)

18. Add section 252.244–7XXX to read as follows:

252.244–7XXX Contractor purchasing system administration.

As prescribed in 244.305–7X, insert the following clause:

CONTRACTOR PURCHASING SYSTEM ADMINISTRATION (DATE)

(a) *Definitions.* As used in this clause—

Acceptable purchasing system means a purchasing system that complies with the system criteria in paragraph (c) of this clause.

Deficiency means a failure to meet one or more system criteria of an acceptable purchasing system.

Purchasing system means the Contractor's system or systems for purchasing and subcontracting, including make or buy decisions, the selection of vendors, analysis of quoted prices, negotiation of prices with vendors, placing and administering of orders, and expediting delivery of materials.

(b) *General.* The Contractor shall establish and maintain an acceptable purchasing system. Failure to maintain an acceptable purchasing system, as defined in this clause, may result in disapproval of the system by the Contracting Officer and/or withholding of payments.

(c) *System criteria.* The Contractor's purchasing system shall—

(1) Have an adequate system description including policies, procedures, and purchasing practices that comply with the Federal Acquisition Regulation (FAR) and the Defense FAR Supplement (DFARS);

(2) Ensure that all applicable purchase orders and subcontracts contain all flow-down clauses, including terms and conditions and any other clauses needed to carry out the requirements of the prime contract;

(3) Maintain an organization plan that establishes clear lines of authority and responsibility;

(4) Ensure all purchase orders are based on authorized requisitions and include a complete and accurate history of purchase transactions to support vendor selected, price paid, and document the subcontract/purchase order files which are subject to Government review;

(5) Establish and maintain adequate documentation to provide a complete and accurate history of purchase transactions to support vendors selected and prices paid;

(6) Apply a consistent make-or-buy policy that is in the best interest of the Government;

(7) Use competitive sourcing to the maximum extent practicable, and ensure debarred or suspended contractors are properly excluded from contract award;

(8) Evaluate price, quality, delivery, technical capabilities, and financial capabilities of competing vendors to ensure fair and reasonable prices;

(9) Require management level justification and adequate cost or price analysis, as applicable, for any sole or single source award;

(10) Perform adequate cost or price analysis and technical evaluation for each subcontractor and supplier proposal or quote to ensure fair and reasonable subcontract prices;

(11) Document negotiations in accordance with FAR 15.406–3;

(12) Seek, take, and document economically feasible purchase discounts, including cash discounts, trade discounts, quantity discounts, rebates, freight allowances, and company-wide volume discounts;

(13) Ensure proper type of contract selection and prohibit issuance of cost-plus-a-percentage-of-cost subcontracts;

(14) Maintain subcontract surveillance to ensure timely delivery of an acceptable product and procedures to notify the Government of potential subcontract problems that may impact delivery, quantity, or price;

(15) Document and justify reasons for subcontract changes that affect cost or price;

(16) Notify the Government of the award of all subcontracts that contain the FAR and DFARS flow-down clauses that allow for Government audit of those subcontracts, and ensure the performance of audits of those subcontracts;

(17) Enforce adequate policies on conflict of interest, gifts, and gratuities, including the requirements of the Anti-Kickback Act;

(18) Perform internal audits or management reviews, training, and maintain policies and procedures for the purchasing department to ensure the integrity of the purchasing system;

(19) Establish and maintain policies and procedures to ensure purchase orders and subcontracts contain mandatory and applicable flow-down clauses, as required by the FAR and DFARS, including terms and conditions required by the prime contract and any clauses required to carry out the requirements of the prime contract;

(20) Provide for an organizational and administrative structure that ensures effective and efficient procurement of required quality materials and parts at the best value from responsible and reliable sources;

(21) Establish and maintain selection processes to ensure the most responsive and responsible sources for furnishing required quality parts and materials and to promote competitive sourcing among dependable suppliers so that purchases are reasonably priced and from sources that meet contractor quality requirements;

(22) Ensure performance of adequate price or cost analysis on purchasing actions; and

(23) Establish and maintain procedures to ensure that proper types of subcontracts are selected, and that there are controls over subcontracting, including oversight and surveillance of subcontracted effort.

(d) *System deficiencies.* (1) The Contracting Officer will provide notification of initial determination to the Contractor, in writing, of any system deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency and its potential harm to the Government.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies deficiencies in the Contractor's purchasing system. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing.

(3) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval, if the Contracting Officer determines that one or more deficiencies warrant system disapproval based on the risk to the Government.

(e) If the Contractor receives the Contracting Officer's final determination of system deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(f) *Withholding payments.* If the Contracting Officer determines that there are one or more system deficiencies that adversely affect the Contractor's purchasing system, leading to a potential risk of harm to the Government, and the contract includes 252.242–7XXX, Business Systems, the Contracting Officer will withhold payments in accordance with that clause.

(End of clause)

19. Add section 252.245–7XXX to read as follows:

252.245–7XXX Contractor property management system administration.

As prescribed in 245.105–7X, insert the following clause:

CONTRACTOR PROPERTY MANAGEMENT SYSTEM ADMINISTRATION (DATE)

(a) *Definitions.* As used in this clause—

Acceptable property management system means a property system that complies with the system criteria in paragraph (c) of this clause.

Deficiency means a failure to meet one or more system criteria of an acceptable property management system.

Property management system means the Contractor's system or systems for managing and controlling Government property.

(b) *General.* The Contractor shall establish and maintain an acceptable property management system. Failure to maintain an acceptable property management system, as defined in this clause, may result in disapproval of the system by the Contracting Officer and/or withholding of payments.

(c) *System criteria.* The Contractor's property management system shall be in accordance with paragraph (f) of the contract clause at Federal Acquisition Regulation 52.245–1.

(d) *System deficiencies.* (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, of any system deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency and its potential harm to the Government.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies deficiencies in the Contractor's property management system. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing.

(3) The contracting officer will evaluate the Contractor's response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval, if the Contracting Officer determines that one or more deficiencies warrant system disapproval based on the risk to the Government.

(e) If the Contractor receives the Contracting Officer's final determination of system deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(f) *Withholding payments.* If the Contracting Officer determines that there are one or more system deficiencies that adversely affect the Contractor's property management system, leading to a potential risk of harm to the Government, and the contract includes 252.242–7XXX, Business Systems, the Contracting Officer will withhold payments in accordance with that clause.

(End of clause)

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Federal Register

Friday,
December 3, 2010

Part III

Department of the Treasury

Comptroller of the Currency
12 CFR Parts 4 and 21

Office of Thrift Supervision
12 CFR Parts 510 and 563

31 CFR Part 103
Standards Governing the Release of a Suspicious Activity Report; Confidentiality of Suspicious Activity Reports; Final Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 4

[Docket ID OCC–2010–0018]

RIN 1557–AD16

Standards Governing the Release of a Suspicious Activity Report

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is revising its regulations governing the release of non-public OCC information. The primary change clarifies that the OCC's decision to release a suspicious activity report (SAR) will be governed by the standards set forth in amendments to the OCC's SAR regulation that is part of a separate final rule published today in the **Federal Register**.

DATES: This rule is effective on January 3, 2011.

FOR FURTHER INFORMATION CONTACT: James Vivenzio, Senior Counsel for BSA/AML, (202) 874–5200; Ellen Warwick, Assistant Director, Litigation, (202) 874–5280; or Patrick Tierney, Counsel, Legislative and Regulatory Activities, (202) 874–5090; Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Introduction

The OCC is amending its regulations set forth in 12 CFR part 4, subpart C, governing the release of non-public OCC information. First, the amendments conform subpart C to amendments to the OCC's SAR confidentiality rule, 12 CFR 21.11(k), that are being issued as part of a separate, but simultaneous, rulemaking that the OCC is conducting together with the Financial Crimes Enforcement Network (FinCEN) and is published elsewhere in this issue of the **Federal Register**. Under the standards that the OCC is incorporating into part 4, the OCC will release a SAR, or any information that would reveal the existence of a SAR (referred to in this **SUPPLEMENTARY INFORMATION** as "SAR information") only when necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act (BSA). The standards also state that "official duties" do not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public OCC information under § 4.33. Thus, one effect of these amendments is that the OCC will not release SAR information in response to a request from a private litigant arising out of a private legal proceeding.

In addition to the clarification of the standards governing the release of SAR information, the amendments to subpart C also clarify that the OCC will deny a request for non-public information made under 12 CFR 4.33, if the release is prohibited by law. Finally, the amendments include a technical correction to § 4.37 that is described in section IV of this **SUPPLEMENTARY INFORMATION**.

II. Background

As described in greater detail below, this final rule amends part 4 to make subpart C consistent with the amendments to the OCC's SAR regulation that implement section 351 of the USA PATRIOT Act to ensure that the appropriate standard is applied to the OCC's disclosure of SAR information.[1] 12 CFR part 4, subpart C, contains the OCC's standards and procedures for the release of "non-public OCC information" and sets forth the restrictions on the dissemination of such information. Generally, "non-public OCC information" is confidential and privileged information that is the property of the OCC and that the OCC is not required to release under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) or that the OCC has not yet published or made available pursuant to 12 U.S.C. 1818(u), the statute requiring publication of certain enforcement actions. Examples in subpart C of "non-public OCC information" currently include "a SAR filed by the OCC, a national bank, or a Federal branch or agency of a foreign bank licensed or chartered by the OCC under 12 CFR 21.11."[2]

Subpart C generally describes procedures for requesting non-public OCC information from the OCC, such as where to submit a request, the form of the request, information that must be included in any request involving an adversarial matter, and various bases for the OCC's denial of such a request.[3] Subpart C also authorizes the OCC to make non-public OCC information available to a supervised entity and to other persons, at the sole discretion of the Comptroller, without a request for records or testimony,[4] and sets forth the OCC's policy regarding the release of non-public OCC information to other government agencies in response to a request.[5] Subpart C also describes the conditions and limitations that the OCC may place on information it discloses under subpart C.

Although SARs fall within the definition of "non-public OCC information," the release of a SAR is governed by standards set forth in the BSA. The BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[6] SARs generally are unsubstantiated reports of possible violations of law or of suspicious activities that are used for law enforcement or regulatory purposes. The BSA provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.[7] More importantly, in 2001, section 351 of the USA PATRIOT Act added a new provision to the BSA prohibiting officers or employees of the Federal government or any State, local, tribal, or territorial government within the United States from disclosing to any person[8] involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[9] Accordingly, it is this provision that now governs the ability of the OCC to disclose SAR information to any person.

To implement this provision, this final rule amends subpart C to provide that the OCC will not, and an officer, employee or agent of the OCC, shall not, disclose SAR information except as necessary to fulfill official duties consistent with Title II of the BSA. The final rule further provides that the OCC will decide whether to release SAR information based upon the standard in its SAR rules, 12 CFR 21.11(k), implementing section 351, rather than

[1] USA PATRIOT Act, section 351(b); Pub. L. 107–56, Title III, section 351; 115 Stat. 272, 320–21 (2001); 31 U.S.C. 5318(g)(2).

[2] *See* 12 CFR 4.32(b)(1)(vii).

[3] *See* 12 CFR 4.33–4.35.

[4] *See* 12 CFR 4.36.

[5] *See* 12 CFR 4.37(c).

[6] *See* 31 U.S.C. 5318(g)(1).

[7] 31 U.S.C. 5318(g)(2)(A)(i).

[8] The phrase "any person involved in the transaction" has been construed to apply to "any person" because the disclosure of SAR information to *any* outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is expressly prohibited by the BSA. *See Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[9] *See* USA PATRIOT Act, section 351(b); Pub. L. 107–56, Title III, section 351; 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(2).

upon any of the factors set out in subpart C.[10]

In addition, the final part 21 rule provides that "official duties" shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public OCC information under § 4.33. The final part 21 SAR rule interprets "official duties" as "official duties consistent with Title II of the Bank Secrecy Act," meaning official disclosures necessary to accomplish a governmental purpose entrusted to the agency, the officer, or employee, consistent with Title II of the BSA.[11] This standard permits, for example, disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement agency; a request from an appropriate Congressional committee or subcommittee; and prosecutorial disclosures mandated by statute or the Constitution in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.[12]

III. Notice of Proposed Rulemaking

On March 9, 2009, the OCC published a notice of proposed rulemaking to amend its regulations set forth in 12 CFR part 4, subpart C, governing the release of non-public OCC information.[13] The OCC received no public comment on the part 4 proposal.[14] The proposed rule is adopted as final without change and is described in detail in the Section-by-Section Analysis section.

IV. Section-by-Section Analysis of the Final Rule

Section 4.31(b)(4) Purpose and Scope

Subpart C currently includes several standards for the release of non-public OCC information. A person seeking non-public OCC information generally must submit a request in writing to the OCC that addresses the factors set forth in § 4.33. Section 4.35 describes how the OCC will make its determination to release the information and contains an illustrative list of possible bases for denial of a request.[15] Section 4.36(a) provides that the OCC may release information to a supervised entity or any person, even without a request, at the discretion of the Comptroller when necessary or appropriate. In addition, the scope section of subpart C makes clear that § 4.37(c) applies to requests for non-public OCC information from Federal and foreign governments and State agencies with authority to investigate violations of criminal law and State bank regulatory agencies.[16] Section 4.37(c) states that, when not prohibited by law, the Comptroller may make non-public OCC information available to these governmental entities for their use when necessary in the performance of their official duties.

This final rule adds a new paragraph (b)(4) to 12 CFR 4.31, the scope section of subpart C, which states that the OCC's decision to disclose records or testimony involving SAR information for purposes of 12 CFR 4.35(a)(1), 4.36(a), and 4.37(c), is governed by the standard in 12 CFR 21.11(k). Accordingly, the Comptroller's discretion to disclose SAR information to any person or entity without a request under § 4.36, and the OCC's determination to disclose SAR information to another government agency under § 4.37, will be subject to the standard in the amendments to 12 CFR 21.11(k) prohibiting the disclosure of SAR information "except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act."[17] In accordance with the OCC's longstanding commitment to protect the confidentiality of SARs, section 21.11(k) also provides that "official duties" does not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under § 4.33.[18]

Section 4.32(b) Definition of Non-Public OCC Information

This final rule amends the definition of "non-public OCC information" in § 4.32(b) to remove the reference to "a SAR filed by the OCC, a national bank, or a Federal branch or agency of a foreign bank licensed or chartered by the OCC under 12 CFR 21.11" from the illustrative list of examples that follow the definition of "non-public OCC information." SAR information is still covered by the definition of "non-public OCC information." However, the OCC is removing the reference to SARs from the illustrative list because highlighting SAR information as an example of non-public OCC information would be misleading in light of the amendments to § 4.31 described in the previous section. As described earlier, under the amendments to subpart C, SAR information will be treated as a unique subset of non-public OCC information subject to release in accordance with the standards set forth in 12 CFR 21.11(k).

Notwithstanding the OCC's deletion of the specific reference to SARs as an example of "non-public OCC information," SAR information continues to be otherwise subject to the provisions of subpart C that are not superseded by the standards in revised part 21. For example, § 4.37(d), which generally provides that the possession by a person of non-public OCC information does not constitute a waiver by the OCC of its right to control, or impose limitations on, the use and dissemination of the information, continues to apply to SAR information.

Section 4.35(a)(2) Consideration of Requests

Section 4.35 generally describes how the OCC makes its determination to release or to withhold non-public OCC information in response to requests received under § 4.33. Section 4.35(a)(2) lists five examples of reasons for which the OCC will deny the release of non-public OCC information.

The final rule adds "when prohibited by law" as a sixth example of a reason for denial of requests made under § 4.35. This addition clarifies that the OCC may deny a request under § 4.33 when prohibited by law, including, for example, § 21.11(k).

Section 4.37(c) Disclosures to Government Agencies

The final rule also makes a technical correction to § 4.37(c). Section 4.37(c) describes the basis for disclosures of non-public OCC information to government agencies. The last sentence in § 4.37(c) also states that any information that is made available under this section is OCC property, and the OCC may condition its use on appropriate confidentiality protections, "including the mechanisms identified in § 4.37." However, the various mechanisms that provide confidentiality protections are identified in § 4.38 of subpart C, rather than in § 4.37. Therefore, the final rule replaces the reference to "§ 4.37" with a reference to "§ 4.38."

[10] *See, e.g.,* 12 CFR 4.35.

[11] 31 U.S.C. 5311 (setting forth the purposes of the BSA).

[12] *See, e.g., Giglio* v. *United States,* 405 U.S. 150, 153–54 (1972); *Brady* v. *Maryland,* 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States,* 353 U.S. 657, 668 (1957).

[13] 74 FR 10136 (Mar. 9, 2009).

[14] However, the OCC received comments on proposed changes to the part 21 SAR rules, which are discussed in the **SUPPLEMENTARY INFORMATION** section of the OCC's part 21 final SAR rule published today in the **Federal Register**.

[15] *See* 12 CFR 4.35(a)(2).

[16] *See* 12 CFR 4.31(b)(3).

[17] *See* 12 CFR 21.11(k)(2).

[18] *Id.*

V. OCC Regulatory Analysis

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency that is issuing a final rule to prepare and make available a final regulatory flexibility analysis that describes the impact of the final rule on small entities, 5 U.S.C. 604. However, the RFA provides that an agency is not required to prepare and make available a final regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its final rule. 5 U.S.C. 605(b). For purposes of the RFA and OCC-regulated entities, a "small entity" is a national bank with assets of $175 million or less (small national bank).

The OCC has determined that this final rule will not have a significant economic impact on a substantial number of small entities. The final rule's changes to the OCC's internal standards, which were prompted by a statutory change, apply to the OCC, and its internal deliberations regarding the agency's ability to disclose a SAR, and not to any other entities. Therefore, pursuant to section 605(b) of the RFA, the OCC certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the requirement to prepare and publish a final regulatory flexibility analysis does not apply to this final rule.

Paperwork Reduction Act

We have reviewed the final rule in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that the final rule does not contain any "collections of information" as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate 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 for inflation) in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that this final rule, which amends the standards the OCC will apply when determining whether to release a SAR, will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more (adjusted for inflation) in any one year. Accordingly, this final rule is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 4

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Women.

Authority and Issuance

■ For the reasons set forth in the preamble, part 4, subpart C, of title 12 of the Code of Federal Regulations is amended as follows:

PART 4—ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

■ 1. Revise the authority citation for part 4 to read as follows:

Authority: 12 U.S.C. 93a. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552; E.O. 12600 (3 CFR 1987 Comp., p. 235). Subpart C also issued under 5 U.S.C. 301, 552; 12 U.S.C. 161, 481, 482, 484(a), 1442, 1817(a)(2) and (3), 1818(u) and (v), 1820(d)(6), 1820(k), 1821(c), 1821(o), 1821(t), 1831m, 1831p–1, 1831o, 1867, 1951 *et seq.,* 2601 *et seq.,* 2801 *et seq.,* 2901 *et seq.,* 3101 *et seq.,* 3401 *et seq.;* 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 5318(g)(2), 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510. Subpart D also issued under 12 U.S.C. 1833e.

■ 2. Add § 4.31(b)(4) to read as follows:

§ 4.31 Purpose and scope.

* * * * *

(b) * * *

(4) For purposes of §§ 4.35(a)(1), 4.36(a) and 4.37(c) of this part, the OCC's decision to disclose records or testimony involving a Suspicious Activity Report (SAR) filed pursuant to the regulations implementing 12 U.S.C. 5318(g), or any information that would reveal the existence of a SAR, is governed by 12 CFR 21.11(k).

§ 4.32 [Amended]

■ 3. Amend § 4.32(b) by:

■ a. Removing paragraph (b)(1)(vii).

■ b. Adding the word "and" at the end of paragraph (b)(1)(v); and

■ c. Removing, at the end of paragraph (b)(1)(vi), "; and" and adding a period in its place.

■ 4. Amend § 4.35(a)(2) by:

■ a. Removing the word "or" at the end of paragraph (a)(2)(iv);

■ b. Removing, in paragraph (a)(2)(v), the period and by adding in lieu thereof "; or"; and

■ c. Adding a new paragraph (a)(2)(vi) to read as follows:

§ 4.35 Consideration of requests.

(a) * * *

(2) * * *

(vi) When prohibited by law.

* * * * *

§ 4.37 [Amended]

■ 5. In § 4.37(c), remove the reference to "§ 4.37" in the last sentence and add in lieu thereof "§ 4.38."

[This Signature Page Relates to the Final Rule on Standards Governing the Release of a Suspicious Activity Report—Part 4.]

Dated: August 16, 2010.

John Walsh,

Acting Comptroller of the Currency.

[FR Doc. 2010–29883 Filed 12–2–10; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 21

[Docket ID OCC–2010–0019]

RIN 1557–AD17

Confidentiality of Suspicious Activity Reports

AGENCY: The Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Final rule.

SUMMARY: The OCC is issuing this final rule to amend its regulations implementing the Bank Secrecy Act (BSA) governing the confidentiality of a suspicious activity report (SAR) to: clarify the scope of the statutory prohibition on the disclosure by a financial institution of a SAR, as it applies to national banks; address the statutory prohibition on the disclosure by the government of a SAR, as that prohibition applies to the OCC's standards governing the disclosure of SARs; clarify that the exclusive standard applicable to the disclosure of a SAR, or any information that would reveal the

existence of a SAR, by the OCC is to fulfill official duties consistent with Title II of the BSA; and modify the safe harbor provision in the OCC's SAR rules to include changes made by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. These amendments are consistent with a final rule being contemporaneously issued by the Financial Crimes Enforcement Network (FinCEN).

DATES: This rule is effective on January 3, 2011.

FOR FURTHER INFORMATION CONTACT: James Vivenzio, Senior Counsel for BSA/AML, (202) 874–5200; Ellen Warwick, Assistant Director, Litigation, (202) 874–5280; or Patrick T. Tierney, Counsel, Legislative and Regulatory Activities, (202) 874–5090; Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Background

The BSA requires financial institutions, including national banks regulated by the OCC, to keep certain records and make certain reports that have been determined to be useful in criminal, tax, or regulatory investigations or proceedings, and for intelligence or counter intelligence activities to protect against international terrorism. In particular, the BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[1]

SARs are used for law enforcement or regulatory purposes to combat terrorism, terrorist financing, money laundering and other financial crimes. For this reason, the BSA provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.[2] To encourage the voluntary reporting of possible violations of law and regulation, and the filing of SARs, the BSA also contains a safe harbor provision, which shields financial institutions making such reports from civil liability.

FinCEN[3] has issued rules implementing the SAR confidentiality provisions for various types of financial institutions that closely mirror the statutory language.[4] In addition, the Federal bank regulatory agencies implemented these provisions through similar regulations that provide SARs are confidential and generally no information about or contained in a SAR may be disclosed.[5] The regulations issued by FinCEN and the Federal bank regulatory agencies also describe the applicability of the BSA's safe harbor provision[6] to both voluntary reports of possible and known violations of law and the required filing of SARs.

The USA PATRIOT Act of 2001 strengthened the confidentiality of SARs by adding to the BSA a new provision that prohibits officers or employees of the Federal government or any State, local, Tribal, or territorial government within the United States with knowledge of a SAR from disclosing to any person involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[7] The USA PATRIOT Act also clarified that the safe harbor shielding financial institutions from liability covers voluntary disclosures of possible violations of law and regulations to a government agency and expanded the scope of the limit on liability to cover any civil liability that may exist "under any contract or other legally enforceable agreement (including any arbitration agreement)."[8]

FinCEN is issuing a final rule to modify its SAR rules to interpret or further interpret the provisions of the BSA that relate to the confidentiality of SARs and the safe harbor for such reporting. The OCC is amending its SAR rules contemporaneously, consistent with the final rule being issued by FinCEN, to clarify the manner in which these provisions apply to national banks and to the OCC's own standards governing the disclosure of a SAR and any information that would reveal the existence of a SAR (referred to in this **SUPPLEMENTARY INFORMATION** as "SAR information").

In a separate rulemaking action from the part 21 proposal, the OCC also simultaneously proposed to amend its information disclosure regulation set forth in 12 CFR part 4, subpart C, to clarify that the exclusive standard governing the release of SAR information is set forth in 12 CFR 21.11.[9] The OCC issued that proposed amendment to 12 CFR part 4, subpart C, at the same time as the part 21 proposal, to make clear that the OCC will disclose SAR information only when necessary to satisfy the BSA purposes for which SARs are filed. Today, the OCC also is adopting the part 4 proposal as final without change.

II. Overview of the Proposed Rule and Related Actions

On March 9, 2009, the OCC published proposed amendments to its rules[10] to include key changes that would: (1) Clarify the scope of the statutory prohibition on the disclosure by a financial institution of a SAR, as it applies to national banks; (2) address the statutory prohibition on the disclosure by the government of a SAR, which was added to the BSA by section 351(b) of the USA PATRIOT Act of 2001, as that prohibition applies to the OCC's standards governing the disclosure of SAR information; and (3) clarify that the exclusive standard applicable to the disclosure of SAR information by the OCC is to fulfill official duties consistent with Title II of the BSA, in order to ensure that SAR information is protected from inappropriate disclosures unrelated to the BSA purposes for which SARs are filed. In addition, the proposed amendments would modify the safe harbor provision in the OCC's SAR rules[11] to include changes made by the USA PATRIOT Act.

Contemporaneously with the publication of, and as described in the OCC's proposal, FinCEN issued for notice and comment proposed guidance regarding the sharing of SARs with

[1] The Annunzio-Wylie Anti-Money Laundering Act (the Annunzio-Wylie Act) amended the BSA and authorized the Secretary of the Treasury to require financial institutions to report suspicious transactions relevant to a possible violation of law or regulation. *See* Public Law 102–550, Title XV, section 1517(b), 106 Stat. 4044, 4059–60 (1992); 31 U.S.C. 5318(g)(1). The OCC, Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS), and National Credit Union Administration (NCUA), (collectively referred to as the Federal bank regulatory agencies) subsequently issued virtually identical implementing regulations on suspicious activity reporting. *See* 12 CFR 21.11 (OCC); 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 563.180 (OTS); and 12 CFR 748.1 (NCUA).

[2] 31 U.S.C. 5318(g)(2)(A)(i).

[3] FinCEN is the agency designated by the Department of the Treasury to administer the BSA and with which SARs must be filed. *See* 31 U.S.C. 5318; 12 CFR 21.11(c).

[4] *See, e.g.,* 31 CFR 103.18(e) (SAR confidentiality rule for banks); 31 CFR 103.19(e) (SAR confidentiality rule for brokers or dealers in securities).

[5] *See* 12 CFR 21.11(k) (OCC); 12 CFR 208.62(j) (FRB); 12 CFR 353.3(g) (FDIC); 12 CFR 563.180(d)(12) (OTS); and 12 CFR 748.1(c)(5) (NCUA).

[6] 31 U.S.C. 5318(g)(3).

[7] *See* USA PATRIOT Act, section 351(b); Pub. L. 107–56, Title III, section 351; 115 Stat. 272, 320–21 (2001); 31 U.S.C. 5318(g)(2).

[8] *See* USA PATRIOT Act, section 351(a); Public Law 107–56, Title III, section 351; 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(3).

[9] 74 FR 10136 (Mar. 9, 2009).

[10] 74 FR 10130 (Mar. 9, 2009).

[11] 12 CFR 21.11(l).

affiliates.[12] That proposed guidance may be used to interpret a provision of the OCC's proposed rulemaking.

III. Comments on the Proposed Rule

The comment period for the proposed rulemakings ended on June 8, 2009. OCC received a total of five comments.[13] Of these, three were submitted by bank trade associations, one was submitted by a bank holding company, and one was submitted by an individual. The comments generally supported the OCC's proposed rule while requesting broadening of FinCEN's proposed sharing guidance.[14] Comments specific to the OCC's proposed rule provided suggestions related to the disclosure of the "underlying facts, transactions, and documents upon which a SAR is based;" the requirement to reveal a SAR request to both OCC and FinCEN; and the proposed modification to the safe harbor provision in the OCC's SAR rules [15] to include changes made by the USA PATRIOT Act. These comments are addressed in the Section-by-Section Analysis section of this **SUPPLEMENTARY INFORMATION**.

IV. Section-by-Section Analysis

Section 21.11(b) Definition of a SAR

The primary purpose of the OCC's SAR rule is to ensure that a national bank files a SAR when it detects a known or suspected violation of a Federal law or a suspicious transaction related to money laundering activity or a violation of the BSA. *See* 12 CFR 21.11(a). Incidental to this purpose, the OCC's SAR rule includes a section that addresses the confidentiality of SARs.

Under the current SAR rule, the term "SAR" means "a Suspicious Activity Report on the form prescribed by the OCC." [16] The proposed rule would have defined a "SAR" generically as "a Suspicious Activity Report." This change would extend the confidentiality provisions of the OCC's SAR rule to all SARs, including those filed on forms prescribed by FinCEN.[17] As a consequence, a national bank that obtained a SAR, for example, from a non-bank affiliate pursuant to the provisions of the proposed rule, would be required to safeguard the confidentiality of the SAR, even if the SAR had not been filed on a form prescribed by the OCC. The OCC received no comments on the proposed revised definition of SAR and adopts the definition as proposed.

Section 21.11(c) SARs Required

To clarify that a national bank must file a SAR on a form "prescribed by the OCC," the OCC proposed to add that phrase to the introductory language of the section of the OCC's SAR rule that describes the procedures for the filing of a SAR. Accordingly, the proposed rule would have required a national bank to file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury *on the form prescribed by the OCC* in accordance with the form's instructions, by sending a completed SAR to FinCEN in particular circumstances.[18] The OCC received no comments on the proposal to add the phrase "prescribed by the OCC" to the introductory language of that section of the OCC's SAR rule and adopts the change as proposed.

Section 21.11(k) Confidentiality of SARs

Prior to this rulemaking, § 21.11(k) specified that SARs are confidential and any national bank or person: (1) Must not disclose a SAR or the information contained in SAR; (2) must not provide any information that would disclose that a SAR has been prepared or filed; and (3) must notify the OCC of any subpoena or request received by a national bank or person to make such a SAR-related disclosure.

The OCC proposed to amend its rules regarding SAR confidentiality [19] by modifying the introductory sentence regarding SAR confidentiality and dividing the remainder of the current provision into two sections. The first section would describe the prohibition on disclosure of SAR information by national banks and the rules of construction applicable to this prohibition. The second section would describe the prohibition on the OCC's disclosure of SAR information.

Prior to this final rulemaking action, the OCC's rules prohibiting the disclosure of SARs began with the statement that SARs are confidential. Over the years, the OCC has received numerous questions regarding the scope of the prohibition on the disclosure of a SAR in its current rules. Accordingly, the OCC proposed to clarify the scope of SAR confidentiality by more clearly describing the information that is subject to the prohibition. Like FinCEN, the OCC believes that all of the reasons for maintaining the confidentiality of SARs are equally applicable to any information that would reveal the existence of a SAR.

The OCC, like FinCEN, recognizes that in order to protect the confidentiality of a SAR, any information that would reveal the existence of a SAR must be afforded the same protection from disclosure. The confidentiality of SARs must be maintained for a number of compelling reasons. For example, the disclosure of a SAR could result in notification to persons involved in the transaction that is being reported and compromise any investigations being conducted in connection with the SAR. In addition, the OCC believes that even the occasional disclosure of a SAR could chill the willingness of a national bank to file SARs and to provide the degree of detail and completeness in describing suspicious activity in SARs that will be of use to law enforcement. If banks believe that a SAR can be used for purposes unrelated to the law enforcement and regulatory purposes of the BSA, the disclosure of such information could adversely affect the timely, appropriate, and candid reporting of suspicious transactions. Banks also may be reluctant to report suspicious transactions, or may delay making such reports, for fear that the disclosure of a SAR will interfere with the bank's relationship with its customer. Further, a SAR may provide insight into how a bank uncovers potential criminal conduct that can be used by others to circumvent detection. The disclosure of a SAR also could compromise personally identifiable information or commercially sensitive information or damage the reputation of individuals or companies that may be named. Finally, the disclosure of a SAR for uses unrelated to the law enforcement and regulatory purposes for which SARs are intended increases the risk that bank employees or others who are involved in the preparation or filing of a SAR could become targets for retaliation by persons whose criminal conduct has been reported.

These reasons for maintaining the confidentiality of SARs also apply to any information that would reveal the existence of a SAR. Therefore, like FinCEN, the OCC proposed to modify the general introduction in its rules to

[12] 74 FR 10158 (Mar. 9, 2009).

[13] None of the comments received by the OCC directly addressed the proposed revisions to the OCC's information disclosure regulation set forth in 12 CFR part 4, subpart C.

[14] Comments about the sharing guidance are addressed separately in a related "notice of availability of guidance" published by FinCEN elsewhere in today's **Federal Register** together with FinCEN's final rules.

[15] 12 CFR 21.11(l).

[16] 12 CFR 21.11(b)(3).

[17] *See, e.g.,* 31 CFR 103.19(b) (FinCEN regulations requiring brokers or dealers in securities to file reports of suspicious transactions on a SAR–S–F).

[18] OCC's current provision, at 12 CFR 21.11(c), requires a national bank to "file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury in accordance with the form's instructions * * *," but does not specify which form.

[19] 12 CFR 21.11(k).

state that confidential treatment also must be afforded to "any information that would reveal the existence of a SAR." The introduction also would indicate that SAR information may not be disclosed, except as authorized in the narrow circumstances that follow.

Some commenters asked that the OCC clarify the phrase "information that would reveal the existence of a SAR" for the purpose of defining the scope of SAR confidentiality. One commenter specifically asked whether that term only includes information that affirmatively states that a SAR was filed. Another commenter urged that the OCC formally recognize that material contained in a reporting institution's files supporting its decision to file or not file a SAR is confidential.

Any document or other information that affirmatively states that a SAR has been filed constitutes information that would reveal the existence of a SAR and must be kept confidential. By extension, a national bank also must afford confidentiality to any document stating that a SAR has not been filed. Were the OCC to allow disclosure of information when a SAR is not filed, institutions would implicitly reveal the existence of a SAR any time they were unable to produce records because a SAR was filed.[20]

Documents that may identify suspicious activity, but that do not reveal whether a SAR exists (*e.g.,* a document memorializing a customer transaction such as an account statement indicating a cash deposit or a record of a funds transfer), should be considered as falling within the underlying facts, transactions, and documents upon which a SAR is based, and need not be afforded confidentiality.[21] This distinction is set forth in the final rule's second rule of construction discussed in this Section-by-Section Analysis and reflects relevant case law.[22]

However, the strong public policy that underlies the SAR system as a whole—namely, the creation of an environment that encourages a national bank to report suspicious activity without fear of reprisal—leans heavily in favor of applying SAR confidentiality not only to a SAR itself, but also in appropriate circumstances to material prepared by the national bank as part of its process to detect and report suspicious activity, regardless of whether a SAR ultimately was filed or not. This interpretation also reflects relevant case law.[23]

As explained in more detail in the proposed rule,[24] the primary purpose for clarifying the scope of the confidentiality provision is to ensure that, due to potentially serious consequences, the persons involved in the transaction and identified in the SAR cannot be notified, directly or indirectly, of the report. Accordingly, like FinCEN, the OCC proposed replacing the previous rule text prohibiting disclosure of the SAR to the person involved in the transaction with a broad general confidentiality provision for all SAR information applicable to all persons not authorized in the rules of construction to receive such information. With respect to "information that would reveal the existence of a SAR," therefore, institutions should distinguish between certain types of statistical or abstract information or general discussions of suspicious activity that may indicate that an institution has filed SARs,[25] and information that would reveal the existence of a SAR in a manner that could enable the person involved in the transaction potentially to be notified, whether directly or indirectly.

Like FinCEN, and for the reasons discussed in this section, the OCC is adopting the proposed introductory language to the Confidentiality of SARs provision (§ 21.11(k)) as final without change.

Section 21.11(k)(1)(i) Prohibition on Disclosure by National Banks

The OCC's current rules provide that any national bank or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR must: (1) Decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed and (2) notify the OCC.

The proposed rule more specifically addressed the prohibition on the disclosure of a SAR by a national bank. The proposed rule provided that the prohibition includes "any information that would reveal the existence of a SAR" instead of using the phrase "any information that would disclose that a SAR has been prepared or filed." The OCC, like FinCEN, believes that the proposed phrase more clearly describes the type of information that is covered by the prohibition on the disclosure of a SAR. In addition, the proposed rule incorporated the specific reference in 31 U.S.C. 5318(g)(2)(A)(i) to a "director, officer, employee, or agent," in order to clarify that the prohibition on disclosure extends to those individuals in a national bank who may have access to SAR information.

Although 31 U.S.C. 5318(g)(2)(A)(i) provides that a person involved in the transaction may not be notified that the transaction has been reported, the proposed rule reflected case law that has consistently concluded, in accordance with applicable regulations, that financial institutions are broadly prohibited from disclosing SAR information to any person. Accordingly, these cases have held that, in the context of discovery in connection with

[20] For example, a private litigant may serve a discovery request on a bank in civil litigation that calls for the bank to produce the underlying documentation on companies A, B, and C, where the bank has filed a SAR on company A, but not companies B or C, and the underlying documentation reflects the SAR filing decisions. If the bank then produces the underlying documentation for companies B and C, but neither confirms nor denies the existence of a SAR when declining to provide similar documentation for company A, by negative implication it may have revealed the existence of the SAR filed on company A.

[21] As one commenter noted, information produced in the ordinary course of business may contain sufficient information that a reasonable and prudent person familiar with SAR filing requirements could use to conclude that an institution likely filed a SAR (*e.g.,* a copy of a fraudulent check or a cash transaction log showing a clear pattern of structured deposits). Such information alone does not constitute information that would reveal the existence of a SAR.

[22] *See, e.g., Whitney Nat. Bank* v. *Karam,* 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004) (noting that courts have "allowed the production of supporting documentation that was generated or received in the ordinary course of the bank's business, on which the report of suspicious activity was based"); *Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002) (holding that the "factual documents which give rise to suspicious conduct * * * are to be produced in the ordinary course of discovery because they are business records made in the ordinary course of business").

[23] *See, e.g., Whitney* at 682–83 (holding that the SAR confidentiality provision protects, *inter alia,* "communications preceding the filing of a SAR and preparatory or preliminary to it; communications that follow the filing of a SAR and are explanations or follow-up discussion; or oral communications or suspected or possible violations that did not culminate in the filing of a SAR"); *Cotton* at 815 (holding that "documents representing the drafts of SARs or other work product or privileged communications that relate to the SAR itself * * * are not to be produced [in discovery] because they would disclose whether a SAR has been prepared or filed"); *Union Bank of California, N.A.* v. *Superior Court,* 29 Cal. Rptr. 2d 894, 902 (2005) (holding that "a draft SAR or internal memorandum prepared as part of a financial institution's process for complying with Federal reporting requirements is generated for the specific purpose of fulfilling the institution's reporting obligation * * * [and] fall within the scope of the SAR [confidentiality] privilege because they may reveal the contents of a SAR and disclose whether 'a SAR has been prepared or filed'" (quoting 12 CFR 21.11(k) (2005)).

[24] 74 FR 10131–32 (Mar. 9, 2009).

[25] One example of such information could include summary information commonly provided by banks in the "notification to the board" required by the various Federal bank regulatory agency SAR rules. National banks subject to the requirement are encouraged to be cautious in the production of relevant portions of board minutes or other records to avoid the risk of potentially exposing SAR information to the subject, either directly or indirectly, in the event such records are subpoenaed.

civil lawsuits, financial institutions are prohibited from disclosing SAR information because section 5318(g) and its implementing regulations have created an unqualified discovery and evidentiary privilege for such information that cannot be waived by financial institutions.[26] Consistent with case law and the current regulation, the text of the proposed rule did not limit the prohibition on disclosure only to the person involved in the transaction. Permitting disclosure to *any* outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which the BSA absolutely prohibits.

The proposed rule continued to provide that any national bank, or any director, officer, employee or agent of a national bank, subpoenaed or otherwise requested to disclose SAR information must decline to provide the information, citing that section of the rule and 31 U.S.C. 5318(g)(2)(A)(i), and must give notice of the request to the OCC. In addition, the proposed rule required the bank to notify the OCC of its response to the request and required the bank to provide the same information to FinCEN.

Two commenters suggested that OCC adjust its SAR rule to remove the "duplicative" requirement for a bank to notify both OCC and FinCEN when SAR information is inappropriately requested. OCC, like FinCEN, disagrees with the commenter's characterization of the notification requirement as "duplicative" because OCC and FinCEN each have issued, and separately administers, its own separate SAR rule.[27] The joint notification requirement in the OCC's final rule, therefore, simply acknowledges the notification requirement of different SAR regulations issued by separate agencies. Therefore, the OCC adopts proposed § 21.11(k)(1)(i) as final without change.

Section 21.11(k)(1)(ii): Rules of Construction

The OCC, like FinCEN, proposed rules of construction to address issues that have arisen over the years about the scope of the SAR disclosure prohibition and to implement statutory modifications to the BSA made by the USA PATRIOT Act. The proposed rules of construction primarily describe situations that are not covered by the prohibition on bank disclosure of SAR information. The introduction to the proposed rules of construction makes clear that they are qualified by the statutory mandate that no person involved in any reported suspicious transaction can be notified that the transaction has been reported. The OCC received no comments on the proposed introductory language to the rules of construction and is adopting the language in the final rule as proposed.

The first proposed rule of construction builds on existing language to clarify that a national bank, or any director, officer, employee, or agent[28] of a national bank may disclose SAR information to FinCEN or any Federal, State, or local law enforcement agency; or any Federal or State regulatory agency that examines the financial institution for compliance with the BSA. Although the permissibility of such disclosures may be readily apparent, the proposal contained this statement to clarify that a national bank cannot use the prohibition on bank disclosure of SAR information to withhold this information from governmental authorities that are otherwise entitled by law to receive SARs and to examine for and investigate suspicious activity.

The first rule of construction is adopted as final with one change to reflect that State regulatory authorities do not examine national banks for compliance with the BSA. Thus, the final rule revises § 21.11(k)(1)(ii)(A)(1) to read, in relevant part, that § 21.11(k)(1) does not prohibit the disclosure by a national bank, or any director, officer, employee, or agent of a national bank, of a "SAR, or any information that would reveal the existence of a SAR, to the OCC, FinCEN, or any Federal, State, or local law enforcement agency. * * *"

The second proposed rule of construction provided that SAR information does not include the underlying facts, transactions, and documents upon which a SAR is based. This statement reflects case law, which has recognized that, while a financial institution is prohibited from producing documents in discovery that evidence the existence of a SAR, factual documents created in the ordinary course of business (for example, business records and account information, upon which a SAR is based) may be discoverable in civil litigation under the Federal Rules of Civil Procedure.[29]

The second proposed rule of construction included some examples of situations where a national bank may disclose the underlying facts, transactions, and documents upon which a SAR is based. The first example clarifies that a national bank, or any director, officer, employee or agent of a national bank, may disclose this information[30] to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.[31] The second example simply codifies a rule of construction added to the BSA by section 351 of the USA PATRIOT Act, which provides that such underlying information may be disclosed in certain written employment references and termination notices.[32]

One commenter suggested that the OCC clarify that the illustrative

[26] *See, e.g., Whitney Nat'l Bank* v. *Karam,* 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004); *Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[27] Because FinCEN's jurisdiction is limited to Title 31 of the Code of Federal Regulations, FinCEN's final rule removes the requirement that a financial institution notify its primary Federal regulator in addition to notifying FinCEN in the event of an inappropriate request for SAR information. However, the OCC's final rule maintains the requirement that any national bank, and any director, officer, employee, or agent of any national bank, that is subpoenaed or otherwise requested to disclose SAR information, shall decline to produce the SAR or such information, citing 12 CFR Part 21 of the OCC's rules and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify both the OCC and FinCEN.

[28] Some commenters requested guidance related to the appropriate use of SARs by agents of national banks. In the Supplementary Information section of FinCEN's final rule issued today, FinCEN states that it is considering additional guidance on the appropriate us of SARs by agents of financial institutions. Until such guidance is issued, however, the OCC and FinCEN remind national banks of their requirement to protect, through reasonable controls or agreements with their agents, the confidentiality of SAR information, as prescribed by the OCC and FinCEN final rules.

[29] *See Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[30] Although the underlying facts, transactions, and documents upon which a SAR is based may include previously filed SARs or other information that would reveal the existence of a SAR, these materials cannot be disclosed as underlying documents.

[31] On December 21, 2006, FinCEN and the Federal bank regulatory agencies announced that the format for the SAR form for depository institutions had been revised to support a new joint filing initiative to reduce the number of duplicate SARs filed for a single suspicious transaction. "*Suspicious Activity Report (SAR) Revised to Support Joint Filings and Reduce Duplicate SARs,*" Joint Release issued by FinCEN, the FRB, the OCC, the OTS, the FDIC, and the NCUA (Dec. 21, 2006). On February 17, 2006, FinCEN and the Federal bank regulatory agencies published a joint **Federal Register** notice seeking comment on proposed revisions to the SAR form. *See* 71 FR 8640. On May 1, 2007, FinCEN announced a delay in implementation of the revised SAR form until further notice. *See* 72 FR 23891. Until such time as a new SAR form is available that facilitates joint filing, institutions authorized to jointly file should follow FinCEN's guidance to use the words "joint filing" in the narrative of the SAR and ensure that both institutions maintain a copy of the SAR and any supporting documentation (*See, e.g., http://www.fincen.gov/statutes_regs/guidance/html/guidance_faqs_sar_10042006.html*).

[32] 31 U.S.C. 5318(g)(2)(B).

examples are not exhaustive, and that there may be other situations not prescribed in the rule where an institution may disclose the underlying facts, transactions, and documents upon which a SAR is based. The OCC did not intend for these examples to be exhaustive and does not believe the text, as proposed, implies that the examples are exhaustive. For purposes of clarity, however, like FinCEN, the OCC is revising the final rule's language at § 21.11(k)(2) to read "* * * [t]he underlying facts, transactions, and documents upon which a SAR is based, including *but not limited to,* disclosures" expressly listed as illustrative examples in the rule. Accordingly, with respect to the SAR confidentiality provision only,[33] national banks may disclose underlying facts, transactions, and documents for any purpose, provided that no person involved in the transaction is notified that the transaction has been reported and none of the underlying information reveals the existence of a SAR.

Another commenter suggested that the rules of construction include a provision expressly authorizing the disclosure of facts, transactions, or documents to affiliates wherever located and clarify that such authority may be exercised independently of the authority to share SAR information with affiliates. Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported and the underlying facts, transactions, and documents do not disclose SAR information, the OCC agrees that such disclosure by a national bank to its affiliates, wherever located, is not prohibited by the final rule. Furthermore, the OCC agrees that the authorization for national banks to disclose underlying information to affiliates in § 21.11(k)(1)(ii)(A)(2) is independent of the authority to share SAR information with affiliates in § 21.11(k)(1)(ii)(B). The OCC believes that the final rule and the BSA already address that commenter's concerns and that further revision to the rule is unnecessary.

The third proposed rule of construction clarified that the prohibition on the disclosure of SAR information by a national bank does not include the sharing by a national bank, or any director, officer, employee or agent of a bank, of SAR information within the bank's corporate organizational structure for purposes consistent with Title II of the BSA as determined by regulation or in guidance. The proposed third rule of construction recognizes that a national bank may find it necessary to share SAR information to fulfill its reporting obligations under the BSA, and to facilitate more effective enterprise-wide BSA monitoring and reporting, consistent with Title II of the BSA. The term "share" used in the third rule of construction is an acknowledgement that sharing within a corporate organization for purposes consistent with Title II of the BSA, as determined by regulation or guidance, is distinguishable from a prohibited disclosure.

FinCEN and the Federal bank regulatory agencies already have issued joint guidance making clear that the U.S. branch or agency of a foreign bank may share a SAR with its head office and that a U.S. bank or savings association may share a SAR with its controlling company (whether domestic or foreign). This guidance stated that the sharing of a SAR with a head office or controlling company both facilitates compliance with the applicable requirements of the BSA and enables the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.[34]

Elsewhere in this issue of the **Federal Register**, FinCEN is issuing additional final guidance that further elaborates on sharing of SAR information within a corporate organization that FinCEN considers to be "consistent with the purposes of the BSA." The final guidance generally permits the sharing of SAR information by depository institutions with their affiliates[35] that are subject to a SAR rule.[36]

In addition, four of the five comments received by the OCC on the proposed rule raised issues related to FinCEN's proposed guidance, much of which is addressed in FinCEN's separate notice of availability of guidance published elsewhere in today's **Federal Register**. In general, the commenters requested an expansion of the sharing authorities with respect to both the parties permitted to share and the parties with whom SAR information could be shared. Most commenters provided a clear rationale for how expanded SAR sharing would benefit their institutions by increasing efficiency, cutting costs, and enhancing the detection and reporting of suspicious activity. However, like FinCEN, the OCC notes that most commenters, however, failed to sufficiently address how they would effectively mitigate the risk of unauthorized disclosure of SAR information if the sharing authority was expanded to the extent they requested. FinCEN has taken the position that due to the risk of unauthorized disclosure of SAR information, broad sharing would not be consistent with the purposes of the BSA. Should FinCEN decide in the future to expand the sharing authority, the rule will allow for such expansion. Therefore, the third rule of construction is adopted as proposed without change.

Section 21.11(k)(2) Prohibition on Disclosure by the OCC

As previously noted, section 351 of the USA PATRIOT Act, 31 U.S.C. 5318(g)(2)(A)(ii), amended the BSA, and added a new provision prohibiting officers and employees of the government from disclosing a SAR to any person involved in the transaction that the transaction has been reported, except "as necessary to fulfill the official duties of such officer or employee." Section 21.11(k)(2) of the OCC's proposed rule addressed this new provision of the BSA and is comparable to FinCEN's proposal. The proposed section provided that the OCC will not, and no officer, employee or agent of the OCC, shall disclose SAR information, except as necessary to fulfill official duties consistent with Title II of the BSA.

As stated in section 5318(g)(2)(A)(i), which prohibits a financial institution's disclosure of a SAR, section 5318(g)(2)(A)(ii) also prohibits the government from disclosing a SAR to "any person involved in the transaction." The OCC, like FinCEN, proposed to address sections 5318(g)(2)(A)(i) and (A)(ii) in a consistent manner, because disclosure by a governmental authority of SAR information to any outside party may make it more likely that the information will be disclosed to a person involved in the transaction. Accordingly, the proposed rule would generally bar disclosures of SAR information by OCC officers, employees, or agents.

However, section 5318(g)(2)(A)(ii) also narrowly permits governmental disclosures as necessary to "fulfill

[33] However, other applicable laws or regulations governing a national bank's responsibilities to maintain and protect information continue to apply, for example, information covered by part 4 of the OCC's rules regarding the release of non-public OCC information.

[34] "*Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices and Controlling Companies,*" Joint Release issued by FinCEN, the FRB, the FDIC, the OCC, and the OTS (Jan. 20, 2006).

[35] Under FinCEN's final guidance, an "affiliate" of a depository institution means any company under common control with, or controlled by, that depository institution.

[36] *See, e.g.,* 12 CFR 21.11 (SAR rule applicable to national banks).

official duties," a phrase that is not defined in the BSA. Consistent with the rules being proposed by FinCEN, the OCC proposed to construe this phrase in the context of the BSA, in light of the purpose for which SARs are filed. Accordingly, the proposed rule interpreted "official duties" to mean "official duties consistent with Title II of the Bank Secrecy Act."[37] When disclosure is necessary to fulfill official duties, the OCC will make a determination, through its internal processes, that a SAR may be disclosed to fulfill official duties consistent with Title II of the BSA. This standard would permit, for example, disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement agency; a request from an appropriate Congressional committee or subcommittee; and prosecutorial disclosures mandated by statute or the Constitution in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.[38] This proposed interpretation of section 5318(g)(2)(A)(ii) would ensure that SAR information will not be disclosed for a reason that is unrelated to the purposes of the BSA. For example, this standard would not permit disclosure of SAR information to the media.

The proposed rule also specifically provided that "official duties" shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 4.33. This statement, which corresponded to a similar provision in FinCEN's proposed rules, establishes that the OCC will not disclose SAR information to a private litigant for use in a private legal proceeding, or pursuant to 12 CFR 4.33, because such a request cannot be consistent with any of the purposes enumerated in Title II of the BSA.[39] The BSA exists, in part, to protect the public's interest in an effective reporting system that benefits the nation by helping to ensure that the U.S. financial system will not be used for criminal activity or to support terrorism. The OCC, like FinCEN, believes that this purpose would be undermined by the disclosure of SAR information to a private litigant for use in a civil lawsuit for the reasons described earlier, including that such disclosures will chill full and candid reporting by national banks and other financial institutions.

Finally, the proposed rule applied to the OCC, in addition to its officers, employees, and agents. Comparable to a provision being proposed by FinCEN, the OCC proposed to include the agency itself in the scope of coverage, because requests for SAR information are typically directed to the agency, rather than to individuals within the OCC with authority to respond to the request. In addition, agents of the OCC were included in proposed § 21.11(k)(2) because they may have access to SAR information. Accordingly, the proposed interpretation would more comprehensively cover disclosures by the OCC or agents of the OCC and protect the confidentiality of SAR information.

The OCC did not receive comments on proposed § 21.11(k)(2) and is adopting this provision as final without change.

Section 21.11(l) Limitation on Liability

In 1992, the Annunzio-Wylie Act amended the BSA by providing a safe harbor for financial institutions and their employees from civil liability for the reporting of known or suspected criminal offenses or suspicious activity through the filing of a SAR.[40] FinCEN and the OCC incorporated the safe harbor provisions of the 1992 law into their SAR rules.[41] Section 351 of the USA PATRIOT Act amended section 5318(g)(3) to clarify that the scope of the safe harbor provision includes the voluntary disclosure of possible violations of law and regulations to a government agency and to expand the scope of the limit on civil liability to include any liability that may exist "under any contract or other legally enforceable agreement (including any arbitration agreement)."[42] The OCC, like FinCEN, incorporated the statutory expansion of the safe harbor by cross-referencing section 5318(g)(3) in the proposed rule.

In addition, consistent with the proposed rule issued by FinCEN, this provision makes clear that the safe harbor also applies to a disclosure by a bank made jointly with another financial institution for purposes of filing a joint SAR.

The OCC received no comments on the proposed safe harbor provision. However, one comment received by FinCEN noted that the statutory safe harbor provision protects *any person* from liability, not just the person involved in the transaction. Accordingly, like FinCEN, the OCC is amending the proposed safe harbor language by inserting the phrase "shall be protected from liability to *any person* for any such disclosure * * *" and is otherwise adopting the proposed § 21.11(l) safe harbor provision as final.

Conforming Amendments to 12 CFR Part 4, Subpart C

Today, the OCC also is publishing a final rule to amend its information disclosure rule set forth in 12 CFR part 4, subpart C. Among other things, the final rule clarifies that the OCC's disclosure of SAR information will be governed exclusively by the standards set forth in the amendments to the OCC's part 21 SAR rule.[43] The effect of these final part 4 amendments is that the OCC: (1) Will not release SAR information to private litigants and (2) will only release SAR information to other government agencies, in response to a request pursuant to 12 CFR 4.37(c) or in the exercise of its discretion as described in 12 CFR 4.36, when necessary to fulfill official duties consistent with Title II of the BSA.

V. OCC Regulatory Analysis

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency that is issuing a final rule to prepare and make available a final regulatory flexibility analysis that describes the impact of the final rule on small entities. 5 U.S.C. 604. However, the RFA provides that an agency is not required to prepare and make available a final regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its final rule. 5 U.S.C. 605(b). For purposes of the RFA and OCC-regulated entities, a "small entity" is a national bank with assets of $175 million or less (small national bank).

The OCC has determined that the costs, if any, associated with the final rule are *de minimis.* The final rule simply clarifies the scope of the

[37] 31 U.S.C. 5311 (setting forth the purposes of the BSA).

[38] *See, e.g., Giglio* v. *United States,* 405 U.S. 150, 153–54 (1972); *Brady* v. *Maryland,* 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States,* 353 U.S. 657, 668 (1957).

[39] 31 U.S.C. 5311.

[40] *See supra* note 1.

[41] *See* 31 CFR 103.18(e) and 12 CFR 21.11(l). The safe harbor regulations also are applicable to oral reports of violations. (In situations requiring immediate attention, a national bank must immediately notify its regulator and appropriate law enforcement by telephone, in addition to filing a SAR. *See, e.g.,* 12 CFR 21.11(d).)

[42] 31 U.S.C. 5318(g)(3).

[43] *See* elsewhere in this issue of the **Federal Register.**

statutory prohibition against the disclosure by financial institutions and by the government of SAR information and clarifies the scope of the safe harbor from liability for institutions that report suspicious activities. Therefore, pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Paperwork Reduction Act

We have reviewed the final rule in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that it does not contain any "collections of information" as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate 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 in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that this final rule will not result in expenditures by State, local, and Tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, this proposal is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 21

Crime, Currency, National banks, Reporting and recordkeeping requirements, Security measures.

Authority and Issuance

■ For the reasons set forth in the preamble, part 21 of title 12 of the Code of Federal Regulations is amended as follows:

PART 21—MINIMUM SECURITY DEVICES AND PROCEDURES, REPORTS OF SUSPICIOUS ACTIVITIES, AND BANK SECRECY ACT COMPLIANCE PROGRAM

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

Authority: 12 U.S.C. 93a, 1818, 1881–1884, and 3401–3422; and 31 U.S.C. 5318.

■ 2. Section 21.11 is amended by revising paragraphs (b)(3), (c) introductory text, (k) and (l) to read as follows:

§ 21.11 Suspicious Activity Report.

* * * * *

(b) * * *

(3) *SAR* means a Suspicious Activity Report.

(c) *SARs required.* A national bank shall file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury on the form prescribed by the OCC and in accordance with the form's instructions. The bank shall send the completed SAR to FinCEN in the following circumstances:

* * * * *

(k) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential, and shall not be disclosed except as authorized in this paragraph (k).

(1) *Prohibition on disclosure by national banks.* (i) *General rule.* No national bank, and no director, officer, employee, or agent of a national bank, shall disclose a SAR or any information that would reveal the existence of a SAR. Any national bank, and any director, officer, employee, or agent of any national bank that is subpoenaed or otherwise requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify the following of any such request and the response thereto:

(A) Director, Litigation Division, Office of the Comptroller of the Currency; and

(B) The Financial Crimes Enforcement Network (FinCEN).

(ii) *Rules of construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (k)(1) shall not be construed as prohibiting:

(A) The disclosure by a national bank, or any director, officer, employee or agent of a national bank of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to the OCC, FinCEN, or any Federal, State, or local law enforcement agency; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including, but not limited to, disclosures:

(*i*) To another financial institution, or any director, officer, employee or agent of a financial institution, for the preparation of a joint SAR; or

(*ii*) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a national bank, or any director, officer, employee, or agent of a national bank, of a SAR, or any information that would reveal the existence of a SAR, within the bank's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosure by the OCC.* The OCC will not, and no officer, employee or agent of the OCC, shall disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public OCC information under 12 CFR 4.33.

(l) *Limitation on liability.* A national bank and any director, officer, employee or agent of a national bank that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another financial institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

Dated: August 16, 2010.

John Walsh,

Acting Comptroller of the Currency.

[FR Doc. 2010–29880 Filed 12–2–10; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 510

[Docket ID OTS–2010–0016]

RIN 1550–AC28

Standards Governing the Release of a Suspicious Activity Report

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is revising its regulations governing the release of unpublished OTS information. The primary change clarifies that the OTS's decision to release a Suspicious Activity Report (SAR) is governed by the standards set forth in amendments to the OTS's SAR regulation that are part of a separate, but simultaneous, rulemaking.

DATES: The final rule is effective January 3, 2011.

FOR FURTHER INFORMATION CONTACT: Marvin Shaw, Senior Attorney, Regulations and Legislation (202–906–6639); Dirk Roberts, Deputy Chief Counsel, Litigation (202–906–7631), Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 9, 2009, the Office of Thrift Supervision (OTS) issued a notice of proposed rulemaking to revise its regulations governing the release of unpublished OTS information.[1] The proposal was intended to clarify that OTS's decision to release a Suspicious Activity Report (SAR) would be governed by the standards set forth in proposed amendments to OTS's SARS regulation at 12 CFR 563.180, *Suspicious Activity Reports and other reports and statements,* that were part of a separate, but simultaneous rulemaking.

OTS received no comments to the proposed amendments to section 510.5, although the agency did receive comments to the proposed amendments to section 563.180. Those comments are addressed in the part 563 final rule published elsewhere in today's **Federal Register**.

II. Final Rule

A. Overview

OTS is amending its regulations set forth in 12 CFR part 510, governing the release of unpublished OTS information. First, the amendments conform section 510.5 to amendments to the OTS's SAR confidentiality rule, 12 CFR 563.180 that are being adopted as part of a separate, but simultaneous, rulemaking that the OTS is conducting. Under the standards that the OTS is incorporating into section 510.5, the OTS will only release a SAR, or any information that reveals the existence of a SAR (referred to in this preamble as "SAR information"), when "necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act (BSA)."

The effect of these amendments is that the OTS will not release SAR information in response to a request from a private litigant arising out of a civil lawsuit or administrative proceeding to which the OTS is not a party. The Director also will not disclose SAR information to any other person or entity, and the OTS will not release SAR information in response to a request by another government agency, except to fulfill official duties in light of the purposes of the BSA.

This final rule amends part 510 to make it consistent with the amendments to OTS's SAR regulation that implements section 351 of the USA PATRIOT Act, thus ensuring that the appropriate standard is applied to OTS's disclosure of SAR information. Section 510.5 sets forth OTS's standards and procedures for the release of "unpublished OTS information," and sets forth the restrictions on the dissemination of such information. Generally, "unpublished OTS information" is confidential and privileged information that is the property of the OTS, and that the OTS is not required to release under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) or that the OTS has not yet published or made available pursuant to 12 U.S.C. 1818(u), the statute requiring publication of certain enforcement orders.

Section 510.5 describes procedures for requesting unpublished OTS information from the OTS, such as, where to submit a request, the form of the request, information that must be included in any request involving an adversarial matter, and various bases for the OTS's denial of such a request.[2] Section 510.5 authorizes the OTS to make unpublished OTS information available to a supervised entity and to other persons, at the sole discretion of the Director or his or her delegate.[3] Section 510.5(d)(5) also indicates that the OTS may condition release of information that it discloses under this section.

Although a SAR may be considered "unpublished OTS information," it is the OTS's position that the release of a SAR must be governed by standards set forth in the BSA. The BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[4] The BSA also provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.[5] Most importantly, in 2001, section 351 of the USA PATRIOT Act added a new provision to the BSA prohibiting officers or employees of the Federal government or any State, local, tribal, or territorial government within the United States from disclosing to any person[6] involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[7] Accordingly, it is this provision that now governs the ability of the OTS to disclose SAR information to any person.

The OTS is revisiting the treatment of SAR information in section 510.5 in light of the 2001 amendments to the BSA, added by section 351 of the USA PATRIOT Act that specifically addresses governmental disclosures of SARs. Under the amendments to section 510.5, the OTS will decide whether to release SAR information based upon the standard in the OTS's amendments to its SAR rules, 12 CFR 563.180, implementing section 351, thereby replacing the factors previously set out in section 510.5(d). The standard in the amendments to the OTS's SAR rule provides that "Neither OTS (nor any officer, employee or agent of OTS, shall disclose a SAR, or any information that will reveal the existence of a SAR except as necessary to fulfill official duties consistent with Title II of the BSA." In addition, the standard provides that "official duties" shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510.5.[8] The

[1] 74 FR 10145, 12 CFR 510.5, *Release of unpublished OTS information.*

[2] *See* 12 CFR 510.5.

[3] *See* 12 CFR 510.5(d).

[4] 31 U.S.C. 5318(g)(1).

[5] 31 U.S.C. 5318(g)(2)(A)(i).

[6] The phrase "any person involved in the transaction" has been construed to apply to "any person" because the disclosure of SAR information to *any* outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is absolutely prohibited by the BSA. *See Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[7] *See* USA PATRIOT Act, section 351(b). Pub. L 107–56, Title III, § 351, 115 Stat. 272, 321(2001).

[8] For purposes of this provision "official duties" means official disclosures necessary to accomplish a governmental purpose consistent with Title II of the BSA entrusted to the agency, the officer or employee. For example, prosecutorial disclosures mandated by statute or the Constitution, such as a statement of a government witness to be called at trial, impeachment of a government witness, or material exculpatory of a criminal defendant. *See, e.g., Giglio* v. *United States,* 405 U.S. 150, 153–54

SAR rules interpret "official duties" to mean "official duties consistent with the purposes of Title II of the BSA," namely, for "criminal, tax, regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." [9] This standard will permit disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement or regulatory agency; and prosecutorial disclosures mandated by statute or the Constitution, in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.[10]

B. Section-by-Section Description of the Rule

Section 510.5(a) and (b) Scope and Purpose.

The existing section 510(b) includes several standards for the release of unpublished OTS information. A person seeking such information, generally must submit a request in writing to the OTS that addresses the factors set forth in section 510.5(b). Section 510.5(d) describes how the OTS will make its determination to release the information. That provision also provides that OTS will deny a request if it deems the information to be (A) not highly relevant, (B) privileged, (C) available from other sources, or (D) information that should not be disclosed for reasons that warrant restriction under the Federal Rules of Civil Procedure.[11]

This final rule adds a new paragraph (iv) to the scope section of 12 CFR 510.5, which states that this section does not apply to OTS's decision to disclose records or testimony involving a SAR filed pursuant to regulations implementing 12 U.S.C. 5318(g) or any information that will reveal the existence of a SAR. Accordingly, the OTS's decision to disclose records or testimony involving SAR information is governed solely by the standard in 12 CFR 563.180. Paragraph (iv) makes clear that the standard in 12 CFR 563.180 applies in place of the standards for denial set forth in 12 CFR 510.5(d)(4). Accordingly, the OTS will not release SAR information in response to any request received pursuant to section 510.5, including from a federal, state, or foreign government, and the Director will not disclose SAR information to any person, except to fulfill the OTS's official duties in light of the purposes of the BSA. Consistent with the OTS's longstanding commitment to protect the confidentiality of SARs, the SAR rule also states that "official duties" does not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510.5.

Section 510.5(d) Consideration of requests.

Section 510.5 generally describes how the OTS makes its determination to release or to withhold unpublished OTS information in response to requests received under section 510.5(b) and (d).[12] Section 510.5(d)(4) specifically lists four examples of reasons for which the OTS will deny the release of unpublished OTS information.

The OTS is adding "when not prohibited by law" as a fifth reason for denial of requests made under section 510.5(d)(4). This addition makes the language in section 510.5(d), consistent with the standard applicable to disclosures to government entities, which includes the condition that such disclosures only be made "when not prohibited by law."

III. Regulatory Analysis

Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

The OTS has determined that the rule does not impose any economic costs as they simply clarify the scope of the statutory prohibition against the disclosure by financial institutions and by the government of SAR information. Therefore, pursuant to section 605(b) of the RFA, the OTS hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

The OTS has determined that this rule is not a significant regulatory action under Executive Order 12866. We have concluded that the changes that made by the amendments will not have an annual effect on the economy of $100 million or more. The OTS further concludes that this rule does not meet any of the other standards for a significant regulatory action set forth in Executive Order 12866.

Paperwork Reduction Act

We have reviewed the amendments in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that they do not contain any "collections of information" as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (UMRA) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year. If a budgetary impact statement is required, section 205 of the UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OTS has determined that its rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of $133 million or more. Accordingly, OTS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 12 CFR Part 510

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Women.

Authority and Issuance

■ For the reasons set forth in the preamble, part 510 of title 12 of the Code of Federal Regulations is amended as follows:

PART 510—MISCELLANEOUS ORGANIZATIONAL REGULATIONS

■ 1. The authority citation for part 510 continues to read as follows:

(1972); *Brady* v. *State of Maryland,* 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States,* 353 U.S. 657, 668 (1957).

[9] 31 U.S.C. 5311 (setting forth the purposes of the BSA).

[10] *See, e.g., Giglio* v. *United States,* 405 U.S. 150, 153–54 (1972); *Brady* v. *State of Maryland,* 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States,* 353 U.S. 657, 668 (1957).

[11] *See* 12 CFR 510.5(d)(4).

[12] As described earlier, § 510.5 does not apply to SAR information.

Authority: 12 U.S.C. 1462a, 1463, 1464; Pub.L. 101–410, 104 Stat 890; Pub.L. 104–134, 110 Stat 1321–358.

■ 2. Amend § 510.5 by:
■ a. Removing, at the end of paragraph (a)(3)(ii), the word "and";
■ b. Removing, at the end of paragraph (a)(3)(iii), the period and adding "; and" in its place;
■ c. Adding paragraph (a)(3)(iv) to read as set forth below;
■ d. Removing, at the end of paragraph (d)(4)(i)(C), the word "or";
■ e. Removing, at the end of paragraph (d)(4)(i)(D) the period and adding "; and" in its place; and
■ f. Adding paragraph (d)(4)(i)(E) as set forth below.

§ 510.5 Release of unpublished OTS information.

(a) * * *
(3) * * *
(iv) Requests for a Suspicious Activity Report (SAR), or any information that would reveal the existence of a SAR.
* * * * *
(d) * * *
(4) * * *
(i) * * *
(E) Information that should not be disclosed, because such disclosure is prohibited by law.
* * * * *

Dated: June 1, 2010.

By the Office of Thrift Supervision.

John E. Bowman,

Acting Director.

[FR Doc. 2010–29871 Filed 12–2–10; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563

[Docket ID OTS–2010–0015]

RIN 1550–AC26

Confidentiality of Suspicious Activity Reports

AGENCY: The Office of Thrift Supervision, Treasury (OTS).

ACTION: Final rule.

SUMMARY: The OTS is issuing this final rule to amend its regulations implementing the Bank Secrecy Act (BSA) governing the confidentiality of a suspicious activity report (SAR) to: Clarify the scope of the statutory prohibition on the disclosure by a financial institution of a SAR, as it applies to savings associations and service corporations; address the statutory prohibition on the disclosure by the government of a SAR, as that prohibition applies to the OTS's standards governing the disclosure of SARs; clarify that the exclusive standard applicable to the disclosure of a SAR, or any information that would reveal the existence of a SAR, by the OTS is to fulfill official duties consistent with the purposes of the BSA; and modify the safe harbor provision in the OTS's SAR rules to include changes made by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. These amendments are consistent with a final rule being contemporaneously issued by the Financial Crimes Enforcement Network (FinCEN) and the Office of Comptroller of the Currency (OCC).

DATES: This rule is effective on January 3, 2011.

FOR FURTHER INFORMATION CONTACT: Marvin Shaw, Senior Attorney, Regulations and Legislation (202–906–6639); Noelle Kurtin, Senior Attorney, Enforcement (202–906–6739); or Stacy Messett, Senior Project Manager, BSA and Compliance Examinations (202–906–6241); Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

The BSA requires financial institutions, including savings associations and service corporations regulated by the OTS, to keep certain records and make certain reports that have been determined to be useful in criminal, tax, or regulatory investigations or proceedings, and for intelligence or counter intelligence activities to protect against international terrorism. In particular, the BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[1]

SARs are used for law enforcement or regulatory purposes to combat terrorism, terrorist financing, money laundering and other financial crimes. For this reason, the BSA provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.[2] To encourage the voluntary reporting of possible violations of law and regulation, and the filing of SARs, the BSA also contains a safe harbor provision, which shields financial institutions making such reports from civil liability.

FinCEN[3] has issued rules implementing the SAR confidentiality provisions for various types of financial institutions that closely mirror the statutory language.[4] In addition, the Federal bank regulatory agencies implemented these provisions through similar regulations that provide SARs are confidential and generally no information about or contained in a SAR may be disclosed.[5] The regulations issued by FinCEN and the Federal bank regulatory agencies also describe the applicability of the safe harbor provision to both voluntary reports of possible and known violations of law and the required filing of SARs.[6]

The USA PATRIOT Act of 2001 strengthened the confidentiality of SARs by adding to the BSA a new provision that prohibits officers or employees of the Federal Government or any State, local, tribal, or territorial government within the United States with knowledge of a SAR, from disclosing to any person involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[7] The USA PATRIOT Act also clarified that the safe harbor shielding financial institutions from liability covers voluntary disclosures of possible violations of law and regulations to a government agency and expanded the scope of the limit on liability to cover any civil liability that

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[1] The Annunzio-Wylie Anti-Money Laundering Act of 1992 (the Annunzio-Wylie Act) amended the BSA and authorized the Secretary of the Treasury to require financial institutions to report suspicious transactions relevant to a possible violation of law or regulation. *See* Pub. L. 102–550, Title XV, section 1517(b), 106 Stat. 4055, 4058–9 (1992); 31 U.S.C. 5318(g)(1). The OTS, Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), and National Credit Union Administration (NCUA), (collectively referred to as the Federal bank regulatory agencies) subsequently issued virtually identical implementing regulations on suspicious activity reporting. *See* 12 CFR 21.11 (OCC); 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 563.180 (OTS); and 12 CFR 748.1 (NCUA).

[2] 31 U.S.C. 5318(g)(2)(A)(i).

[3] FinCEN is the agency designated by the Department of the Treasury to administer the BSA, and with which SARs must be filed. *See* 31 U.S.C. 5318; 12 CFR 21.11(c).

[4] *See, e.g.,* 31 CFR 103.18(e) (SAR confidentiality rule for banks); 31 CFR 103.19(e) (SAR confidentiality rule for brokers or dealers in securities).

[5] *See* 12 CFR 21.11(k) (OCC); 12 CFR 208.62(j) (FRB); 12 CFR 353.3(g) (FDIC); 12 CFR 563.180(d)(12) (OTS); and 12 CFR 748.1 (NCUA).

[6] 31 U.S.C. 5318(q)(3).

[7] *See* USA PATRIOT Act, section 351(b), Pub. L. 107–56, Title III, section 351, 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(2).

may exist "under any contract or other legally enforceable agreement (including any arbitration agreement)."[8]

FinCEN is issuing a final rule to modify its SAR rules to interpret or further interpret the provisions of the BSA that relate to the confidentiality of SARs and the safe harbor for such reporting. The OTS is amending its SAR rules contemporaneously, consistent with the final rules being issued by FinCEN and the OCC, to clarify the manner in which these provisions apply to savings associations and service corporations and to the OTS's own standards governing the disclosure of a SAR and any information that would reveal the existence of a SAR (referred to in this preamble as "SAR information").

In a separate rulemaking action from the part 563 proposal, the OTS also simultaneously proposed to amend its information disclosure regulation set forth in 12 CFR part 510 to clarify that the exclusive standard governing the release of SAR information is set forth in 12 CFR 563.180.[9] The OTS issued that proposed amendment to 12 CFR part 510 at the same time as the part 563 proposal, to make clear that the OTS will disclose SAR information only when necessary to satisfy the BSA purposes for which SARs are filed. Today, the OTS also is adopting the part 510 proposal as final without change.

II. Overview of the Proposed Rule and Related Actions

On March 9, 2009, the OTS published proposed amendments to its rules[10] to include key changes that would: (1) Clarify the scope of the statutory prohibition on the disclosure by a financial institution of a SAR, as it applies to savings associations and service corporations; (2) address the statutory prohibition on the disclosure by the government of a SAR, which was added to the BSA by section 351(b) of the USA PATRIOT Act of 2001, as that prohibition applies to the OTS's standards governing the disclosure of SAR information; and (3) clarify that the exclusive standard applicable to the disclosure of SAR information by the OTS is to fulfill official duties consistent with the purposes of the BSA, in order to ensure that SAR information is protected from inappropriate disclosures unrelated to the BSA purposes for which SARs are filed. In addition, the proposed amendments would modify the safe harbor provision in the OTS's SAR rules[11] to include changes made by the USA PATRIOT Act.

Contemporaneously with the publication of, and as described in, the OTS's proposal, FinCEN issued for notice and comment proposed guidance regarding the sharing of SARs with affiliates.[12] That proposed guidance may be used to interpret a provision of the OTS's proposed rulemaking.

III. Comments on the Proposed Rule

The comment period for the proposed rulemakings ended on June 8, 2009. OTS received a total of three comments.[13] Of these, two were submitted by bank trade associations and one was submitted by an individual. The comments generally supported the OTS's proposed rule while requesting broadening of FinCEN's proposed sharing guidance.[14] Comments specific to the OTS's proposed rule provided suggestions related to the disclosure of the "underlying facts, transactions, and documents upon which a SAR is based;" the requirement to reveal a SAR request to both OTS and FinCEN; and the proposed modification to the safe harbor provision in the OTS's SAR rules[15] to include changes made by the USA PATRIOT Act. These comments are addressed in the Section-by-Section Analysis section of this **SUPPLEMENTARY INFORMATION**.

IV. Section-by-Section Analysis

Section 563.180(d)(2)(iii) Definition of a SAR

The primary purpose of the OTS's SAR rule is to ensure that a savings association or service corporation files a SAR when it detects a known or suspected violation of a Federal law or a suspicious transaction related to money laundering activity or a violation of the BSA. *See* 12 CFR 563.180. Incidental to this purpose, the OTS's SAR rule includes a section that addresses the confidentiality of SARs.

Under the current SAR rule, the term "SAR" means "a Suspicious Activity Report on the form prescribed by the OTS."[16] The proposed rule would have defined a "SAR" generically as "a Suspicious Activity Report." This change would extend the confidentiality provisions of the OTS's SAR rule to all SARs, including those filed on forms prescribed by FinCEN.[17] As a consequence, a savings association or service corporation that obtained a SAR, for example, from a non-bank affiliate pursuant to the provisions of the proposed rule, would be required to safeguard the confidentiality of the SAR, even if the SAR had not been filed on a form prescribed by the OTS. The OTS received no comments on the proposed revised definition of SAR and adopts the definition as proposed.

Section 563.180(d)(3) SARs Required

To clarify that a savings association or service corporation must file a SAR on a form "prescribed by the OTS," the OTS proposed to add that phrase to the introductory language of the section of the OTS's SAR rule that describes the procedures for the filing of a SAR. Accordingly, the proposed rule would have required a savings association or service corporation to file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury *on the form prescribed by the OTS* in accordance with the form's instructions, by sending a completed SAR to FinCEN in particular circumstances.[18] The OTS received no comments on the proposal to add the phrase "prescribed by the OTS" to the introductory language of that section of the OTS's SAR rule and adopts the change as proposed.

Section 563.180(d)(12) Confidentiality of SARs

The OTS proposed to amend its rules regarding SAR confidentiality[19] by modifying the introductory sentence regarding SAR confidentiality, and dividing the remainder of the current provision into two sections. The first section would describe the prohibition on disclosure of SAR information by savings association or service corporation and the rules of construction applicable to this prohibition. The second section would describe the prohibition on the OTS's disclosure of SAR information.

[8] *See* USA PATRIOT Act, section 351(a), Pub. L. 107–56, Title III, section 351, 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(3).

[9] *See* elsewhere in this issue of the **Federal Register.**

[10] 74 FR 10139 (March 9, 2009).

[11] 12 CFR 563.180(d)(13).

[12] 74 FR 10158 (Mar. 9, 2009).

[13] None of the comments received by the OTS directly addressed the proposed revisions to the OTS's information disclosure regulation set forth in 12 CFR part 510.

[14] Comments about the sharing guidance are addressed separately in a related "notice of availability of guidance" published by FinCEN elsewhere in today's **Federal Register** together with FinCEN's final rules.

[15] 12 CFR 1563.180(d)(13).

[16] 12 CFR 563.180(d)(2).

[17] *See, e.g.,* 31 CFR 103.19 (FinCEN regulations requiring brokers or dealers in securities to file reports of suspicious transactions on a SAR–S–F).

[18] OTS's current provision, at 12 CFR 563.180(d)(2), requires a savings association or service corporation to "file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury in accordance with the form's instructions * * *," but does not specify which form.

[19] 12 CFR 563.180(d)(12).

Prior to this final rulemaking action, the OTS's rules prohibiting the disclosure of SARs began with the statement that SARs are confidential. Over the years, the OTS has received numerous questions regarding the scope of the prohibition on the disclosure of a SAR in its current rules. Accordingly, the OTS proposed to clarify the scope of SAR confidentiality by more clearly describing the information that is subject to the prohibition. Like FinCEN and the OCC, the OTS believes that all of the reasons for maintaining the confidentiality of SARs are equally applicable to any information that would reveal the existence of a SAR.

The OTS, like FinCEN and the OCC, recognizes that in order to protect the confidentiality of a SAR, any information that would reveal the existence of a SAR must be afforded the same protection from disclosure. The confidentiality of SARs must be maintained for a number of compelling reasons. For example, the disclosure of a SAR could result in notification to persons involved in the transaction that is being reported, and compromise any investigations being conducted in connection with the SAR. In addition, the OTS believes that even the occasional disclosure of a SAR could chill the willingness of a savings association or service corporation to file SARs, and to provide the degree of detail and completeness in describing suspicious activity in SARs that will be of use to law enforcement. If savings associations or service corporations believe that a SAR can be used for purposes unrelated to the law enforcement and regulatory purposes of the BSA, the disclosure of such information could adversely affect the timely, appropriate, and candid reporting of suspicious transactions. Savings associations and service corporations also may be reluctant to report suspicious transactions, or may delay making such reports, for fear that the disclosure of a SAR will interfere with its relationship with its customer. Further, a SAR may provide insight into how a savings association or service corporation uncovers potential criminal conduct that can be used by others to circumvent detection. The disclosure of a SAR also could compromise personally identifiable information or commercially sensitive information or damage the reputation of individuals or companies that may be named. Finally, the disclosure of a SAR for uses unrelated to the law enforcement and regulatory purposes for which SARs are intended increases the risk that employees of the savings association or service corporation or others who are involved in the preparation or filing of a SAR could become targets for retaliation by persons whose criminal conduct has been reported.

These reasons for maintaining the confidentiality of SARs also apply to any information that would reveal the existence of a SAR. Therefore, like FinCEN and the OCC, the OTS proposed to modify the general introduction in its rules to state that confidential treatment also must be afforded to "any information that would reveal the existence of a SAR." The introduction also would indicate that SAR information may not be disclosed, except as authorized in the narrow circumstances that follow.

Some commenters asked that the OTS clarify the phrase "information that would reveal the existence of a SAR" for the purpose of defining the scope of SAR confidentiality. One commenter specifically asked whether that term only includes information that affirmatively states that a SAR was filed. Another commenter urged that the OTS formally recognize that material contained in a reporting institution's files supporting its decision to file or not file a SAR is confidential.

Any document or other information that affirmatively states that a SAR has been filed constitutes information that would reveal the existence of a SAR and must be kept confidential. By extension, a savings association or service corporation also must afford confidentiality to any document stating that a SAR has *not* been filed. Were the OTS to allow disclosure of information when a SAR is not filed, institutions would implicitly reveal the existence of a SAR any time they were unable to produce records because a SAR was filed.[20]

Documents that may identify suspicious activity, but that do not reveal whether a SAR exists (*e.g.,* a document memorializing a customer transaction such as an account statement indicating a cash deposit or a record of a funds transfer), should be considered as falling within the underlying facts, transactions, and documents upon which a SAR is based, and need not be afforded confidentiality.[21] This distinction is set forth in the final rule's second rule of construction discussed in this Section-by-Section Analysis and reflects relevant case law.[22]

However, the strong public policy that underlies the SAR system as a whole—namely, the creation of an environment that encourages a savings association or service corporation to report suspicious activity without fear of reprisal—leans heavily in favor of applying SAR confidentiality not only to a SAR itself, but also in appropriate circumstances to material prepared by the savings association or service corporation as part of its process to detect and report suspicious activity, regardless of whether a SAR ultimately was filed or not. This interpretation also reflects relevant case law.[23]

As explained in more detail in the proposed rule,[24] the primary purpose for clarifying the scope of the confidentiality provision is to ensure that, due to potentially serious consequences, the persons involved in

[20] For example, a private litigant may serve a discovery request on a savings association or service corporation in civil litigation that calls for the savings association or service corporation to produce the underlying documentation on companies A, B, and C, where the financial institution has filed a SAR on company A, but not companies B or C, and the underlying documentation reflects the SAR filing decisions. If the savings association or service corporation then produces the underlying documentation for companies B and C, but neither confirms nor denies the existence of a SAR when declining to provide similar documentation for company A, by negative implication it may have revealed the existence of the SAR filed on company A.

[21] As one commenter noted, information produced in the ordinary course of business may contain sufficient information that a reasonable and prudent person familiar with SAR filing requirements could use to conclude that an institution likely filed a SAR (*e.g.,* a copy of a fraudulent check or a cash transaction log showing a clear pattern of structured deposits). Such information alone does not constitute information that would reveal the existence of a SAR.

[22] *See, e.g., Whitney Nat. Bank* v. *Karam,* 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004) (noting that courts have "allowed the production of supporting documentation that was generated or received in the ordinary course of the banks' business, on which the report of suspicious activity was based"); *Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002) (holding that the "factual documents which give rise to suspicious conduct * * * are to be produced in the ordinary course of discovery because they are business records made in the ordinary course of business").

[23] *See, e.g., Whitney* at 682–83 (holding that the SAR confidentiality provision protects, *inter alia,* "communications preceding the filing of a SAR and preparatory or preliminary to it; communications that follow the filing of a SAR and are explanations or follow-up discussion; or oral communications or suspected or possible violations that did not culminate in the filing of a SAR"); *Cotton* at 815 (holding that "documents representing the drafts of SARs or other work product or privileged communications that relate to the SAR itself * * * are not to be produced [in discovery] because they would disclose whether a SAR has been prepared or filed"); *Union Bank of California, N.A.* v. *Superior Court,* 130 Cal. App. 4th 378, 391 (2005) (holding that "a draft SAR or internal memorandum prepared as part of a financial institution's process for complying with federal reporting requirements is generated for the specific purpose of fulfilling the institution's reporting obligation * * * [and] fall within the scope of SAR [confidentiality] because they may reveal the contents of a SAR and disclose whether a SAR has been prepared or filed").

[24] 74 FR 10142—43 (March 9, 2009).

the transaction and identified in the SAR cannot be notified, directly or indirectly, of the report. Accordingly, like FinCEN and the OCC, the OTS proposed replacing the previous rule text prohibiting disclosure of the SAR to the person involved in the transaction with a broad general confidentiality provision for all SAR information applicable to all persons not authorized in the rules of construction to receive such information. With respect to "information that would reveal the existence of a SAR," therefore, institutions should distinguish between certain types of statistical or abstract information or general discussions of suspicious activity that may indicate that an institution has filed SARs,[25] and information that would reveal the existence of a SAR in a manner that could enable the person involved in the transaction potentially to be notified, whether directly or indirectly.

Like FinCEN and the OCC, and for the reasons discussed in this section, the OTS is adopting the proposed introductory language to the Confidentiality of SARs provision (§ 563.180(d)(12)(ii) as final without change.

Section 563.180(d)(12) Prohibition on Disclosure by Savings Associations

The OTS's current rules provide that any savings association or service corporation or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR must: (1) Decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed and (2) notify the OTS.

The proposed rule more specifically addressed the prohibition on the disclosure of a SAR by a savings association or service corporation. The proposed rule provided that the prohibition includes "any information that would reveal the existence of a SAR" instead of using the phrase "any information that would disclose that a SAR has been prepared or filed." The OTS, like FinCEN and the OCC, believes that the proposed phrase more clearly describes the type of information that is covered by the prohibition on the disclosure of a SAR. In addition, the proposed rule incorporated the specific reference in 31 U.S.C. 5318(g)(2)(A)(i) to a "director, officer, employees or agent," in order to clarify that the prohibition on disclosure extends to those individuals in a savings association or service corporation who may have access to SAR information.

Although 31 U.S.C. 5318(g)(2)(A)(i) provides that a person involved in the transaction may not be notified that the transaction has been reported, the proposed rule reflected case law that has consistently concluded, in accordance with applicable regulations, that financial institutions are broadly prohibited from disclosing SAR information to any person. Accordingly, these cases have held that, in the context of discovery in connection with civil lawsuits, financial institutions are prohibited from disclosing SAR information because section 5318(g) and its implementing regulations have created an unqualified discovery and evidentiary privilege for such information that cannot be waived by financial institutions.[26] Consistent with case law and the current regulation, the texts of the proposed rule did not limit the prohibition on disclosure only to the person involved in the transaction. Permitting disclosure to *any* outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which the BSA absolutely prohibits.

The proposed rule continued to provide that any savings association or service corporation, or any director, officer, employee or agent of a savings association or service corporation, subpoenaed or otherwise requested to disclose SAR information must decline to provide the information, citing that section of the rule and 31 U.S.C. 5318(g)(2)(A)(i), and must give notice of the request to the OTS. In addition, the proposed rule required the savings association or service corporation to notify the OTS of its response to the request and required the savings association or service corporation to provide the same information to FinCEN.

Commenters suggested that OTS adjust its SAR rule to remove the "duplicative" requirement for a savings association to notify both OTS and FinCEN when SAR information is inappropriately requested. OTS, like FinCEN and the OCC, disagrees with the commenter's characterization of the notification requirement as "duplicative" because OTS and FinCEN each have issued, and separately administers, its own separate SAR rule. The joint notification requirement in the OTS's final rule, therefore, simply acknowledges the notification requirement of different SAR regulations issued by separate agencies. Therefore, the OTS adopts proposed § 560.183(d)(12) as final without change.

Section 563.180(d)(12) Rules of Construction

The OTS, like FinCEN and the OCC, proposed rules of construction to address issues that have arisen over the years about the scope of the SAR disclosure prohibition and to implement statutory modifications to the BSA made by the USA PATRIOT Act. The proposed rules of construction primarily describe situations that are not covered by the prohibition on disclosure of SAR information by a savings association or service corporation. The introduction to the proposed rules of construction makes clear that they are qualified by the statutory mandate that no person involved in any reported suspicious transaction can be notified that the transaction has been reported. The OTS received no comments on the proposed introductory language to the rules of construction and is adopting the language in the final rule as proposed.

The first proposed rule of construction clarified the permissibility of disclosures to governmental authorities or other examining authorities that are otherwise entitled by law to receive SARs and to examine for or investigate suspicious activity. Specifically, the proposal was intended to clarify existing language that a savings association or service corporation, or any director, officer, employee, or agent[27] of a savings association may disclose SAR information to FinCEN or any Federal, State, or local law enforcement agency; or any Federal or State regulatory agency that examines the financial institution for compliance with the BSA. Although the permissibility of such disclosures may be readily apparent, the proposal contained this statement to clarify that a savings

[25] One example of such information could include summary information commonly provided by savings association or service corporations in the "notification to the board" required by the various Federal bank regulatory agency SAR rules. Savings Associations subject to the requirement are encouraged to be cautious in the production of relevant portions of board minutes or other records to avoid the risk of potentially exposing SAR information to the subject, either directly or indirectly, in the event such records are subpoenaed.

[26] *See, e.g., Whitney Nat'l Bank* v. *Karam,* 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004); *Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[27] Some commenters requested guidance related to the appropriate use of SARs by agents of savings associations and service corporations. In the Supplementary Information section of FinCEN's final rule issued today, FinCEN states that it is considering additional guidance on the appropriate use of SARs by agents of financial institutions. Until such guidance is issued, however, the OTS and FinCEN remind financial institutions of their requirement to protect, through reasonable controls or agreements with their agents, the confidentiality of SAR information, as prescribed by the OTS and FinCEN final rules.

association or service corporation cannot use the prohibition on disclosure of SAR information to withhold this information from governmental authorities that are otherwise entitled by law to receive SARs and to examine for and investigate suspicious activity.

Like FinCEN, OTS is adjusting the language slightly in the final rule to make a technical correction in the SAR rule text. The proposal stated that the rule should not be construed as prohibiting disclosure of a SAR "to FinCEN or any Federal, State or local law enforcement agency; or any Federal or State regulatory authority that examines the savings association for compliance with the Bank Secrecy Act." The proposed rules sought to expand these terms by describing explicitly the types of entities that fit into those categories. Accordingly, the proposed rule used the phrase "* * * State regulatory authority that examines the savings association for compliance with the BSA." Like FinCEN, OTS believes that commenters clearly understood and consented to the intent of this language, but will use the more technically accurate phrase "* * * State regulatory authority administering a State law that requires [the institution] to comply with the BSA or otherwise authorizes the State authority to ensure that the institution complies with the BSA" in the final rule.

This change recognizes that State regulatory authorities are generally authorized by State law to examine for compliance with the BSA in one of two ways: (1) The law authorizes the State authority to examine the institution for compliance with all Federal laws and regulations generally or with the BSA explicitly, or (2) the law requires a financial institution to comply with all Federal laws and regulations generally or with the BSA explicitly, and authorizes the State authority to examine for compliance with the State law. An institution may provide SAR information to a State regulatory authority meeting either criterion.

The second proposed rule of construction provided that SAR information does not include the underlying facts, transactions, and documents upon which a SAR is based. This statement reflects case law, which has recognized that, while a financial institution is prohibited from producing documents in discovery that evidence the existence of a SAR, factual documents created in the ordinary course of business (for example, business records and account information, upon which a SAR is based), may be discoverable in civil litigation under the Federal Rules of Civil Procedure.[28]

The second proposed rule of construction included some examples of situations where a savings association or service corporation may disclose the underlying facts, transactions, and documents upon which a SAR is based. The first example clarifies that a savings association or service corporation, or any director, officer, employee or agent of such a financial institution, may disclose this information [29] to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.[30] The second example simply codifies a rule of construction added to the BSA by section 351 of the USA PATRIOT Act, which provides that such underlying information may be disclosed in certain written employment references and termination notices.[31]

One commenter suggested that the OTS clarify that the illustrative examples are not exhaustive, and that there may be other situations not prescribed in the rule where an institution may disclose the underlying facts, transactions, and documents upon which a SAR is based. The OTS did not intend for these examples to be exhaustive and does not believe the text, as proposed, implies that the examples are exhaustive. For purposes of clarity, however, like FinCEN and the OCC, the OTS is revising the final rule's language at § 563.180(d)(12) to read

"* * * [t]he underlying facts, transactions, and documents upon which a SAR is based, including *but not limited to,* disclosures" expressly listed as illustrative examples in the rule. Accordingly, with respect to the SAR confidentiality provision only,[32] savings associations and service corporations may disclose underlying facts, transactions, and documents for any purpose, provided that no person involved in the transaction is notified that the transaction has been reported and none of the underlying information reveals the existence of a SAR.

Another commenter suggested that the rules of construction include a provision expressly authorizing the disclosure of facts, transactions, or documents to affiliates wherever located and clarify that such authority may be exercised independently of the authority to share SAR information with affiliates. Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported and the underlying facts, transactions, and documents do not disclose SAR information, the OTS agrees that such disclosure by a savings association or service corporation to its affiliates, wherever located, is not prohibited by the final rule. Furthermore, the OTS agrees that the authorization for a savings association or service corporation to disclose underlying information to affiliates is independent of the authority to share SAR information with affiliates. The OTS believes that the final rule and the BSA already address that commenter's concerns and that further revision to the rule is unnecessary.

The third proposed rule of construction clarified that the prohibition on the disclosure of SAR information by a savings association or service corporation does not include the sharing by a savings association or service corporation, or any director, officer, employee or agent of a savings association, of SAR information within the savings association's corporate organizational structure, for purposes consistent with Title II of the BSA, as determined by regulation or in guidance. The proposed third rule of construction recognizes that a savings association or service corporation may find it necessary to share SAR information to fulfill its reporting obligations under the BSA, and to facilitate more effective enterprise-wide BSA monitoring and reporting, consistent with Title II of the BSA. The term "share" used in the third rule of construction is an acknowledgement that sharing within a corporate

[28] *See Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[29] Although the underlying facts, transactions, and documents upon which a SAR is based may include previously filed SARs or other information that would reveal the existence of a SAR, these materials cannot be disclosed as underlying documents.

[30] On December 21, 2006, FinCEN and the Federal bank regulatory agencies announced that the format for the SAR form for depository institutions had been revised to support a new joint filing initiative to reduce the number of duplicate SARs filed for a single suspicious transaction. "*Suspicious Activity Report (SAR) Revised to Support Joint Filings and Reduce Duplicate SARs,*" Joint Release issued by FinCEN, the FRB, the OCC, the OTS, the FDIC, and NCUA (Dec. 21, 2006). On February 17, 2006, FinCEN and the Federal bank regulatory agencies published a joint **Federal Register** notice seeking comment on proposed revisions to the SAR form. *See* 71 FR 8640. On May 1, 2007, FinCEN announced a delay in implementation of the revised SAR form until further notice. *See* 72 FR 23891. Until such time as a new SAR form is available that facilitates joint filing, institutions authorized to jointly file should follow FinCEN's guidance to use the words "joint filing" in the narrative of the SAR and ensure that both institutions maintain a copy of the SAR and any supporting documentation (*See, e.g., http://www.fincen.gov/statutes_regs/guidance/html/guidance_faqs_sar_10042006.html*).

[31] 31 U.S.C. 5318(g)(2)(B).

[32] However, other applicable laws or regulations governing a savings association's responsibilities to maintain and protect information continue to apply, for example, information covered by part 510 of the OTS's rules regarding the release of non-public OTS information.

organization for purposes consistent with Title II of the BSA, as determined by regulation or guidance issued by the OTS or FinCEN, is distinguishable from a prohibited disclosure.

FinCEN and the Federal bank regulatory agencies have already issued joint guidance making clear that the U.S. branch or agency of a foreign bank may share a SAR with its head office, and that a U.S. bank or savings association may share a SAR with its controlling company (whether domestic or foreign). This guidance stated that the sharing of a SAR with a head office or controlling company both facilitates compliance with the applicable requirements of the BSA and enables the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.[33]

Elsewhere in this issue of the **Federal Register**, FinCEN is issuing additional final guidance that further elaborates on sharing of SAR information within a corporate organization that FinCEN considers to be "consistent with the purposes of the BSA." The final guidance generally permits the sharing of SAR information by depository institutions with their affiliates [34] that are subject to a SAR rule.

In addition, OTS received comments that addressed FinCEN's proposed guidance, much of which is addressed in FinCEN's separate notice of availability of guidance published elsewhere in today's **Federal Register**. In general, the commenters requested an expansion of the sharing authorities with respect to both the parties permitted to share and the parties with whom SAR information could be shared. Most commenters provided a clear rationale for how expanded SAR sharing would benefit their institutions by increasing efficiency, cutting costs, and enhancing the detection and reporting of suspicious activity. However, like FinCEN and the OCC, OTS notes that most commenters, however, failed to sufficiently address how they would effectively mitigate the risk of unauthorized disclosure of SAR information if the sharing authority was expanded to the extent they requested. The OTS and FinCEN believe the risk of unauthorized disclosure of SAR information outweighs the benefits of any expansion of the sharing authority at this time. Therefore, the third rule of construction is adopted as proposed without change.

Section 563.180(d)(12) Prohibition on Disclosure by the OTS

As previously noted, section 351 of the USA PATRIOT Act, 31 U.S.C. 5318(g)(2)(A)(ii), amended the BSA, and added a new provision prohibiting officers and employees of the government from disclosing a SAR to any person involved in the transaction that the transaction has been reported, except "as necessary to fulfill the official duties of such officer or employee." Section § 563.180(d)(12) of OTS's proposed rule addressed this new provision of the BSA and is comparable to FinCEN's proposal. The proposed section provided that the OTS will not, and no officer, employee or agent of the OTS, shall disclose SAR information, "except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act."

As stated in section 5318(g)(2)(A)(i), which prohibits a financial institution's disclosure of a SAR, section 5318(g)(2)(A)(ii) also prohibits the government from disclosing a SAR to "any person involved in the transaction." OTS, like FinCEN and OCC, proposed to address sections 5318(g)(2)(A)(i) and (A)(ii) in a consistent manner, because disclosure by a governmental authority of SAR information to any outside party may make it more likely that the information will be disclosed to a person involved in the transaction. Accordingly, the proposed rule would generally bar disclosures of SAR information by OTS officers, employees, or agents.

However, section 5318(g)(2)(A)(ii) also narrowly permits governmental disclosures as necessary to "fulfill official duties," a phrase that is not defined in the BSA. Consistent with the rules being proposed by FinCEN and the OCC, OTS proposed to construe this phrase in the context of the BSA, in light of the purpose for which SARs are filed. Accordingly, the proposed rule interpreted "official duties" to mean "official duties consistent with the purposes of Title II of the BSA," namely, for "criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." [35] When disclosure is necessary to fulfill official duties, OTS will make a determination, through its internal processes, that a SAR may be disclosed to fulfill official duties consistent with the BSA. This standard would permit, for example, disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement agency; a request from an appropriate Congressional committee or subcommittee; and prosecutorial disclosures mandated by statute or the Constitution, in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.[36] This proposed interpretation of section 5318(g)(2)(A)(ii) would ensure that SAR information will not be disclosed for a reason that is unrelated to the purposes of the BSA. For example, this standard would not permit disclosure of SAR information to the media.

The proposed rule also specifically provided that "official duties" shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510. This statement, which corresponded to a similar provision in FinCEN's proposed rules, establishes that OTS will not disclose SAR information to a private litigant for use in a private legal proceeding, or pursuant to 12 CFR 510.5, because such a request cannot be consistent with any of the purposes enumerated in Title II of the BSA. The BSA exists, in part, to protect the public's interest in an effective reporting system that benefits the nation by helping to ensure that the U.S. financial system will not be used for criminal activity or to support terrorism. OTS like the OCC and FinCEN, believes that this purpose would be undermined by the disclosure of SAR information to a private litigant for use in a civil lawsuit for the reasons described earlier, including that such disclosures will chill full and candid reporting by savings associations and service corporations.

Finally, the proposed rule applied to OTS, in addition to its officers, employees, and agents. Comparable to a provision being proposed by FinCEN and the OCC, OTS proposed to include the agency itself in the scope of coverage, because requests for SAR information are typically directed to the agency, rather than to individuals within the OTS with authority to

[33] "Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices and Controlling Companies" (January 20, 2006).

[34] Under FinCEN's final guidance, an "affiliate" of a depository institution means any company under common control with, or controlled by, that depository institution.

[35] 31 U.S.C. 5311 (setting forth the purposes of the BSA).

[36] *See, e.g., Giglio* v. *United States,* 405 U.S. 150, 153–54 (1972); *Brady* v. *State of Maryland,* 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States,* 353 U.S. 657, 668 (1957).

respond to the request. In addition, agents were included in the proposal because agents of OTS may have access to SAR information. Accordingly, the proposed interpretation would more comprehensively cover disclosures by OTS or agents of OTS, and protect the confidentiality of SAR information. OTS did not receive comments on this issue and is adopting this provision as final without change.

Section 563.180(d)(13) Safe Harbor/ Limitation on Liability

In 1992, the Annunzio-Wylie Act amended the BSA by providing a safe harbor for financial institutions and their employees from civil liability for the reporting of known or suspected criminal offenses or suspicious activity through the filing of a SAR.[37] OTS, FinCEN and the OCC incorporated the safe harbor provisions of the 1992 law into their SAR rules.[38] Section 351 of the USA PATRIOT Act amended section 5318(g)(3) to clarify that the scope of the safe harbor provision includes the voluntary disclosure of possible violations of law and regulations to a government agency and to expand the scope of the limit on civil liability to include any liability that may exist "under any contract or other legally enforceable agreement (including any arbitration agreement)."[39] OTS, like FinCEN and the OCC, incorporated the statutory expansion of the safe harbor by cross-referencing section 5318(g)(3) in the proposed rule.

In addition, consistent with the proposed rule issued by FinCEN, this provision makes clear that the safe harbor also applies to a disclosure by a savings association or service corporation made jointly with another financial institution for purposes of filing a joint SAR.

OTS received no comments on the proposed safe harbor provision. However, one comment received by FinCEN noted that the statutory safe harbor provision protects *any person* from liability, not just the person involved in the transaction. Accordingly, like FinCEN and the OCC, OTS is amending the proposed safe harbor language by inserting the phrase "shall be protected from liability to *any person,* for any such disclosure * * *." and is otherwise adopting proposed § 563.180(d)(l3) safe harbor provision as final.

Conforming Amendments to 12 CFR Part 510

Today, OTS also is publishing a final rule to amend its information disclosure rule set forth in 12 CFR part 510. Among other things, the final rule clarifies that the OTS's disclosure of SAR information will be governed exclusively by the standards set forth in the amendments to OTS's SAR rule set forth in 12 CFR 563.180.[40] The effect of these final part 510 amendments is that OTS: (1) Will not release SAR information to private litigants and (2) will only release SAR information to other government agencies, in response to a request pursuant to 12 CFR 563.180 or in the exercise of its discretion, when necessary to fulfill official duties consistent with the purposes of Title II of the BSA.

V. OTS Regulatory Analysis

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency that is issuing a final rule to prepare and make available a final regulatory flexibility analysis that describes the impact of the final rule on small entities, 5 U.S.C. 604. However, the RFA provides that an agency is not required to prepare and make available a final regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its final rule. 5 U.S.C. 605(b). For purposes of the RFA and OTS-regulated entities, a "small entity" is a savings association or service corporation with assets of $175 million or less.

OTS has determined that the costs, if any, associated with the final rule are *de minimis.* The final rule simply clarifies the scope of the statutory prohibition against the disclosure by financial institutions and by the government of SAR information and clarifies the scope of the safe harbor from liability for institutions that report suspicious activities. Therefore, pursuant to section 605(b) of the RFA, OTS hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

OTS has determined that this final rule is not a significant regulatory action under Executive Order 12866. We have concluded that the changes made by this final rule will not have an annual effect on the economy of $100 million or more. OTS further concludes that this final rule does not meet any of the other standards for a significant regulatory action set forth in Executive Order 12866.

Paperwork Reduction Act

We have reviewed the final rule in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that it does not contain any "collections of information" as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate 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 in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

OTS has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, this proposal is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 563

Crime, Currency, Savings associations, reporting and recordkeeping requirements, Security measures.

Authority and Issuance

■ For the reasons set forth in the preamble, part 563 of title 12 of the Code of Federal Regulations is amended as follows:

PART 563—SAVINGS ASSOCIATIONS—OPERATIONS

■ 1. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 375b, 1462a, 1463, 1464, 1467a, 1468, 1817, 1828, 3806; 31 U.S.C 5318.

[37] *See supra* note 1.

[38] *See* 31 CFR 103.18(e), 12 CFR 563.180(d)(13) and 12 CFR 21.11(l). The safe harbor regulations are also applicable to oral reports of violations. (In situations requiring immediate attention, a savings association must immediately notify its regulator and appropriate law enforcement by telephone, in addition to filing a SAR. *See, e.g.,* 12 CFR 21.11(d).)

[39] 31 U.S.C. 5318(g)(3).

[40] *See* elsewhere in this issue of the **Federal Register.**

■ 2. Section 563.180 is amended by revising paragraphs (d)(2)(iii) and (d)(3) introductory text, adding a new sentence to the end of paragraph (d)(8), and revising paragraph (d)(12) to read as follows:

§ 563.180 Suspicious Activity Reports and other reports and statements.

* * * * *

(d) * * *

(2) * * *

(iii) *SAR* means a Suspicious Activity Report.

(3) *SARs required.* A savings association or service corporation shall file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury on the form prescribed by the OTS and in accordance with the form's instructions, by sending a completed SAR to FinCEN in the following circumstances:

* * * * *

(8) *Retention of records.* * * * A savings association or service corporation shall make all supporting documentation available to OTS, FinCEN, or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the savings association or service corporation for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the savings association or service corporation to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the institution complies with the Bank Secrecy Act, upon request.

* * * * *

(12) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential, and shall not be disclosed except as authorized in this paragraph (d)(12).

(i) *Prohibition on disclosure by savings associations or service corporations.* (A) *General rule.* No savings association or service corporation, and no director, officer, employee, or agent of a savings association or service corporation, shall disclose a SAR or any information that would reveal the existence of a SAR. Any savings association or service corporation, and any director, officer, employee, or agent of any savings association or service corporation that is subpoenaed or otherwise requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify the following of any such request and the response thereto:

(A) Deputy Chief Counsel, Litigation Division, Office of Thrift Supervision; and

(B) The Financial Crimes Enforcement Network (FinCEN).

(ii) *Rules of construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, paragraph (d)(1) of this section shall not be construed as prohibiting:

(A) The disclosure by a savings association or service corporation, or any director, officer, employee or agent of a savings association or service corporation of:

(1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or OTS, or any Federal, State, or local law enforcement agency; or any Federal regulatory authority that examines the savings association or service corporation for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires compliance with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the institution complies with the Bank Secrecy Act; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including, but not limited to, disclosures:

(i) To another financial institution, or any director, officer, employee or agent of a financial institution, for the preparation of a joint SAR; or

(ii) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a savings association or service corporation, or any director, officer, employee, or agent of a savings association or service corporation, of a SAR, or any information that would reveal the existence of a SAR, within the corporate organizational structure of the savings association or service corporation, for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(iii) *Prohibition on disclosure by OTS.* The OTS will not, and no officer, employee or agent of OTS, shall disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, "official duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510.5.

(iv) *Limitation on liability.* A savings association or service corporation and any director, officer, employee or agent of a savings association or service corporation that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

* * * * *

Dated: June 1, 2010.

By the Office of Thrift Supervision.

John E. Bowman,

Acting Director.

[FR Doc. 2010–29877 Filed 12–2–10; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AA99

Financial Crimes Enforcement Network; Confidentiality of Suspicious Activity Reports

AGENCY: The Financial Crimes Enforcement Network ("FinCEN"), Treasury.

ACTION: Final rule.

SUMMARY: FinCEN is issuing this final rule to amend the Bank Secrecy Act ("BSA") regulations regarding the confidentiality of a report of suspicious activity ("SAR") to: Clarify the scope of the statutory prohibition against the disclosure by a financial institution of a SAR; address the statutory prohibition against the disclosure by the government of a SAR; clarify that the exclusive standard applicable to the disclosure of a SAR by the government is to fulfill official duties consistent with the purposes of the BSA; modify the safe harbor provision to include changes made by the Uniting and Strengthening America by Providing the Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"); and make minor technical revisions for consistency and harmonization among the different SAR rules. These amendments are part of the Department of the Treasury's continuing effort to increase the efficiency and effectiveness of its anti-money laundering and counter-terrorist

financing policies. These amendments are consistent with similar proposals to be issued by some of the Federal bank regulatory agencies in conjunction with FinCEN.[1]

DATES: *Effective Date:* January 3, 2011.

FOR FURTHER INFORMATION CONTACT: The FinCEN regulatory helpline at (800) 949–2732.

SUPPLEMENTARY INFORMATION:

I. Background

The BSA requires financial institutions to keep certain records and make certain reports that have been determined to be useful in criminal, tax, or regulatory investigations or proceedings, and for intelligence or counter-intelligence activities to protect against international terrorism. In particular, the BSA and its implementing regulations require financial institutions in certain industries[2] to file a SAR when they detect a known or suspected violation of Federal law or regulation, or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[3]

SARs generally are unproven reports of possible violations of law or regulation, or of suspicious activities, that are used for law enforcement or regulatory purposes. The BSA provides that a financial institution and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.[4] FinCEN implemented this provision in its SAR regulations for each industry through an explicit prohibition that closely mirrored the enacting statutory language. Specifically, we clarified that disclosure could not be made to the person involved in the transaction, but that the SAR could be provided to FinCEN, law enforcement, and the financial institution's supervisory or examining authority. In certain SAR rules, we have expressly provided for the possibility of institutions jointly filing a SAR regarding suspicious activity that occurred at multiple institutions.[5]

The USA PATRIOT Act strengthened the confidentiality of SARs by adding to the BSA a new provision that prohibits officers or employees of the Federal government or any State, local, Tribal, or territorial government within the United States with knowledge of a SAR from disclosing to any person involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[6]

To encourage the reporting of possible violations of law or regulation, and the filing of SARs, the BSA contains a safe harbor provision that shields financial institutions making such reports from civil liability in connection with the report. In 2001, the USA PATRIOT Act clarified that the safe harbor also covers voluntary disclosure of possible violations of law and regulations to a government agency and expanded the scope of the limit on liability to cover any civil liability that may exist "under any contract or other legally enforceable agreement (including any arbitration agreement)."[7]

II. The Notice of Proposed Rulemaking and Related Actions

On March 9, 2009, FinCEN published in the **Federal Register** a notice of proposed rulemaking ("the proposed rule") and two separate notices and requests for comment on proposed guidance ("the proposed guidance") (collectively, "the notices"). In the proposed rule, FinCEN proposed amendments to each of FinCEN's SAR rules to include key changes that would (1) clarify the scope of the statutory prohibition against the disclosure by a financial institution of a SAR; (2) address the statutory prohibition against the disclosure by the government of a SAR; (3) clarify that the exclusive standard applicable to the disclosure of a SAR, or any information that would reveal the existence of a SAR by the government is "to fulfill official duties consistent with Title II of the BSA," in order to ensure that SAR information is protected from inappropriate disclosures unrelated to the BSA purposes for which SARs are filed; (4) modify the safe harbor provision to include changes made by the USA PATRIOT Act; and (5) where possible, harmonize minor technical differences that exist among the confidentiality, safe harbor, and compliance provisions of our rulemakings for different industries. The proposed guidance interpreted one of the provisions of the proposed rules relating to (1) above, to clarify that SARs could be shared, subject to certain qualifications, within an institution's corporate organizational structure.

In separate but contemporaneous rulemakings, some of the Federal bank regulatory agencies proposed amending their SAR rules to incorporate comparable provisions to FinCEN's proposed rules, and amending their information disclosure regulations[8] to clarify that the exclusive standard governing the release of a SAR, or any information that would reveal the existence of a SAR, is set forth in the confidentiality provisions of their respective SAR rules.

The notices and related Federal bank regulatory agency actions were published together in their own separate part of the **Federal Register** to encourage commenters to take into account all relevant provisions.

III. Comments on the Notices—Overview and General Issues

The comment period for the notices ended on June 8, 2009. We received a total of 26 submissions from 25 distinct entities.[9] Of these, 15 were submitted by trade groups or associations, four were submitted by individual financial

[1] The Federal bank regulatory agencies have parallel SAR requirements for their supervised entities: *See* 12 CFR 208.62, 12 CFR 211.24(f), and 12 CFR 225.4(f) (the Board of Governors of the Federal Reserve System) ("Fed")); 12 CFR 353.3 (the Federal Deposit Insurance Corporation ("FDIC")); 12 CFR 748.1 (the National Credit Union Administration ("NCUA")); 12 CFR 21.11 (the Office of the Comptroller of Currency ("OCC")) and 12 CFR 563.180 (the Office of Thrift Supervision ("OTS")).

[2] FinCEN has implemented regulations for suspicious activity reporting at 31 CFR 103.15 (for mutual funds); 31 CFR 103.16 (for insurance companies); 31 CFR 103.17 (for futures commission merchants and introducing brokers in commodities); 31 CFR 103.18 (for banks); 31 CFR 103.19 (for broker-dealers in securities); 31 CFR 103.20 (for money services businesses); 31 CFR 103.21 (for casinos).

[3] The Annunzio-Wylie Anti-Money Laundering Act of 1992 (the Annunzio-Wylie Act), amended the BSA and authorized the Secretary of the Treasury to require financial institutions to report suspicious transactions relevant to a possible violation of law or regulation. *See* Public Law 102–550, Title XV, 1517(b), 106 Stat. 4055, 4058–9 (1992); 31 U.S.C. 5318(g)(1).

[4] *See* 31 U.S.C. 5318(g)(2).

[5] Bank Secrecy Act regulations expressly permitting the filing of a joint SAR when multiple financial transactions are involved in a common transaction or series of transactions involving suspicious activity can be found at 31 CFR 103.15(a)(3) (for mutual funds); 31 CFR 103.16(b)(3)(ii) (for insurance companies); 31 CFR 103.17(a)(3) (for futures commission merchants and introducing brokers in commodities); 31 CFR 103.19(a)(3) (for broker-dealers in securities); and 31 CFR 103.20(a)(4) (for money services businesses).

[6] *See* USA PATRIOT Act, section 351(b). Public Law 107–56, Title III, § 351, 115 Stat. 272, 321(2001); 31 U.S.C. 5318(g)(2).

[7] *See* USA PATRIOT Act, section 351(a). Public Law 107–56, Title III, § 351, 115 Stat. 272, 321(2001); 31 U.S.C. 5318(g)(3).

[8] Generally, these regulations are known as "Touhy regulations," after the Supreme Court's decision in *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. As such, an agency's Touhy regulations are the instructions agency employees must follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

[9] All comments to the notices are available for public viewing at *http://www.regulations.gov* or *http://www.fincen.gov/statutes_regs/bsa/regs_proposal_comment.html.*

institutions, three were submitted by Federal, Tribal, or foreign government agencies, three were submitted by consultants or attorneys not affiliated with a specific financial institution, and one was submitted by a self-regulatory organization ("SRO"). The comments generally supported the proposed rules while requesting the broadening of the proposed sharing guidance.[10] Several of the comments specific to the proposed rules provided suggestions for additionally strengthening or clarifying the general confidentiality provision, as well as the specific confidentiality provisions for institutions, governments, and SROs. Due to the broad and varied topics raised during comment, the majority of comments are addressed in the section-by-section analysis, below.

IV. Section-by-Section Analysis

A. Confidentiality of SARs

FinCEN proposed clarifying the general introduction to the confidentiality provision in each of its SAR rules to read, "A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph." FinCEN proposed this change to be more comprehensive than the previous language that, on face value, was limited only to the person involved in the transaction and applied only with respect to the SAR form itself. The phrase "SAR[s] are confidential" also was consistent with the existing Federal bank regulatory agency SAR rules, while the application of confidentiality to "a SAR, and information that would reveal the existence of a SAR" ("SAR information") was consistent with both FinCEN and case law interpretations [11] of the previous non-disclosure provision. In the final rule, FinCEN is adopting this language as proposed, without change.

Some commenters asked that FinCEN clarify the term "information that would reveal the existence of a SAR" for the purpose of defining the scope of SAR confidentiality. One commenter specifically asked whether that term only includes information that affirmatively states that a SAR was filed. Another commenter urged that FinCEN formally recognize that documents prepared by a financial institution when complying with its SAR obligations should be afforded confidentiality.

Clearly, any document or other information that affirmatively states that a SAR has been filed constitutes information that would reveal the existence of a SAR and should be kept confidential. By extension, an institution also should afford confidentiality to any document stating that a SAR has *not* been filed. Were FinCEN to allow disclosure of information when a SAR is not filed, institutions would implicitly reveal the existence of a SAR any time they were unable to produce records because a SAR was filed.[12]

The more difficult situation is when a document or other information is silent as to whether a SAR has or has not been filed. Documents that may identify suspicious activity but that do not reveal whether a SAR exists (*e.g.,* a document memorializing a customer transaction, such as an account statement indicating a cash deposit or a record of a funds transfer), should be treated as falling within the underlying facts, transactions, and documents upon which a SAR may be based, and should not be afforded confidentiality.[13] This distinction is set forth in the final rule's second rule of construction and reflects relevant case law.[14]

However, the strong public policy that underlies the SAR system as a whole—namely, the creation of an environment that encourages financial institutions to report suspicious activity without fear of reprisal—leans heavily in favor of applying SAR confidentiality not only to a SAR itself, but also in appropriate circumstances to material prepared by the financial institution as part of its process to detect and report suspicious activity, regardless of whether a SAR ultimately was filed or not. This interpretation also reflects relevant case law.[15]

As explained in more detail in the proposed rule, the primary purpose for clarifying the scope of the confidentiality provision is to ensure that, due to potentially serious consequences, the persons involved in the transaction and identified in the SAR cannot be notified, directly or indirectly, of the report. Accordingly, FinCEN proposed replacing the previous rule text prohibiting disclosure of the SAR to the person involved in the transaction with a broad general confidentiality provision for all SAR information applicable to all persons not authorized in the rules of construction to receive such information. With respect to "information that would reveal the existence of a SAR," therefore, institutions should distinguish between certain types of statistical or abstract information or general discussions of suspicious activity that may indicate that an institution has filed SARs,[16] and information that would reveal the existence of a SAR in a manner that could enable the person involved in the

[10] Comments about the sharing guidance are addressed separately in a related "notice of availability of guidance" published by FinCEN in today's **Federal Register**.

[11] *See, e.g., Whitney Nat'l Bank* v. *Karam,* 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004); *Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[12] For example, a private litigant may serve a discovery request on a bank in civil litigation that calls for the bank to produce the underlying documentation on companies A, B, and C, where the bank has filed a SAR on company A but not companies B or C, and the underlying documentation reflects the SAR filing decisions. If the bank then produces the underlying documentation for companies B and C, but neither confirms nor denies the existence of a SAR when declining to provide similar documentation for company A, by negative implication it may have revealed the existence of the SAR filed on company A.

[13] As one commenter correctly suggested, information produced in the ordinary course of business may contain sufficient information that a reasonable and prudent person familiar with SAR filing requirements could use to conclude that an institution likely filed a SAR (*e.g.,* a copy of a fraudulent check, or a cash transaction log showing a clear pattern of structured deposits). Such information, alone, does not constitute information that would reveal the existence of a SAR.

[14] *See, e.g., Whitney Nat. Bank* v. *Karam,* 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004) (noting that courts have "allowed the production of supporting documentation that was generated or received in the ordinary course of the banks' business, on which the report of suspicious activity was based"); *Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002) (holding that the "factual documents which give rise to suspicious conduct * * * are to be produced in the ordinary course of discovery because they are business records made in the ordinary course of business").

[15] *See, e.g., Whitney* at 682–83 (holding that the SAR confidentiality provision protects, *inter alia,* "communications preceding the filing of a SAR and preparatory or preliminary to it; communications that follow the filing of a SAR and are explanations or follow-up discussion; or oral communications or suspected or possible violations that did not culminate in the filing of a SAR"); *Cotton* at 815 (holding that "documents representing the drafts of SARs or other work product or privileged communications that relate to the SAR itself * * * are not to be produced [in discovery] because they would disclose whether a SAR has been prepared or filed"); *Union Bank of California, N.A.* v. *Superior Court,* 130 Cal. App. 4th 378, 391 (2005) (holding that "a draft SAR or internal memorandum prepared as part of a financial institution's process for complying with Federal reporting requirements is generated for the specific purpose of fulfilling the institution's reporting obligation * * * [and] fall within the scope of SAR [confidentiality] because they may reveal the contents of a SAR and disclose whether 'a SAR has been prepared or filed' ").

[16] One example of such information could include summary information commonly provided by banks in the "notification to the board" required by the various Federal bank regulatory agency SAR rules. Banks subject to the requirement are encouraged to be cautious in the production of relevant portions of board minutes or other records to avoid the risk of potentially exposing SAR information to the subject, either directly or indirectly, in the event such records are subject to future subpoena.

transaction potentially to be notified, whether directly or indirectly.

FinCEN also proposed modifying this introductory section to clarify that "for purposes of [the confidentiality provision] only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part" and eliminating references in the confidentiality provisions of certain rules to specific versions of the SAR form like the SAR–SF (for use by the securities and futures industries) or SAR–MSB (for use by money services businesses). This change clarified that the confidentiality provisions of our SAR rules apply with respect to any type of SAR in the filing institution's possession, which, since it may result from the joint filing or sharing of a SAR with another type of financial institution in accordance with the provisions of these proposed rules, could include a type of SAR form not used by the institution. This provision is also being adopted as proposed, without change.

B. Disclosure by Financial Institutions

The proposed rule provided that any financial institution, or any director, officer, employee, or agent of a financial institution, that is subpoenaed or otherwise requested to disclose a SAR, or information that would reveal the existence of a SAR, must decline to provide the information, citing this section of the rules and 31 U.S.C. 5318(g)(2)(A)(i), and must provide notification of the request and its response thereto to FinCEN and, in the rules for those industries with parallel SAR requirements administered by a primary Federal functional regulator,[17] notification to that regulator as well.

One commenter suggested that FinCEN adjust the SAR rule for banks to remove the "duplicative" requirement for a bank to notify both FinCEN and its primary Federal functional regulator when SAR information is inappropriately requested. FinCEN disagrees with the characterization of the requirement as "duplicative" since the entities in question have separate SAR rules issued and administered by separate agencies. The joint notification requirement in FinCEN's rule, therefore, simply acknowledges the notification requirement of multiple SAR regulations issued under multiple authorities.

Because FinCEN's jurisdiction is limited to the Title 31 SAR rules, however, FinCEN is removing the requirement from its bank SAR rule that an institution notify its primary Federal regulator in addition to notifying FinCEN in the event of an inappropriate request for SAR information. While this will create greater consistency within FinCEN's SAR rules for multiple industries and between FinCEN's rules and most of the primary Federal regulator bank SAR rules with respect to the requirement to notify only the agency administering that rule, it does not relieve institutions from their requirement to comply with the provisions of similar but distinct rules administered by separate agencies. FinCEN will continue to explore the possibility of streamlining the process of notification under separate legal authorities.[18]

Another commenter asked FinCEN to establish procedures by which an institution, if it thought it would benefit the institution, could petition FinCEN to authorize the disclosure of SAR information for *in camera* review during a private legal proceeding. As discussed elsewhere in this rulemaking, the protection of the filing institution is not the only reason for the SAR confidentiality provision. Further, FinCEN believes that in most legal proceedings, a filing institution that would benefit from the disclosure of a SAR would benefit comparably with evidence from underlying facts, transactions, and documents. Consequently, FinCEN does not intend to establish procedures for submitting such a request in this rulemaking.

C. Rules of Construction

FinCEN proposed rules of construction that clarify the scope of the SAR disclosure prohibition and implement statutory modifications to the BSA made by the USA PATRIOT Act. The proposed rules of construction primarily describe situations that are not covered by the prohibition against the disclosure of SAR information. The introduction to these rules makes clear that the rules of construction are each qualified by and subordinate to the statutory mandate that no person involved in any reported suspicious transaction can be notified that the transaction has been reported. This introductory sentence is being adopted as proposed, without change, in the final rule.

1. The First Rule of Construction

The first proposed rule of construction clarified the permissibility of disclosures to governmental authorities or other examining authorities that are otherwise entitled by law to receive SARs and to examine for or investigate suspicious activity. For most industries, the rule stated that a financial institution, or any director, officer, employee, or agent of a financial institution, may disclose a SAR, or information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency or any Federal or State regulatory authority that examines the financial institution for compliance with the BSA.

a. State Regulatory Authorities

FinCEN is adjusting the language slightly in the final rule to make a technical correction in the SAR rule text for some industries. While the original SAR rules provided for requests for disclosure from "appropriate law enforcement [and] supervisory agenc[ies]," the proposed rules sought to expand these terms by describing explicitly the types of entities that fit into those categories. Accordingly, some of the proposed rules used the phrase "* * * state regulatory authority that examines [the institution] for compliance with the BSA." FinCEN believes that commenters clearly understood and consented to the intent of this language, but will use the more technically accurate phrase "* * * state regulatory authority administering a state law that requires [the institution] to comply with the BSA or otherwise authorizes the state authority to ensure that the institution complies with the BSA" in the final rule.

This change recognizes that State regulatory authorities are generally authorized by State law to examine for compliance with the BSA in one of two ways: (1) The law authorizes the State authority to examine the institution for compliance with all Federal laws and regulations generally or with the BSA explicitly, or (2) the law requires a financial institution to comply with all Federal laws and regulations generally or with the BSA explicitly, and authorizes the State authority to examine for compliance with the State law. An institution may provide SAR information to a State regulatory authority meeting either criterion.

Commenters pointed out that some, but not all of the rules, provided for a financial institution to disclose SAR information to these State regulatory authorities. While one of FinCEN's goals

[17] Primary Federal functional regulator, for purposes of this final rule, means the Federal bank regulatory agencies, the Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission ("CFTC"). Only the Federal bank regulatory agencies administer parallel SAR requirements.

[18] In the interim, upon notification by a financial institution, FinCEN will ensure that an institution's primary Federal regulator has been notified of such a request and the institution's response thereto.

for the final rule is to create consistency between the various industry SAR rules where appropriate, FinCEN intentionally omitted State regulatory agencies from this rule of construction for the securities and futures industries. FinCEN has not delegated, and Congress has not authorized, State regulation for compliance with the BSA to these industries. Accordingly, the provision regarding disclosures to State regulatory authorities has been incorporated into the final rule for all industries other than securities broker-dealers, futures commission merchants, introducing brokers in commodities, and mutual funds.

For each of those industries excluded from the aforementioned "state regulatory" provision, FinCEN also has made a comporting change in the final rule to the paragraph entitled "Retention of Records." With respect to an institution's obligation to provide the supporting documentation to a SAR only to appropriate parties upon request, the final rule text includes Federal regulatory agencies, but not State regulatory agencies.

b. Tribal Regulatory Authorities

FinCEN received a similar comment regarding Tribal casinos that may be regulated by a Tribal regulatory authority. As with State agencies, FinCEN believes disclosures to such authorities should be limited only to an entity with authority to examine for compliance with laws requiring compliance with the BSA. Accordingly, FinCEN is incorporating a technical change similar to that described for State regulatory authorities, above, to more accurately describe the methods by which Tribal regulatory authorities obtain jurisdiction to examine for BSA compliance. The first rule of construction in the final rule for casinos now reads, "* * * or any tribal regulatory authority administering a tribal law that requires the casino to comply with the BSA or otherwise authorizes the tribal regulatory authority to ensure that the casino complies with tribal law."

c. Self-Regulatory Organizations

For the proposed rules governing securities broker-dealers, futures commission merchants, and introducing brokers in commodities, an institution's ability to disclose under the first rule of construction also was extended to a self-regulatory organization that is examining the institution for compliance with the requirements "of this section," a phrase FinCEN interpreted in the preamble as meaning the SAR rules. FinCEN received multiple and conflicting comments on this provision. Commenters correctly noted that this language differs from the standard used for Federal and State regulatory authorities.

One comment received from a government agency supported this different standard, stating that while Congress directed FinCEN to make SARs available to certain SROs in Section 358(c) of the USA PATRIOT Act (amending 31 U.S.C. 5319), Congress's simultaneous expansion in Section 358(a) of the "declaration of purpose" for the data collected under the BSA in Chapter 53 of Title 31 of the U.S.C. did not include self-regulatory purposes. Another comment from an SRO argued, however, that limiting SRO access to SAR information only in conjunction with an examination for BSA compliance was inconsistent with the aims of the BSA.

The language in the proposed rule limiting SRO use of SARs was consistent with the uses originally described in the previous SAR rules.[19] As such, the proposed rule did not propose restricting, but rather declined to expand, the existing SRO authority to use SARs. In the final rule, however, FinCEN is emphasizing the important role of BSA data in the support of supervisory functions to promote the integrity of financial markets and mitigate risks of financial crime. Accordingly, the final rule text regarding SROs more closely models the language used for government regulatory authorities. At the same time, the final rule recognizes the relationship of SROs and the Federal agencies responsible for their oversight, upon whom FinCEN relies for the purpose of helping to ensure that the SROs are operating in a manner consistent with FinCEN's mission.

SROs are not governmental entities, but do play a significant role in regulating segments of the financial industry under the close supervision and regulatory oversight by specific Federal agencies. The SEC regulates the Financial Industry Regulatory Authority ("FINRA") and other SROs, while the CFTC regulates the National Futures Association ("NFA") and a number of other SROs. FinCEN relies on the close supervision by the Federal functional regulators of those industries also subject to SRO oversight to assist FinCEN in ensuring that SROs appropriately use and handle BSA information. As these agencies are in a position to understand the needs of the SROs for BSA information and are also in a position to monitor the SROs' interaction with the entities subject to both the regulators' and the SROs' purview, FinCEN has determined that SROs should obtain SARs and supporting documentation from the entities that they examine in a manner and for purposes that the Federal agency responsible for its oversight deems appropriate. Thus, the final rule makes it clear that a financial institution examined by an SRO can provide SAR information to the SRO, upon the request of the Federal agency responsible for its oversight.

This request may apply to the SRO in an isolated context or in a broad context to cover a variety of situations and understood uses, as determined appropriate by that agency. FinCEN expects the Federal agency responsible for the SRO's oversight to provide this request either to the institution in writing, or to the SRO in the form of a writing that is available for the SRO to share with the institution. Given the fact that many institutions may come under the jurisdiction of more than one regulator and more than one SRO, a record of the relevant Federal regulator's request is important to avoid confusion.

In keeping with its cooperative relationships with the relevant Federal regulators, FinCEN will monitor the regulators' requests for SAR information and communicate with the regulators with respect to any concerns that either FinCEN or the regulators identify with respect to the use and protection of SARs by an SRO.

In light of the above considerations, the final rule for those industries with SROs now reads to allow disclosure to "* * * any SRO that examines [the institution] for compliance with the requirements of this section, upon the request of [the Federal agency responsible for its oversight]."

d. Civil Enforcement Authorities

One commenter also argued that the SEC and CFTC, in their capacity of civil enforcement of laws applicable to all persons (including institutions they do not examine for compliance with the BSA), should have the authority to request SAR information (specifically, supporting documentation) from all financial institutions in the same manner as law enforcement agencies. FinCEN is not amending the first rule of construction to allow this for two reasons. First, limiting the ability of the SEC or the CFTC to obtain information that would reveal that a SAR has been filed only from the types of institutions

[19] For example, prior to this final rule, the existing SAR rule for securities broker-dealers at 31 CFR 103.19(g) stated that "[r]eports filed under this section shall be made available to an SRO registered with the [SEC] examining a broker-dealer for compliance with the requirements of this section."

they examine for compliance with the BSA is consistent with the treatment under the final rule of all other Federal regulatory authorities, many of which also possess civil enforcement authorities. Second, although FinCEN recognizes the civil enforcement authority of the SEC and CFTC, FinCEN believes both agencies have been adequately empowered with requisite subpoena powers to obtain relevant data from financial institutions they do not examine for BSA compliance. That data includes the underlying facts, transactions, and documents upon which a SAR is based, pursuant to the second rule of construction. For example, if a bank receives a subpoena from the SEC or the CFTC that does not refer to a SAR, but merely requests certain transactional documents, then it would be permissible for the bank to respond to the subpoena with relevant documents, so long as the disclosure of any such document would not reveal the existence of a SAR. FinCEN understands that there may be situations in which documentation revealing the existence of a SAR will be responsive to an SEC or CFTC subpoena. In such situations, a financial institution should contact FinCEN with any questions concerning its ability under the SAR rules to provide information in response to a subpoena. In situations where the SEC or CFTC deem a subpoena to be imprudent, FinCEN notes the ability of those agencies to make a request for supporting documentation through FinCEN or the primary Federal regulator for that institution.

e. Other Requests for SAR Information

One commenter brought to FinCEN's attention examples of "dual filing requirements" imposed by State regulatory authorities that do not meet the criteria in the first rule of construction of administering a State law that requires the financial institution to comply with the BSA or otherwise authorizes the State authority to ensure that the institution complies with the BSA. According to the commenter, these State agencies request that copies of SARs filed with FinCEN be provided to the State authority.[20] The confidentiality provision and first rule of construction, as finalized, explicitly prohibit an institution from complying with such a request. Institutions should provide SAR information to only those entities specifically included in the rules of construction. In the event that a State agency that is not described in the rules of construction requires access to SAR information to exercise its authorities, that agency should seek access from FinCEN for such information. Institutions that are subject to such "dual filing requirements" from an unauthorized entity should contact FinCEN in accordance with the procedures of this rule.

Finally, multiple commenters requested assistance from FinCEN in discerning whether a request for SAR information comes from an appropriate party. For example, one commenter suggested that FinCEN develop a "standard request form" for law enforcement to use when requesting SAR information. Due to the variety of authorities to whom a SAR may be disclosed, the variety of purposes for which they may require SAR information, and the greater clarity already provided in the first rule of construction, FinCEN believes such a request to be impractical and unnecessary. Another commenter suggested FinCEN issue standard verification procedures for an institution to follow to determine who is an "appropriate" authority. In both the proposed rules and final rules, FinCEN has removed the term "appropriate" from the list of entities that could receive SAR information. This change from the previous SAR rules indicates FinCEN's intention to list explicitly in the first rule of construction all categories of authorities to whom an institution may provide SAR information without a subpoena. FinCEN believes this should greatly reduce the ambiguity surrounding requests. One commenter, however, requested confirmation that when an institution receives a request for disclosure of SAR information and contacts FinCEN and its regulator because of uncertainty regarding the requesting entity's status as an authority authorized by the first rule of construction, that the SAR should continue to be kept confidential as prescribed by the regulation. FinCEN agrees, but urges institutions in such a situation to quickly contact FinCEN for resolution.

2. The Second Rule of Construction

The second proposed rule of construction provided that the phrase, "a SAR or information that would reveal the existence of a SAR" does not include "the underlying facts, transactions, and documents upon which a SAR is based," which therefore are not subject to the confidentiality provision.

This proposed rule of construction included illustrative examples of situations where the underlying facts, transactions, and documents upon which a SAR is based may be disclosed. One commenter suggested that FinCEN clarify that the illustrative examples are not exhaustive, and that there may be other situations not prescribed in the rule where an institution may disclose the underlying facts, transactions, and documents upon which a SAR is based. FinCEN did not intend for these examples to be exhaustive and does not believe the text, as proposed, implies that the examples are exhaustive. The preamble to the proposed rules, for example, expressly stated that "these two examples are not intended to be an exhaustive list of all possible scenarios in which the disclosure of underlying information is permissible" and included a discussion of disclosure of underlying information that was not explicitly listed in the rule text. It stated that "while a financial institution is prohibited from producing documents in discovery that evidence the existence of a SAR, factual documents created in the ordinary course of business (for example, business records and account information upon which a SAR is based), may be discoverable in civil litigation under the Federal Rules of Civil Procedure.[21]

For purposes of clarity, however, FinCEN is modifying the final rule language to read "* * * the underlying facts, transactions, and documents upon which a SAR is based, including *but not limited to,* disclosures" expressly listed as illustrative examples in the rule. Accordingly, with respect to the SAR confidentiality provision only,[22] institutions may disclose underlying facts, transactions, and documents for any purpose, provided that no person involved in the transaction is notified and none of the underlying information reveals the existence of a SAR.

The first illustrative example in the proposed rules clarified that underlying information[23] may be disclosed to another financial institution, or any director, officer, employee, or agent of the financial institution, for the preparation of a joint SAR. This text is being adopted in the final rule, as

[20] Such "dual filing" requirements, regardless of whether the State authority examines for compliance with State laws requiring compliance with the BSA, are inherently inconsistent with 31 U.S.C. 5318(g)(4), which clearly intends that all SARs be filed to a single government agency designated by the Secretary of the Treasury.

[21] *See Cotton,* 235 F. Supp. 2d at 815.

[22] This sentence does not speak to any other laws or regulations governing a financial institution's responsibilities to maintain and protect information.

[23] FinCEN reminds institutions that the underlying facts, transactions, and documents upon which a SAR is based may include or reference previously filed SARs or other information that would reveal the existence of a SAR. Such underlying information could not be disclosed under this rule of construction.

proposed, and clarifies the authority for all institutions with a SAR requirement to jointly file SARs with any other institution with a SAR requirement.[24]

The second illustrative example in the proposed rule was included only in the final SAR rules for depository institutions, securities broker-dealers, futures commission merchants, and introducing brokers in commodities, and provided that such underlying information may be disclosed in certain written employment references and termination notices as authorized by section 351 of the USA PATRIOT Act.[25] One commenter suggested that this illustrative example should be placed in the SAR rules for all industries. The statutory authority for this provision, however, extends only to entities governed by either section 18(w) of the Federal Deposit Insurance Act or relevant rules of SROs registered with the SEC or the CFTC.[26]

One commenter asked FinCEN to allow the disclosure of SAR information to a party that has expressed interest in purchasing an institution. While FinCEN believes generally that such a disclosure is inconsistent with the purposes of the BSA, certain information, such as statistics or other underlying information that does not reveal the existence of a SAR, could be provided to such parties under the second rule of construction and could assist such purchasers with their due diligence obligations.

Another commenter suggested that FinCEN include another illustrative example of the disclosure of underlying facts, transactions, and documents not prohibited by the confidentiality provision. Specifically, this commenter asked that we explicitly authorize such information to be disclosed within an institution's corporate organizational structure for enterprise-wide risk management and the identification and reporting of suspicious activity. Provided that such information does not disclose a SAR or information that would reveal the existence of a SAR, FinCEN agrees that such disclosure of underlying information is not prohibited by the final rule or any previous SAR rules. Given the greater clarity provided by the phrase "including but not limited to" discussed previously, and the unnecessarily limited universe of entities to whom an institution could disclose underlying information suggested by the commenter,[27] FinCEN is reluctant to introduce the complex and potentially limiting concept of "corporate organizational structure" within this intentionally broad rule of construction.

3. The Third Rule of Construction

As proposed, the third rule of construction applied only to depository institutions, securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities, and made clear that the prohibition against the disclosure of SAR information did not preclude the sharing by any of those financial institutions, or any director, officer, employee, or agent of those institutions, of a SAR or information that would reveal the existence of the SAR within the institution's corporate organizational structure, for purposes that are consistent with Title II of the BSA, as determined by regulation or in guidance. This proposed rule of construction recognized that these financial institutions may find it necessary to share SAR information to fulfill reporting obligations under the BSA, and to facilitate more effective enterprise-wide BSA monitoring, reporting, and general risk-management. The term "share" used in this rule of construction was an acknowledgement that sharing within a corporate organization for purposes consistent with Title II of the BSA is distinguishable from a prohibited disclosure.

FinCEN received substantial comment about the issue of SAR sharing, much of which is addressed in the separate notice of availability of guidance published in today's **Federal Register**. In general, the comments requested an expansion of the sharing authorities with respect to both the parties permitted to share and the parties with whom SAR information could be shared. Most commenters provided a clear rationale for how expanded SAR sharing would benefit their institutions by increasing efficiency, cutting costs, and enhancing the detection and reporting of suspicious activity. Most commenters, however, failed to sufficiently address how they would mitigate effectively the risk of unauthorized disclosure of SAR information if the sharing authority was expanded to the extent requested.

Multiple commenters requested the expansion of the SAR sharing authority to all industries that currently have a SAR requirement, not just to depository institutions and the securities and futures industries. However, these commenters failed to address the disparity in regulatory oversight between those industries with a primary Federal functional regulator (industries to whom the proposed rules granted the authority to share) and those without. Accordingly, FinCEN is taking a phased approach in the final rule to granting additional industries the ability to share within their corporate organizational structure. To allow for potential future expansion of the sharing guidance, we are including the third rule of construction in the final rule text for all industries. As discussed further in the notice of availability of guidance, however, we have not at this time included those industries without a primary Federal functional regulator in the guidance authorizing sharing with affiliates. This approach establishes the regulatory framework for those industries potentially to share SAR information within their corporate structure in the future, as prescribed by FinCEN in regulation or guidance, without necessarily requiring an amendment to the SAR confidentiality provision in each industry's SAR rules.[28]

D. Disclosures by Government Authorities

In the proposed rule, FinCEN included a regulatory prohibition in each industry's SAR rule that created a prohibition against disclosure by all Federal, State, local, territorial, or Tribal government authorities, and any director, officer, employee, or agent of those authorities. The proposed rule

[24] On December 21, 2006, FinCEN and the Federal bank regulatory agencies announced that the format for the SAR form for depository institutions had been revised to support a new joint filing initiative to reduce the number of duplicate SARs filed for a single suspicious transaction. "Suspicious Activity Report (SAR) Revised to Support Joint Filings and Reduce Duplicate SARs," Joint Release issued by FinCEN, the FRB, the OCC, the OTS, the FDIC, and NCUA (Dec. 21, 2006). On February 17, 2006, FinCEN and the Federal bank regulatory agencies published a joint **Federal Register** notice seeking comment on proposed revisions to the SAR form. *See* 71 FR 8640. On April 26, 2007, FinCEN announced a delay in implementation of the revised SAR form until further notice. *See* 72 FR 23891. Until such time as a new SAR form is available that facilitates joint filing, institutions authorized to jointly file should follow FinCEN's guidance to use the words "joint filing" in the narrative of the SAR and ensure that both institutions maintain a copy of the SAR and any supporting documentation (*See, e.g., http://www.fincen.gov/statutes_regs/guidance/html/guidance_faqs_sar_10042006.html*).

[25] 31 U.S.C. 5318(g)(2)(B).

[26] *See,* 31 U.S.C. 5318(g)(2(B).

[27] Disclosure of underlying facts, transactions, and documents for compliance purposes to an entity *outside* of an institution's corporate organizational structure may be warranted and would not be prohibited, provided that a SAR or information that would reveal the existence of a SAR was not disclosed.

[28] At this time, we are also not expanding the 2006 guidance on sharing with head offices and controlling companies to additional industries. The regulatory framework provided in the final rule, however, also would facilitate the potential expansion of this authority to those industries in the future.

tracked the statutory language[29] closely by clarifying that any officer or employee of the government may not disclose a SAR or information that would reveal the existence of the SAR, "except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act."

This standard would permit, for example, official disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement or regulatory agency; a request from an appropriate Congressional committee or subcommittees; and prosecutorial disclosures mandated by statute or the Constitution, in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.[30] This proposed interpretation of section 5318(g)(2)(A)(ii) would ensure that SAR information will not be disclosed for a reason that is unrelated to the purposes of the BSA. For example, this standard would not permit the disclosure of SAR information to the media.

The proposed rules also specifically provide that "official duties consistent with Title II of the BSA" shall not include the disclosure of SAR information in response to a request for disclosure of non-public information[31] or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11. The BSA exists, in part, to protect the public's interest in an effective reporting system that benefits the nation by helping to assure that the U.S. financial system will not be used for criminal activity or to support terrorism. FinCEN believes that this purpose would be undermined by the disclosure of SAR information to a private litigant for use in a civil lawsuit for the reasons described earlier, including the reason that such disclosures could negatively impact full and candid reporting by financial institutions.

FinCEN is adopting the text, as proposed, while clarifying that the rule should not be read to preclude inter-governmental sharing of SAR information. For example, while a FinCEN employee would be precluded under this provision from disclosing SAR information if requested by the press under the Freedom of Information Act, it would not necessarily be outside of the FinCEN employee's official duties to provide that information to another government agency.

E. Disclosures by Self-Regulatory Organizations

In the proposed rules governing entities which may be examined for compliance with their SAR requirements by an SRO, FinCEN included a provision regarding disclosures by SROs that closely paralleled the provision regarding government disclosures. The language differed, however, to reflect the fact that self-regulatory organizations are not governmental entities. One commenter suggested that because SROs are not governmental entities but rather are subject to oversight by the SEC and CFTC, they cannot possess "official duties" in the same capacity as a government representative. Another comment submitted by an SRO requested that FinCEN expand, rather than limit, an SRO's authority to use and disclose SARs for all self-regulatory purposes. While FinCEN agrees that SROs are not government agencies, FinCEN believes it is not necessary to define the extent to which SROs possess "official duties" under 31 U.S.C. 5318(g)(2)(A)(ii) at this time. Instead, FinCEN has modified the language of the final rule text to comport with language from the first rule of construction by stating that SROs "shall not disclose * * * except as necessary to fulfill self-regulatory duties upon the request of [the Federal agency responsible for its oversight], in a manner consistent with title II of the BSA."

For consistency, we also are removing "official duties" from the subsequent sentences in the final rule (regarding the appropriate SRO response to requests for use in a private legal proceeding or for disclosure of non-public information) and using the same replacement language.

F. Limitation on Liability

In Section 351 of the USA PATRIOT Act, Congress amended section 5318(g)(3) to clarify that the scope of the safe harbor provision also includes the voluntary disclosure of possible violations of law and regulations to a government agency, and to expand the scope of the limit on liability to include any liability which may exist "under any contract or other legally enforceable agreement (including any arbitration agreement)." FinCEN tracked more closely the statutory language in the proposed rules, particularly by stating that the safe harbor applies to "disclosures" (and not "reports" as in some previous rulemakings) made by institutions.

Additionally, to comport with the authorization to jointly file SARs in the second rule of construction, FinCEN clarified that the safe harbor also applies to "a disclosure made jointly with another institution." This concept exists currently in those SAR rules where joint filing had been explicitly referenced, but has been revised to track more closely the statutory language. It was also inserted for the sake of consistency into those SAR rules where it had been absent previously, clarifying that all parties to a joint filing, and not simply the party that provides the form to FinCEN, fall within the scope of the safe harbor.

For consistency, FinCEN also separated the provision for confidentiality of reports and limitation of liability into two separate provisions in those rules for industries which previously contained both provisions under the single heading "confidentiality of reports; limitation of liability."

All comments received about the safe harbor provision encouraged making the provision as strong as possible. One commenter identified the statutory phrase, "to any person," that was not included in the proposed rules, and which FinCEN believes would strengthen the safe harbor provided by the final rule. The commenter correctly pointed out that the statutory safe harbor provision protects persons from liability not only to the person involved in the transaction, but also to any other person. Accordingly the final rule is being amended to insert the phrase "shall be protected from liability *to any person,* for any such disclosure * * *" and is otherwise being adopted as proposed, without change.

Another commenter requested that FinCEN expressly grant safe harbor to an institution that makes a determination not to file a SAR after investigating potentially suspicious activity. The statutory safe harbor provision, however, is clearly intended to protect persons involved in the filing of a voluntary or required SAR from civil liability only for filing the SAR and for refusing to provide notice of such filing. FinCEN cannot provide additional protection from liability for other actions.

G. Compliance

In the proposed rule, FinCEN streamlined the compliance provision by providing only that (1) FinCEN or its

[29] *See* 31 U.S.C. 5318(g)(2)(A)(ii).

[30] *See, e.g., Giglio* v. *United States,* 405 U.S. 150, 153–54 (1972); *Brady* v. *State of Maryland,* 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States,* 353 U.S. 657, 668 (1957).

[31] For purposes of this rulemaking, "non-public information" refers to information that is exempt from disclosure under the Freedom of Information Act.

delegatees [32] may examine the institution for compliance with the SAR requirement; (2) that a failure to satisfy the requirements of the SAR rule may constitute a violation of the BSA or BSA regulations; and (3) for depository institutions with parallel Title 12 SAR requirements, that failure to comply with FinCEN's SAR requirement may also constitute a violation of the parallel Title 12 rules. For consistency, the proposed rules also used only the heading "Compliance" for this provision in each of the SAR rules.[33] In the absence of any comments objecting to any of the proposed changes to the Compliance provision, FinCEN is adopting them as proposed, without change, in the final rule.

H. Technical Corrections and Harmonization

In addition to the changes described above in the Section-by-Section analysis, the final rule incorporates the proposed technical corrections to harmonize, where appropriate, each of FinCEN's seven SAR rules with each other and with those being issued by some of the Federal bank regulatory agencies. FinCEN believes that such efforts will simplify compliance with SAR reporting requirements.

In the final rule for each industry, FinCEN is making one such change that had not been proposed. FinCEN is amending the paragraph entitled "retention of records" so that the standard for the disclosure of a SAR's supporting documentation to appropriate governmental authorities comports with the standard found in the first rule of construction. Because the supporting documentation is deemed to have been filed with the SAR but kept in custody by the financial institution, this change is necessary to ensure that all types of SAR information are subject to the same standard of confidentiality. This comporting change is consistent with the substance of the proposed rule text, as addressed through public comment.

For the mutual fund SAR rule only, this comporting change results in striking language regarding supporting documentation for a SAR jointly filed with a broker-dealer in securities being made available by the mutual fund to the SRO of the broker-dealer. This change is consistent with FinCEN's treatment elsewhere in the final rule of regulatory authorities' ability to request SAR information from entities they do not regulate.[34]

V. Other Issues

A. Requests for Guidance

One commenter requested additional guidance from FinCEN regarding additional situations under which a SAR could be disclosed, but did not provide any examples of the "unclear and vague" issues that remained. It is FinCEN's intent, and one of the underlying motivations for this rulemaking, that the rules of construction, as finalized, constitute clearly all of the circumstances under which an institution may disclose SAR information to, or share SAR information with, a third party.

Additional commenters requested guidance regarding the appropriate use of SARs by agents of financial institutions. Examples of such agents suggested by one commenter included independent auditors or other contracted service providers (information technology, legal counsel, *etc.*). Another commenter requested similar clarification regarding the use of SAR information by transfer agents or other third party service providers in the context of mutual funds. FinCEN reiterates from the notices that nothing in the final rule or accompanying guidance supersedes any of FinCEN's previous written guidance or the adopting release for the mutual fund SAR rule.[35]

FinCEN also recognizes, particularly in the context of the money services business ("MSB") industry, potential concerns regarding confidentiality and the principal-agent relationship when both parties are subject to a SAR rule. Nothing in the final rule is intended to preclude the disclosure of SAR information within the United States between an agent-MSB and its principal-MSB.[36]

FinCEN is considering additional guidance on each of these matters. Until such guidance is issued, however, FinCEN reminds institutions of their ultimate responsibility to protect, through reasonable controls or agreements with such agents, the confidentiality of a SAR, or any information that would reveal the existence of a SAR, as prescribed in the final rule.

B. Comments Outside the Scope of This Rulemaking

FinCEN received multiple comments making suggestions relevant to, but outside the scope of, this final rule. One commenter, for example, requested that FinCEN grant greater electronic access of all BSA data to certain SROs. Similarly, one government agency requested an expansion of the universe of BSA data available to them electronically. Prior to the issuance of the proposed rules, FinCEN was considering each of these issues in a context other than within this rulemaking. FinCEN will continue such efforts apart from this rulemaking. Another commenter's suggestion for FinCEN-issued guidance regarding what constitutes "supporting documentation" of a SAR also had been addressed outside this rulemaking.[37]

Finally, one commenter from a large trade organization stated that the organization interpreted the proposals to have authorized international outsourcing of compliance functions related to suspicious activity reporting. FinCEN was intentionally silent on the issue in the proposed rules, and has been studying the issue while considering additional future guidance with respect to outsourcing. Like the proposed rules, this final rulemaking takes no position on the matter.

VI. Location in Chapter X

As discussed in **Federal Register** Notice, 75 FR 65806, October 26, 2010, FinCEN will be removing Part 103 of

[32] In the case of the SEC and the CFTC, that authority may be further delegated to SROs.

[33] Identical section in separate SAR rules had been titled "Compliance" or "Examination and Enforcement" prior to the proposed rule.

[34] *See* the earlier preamble discussion of "civil enforcement authorities" under the first rule of construction, including the ability of a regulator to obtain supporting documentation from FinCEN or the supervisor of an institution in cases where its own authorities are limited.

[35] Specifically, we note that in both the mutual fund SAR rule adopting release (71 FR 26213) and the October 2006 guidance, (*http://www.fincen.gov/statutes_regs/guidance/pdf/guidance_faqs_sar_10042006.pdf*), FinCEN acknowledged the role of transfer agents and other service providers and their access to SAR information in the context of the suspicious activity monitoring, detection, and reporting obligations of mutual funds. These service providers may be unaffiliated or affiliated with the mutual funds. The October 2006 guidance and adopting release clarified that a mutual fund may contractually delegate its SAR functions to such an agent, although the mutual fund remains responsible for assuring compliance with the rule, and therefore must monitor actively the performance of its reporting obligations. In those same documents, FinCEN acknowledged the role of an investment adviser that controls a mutual fund and its access to SAR information in the context of enterprise-wide risk management and compliance functions.

[36] An agent and principal should only disclose SAR information with respect to transactions common to both parties. For example, an independent currency exchanger may not disclose suspicious activity regarding currency exchange to its principal MSB for money transmission, unless there is a nexus between the currency exchange and money transmission activity. Additionally, FinCEN has not authorized at this time the sharing of SAR information between multiple agents of the same principal MSB.

[37] *See* Suspicious Activity Report Supporting Documentation. June 13, 2007. *http://www.fincen.gov/statutes_regs/guidance/html/Supporting_Documentation_Guidance.html.*

Chapter I of Title 31, Code of Federal Regulations, and adding Parts 1000 to 1099 (Chapter X) effective March 1, 2011. Per that final rule, the changes in the present rule will be reorganized according to Chapter X within a separate technical amendment to Chapter X in advance of the March 1, 2011 effective date. The upcoming reorganization will have no substantive effect on the regulatory changes herein. The regulatory changes of this specific rulemaking would be renumbered according to Chapter X as follows:

- § 103.15 would be moved to § 1024.320;
- § 103.16 would be moved to § 1025.320;
- § 103.17 would be moved to § 1026.320;
- § 103.18 would be moved to § 1020.320;
- § 103.19 would be moved to § 1023.320;
- § 103.20 would be moved to § 1022.320; and
- § 103.21 would be moved to § 1021.320.

VII. Regulatory Matters

A. Executive Order 12866

The final rule is a significant regulatory action for purposes of Executive Order 12866.

B. Paperwork Reduction Act Notices

The final rule does not contain any "collections of information" as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1).

C. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), FinCEN certifies that this final regulation will not have a significant economic impact on a substantial number of small entities. The regulatory changes in this rulemaking affect only the disclosure provisions of the current rules relating to the reporting of suspicious activity by financial institutions, and do not change any requirement to file or maintain a report. In the context of disclosure, the rulemaking clarifies, rather than adding to, existing regulatory provisions regarding the confidentiality of suspicious activity reports. FinCEN therefore expects little or no economic impact to result from the final rule. Accordingly, a regulatory flexibility analysis is not required.

D. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate 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 in any one year. The current inflation-adjusted expenditure threshold is $133 million. If a budgetary impact statement is required, § 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

FinCEN has determined that the proposed rules will not result in expenditures by State, local, and Tribal governments, or by the private sector, of $133 million or more in any one year. Accordingly, this proposal is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 31 CFR Part 103

Administrative practice and procedure, Authority delegations (government agencies), Crime, Currency, Investigations, Law enforcement, Reporting and recordkeeping requirements, Security measures.

Authority and Issuance

■ For the reasons set forth in the preamble, 31 CFR Part 103 is amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314 Pub. L. 107–56, 115 Stat. 307.

■ 2. Section 103.15 is amended by:

■ a. Revising the last sentence of paragraph (c); and

■ b. Revising paragraphs (d), (e), and (f), to read as follows:

§ 103.15 Reports by mutual funds of suspicious transactions.

* * * * *

(c) * * * The mutual fund shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the mutual fund for compliance with the Bank Secrecy Act, upon request..

(d) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by mutual funds.* (i) *General rule.* No mutual fund, and no director, officer, employee, or agent of any mutual fund, shall disclose a SAR or any information that would reveal the existence of a SAR. Any mutual fund, and any director, officer, employee, or agent of any mutual fund that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (d)(1) shall not be construed as prohibiting:

(A) The disclosure by a mutual fund, or any director, officer, employee, or agent of a mutual fund, of:

(1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the mutual fund for compliance with the Bank Secrecy Act; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(B) The sharing by a mutual fund, or any director, officer, employee, or agent of the mutual fund, of a SAR, or any information that would reveal the existence of a SAR, within the mutual fund's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or Tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, "official duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in

response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(e) *Limitation on liability.* A mutual fund, and any director, officer, employee, or agent of any mutual fund, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(f) *Compliance.* Mutual funds shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

■ 3. Section 103.16 is amended by:
■ a. Revising the last sentence of paragraph (e);
■ b. Revising paragraph (f);
■ c. Redesignating paragraphs (g) through (i) as paragraphs (h) through (j);
■ d. Adding new paragraph (g); and
■ e. Revising newly designated paragraph (h), to read as follows:

§ 103.16 Reports by insurance companies of suspicious transactions.

* * * * *

(e) * * * An insurance company shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the insurance company for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the insurance company to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the institution complies with the Bank Secrecy Act, upon request.

(f) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (f). For purposes of this paragraph (f) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by insurance companies.* (i) *General rule.* No insurance company, and no director, officer, employee, or agent of any insurance company, shall disclose a SAR or any information that would reveal the existence of a SAR. Any insurance company, and any director, officer, employee, or agent of any insurance company that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (f)(1) shall not be construed as prohibiting:

(A) The disclosure by an insurance company, or any director, officer, employee, or agent of an insurance company, of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the insurance company for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the insurance company to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the institution complies with the Bank Secrecy Act; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.

(B) The sharing by an insurance company, or any director, officer, employee, or agent of the insurance company, of a SAR, or any information that would reveal the existence of a SAR, within the insurance company's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or Tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, "official duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(g) *Limitation on liability.* An insurance company, and any director, officer, employee, or agent of any insurance company, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(h) *Compliance.* Insurance companies shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

■ 4. Section 103.17 is amended by revising the last sentence in paragraph (d), and all of paragraphs (e), (f), and (g) to read as follows:

§ 103.17 Reports by futures commission merchants and introducing brokers in commodities of suspicious transactions.

* * * * *

(d) * * * An FCM or IB–C shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the FCM or IB–C for compliance with the BSA, upon request; or to any registered futures association or registered entity (as defined in the Commodity Exchange Act, 7 U.S.C. 21 and 7 U.S.C. 1(a)(29)) (collectively, a self-regulatory organization ("SRO")) that examines the FCM or IB–C for compliance with the requirements of this section, upon the request of the Commodity Futures Trading Commission.

(e) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by futures commission merchants and introducing brokers in commodities.* (i) *General rule.* No FCM or IB–C, and no director, officer, employee, or agent of

any FCM or IB–C, shall disclose a SAR or any information that would reveal the existence of a SAR. Any FCM or IB–C, and any director, officer, employee, or agent of any FCM or IB–C that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting:

(A) The disclosure by an FCM or IB–C, or any director, officer, employee, or agent of an FCM or IB–C, of:

(1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the FCM or IB–C for compliance with the BSA; or to any SRO that examines the FCM or IB–C for compliance with the requirements of this section, upon the request of the Commodity Futures Trading Commission; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures:

(i) To another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(ii) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by an FCM or IB–C, or any director, officer, employee, or agent of the FCM or IB–C, of a SAR, or any information that would reveal the existence of a SAR, within the FCM's or IB–C's corporate organizational structure for purposes consistent with Title II of the BSA as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or Tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the BSA. For purposes of this section, "official duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(3) *Prohibition on disclosures by Self-Regulatory Organizations.* Any self-regulatory organization registered with or designated by the Commodity Futures Trading Commission, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR except as necessary to fulfill self-regulatory duties upon the request of the Commodity Futures Trading Commission, in a manner consistent with Title II of the BSA. For purposes of this section, "self-regulatory duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding.

(f) *Limitation on liability.* An FCM or IB–C, and any director, officer, employee, or agent of any FCM or IB–C, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(g) *Compliance.* FCMs or IB–Cs shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

■ 5. Section 103.18 is amended by:

■ a. Revising the last sentence of paragraph (d); and

■ b. Revising paragraphs (e) and (f); and

■ c. Adding new paragraph (g), to read as follows:

§ 103.18 Reports by banks of suspicious transactions.

* * * * *

(d) * * * A bank shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the bank for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the bank to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the institution complies with the Bank Secrecy Act, upon request.

(e) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by banks.* (i) *General rule.* No bank, and no director, officer, employee, or agent of any bank, shall disclose a SAR or any information that would reveal the existence of a SAR. Any bank, and any director, officer, employee, or agent of any bank that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting:

(A) The disclosure by a bank, or any director, officer, employee, or agent of a bank, of:

(1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the bank for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the bank to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the bank complies with the Bank Secrecy Act; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures:

(i) To another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(ii) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a bank, or any director, officer, employee, or agent of the bank, of a SAR, or any information that would reveal the existence of a SAR, within the bank's corporate organizational structure for purposes consistent with Title II of the Bank

Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or Tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, "official duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(f) *Limitation on liability.* A bank, and any director, officer, employee, or agent of any bank, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(g) *Compliance.* Banks shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part. Such failure may also violate provisions of Title 12 of the Code of Federal Regulations.

■ 6. Section 103.19 is amended by revising the last sentence in paragraph (d), and all of paragraphs (e), (f), and (g) to read as follows:

§ 103.19 Reports by brokers or dealers in securities of suspicious transactions.

* * * * *

(d) * * * A broker-dealer shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the broker-dealer for compliance with the Bank Secrecy Act, upon request; or to any SRO that examines the broker-dealer for compliance with the requirements of this section, upon the request of the Securities and Exchange Commission.

(e) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by brokers or dealers in securities.* (i) *General rule.* No broker-dealer, and no director, officer, employee, or agent of any broker-dealer, shall disclose a SAR or any information that would reveal the existence of a SAR. Any broker-dealer, and any director, officer, employee, or agent of any broker-dealer that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting:

(A) The disclosure by a broker-dealer, or any director, officer, employee, or agent of a broker-dealer, of:

(1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the broker-dealer for compliance with the Bank Secrecy Act; or to any SRO that examines the broker-dealer for compliance with the requirements of this section, upon the request of the Securities Exchange Commission; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures:

(i) To another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(ii) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a broker-dealer, or any director, officer, employee, or agent of the broker-dealer, of a SAR, or any information that would reveal the existence of a SAR, within the broker-dealer's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or Tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, "official duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(3) *Prohibition on disclosures by Self-Regulatory Organizations.* Any self-regulatory organization registered with the Securities and Exchange Commission, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR except as necessary to fulfill self-regulatory duties with the consent of the Securities Exchange Commission, in a manner consistent with Title II of the Bank Secrecy Act. For purposes of this section, "self-regulatory duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding.

(f) *Limitation on liability.* A broker-dealer, and any director, officer, employee, or agent of any broker-dealer, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(g) *Compliance.* Broker-dealers shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

■ 7. Section 103.20 is amended by:
■ a. Revising the last sentence of paragraph (c);
■ b. Revising paragraph (d);
■ c. Redesignating paragraphs (e) and (f) as paragraphs (f) and (g);
■ d. Adding new paragraph (e); and
■ e. Revising newly designated paragraph (f), to read as follows:

§ 103.20 Reports by money services businesses of suspicious transactions.

* * * * *

(c) * * * A money services business shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the money services business for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the money services business to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the money services business complies with the Bank Secrecy Act.

(d) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by money services businesses.* (i) *General rule.* No money services business, and no director, officer, employee, or agent of any money services business, shall disclose a SAR or any information that would reveal the existence of a SAR. Any money services business, and any director, officer, employee, or agent of any money services business that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (d)(1) shall not be construed as prohibiting:

(A) The disclosure by a money services business, or any director, officer, employee, or agent of a money services business, of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the money services business for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the money services business to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the money services business complies with the Bank Secrecy Act; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.

(B) The sharing by a money services business, or any director, officer, employee, or agent of the money services business, of a SAR, or any information that would reveal the existence of a SAR, within the money services business's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or Tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, "official duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(e) *Limitation on liability.* A money services business, and any director, officer, employee, or agent of any money services business, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(f) *Compliance.* Money services businesses shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

■ 8. Section 103.21 is amended by:

■ a. Revising the last sentence of paragraph (d);

■ b. Revising paragraph (e);

■ c. Redesignating paragraphs (f) and (g) as paragraphs (g) and (h);

■ d. Adding new paragraph (f); and

■ e. Revising newly designated paragraph (g).

§ 103.21 Reports by casinos of suspicious transactions.

* * * * *

(d) * * * A casino shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the casino for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the casino to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the casino complies with the Bank Secrecy Act, or any Tribal regulatory authority administering a Tribal law that requires the casino to comply with the Bank Secrecy Act or otherwise authorizes the Tribal regulatory authority to ensure that the casino complies with the Bank Secrecy Act, upon request.

(e) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by casinos.* (i) *General rule.* No casino, and no director, officer, employee, or agent of any casino, shall disclose a SAR or any information that would reveal the existence of a SAR. Any casino, and any director, officer, employee, or agent of any casino that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting:

(A) The disclosure by a casino, or any director, officer, employee, or agent of a casino, of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the casino for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that

requires the casino to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the casino complies with the Bank Secrecy Act, or any Tribal regulatory authority administering a Tribal law that requires the casino to comply with the Bank Secrecy Act or otherwise authorizes the Tribal regulatory authority to ensure that casino complies with the Bank Secrecy Act; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.

(B) The sharing by a casino, or any director, officer, employee, or agent of the casino, of a SAR, or any information that would reveal the existence of a SAR, within the casino's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or Tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act (BSA). For purposes of this section, "official duties" shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(f) *Limitation on liability.* A casino, and any director, officer, employee, or agent of any casino, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(g) *Compliance.* Casinos shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

Dated: November 22, 2010.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2010–29869 Filed 12–2–10; 8:45 am]

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DEPARTMENT OF THE TREASURY

31 CFR Part 103

[Docket Number: Treas-FinCEN–2008–0022]

Notice of Availability of Final Interpretative Guidance—Sharing Suspicious Activity Reports by Depository Institutions and Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, or Introducing Brokers in Commodities With Certain U.S. Affiliates

AGENCY: Financial Crimes Enforcement Network ("FinCEN"), Treasury.

ACTION: Interpretive guidance.

SUMMARY: By this notice, FinCEN announces the availability of two related pieces of guidance that apply to depository institutions and to securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities (collectively referred to as "final guidance") interpreting the final rule published elsewhere in this part of today's **Federal Register**. Among other things, the final rule clarifies the scope of the statutory prohibition on the disclosure by a financial institution of a report of a suspicious transaction set forth in the Bank Secrecy Act ("BSA") by stating that the confidentiality provision does not apply when a depository institution, securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities (hereafter, "an authorized institution") shares a suspicious activity report ("SAR"), or any information that would reveal the existence of a SAR, within its corporate organizational structure for purposes consistent with Title II of the BSA, as determined by regulation or guidance. The final guidance interprets this provision to permit an authorized institution to share a SAR, or information that would reveal the existence of a SAR (collectively, "SAR information"), with certain affiliates.

DATES: This final guidance is effective January 3, 2011.

ADDRESSES: The final guidance is available in the U.S. Government's electronic docket site at *http://www.regulations.gov* under the under docket number TREAS–2008–0022 and on FinCEN's Web site at *http://www.fincen.gov.*

FOR FURTHER INFORMATION CONTACT: FinCEN's Regulatory Helpline, (800) 949–2732.

SUPPLEMENTARY INFORMATION:

I. Background

FinCEN, through its authority under the BSA, as delegated by the Secretary of the Treasury, may require financial institutions to keep records and file reports that FinCEN determines have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or for intelligence or counter-intelligence activities to protect against international terrorism. In particular, the BSA and its implementing regulations require financial institutions in certain industries [1] to file a SAR when they detect a known or suspected violation of Federal law or regulation, or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[2]

II. The Notice of Proposed Guidance and Related Actions

On March 9, 2009, FinCEN published in the **Federal Register** a notice of proposed rulemaking ("the proposed rule") and two separate notices and requests for comment on proposed guidance ("the proposed guidance") (collectively, "the notices"). In the proposed rule, FinCEN proposed amendments to each of FinCEN's SAR rules [3] to include key changes that would, among other things, clarify the scope of the statutory prohibition against the disclosure by a financial institution of a SAR.

[1] FinCEN has implemented regulations for suspicious activity reporting at 31 CFR 103.15 (for mutual funds); 31 CFR 103.16 (for insurance companies); 31 CFR 103.17 (for futures commission merchants and introducing brokers in commodities); 31 CFR 103.18 (for banks); 31 CFR 103.19 (for broker-dealers in securities); 31 CFR 103.20 (for money services businesses); 31 CFR 103.21 (for casinos).

[2] The Annunzio-Wylie Anti-Money Laundering Act of 1992 (the Annunzio-Wylie Act), amended the BSA and authorized the Secretary of the Treasury to require financial institutions to report suspicious transactions relevant to a possible violation of law or regulation. *See* Public Law 102–550, Title XV, § 1517(b), 106 Stat. 4055, 4058–9 (1992); 31 U.S.C. 5318(g)(1).

[3] FinCEN's SAR rules include 31 CFR 103.15 (for mutual funds); 31 CFR 103.16 (for insurance companies); 31 CFR 103.17 (for futures commission merchants and introducing brokers in commodities); 31 CFR 103.18 (for banks); 31 CFR 103.19 (for broker-dealers in securities); 31 CFR 103.20 (for money services businesses); 31 CFR 103.21 (for casinos).

In separate but contemporaneous rulemakings, some of the Federal bank regulatory agencies [4] proposed amending their SAR rules to incorporate comparable provisions to FinCEN's proposed rules, and amending their information disclosure regulations [5] to clarify that the exclusive standard governing the release of a SAR, or any information that would reveal the existence of a SAR, is set forth in the confidentiality provisions of their respective SAR rules.

The proposed rule included a provision which states that the confidentiality provision does not apply when a bank shares a SAR, or any information that would reveal the existence of a SAR, within its corporate organizational structure for purposes consistent with Title II of the BSA, as determined by regulation or guidance. The proposed guidance interpreted this provision to permit a bank to share a SAR with certain affiliates, subject to certain qualifications.

The notices and related Federal bank regulatory agency actions were published in their own separate part of the **Federal Register** to encourage commenters to take into account all relevant provisions.

III. Comments

The comment period for the notices ended on June 8, 2009. We received a total of 26 submissions from 25 distinct entities.[6] Of these, 15 were submitted by trade groups or associations, four were submitted by individual financial institutions, three were submitted by Federal, tribal, or foreign government agencies, three were submitted by consultants or attorneys not affiliated with a specific financial institution, and one was submitted by a self regulatory organization ("SRO"). The comments generally supported the proposed rules [7] while requesting the broadening of the proposed sharing guidance.

A. Definition of "Affiliate"

FinCEN did not receive any comments that were critical of its proposed definition of "affiliate." One commenter, however, did ask FinCEN to treat all of the subsidiaries of a bank holding company not as affiliates, but as the same legal entity, for purposes of SAR confidentiality. The commenter believed this would authorize the entire corporate family held by a bank holding company to share SAR information with each other. Due to the impropriety of arbitrarily creating such a provision for bank holding companies only, and the imprecise legal construct the commenter has conceived, FinCEN is not compelled to accommodate this request. Accordingly, FinCEN is adopting as proposed the definition of affiliate.[8]

B. The Universe of Entities To Whom the Final Guidance is Applicable

Multiple commenters requested the expansion of the SAR sharing authority to all industries that currently have a FinCEN SAR requirement, not just to the authorized institutions proposed. These commenters suggested that institutions and the government would benefit from such expansion by increasing efficiency, cutting costs, and enhancing the detection and reporting of suspicious activity. FinCEN recognizes the importance of a robust and efficient enterprise-wide compliance function, and is committed to facilitating such through rulemaking and guidance whenever possible. Most commenters, however, failed to sufficiently address how they would mitigate effectively the risk of unauthorized disclosure of SAR information if the sharing authority was expanded to the extent requested.

FinCEN is particularly concerned about unauthorized disclosure of SAR information due to the disparity in regulatory oversight between those industries with a primary Federal functional regulator [9] (industries to whom the proposed rules granted the authority to share, and for whom the guidance was proposed) and those without. Were the guidance expanded to include all industries, FinCEN would be unable to ensure, in the absence of regular examination of all institutions within those industries, that SAR information was being disclosed in accordance with the final rule and final guidance. Due to the particular sensitivities associated with SAR information, and the potentially grave consequences of inappropriate disclosure,[10] FinCEN does not believe that the potential benefits of expanding the guidance to additional industries warrant such an expansion at this time.[11]

To facilitate a potential future expansion of the guidance, however, FinCEN is taking a phased approach in the final rule and final guidance to granting additional industries the ability to share within their corporate organizational structure. In the final rule text published separately in today's **Federal Register**, we included for all industries the rule of construction for sharing within an institution's corporate organizational structure. We are not expanding the final guidance at this time, however, to include additional industries without a primary Federal functional regulator.[12] This phased approach establishes the regulatory framework for those industries potentially to share SAR information within their corporate structure in the future, as prescribed by FinCEN in regulation or guidance, without necessarily requiring an amendment to the SAR confidentiality provision in each industry's SAR rules.

Some commenters also asked FinCEN to authorize "two-way sharing," a concept they described as an affiliate of an authorized institution (*i.e.,* a party to which the authorized institution could share SAR information) being able to share SAR information with the authorized institution. Under the final

[4] The Federal Bank Regulatory Agencies include the Board of Governors of the Federal Reserve ("FRB"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA").

[5] Generally, these regulations are known as "Touhy regulations," after the Supreme Court's decision in *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. As such, an agency's Touhy regulations are the instructions agency employees must follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

[6] All comments to the notices are available for public viewing at *http:*//www.regulations.gov or *http://www.fincen.gov/statutes_regs/bsa/regs_proposal_comment.html.*

[7] Comments about the proposed rules are addressed separately in the related Final Rule published by FinCEN in today's **Federal Register.**

[8] To accommodate specific industry terms and practices, the definition in the guidance for banks contains slight differences from the definition in the guidance for the securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities.

[9] For purposes of this guidance, primary Federal functional regulator includes the Federal bank regulatory agencies, the Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission ("CFTC").

[10] For a more complete discussion of the importance of SAR confidentiality, and the potential consequences of lapses in such, see the relevant discussion in the final rule preamble published in this same part of today's **Federal Register**.

[11] Institutions are reminded that the final rule, published in this same part of today's **Federal Register**, contains a rule of construction for all industries authorizing the disclosure of "underlying facts, transactions, and documents upon which a SAR is based." Therefore, although FinCEN is not authorizing SAR sharing with affiliates for all industries at this time, FinCEN has recognized an alternative vehicle to accomplishing many enterprise-wide compliance functions.

[12] For similar reasons, we are also not expanding the 2006 guidance on sharing with head offices, controlling company, or parent entities to additional industries at this time.

guidance, such sharing would be permitted only when both affiliated institutions are either a depository institution, a securities broker-dealer, a mutual fund, a futures commission merchant, or an introducing broker in commodities. Based on FinCEN's determination not to expand the final guidance to authorize additional industries to share SAR information with affiliates, "two-way sharing" is not permissible by an affiliate that is not an authorized institution, even if the affiliate intends to share SAR information only with authorized institutions.

Commenters also asked that an affiliate of an authorized institution that receives shared SAR information be authorized to further share that SAR information with its affiliates. FinCEN cannot comply with this request, noting that the guidance only authorizes an institution "that has filed a SAR [to] share the SAR, or any information that would reveal the existence of the SAR, with certain affiliates." Because a receiving affiliate is not the filing institution, it may not further share received SAR information. Additionally, in cases where there is no affiliate relationship between the authorized institution and its affiliate's affiliate, further sharing by the receiving affiliate would indirectly cause SAR information to be shared outside of the filing institution's corporate organizational structure, as defined in the guidance.

C. The Universe of Entities to Whom a SAR May Be Shared

Several commenters asked FinCEN to expand the scope of the guidance to include additional parties to whom SAR information may be shared. For example, several commenters asked FinCEN to allow unrestricted sharing with all affiliates within an institution's corporate organizational structure by removing the limitation on sharing only with affiliates subject to a SAR requirement. One of these commenters suggested that institutions should be able to share with any affiliates at least as much information as unaffiliated institutions are authorized to share under Section 314(b) information sharing authorities.[13] FinCEN notes that the final rule may permit the disclosure of such information to any affiliate financial institution, apart from this final guidance, under the rule of construction regarding disclosures of underlying facts, transactions, and documents upon which a SAR is based. However, FinCEN cautions institutions that sharing between affiliates of such information outside the 314(b) process would not be afforded the relevant 314(b) safe harbor. Similarly, when sharing underlying facts, transactions, and documents there would be no SAR safe harbor, which applies only to disclosures (SAR filings) made to the government and to the refusal to disclose SAR information to an inappropriate party.

Other commenters supporting the removal of the requirement that an authorized institution share only with affiliates subject to a SAR stated that institutions could ensure the confidentiality of SAR information once shared with an affiliate not subject to a SAR rule through confidentiality agreements or other security controls. FinCEN does not agree. Given the potentially significant consequences of unauthorized disclosure by an entity in possession of a SAR that is not subject to a SAR rule, the lack of oversight and enforcement powers of FinCEN with respect to such parties, and the significant exposure to liability to which the sharing institution could be exposed, FinCEN believes that authorizing sharing with affiliates without a SAR requirement at this time would be inconsistent with the purposes of the BSA.

Multiple commenters, including some trade organizations, also objected to the requirement that affiliates be subject to a SAR requirement, as this precludes the sharing of SAR information with foreign affiliates that are within an institution's corporate organizational structure. Commenters reasoned that since FinCEN's 2006 Guidance permitted sharing with a foreign head office, controlling company, or parent entity despite concerns that the SAR could become discoverable under the laws of a foreign jurisdiction, sharing with a foreign affiliate should also be permitted despite such concerns. FinCEN disagrees. A foreign head office, controlling company, or parent entity may have oversight responsibilities with respect to enterprise-wide risk management and compliance with laws and regulations. These responsibilities may include a valid need to review compliance by U.S.-based financial institutions with legal requirements to identify and report suspicious activity.

FinCEN believes that the responsibilities of the foreign head office, controlling company, or parent entity in certain jurisdictions may outweigh concerns of a SAR becoming subject to the laws of that jurisdiction,[14] and that in such circumstances the sharing of SARs is consistent with the purposes of the BSA. The same circumstances do not yet apply to foreign affiliates. FinCEN believes that the need to prevent a SAR from becoming subject to the laws of a foreign jurisdiction significantly outweighs any limited need for a foreign affiliate to obtain SAR information. Furthermore, nothing in this guidance or the final rule prevents an authorized institution from sharing underlying facts, transactions, and documents upon which the SAR is based with foreign affiliates, provided that neither the SAR, nor information that would reveal the existence of a SAR, is disclosed. Accordingly, the final guidance does not permit the sharing of SAR information, even by authorized institutions, with their foreign affiliates at this time.

For similar reasons, FinCEN is not incorporating into the final guidance another commenter's suggestion that a bank be authorized to share SAR information with its foreign branches. FinCEN believes that neither a U.S. bank, nor its foreign branch, has sufficient need to share or receive SAR information that would outweigh concerns over SAR information becoming subject to the laws of a foreign jurisdiction and that sharing in such circumstances, at this time, is inconsistent with the purposes of the BSA.

One commenter, perhaps anticipating our reluctance to authorize the international sharing of SAR information, encouraged FinCEN to work with other jurisdictions to ensure equal SAR sharing capabilities for financial institutions in those jurisdictions, and between financial institutions in the United States and financial institutions in foreign jurisdictions. The commenter suggested FinCEN seek to harmonize its SAR rules, and relevant confidentiality authorities, with the rules and provisions of foreign jurisdictions. FinCEN engages regularly with foreign jurisdictions on these issues, and has been vocal about its efforts to promote an international regulatory climate

[13] Section 314(b) of the USA PATRIOT Act authorized the sharing of information relating to suspected terrorist or money laundering activities between financial institutions, and created a safe harbor for such sharing. Neither Section 314(b) nor its implementing regulation at 31 CFR 103.110 explicitly authorizes the sharing of a SAR, or information that would reveal the existence of a SAR.

[14] Accordingly, the 2006 guidance authorized the sharing of a SAR with such foreign entities, while clarifying that depository and securities/futures institutions may be liable for direct or indirect disclosure by the foreign head office, controlling company, or parent entity. The guidance also required that depository or securities/futures institutions must protect the confidentiality of the SAR and obtain written confidentiality agreements to ensure the confidentiality of the SAR is protected by the foreign recipient of the SAR.

under which the authority for financial institutions to share SAR information could be broadened significantly.

D. Confidentiality Agreements

Multiple commenters questioned the need to have a written confidentiality agreement in place between sharing affiliates. The proposed guidance included a provision that stated that sharing affiliates should have written confidentiality agreements in place. Commenters noted that they should be able to utilize or modify their existing confidentiality processes and procedures for sensitive information, and that requiring "written agreements" unnecessarily burdened financial institutions by being overly prescriptive with respect to an objective that could be accomplished through various means. FinCEN believes that this is a reasonable request, particularly since the final guidance allows sharing only with affiliates subject to a SAR rule. The existing confidentiality requirements prescribed in those rules significantly mitigates the risk of a recipient of shared SAR information further disclosing that information. Therefore, the final guidance has been amended to state that an institution, "as part of its internal controls, should have policies and procedures to ensure that its affiliates protect the confidentiality of a SAR." [15]

E. Consistency With the Final Rule Language

As discussed in more detail in the final rule published elsewhere in today's **Federal Register**, FinCEN made several changes to the proposed rule based on the comments received. In several instances, the proposed guidance quoted or referenced language from the proposed rules. In the final guidance, we are making comporting changes to ensure consistency with the final rule. None of these changes substantively impact the authority to share SAR information with affiliates.

F. Guidance

Excluding those changes specifically referenced in the above preamble to this notice of availability of guidance, the final guidance is being adopted, as proposed. FinCEN is making this final guidance available on its Web site today.[16]

Dated: November 22, 2010.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2010–29884 Filed 12–2–10; 8:45 am]

BILLING CODE 4810–02–P

[15] This in no way alters the confidentiality agreement requirement imposed in FinCEN's January 20, 2006 "Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices and Controlling Companies" and the "Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures Commission Merchants, and Introducing Brokers in Commodities." FinCEN notes that entities to which an institution is authorized to share in the 2006 guidance may not be subject to a SAR rule. Accordingly, a depository or securities/futures institution that shares a SAR, or information that would the reveal the existence of a SAR to a head office, controlling company, or parent entity must have a confidentiality agreement in place.

[16] Initially, the final guidance will appear under the *What's New* tab. Institutions can also find the final guidance under the *Guidance* Section of the *Financial Industry* tab or under the appropriate *Industry* tab.

Federal Register

Friday,
December 3, 2010

Part IV

The President

Proclamation 8607—Critical Infrastructure Protection Month, 2010

Proclamation 8608—Helsinki Human Rights Day, 2010

Proclamation 8609—World AIDS Day, 2010

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Presidential Documents

Title 3—

The President

Proclamation 8607 of November 30, 2010

Critical Infrastructure Protection Month, 2010

By the President of the United States of America

A Proclamation

During Critical Infrastructure Protection Month, we highlight the vast network of systems and structures that sustain the vigor and vitality of our Nation. Critical infrastructure includes the assets, networks, and functions—both physical and virtual—essential to the security, economic welfare, public health, and safety of the United States.

The Department of Homeland Security leads an unprecedented national partnership dedicated to the security and resilience of our critical infrastructure. The National Infrastructure Protection Plan integrates a multitude of diverse stakeholders—Federal, State, local, territorial, and tribal governments; private sector critical infrastructure owners and operators; first responders; and the public—to identify and protect our infrastructure from hazards or attack. These critical infrastructure partnerships continue to build their information-sharing capacity and develop actions that strengthen our Nation's preparedness, response capabilities, and recovery resources.

My Administration is committed to delivering the necessary information, tools, and resources to areas where critical infrastructure exists in order to maintain and enhance its security and resilience. I have proposed a bold plan for renewing and expanding our Nation's infrastructure, including its critical infrastructure, in the coming years. Additionally, we must work to empower communities, an integral part of critical infrastructure security, to work with local infrastructure owners and operators, which will make our physical and cyber infrastructure more resilient. Working together, we can raise awareness of the important role our critical infrastructure plays in sustaining the American way of life and develop actions to protect these vital resources.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 2010 as Critical Infrastructure Protection Month. I call upon the people of the United States to recognize the importance of protecting our Nation's resources and to observe this month with appropriate events and training to enhance our national security and resilience.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of November, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2010–30581
Filed 12–2–10; 11:15 am]
Billing code 3195–W1–P

Presidential Documents

Proclamation 8608 of November 30, 2010

Helsinki Human Rights Day, 2010

By the President of the United States of America

A Proclamation

This year marks the 35th anniversary of the Helsinki Final Act, a seminal document tying lasting security among states with respect for human rights and fundamental freedoms within states. With the signing of the Act on August 1, 1975, the United States, Canada, the Soviet Union, and the countries of a divided Europe solemnly pledged to work together to realize comprehensive security across the European continent. This occasion also spurred courageous human rights activists in Eastern Europe to form citizens' groups to press for the implementation of commitments their governments had made, launching the Helsinki movement.

The guiding principles set forth 35 years ago in the Helsinki Final Act, now institutionalized in the Organization for Security and Cooperation in Europe (OSCE), still serve as a beacon to all who strive for freedom and peace across the Euro-Atlantic region. On this day, we reaffirm our sincere belief that security is indivisible, and must be rooted in confidence, cooperation, transparency, and respect for human rights and fundamental freedoms. We also recommit to calling on fellow participating states to reexamine their compliance with their OSCE commitments.

The Helsinki Final Act, with its affirmation of fundamental human rights, inspired many who struggled against repressive regimes and for human dignity. Today, a new generation of brave women and men work tirelessly—often risking their lives—to realize those same rights. We stand with them and with all who advocate for the rights of their fellow citizens and for the betterment of their societies.

Together, we will ensure the United States continues to serve as an example in both word and deed to the Helsinki principles. As President Gerald Ford said to his fellow signatories at the signing of the Helsinki Final Act, history will judge us "not by the promises we make, but by the promises we keep."

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 1, 2010, as Helsinki Human Rights Day. I call upon all the people of the United States to observe this day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of November, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2010–30584
Filed 12–2–10; 11:15 am]
Billing code 3195–W1–P

Presidential Documents

Proclamation 8609 of November 30, 2010

World AIDS Day, 2010

By the President of the United States of America

A Proclamation

On this World AIDS Day, as we approach the thirtieth year of the HIV/AIDS pandemic, we reflect on the many Americans and others around the globe lost to this devastating disease, and pledge our support to the 33 million people worldwide who live with HIV/AIDS. We also recommit to building on the great strides made in fighting HIV, to preventing the spread of the disease, to continuing our efforts to combat stigma and discrimination, and to finding a cure.

Today, we are experiencing a domestic HIV epidemic that demands our attention and leadership. My Administration has invigorated our response to HIV by releasing the first comprehensive National HIV/AIDS Strategy for the United States. Its vision is an America in which new HIV infections are rare, and when they do occur, all persons—regardless of age, gender, race or ethnicity, sexual orientation, gender identity, or socio-economic circumstance—will have unfettered access to high-quality, life-extending care.

Signifying a renewed level of commitment and urgency, the National HIV/AIDS Strategy for the United States focuses on comprehensive, evidence-based approaches to preventing HIV in high-risk communities. It strengthens efforts to link and retain people living with HIV into care, and lays out new steps to ensure that the United States has the workforce necessary to serve Americans living with HIV. The Strategy also provides a path for reducing HIV-related health disparities by adopting community-level approaches to preventing and treating this disease, including addressing HIV-related discrimination.

Along with this landmark Strategy, we have also made significant progress with the health reform law I signed this year, the Affordable Care Act. For far too long, Americans living with HIV and AIDS have endured great difficulties in obtaining adequate health insurance coverage and quality care. The Affordable Care Act prohibits insurance companies from using HIV status and other pre-existing conditions as a reason to deny health care coverage to children as of this year, and to all Americans beginning in 2014. To ensure that individuals living with HIV/AIDS can access the care they need, the Affordable Care Act ends lifetime limits and phases out annual limits on coverage. Starting in 2014, it forbids insurance companies from charging higher premiums because of HIV status, and introduces tax credits that will make coverage more affordable for all Americans. This landmark law also provides access to insurance coverage through the Pre-Existing Condition Insurance Plan for the uninsured with chronic conditions.

Our Government has a role to play in reducing stigma, which is why my Administration eliminated the entry ban that previously barred individuals living with HIV/AIDS from entering the United States. As a result, the 2012 International AIDS Conference will be held in Washington, D.C., the first time this important meeting will be hosted by the United States in over two decades. For more information about our commitment to fighting this epidemic and the stigma surrounding it, I encourage all Americans to visit: www.AIDS.gov.

Tackling this disease requires a shared response that builds on the successes achieved to date. Globally, tens of millions of people have benefited from HIV prevention, treatment, and care programs supported by the American people. The President's Emergency Plan for AIDS Relief (PEPFAR) and the Global Fund to Fight AIDS, Tuberculosis and Malaria support anti-retroviral treatments for millions around the world. My Administration has also made significant investments and increases in our efforts to fight the spread of HIV/AIDS at home and abroad by implementing a comprehensive package of proven prevention programs and improving the health of those in developing countries. Additionally, the Global Health Initiative integrates treatment and care with other interventions to provide a holistic approach to improving the health of people living with HIV/AIDS. Along with our global partners, we will continue to focus on saving lives through effective prevention activities, as well as other smart investments to maximize the impact of each dollar spent.

World AIDS Day serves as an important reminder that HIV/AIDS has not gone away. More than one million Americans currently live with HIV/AIDS in the United States, and more than 56,000 become infected each year. For too long, this epidemic has loomed over our Nation and our world, taking a devastating toll on some of the most vulnerable among us. On World AIDS Day, we mourn those we have lost and look to the promise of a brighter future and a world without HIV/AIDS.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States do hereby proclaim December 1, 2010, as World AIDS Day. I urge the Governors of the States and the Commonwealth of Puerto Rico, officials of the other territories subject to the jurisdiction of the United States, and the American people to join in appropriate activities to remember the men, women, and children who have lost their lives to AIDS and to provide support and comfort to those living with this disease.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of November, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2010–30585
Filed 12–2–10; 11:15 am]
Billing code 3195–W1–P

Reader Aids

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The Physician Payment and Therapy Relief Act of 2010 (Nov. 30, 2010; 124 Stat. 3056)

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S. 3567/P.L. 111–288

To designate the facility of the United States Postal Service located at 100 Broadway in Lynbrook, New York, as the "Navy Corpsman Jeffrey L. Wiener Post Office Building". (Nov. 30, 2010; 124 Stat. 3061)

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Appointing the day for the convening of the first session of the One Hundred Twelfth Congress. (Nov. 30, 2010; 124 Stat. 3062)

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